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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SANTAM INSURANCE LTD ..... APPELLANT

and

MICHAEL CAVE t/a THE ENTERTAINERS
AND THE RECORD BOX ..... RESPONDENT

CORAM: RABIE, CJ, JANSEN, TRENGOVE, BOTHA, BOSHOFF,JJA

HEARD: 5 NOVEMBER 1985

DELIVERED: 29 NOVEMBER 1985

J U D G M E N T

BOSHOFF, JA

This appeal turns on the correctness of the

construction/.....

construction placed by Kirk-Cohen J in the Witwaters-rand Local Division on two general conditions in an insurance policy which provides cover for inter alia loss or damage caused by burglary as defined in the policy. The judgment has since been reported in 1984(3) SA 735 (W).

The insured, now the respondent, was the plaintiff in the Court a quo and claimed from the in-surer, now the appellant, the defendant in the Court a quo, R11 806,10 under the policy. The appellant denied liability and raised the following two special defences; (a) In terms of an endorsement on the policy the parties agreed that the respondent would install burglar bars on all the windows of the premises

to the satisfaction of the appellant on or before the 15th January 1982, and that should the respondent fail to do so cover under the burglary section of the policy would be excluded. The respondent failed to install such burglar bars. (b) On 18 alternatively 24 February 1982 the appellant disclaimed liability in respect of the claim; in terms of clause A(9) of the general conditions of the policy all benefits under the policy are forfeited by the respondent if action be not instituted against the appellant within three months after a disclaimer of liability in respect of any claim. The respondent instituted action against the appellant more than three months after the disclaimer.

The parties thereafter agreed upon a written statement of facts in the form of a special case for the adjudication of the court in terms of rule 33 of the Uniform Rules of Court. The parties also agreed that in the event of the court, (a) dismissing both defences, judgment should be granted in favour of the plaintiff for R11 806,10 with interest thereon at 11% per annum from the date of judgment to the date of payment and costs of suit, and, (b) upholding either of the defendant's defences, the action should be dismissed with costs.

The material facts agreed upon are the following. On 30 January 1980 the respondent effected a written policy of insurance with the appellant. The policy commenced on 7 January 1980 and was

renewable on the 7th of each successive month thereafter. The annual premium was payable by monthly debit orders on the respondent's bank account. The policy was renewed on 7 January 1982 and remained operative and effective until cancelled on 4 May 1982 with effect from 3 June 1982. At all material times William Slabe and Company were the duly authorised agents and insurance brokers of the respondent and had authority generally to act on respondent's behalf in all matters relating to the policy including applications for increased cover, endorsements issued pursuant thereto and claims under the policy. During about October 1981 respondent requested appellant to increase the cover

in the All Risks Section of the policy. Subsequently on or about 20 November 1981 the appellant advised William Slabe and Company that burglar bars were required to be installed on the windows of respondent's premises. No time limit was imposed for the installation of the burglar bars. Very shortly thereafter in November 1981, William Slabe and Company advised the respondent of the requirement. On 22 November 1981 the respondent entered into an agreement with Bezcam Welding Specialists for the installation of the burglar bars and respondent was advised that they would be installed either in January or February 1982 as the firm's workshop would be closed during December 1981. On 18 December 1981 the appellant in Johannesburg

issued and posted to William Slabe and Company in Johannesburg endorsement no 95860, the material part of which reads as follows: "It is hereby declared and agreed that the insured shall install burglar bars to all the windows of the premises to the satisfaction of the company on or before the 15th January 1982. Failing to do so cover will be excluded from the burglary section."

The parties are unable to state when the endorsement was received by William Slabe and Company. In the normal course of events a letter posted in Johannesburg would reach the addressee in Johannesburg within 7 days. The burglar bars were installed at the respondent's premises at the end of January 1982.

On/.....

On 20 January 1982, and before the burglar bars were installed, various assets of the respondent situated on the property were stolen by forced entry, and the respondent suffered loss thereby in the sum of R11 806,10. The appellant refused to pay this sum to the respondent. The respondent gave the appellant timeous notice of the incident and on 25 January 1982 lodged a claim form with the appellant. On 18 February 1982 the appellant orally disclaimed liability on the ground that the written endorsement had not been complied with. On 24 February 1982 the appellant addressed a letter to William Slabe and Company confirming the repudiation of the said claim. The letter was received by William Slabe and Company by the end

of February 1982. The material portion of the letter reads as follows: "As mentioned in our telephonic conversation of the 18th February 1982 we hereby confirm the repudiation of the above-mentioned claim due to the condition of endorsement no 95860 not being adhered to. As there is no immediate action needed we are hereby filing our papers as a no-claim."

On 15 March 1982 the appellant wrote as follows to the respondent's insurance brokers.

"Our letter dated 24 February 1982 and your subsequent personal discussion with writer refer.

There can be no doubt that the loss sustained by your client falls to be dealt with under the

burglary section of the policy. As your client did not comply with the burglar bar warranty on the policy, we can only confirm our repudiation of the claim as per our letter of the 24th February 1982."

On 22nd March 1982 the respondent's attorney addressed a letter to the appellant, the material portion of which reads as follows: "In terms of the general provisions of the policy our client cannot proceed to enforce his claim in the event of your disputing the amount of our client's claim, in which event such dispute must first be submitted to arbitration. In the circumstances we should be pleased if you would kindly advise us within one week from date hereof:

1. If you are prepared to admit our client's

claim and if so, we should be pleased to receive a cheque for our client in the amount of our client's claim.

2. If you will continue to dispute liability to pay our client's claim, if you are prepared to admit the amount of the claim in order to obviate any arbitration proceedings."

The appellant did not reply to this letter and action was instituted against appellant on 14 June 1982 for the damage sustained by the respondent, that is to say more than three months after the appellant rejected the respondent's claim.

This appeal concerns the second special defence raised by the appellant in its plea and which was based on general conditions A(8) and A(9) of the insurance policy. Mention was made of the first special defence and the facts on which it was

based/.....

based merely to disclose the reason why the appellant rejected the respondent's claim and these matters need not be referred to again.

General condition A(9) reads as follows:

"In the event of Santam (the appellant) disclaiming liability in respect of any claim and an action or suit be not commenced within three months after such disclaimer or (in case of arbitration taking place in pursuance of general condition A(8) of this policy within three months after the arbitrator or arbitrators or umpire shall have made his or their award all benefit under this policy in respect of such claim shall be forfeited."

General condition A(8) provides as follows:

"If any/.....

"If any difference arises as to the amount of any loss, destruction, damage or injury Santam (the appellant) shall have the right to require that such difference shall independently of all other questions be referred for a decision to arbitration in accordance with the statutory provisions in force at the time of such difference in the territory in which this policy was issued provided that the appointment of any arbitrator, arbitrators or umpire in terms of such statutory provisions shall be made in writing by the parties in difference. And it is hereby expressly stipulated and declared that should Santam's aforesaid right regarding arbitration be exercised it shall be a condition precedent to any

right/.....

right of action or suit upon this policy that the award by such arbitrator arbitrators or umpire of the amount of the loss destruction damage or injury if disputed shall be first obtained."

The rights and obligations of the appellant and the respondent must be sought in the insurance policy in question. The appellant agreed, subject to the terms exceptions and conditions contained in the policy and in any endorsement issued in respect thereof, to indemnify or compensate the respondent in respect of the defined events stated in the different sections of the policy. In the section burglary insurance the defined event is loss or damage to the whole or part of the insured property by burglary. In terms of

general condition A(3)(b)(ii) no claim under the policy is payable after the expiration of twelve months from the happening of the occurrence that has given rise to the claim unless such claim is the subject of a pending court action or the subject of arbitration under the provisions of general condition A(8). The remaining portion of this condition is not relevant. This condition deals with the position where there is no pending action or arbitration proceedings.

General condition A(9), to which I shall refer as the forfeiture clause, in its opening words deals with the situation where there has been a disclaimer of liability in respect of a claim. In such

event an action or suit has to be commenced within three months after the disclaimer. If this is not done all benefit under the policy in respect of the claim becomes forfeited.

General condition A(8), to which I shall refer as the arbitration clause, deals with the situation where a difference arises as to the amount of the loss or damage suffered by the insured. In that event the insurer has an election of either allowing the insured to institute action against it for the amount claimed or of re-

quiring that the difference be referred for a decision to arbitration. In the latter case the insurer has in terms of the arbitration clause a right to require that the matter be referred to arbitration and if that right is exercised by the insurer it is then a condition precedent to any right of action or suit upon the policy that the award by the arbitrator of the amount of the loss or damage be first obtained. This clause has relevance and application only if and when two essential requirements have been satisfied, namely, (a) there must be in existence a difference between the parties as to the amount of the loss or damage and (b) the insurer must have exercised its right by actually requiring that the difference be referred

for a decision to arbitration. The parties by including this arbitration clause in the policy manifestly intended to afford the insurer the right and opportunity to have the disputed amount determined by arbitration if it should so desire because if it should exercise that right no action or suit against the insurer may be commenced until the award is first obtained. The condition precedent comes into operation only after the insurer has actually exercised its right to require that the disputed amount of the loss or damage be determined by arbitration. If there is no dispute then there is obviously nothing that can be referred to arbitration.

It is my respectful view that the language employed in the two general conditions is clear and

unambiguous and does not support the construction which Kirk-Cohen J in the Court a quo sought to place on them and for which Mr Rubens for the respondent contended. The learned judge (p 745G) construed the arbitration clause to mean that where the appellant disputes the amount of any loss it has an unfettered right whether to invoke arbitration proceedings or not and, until such right has been exercised the respondent has no right to sue. Even where the appellant disputes the amount of any loss, according to the learned Judge, the respondent has no right nor a duty to commence or compel the institution of arbitration proceedings until the appellant elects to proceed to arbitration.

The learned Judge was furthermore of the view (p 743 I - 744 A) that if a claimant institutes an action

and the appellant thereafter pleads that it disputes the amount of the claim and elects to proceed to arbitration thereon, the condition precedent of the claimant's right to sue has not occurred and the claimant would have no enforceable right of action.

The learned Judge, with respect, overlooked the fact that the arbitration clause clearly provides that the condition precedent to any right of action or suit only comes into operation if and when the appellant exercises its right to require the dispute to be referred to arbitration. If the appellant does not exercise that right the respondent is free to commence his action or suit, for there is then no condition precedent in operation to prevent him from doing so. When an action has been instituted the appellant will obviously not be able

by thereafter raising a dispute as to the amount of the claim, to cause the condition precedent to come into operation with retrospective effect. There is accordingly no room for the problem to arise which was posed and grappled with in the judgment of the Court a quo (See p 744 A - C and pp 745 H - 746 A).

This initial faulty construction with respect caused the learned Judge (P 746E - 747A) to resort to the following faulty reasoning in further construing the general conditions. According to the learned Judge the provisions of these conditions confer rights upon the appellant and, concomitantly, an obligation to exercise those rights so as not to render impossible of performance or nugatory the respondent's rights to enforce a claim. By reason of the condition precedent, the respondent could

not institute action until the appellant had exercised its rights in terms of the provisions of the arbitration clause and made them known; the appellant's decision on the amount of the loss and its consequential unfettered discretion whether or not to invoke arbitration constituted a condition precedent to a right of action. The appellant's answers were vital and, despite the respondent's attorneys's requests that the appellant answer, as contained in the letter of 22 March 1982, they were ignored by the appellant. In all the circumstances there was in the opinion of the learned Judge, a duty upon the appellant to decide whether it disputed the amount of the respondent's claim and, if so, to exercise its right of election to refer the matter to arbitration or not, and to inform the respondent thereof within a reasonable time prior to the

expiration of a period of three months from the date of disclaimer of liability in order that the condition precedent could be fulfilled timeously and that the respondent could comply with the procedural sine qua non set out in the forfeiture clause. In the view of the learned Judge this duty upon the appellant is implied and necessary in the business sense to give efficacy to the contract of insurance and must be performed in order that the condition precedent be fulfilled and the procedural requirements set out in the forfeiture clause could be complied with by the respondent. Should the appellant fail so to do it cannot rely upon the procedural requirement.

The learned Judge, because of his initial faulty construction, erroneously introduced and obligation on the part of the appellant which does not appear from the

clauses and this caused him to overlook the fact that each of the two clauses deals with entirely different matters and have different areas of relevance and application. The arbitration clause deals exclusively with a situation where there is a dispute as to the amount of the claim in existence and has an effect on the insured's right to institute action only if and when the insurer has exercised its right to require the dispute to be referred to arbitration.

In the instant case, as is clear from the appellant's letters of 24 February 1982 and 15 March 1982, there was a complete and unequivocal rejection of the respondent's claim. No correspondence passed between the parties that could give rise to a dispute as to the amount of the claim. There was thus no dispute in

existence/.....

existence and no room nor opportunity for anything to be done under the arbitration clause. The respondent failed to commence his action against the appellant within three months after the appellant rejected his claim with the result that all benefit under the policy in respect of the claim was by reason of the forfeiture clause forfeited.

In all the circumstances the Court a quo should have upheld the second special plea of the appellant and have dismissed the respondent's action with costs.

The appeal is accordingly upheld with costs and the order of the Court a quo is set aside and the following order is substituted therefore:

The action is dismissed with costs.

JUDGE OF APPEAL

RABIE	CJ)	
JANSEN	JA)	CONCUR
TRENGOVE	JA)	
BOTHA	JA)	