In The Supreme Court Of Appeal Of South Africa

Case No 126/2001
REPORTABLE

In the matter between

Phillipus Petrus Nicolaas Coetzee — Appellant

and

Attorneys' Insurance Indemnity Fund — Respondent

Before: Nienaber, Marais, Schutz, Navsa and Mthiyane JJA

Heard: 21 May 2002

Delivered: 2 September 2002

Indemnity insurance – limitation clause – interpretation – whether extends to costs claim of claimant – operation of s156 of Insolvency Act where insured sequestrated.

JUDGMENT

SCHUTZ JA

[1] This appeal is concerned with the operation of the limitation of liability clause in an indemnity policy, in circumstances where the estate of the insured has been sequestrated, so that s156 of the Insolvency Act 24 of 1936 (the Act) functions. The section confers a direct action against an indemnifying insurer upon a third party who has a claim against the insured.

[2] That third party is one Coetzee, who suffered serious injuries when he slipped on a wet floor at the house of one Schmidt in Welkom. This led to a claim against Schmidt of about one and a half million rands. Coetzee appointed an attorney, one Botha, to bring action on his behalf. Acting negligently, Botha allowed Coetzee's claim to become prescribed. Coetzee then sued Botha for the sum abovementioned, together with costs. It is this action that has led to the dispute which has come before us. The claim for the capital amount, together with the costs later incurred, far exceeds the limit of one million rands contained in Botha's indemnity policy with the respondent, the Attorneys Insurance Indemnity Fund (the Fund). As will be explained below, the Fund was later substituted for Botha as the defendant (under s156 of the Act). Coetzee, as plaintiff, accepts that the capital amount of his claim is limited to R1 m, but contends that his recoverable costs are not subject to the limitation and may be recovered from the Fund in addition to the R1 m.

The Fund, on the other hand, contends that its total liability for capital and costs is R1 m. That is the dispute.

[3] Before the trial was heard, and on 9 January 1997, Botha's estate was finally sequestrated. Shortly before the trial date, 2 September 1997, Coetzee's representatives gave notice to amend the particulars of claim by replacing Botha as defendant with his trustee in insolvency, one Wessels. This led to the need to seek condonation. Hancke J, before whom the trial came, then suggested that there should be a substitution of defendants to cite, not Wessels, but the Fund, this under s156 of the Act. The parties agreed. Accordingly on 3 September the Fund became the sole defendant. The trustee in insolvency seems to have got lost on the way, as one would have expected that Coetzee would have claimed from the Fund up to its indemnity limit and from the trustee for any balance. Merits and quantum having been separated, Hancke J in due course decided in favour of Coetzee on the merits. He also ordered costs against the Fund. These costs were later taxed in an amount of R49 619,13. That sum is by no means the full measure of Coetzee's recoverable costs.

[4] Subsequently quantum was agreed, save that the parties could not agree whether costs were to be included in the R1 m limit, so that their inclusion would proportionally reduce the capital claim, or whether they were recoverable additionally to the R1 m. This dispute came before Lombard J. His decision, favourable to Coetzee, is reported as *Coetzee v*

Vrywaringsversekeringsfonds Vir Prokureurs 2000 (2) SA 262 (O). It was reversed by Malherbe J with Wright J and Wessels AJA concurring. Their decision is reported as *Vrywaringsversekeringsfonds Vir Prokureurs v Coetzee* 2001 (4) SA 1273 (O). It is the appeal against that decision which is now before us, special leave having been granted by this Court. The combined sum of the agreed quantum and Coetzee's recoverable costs well exceeds one million rands.

[5] There are two main issues to be decided. The first is whether in terms of the indemnity policy Coetzee's costs are included in the limit. The second is whether, even if they are, s156 operates in such a way as to allow him to recover them in excess of the limit, this because the costs, or at least the post-sequestration costs, are recoverable not from Coetzee, who is bound by the terms of the policy, but from a new defendant who has been introduced by statute and who is not so bound.

The Interpretation of the Policy

[6] The decision of the first question depends upon the interpretation of the policy. The limit is contained in clause 3.1, which reads:

> 'The liability of Insurers in respect of all claims and claimants' costs and expenses and Approved Costs arising out of one event or occurrence shall not exceed the Limit of Indemnity specified in Schedule A.'

The Schedule A limit is R1 000 000-00.

[7] The indemnity is contained in clause 1, the relevant part of which reads:

> 'The indemnity granted in this policy is in respect of:
>
> 1.1 the Insured's legal liability to any third party arising out of the Conduct of the profession by the Insured which legal liability is the subject of a claim first made on the Insured during the Period of Insurance irrespective of when or where such liability arose.
>
> 1.2 Approved Costs in connection with any claim under 1.1 …..'

[8] Approved costs are defined in clause 2.3 to mean:

> '"Approved Costs" – all legal and similar costs and expenses which the Insured may incur with Insurers written consent which shall not be unreasonably withheld.'

[9] 'The Insured' in terms of clause 2.4 of the policy is the attorney Botha. His costs are, in terms of the definition thereof and as limited by the said definition of 'Approved Costs', included in the indemnity by virtue of clause 1.2. The Fund's written consent to the incurring of the costs was given. The first of the elements making up the limit in clause 3.1 is therefore identified. Botha's costs are the 'Approved Costs'.

[10] The remaining phrase in clause 3.1 needing interpretation is 'all claims and claimants' costs and expenses'. The 'claim' in this case is plainly Coetzee's claim, at least for the capital amount thereof, as it is a claim of the kind indemnified against in clause 1.1.

[11] There remains the question, the one that has to be decided, whether Coetzee's costs are included in the indemnity and also the limit set out in clause 3.1. In my opinion those costs are included in both. As far as the

indemnity is concerned those costs are part of Botha's 'legal liability', even if not yet incurred or quantified, as a liability for costs potentially flows out of a liability in delict. Whether or not the 'claim' when first made expressly mentions costs, a claim for costs is implicitly included. Any opposite conclusion would be thoroughly unbusinesslike. *Cf M Zahn Investments (Pty) Ltd v General Accident Insurance of South Africa Ltd* 1981 (4) SA 143 (SECLD) at 148B-C. It would be astounding if an attorney in Botha's position were to be indemnified against a damages claim but not against a claim for costs inevitably accompanying it. My conclusion is that Coetzee's costs claim is covered by the indemnity.

[12] As regards the *limit* in clause 3.1, these costs are plainly included in the words 'and claimant's costs and expenses.' The 'claimant' is not Botha, who is referred to throughout as 'the insured.' The 'claimant' is the third party, in this case Coetzee. So his claim for costs is included in the limit. Again this is the businesslike conclusion, as without such inclusion the limit would be holed and would not really be a limit at all. In this connection it should be remembered that a limit and its amount, plays a part in fixing the premium.

[13] A further argument, also based on the terms of the policy, is raised on behalf of Coetzee. It is based on sub-clause 6.10. Clause 6 is headed 'Conditions'. The sub-clause reads:

> 'Insurers may in their sole discretion, in the case of any claim for indemnity, pay to the Insured or to any person claiming any benefit under this policy or to the claimant, the Limit of Indemnity (but deducting in such case any sum

> or sums already paid as indemnity) or any lesser sum for which the claim or claims arising from such claim for indemnity can be settled and Insurers shall thereafter be under no further liability in respect of such claims for indemnity, *except for the payment of costs and expenses of litigation incurred prior to the date of payment of such Limit of Indemnity or such lesser sum*' (emphasis supplied).

Mr Lowe, for Coetzee, contends that the italicised words have the effect of increasing the indemnity limit by the amount of costs incurred prior to payment by the insurer in terms of the sub-clause. In other words he says that here is a positive enactment increasing the limit elsewhere established.

[14] The Conditions part of the policy is hardly the place where one would expect to find such a positive enactment, as the function of conditions is usually to cut down or qualify, in a variety of ways, the insurer's liability as defined in general terms in the indemnity section of the policy. In other words a condition usually operates as a proviso does. The expression 'except for' in clause 6.10 has much the same meaning as 'provided that'. In *S v Mhlanga and Others* 1995 (3) SA 867 (CC) at 899A-C Kentridge AJ said of a proviso:

> 'The effect of a proviso is to except something from the preceding portion of the enactment which, but for the proviso, would be within it. It cannot be construed as if it were an enacting clause. *R v Dibdin* [1910] P 57 at 125; *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 634(A) at 645.'

See also the judgment of Mahomed J at 883H.

[15] The purpose of clause 6.10 appears to me to be to confer on the insurer the right to form the view that the damages claim is likely to succeed, and in consequence to pay out (whether to the insured or directly to the claimant) an amount in settlement up to the limit of the indemnity, leaving the insured to litigate at his option without further cover. The purpose of the italicised words is to ensure that when the insurer withdraws from the fray he does not by so doing release himself from liability for costs already incurred.

[16] My conclusion that the words should be interpreted in that way and not as a positive enactment is reinforced by the absence in clause 3.1 of words such as 'Except as is provided in clause 6.10' or in clause 6.10 of words like 'Notwithstanding what is provided in clause 3.1'. As things stand there is no indication of an intention to qualify clause 3.1 and there is no conflict between the two sub-clauses. They serve different purposes.

[17] Accordingly I am of the view that the reliance on clause 6.10 is misplaced.

The Effect Of Section 156

[18] The second main question is whether the substitution of the Fund in terms of s156 makes any difference: Section 156 reads:

> '**Insurer obliged to pay third party's claim against insolvent**
>
> Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not

> exceeding the maximum amount for which the insurer has bound himself to indemnify the insured.'

[19] The purpose and operation of this section was explained by Scott JA in *Le Roux v Standard General Versekeringsmaatskappy Bpk* 2000 (4) SA 1035 (SCA) at 1046J-1047G. In the absence of such a section the insured's creditor, upon the former's sequestration, would have to prove a claim in his insolvent estate and be content with whatever dividend is paid to the concurrent creditors; whilst the insured's rights under the policy would vest in his trustee, who would claim from the insurer for the benefit of the general body of creditors. The effect of the section, therefore, is that the creditor is granted the considerable advantage that he does not have to share the proceeds of the policy with other creditors. To that end he is given a direct right of action against the insurer.

[20] However, proceeded Scott JA, the section was not designed to confer any additional favour upon that creditor. He would have to prove not only his claim against the insured, but also that the insured would have succeeded against the insurer in his claim for an indemnity. In *Le Roux's* case no notice of a claim against the insured had been given to the insurer, as was required by the policy. The plaintiff contended that he had obtained a vested right against the insurer upon the sequestration of the insured's estate and that this right was not extinguished by the insurer's subsequent nullification of the policy, based

on the insured's earlier failure to give notice. This argument was rejected, Scott JA saying (at 1047F-H):

> 'Indien die appellant se vertolking van die artikel korrek is, sou dit beteken dat 'n eiser onder die artikel 'n beter reg teen die versekeraar verkry as wat die versekerde self geniet het. Dit sou ook beteken dat die versekeraar verhoed word om op sy kontraktuele regte te steun indien dit blyk dat die versekerde kontrakbreuk gepleeg het. So 'n vertolking is onhoudbaar en kon nooit die bedoeling van die Wetgewer gewees het nie.'

[21] See also *Woodley v Guardian Assurance Co of SA Ltd* 1976 (1) SA 758 (W) at 759 E-H and *Canadian Superior Oil Ltd v Concord Insurance Co Ltd (formerly INA Insurance Co Ltd)* 1992 (4) SA 263 (W) at 273H-274B. In the latter part of this passage van Schalkwyk J said:

> 'What the third party can recover, however, and whether the third party's claim is of such a kind as is covered by the indemnity conferred upon the insured, are matters which have to be determined by reference to the contract of insurance. If the liability is not of the kind covered by the indemnity provided by the insurer, then, it stands to reason, there will be no liability upon the insurer to the third party. So also, if the liability is of a kind for which the contract of insurance makes provision subject to a condition, the insurer will only be obliged to pay if the condition has been fulfilled.'

[22] The argument for Coetzee cannot succeed. It flies in the face of these passages, which are clearly consistent with the terms and purpose of the section. The argument is indeed that in some circumstances a plaintiff has a better right than the insured, this because, so it is contended, costs are incurred in enforcing a new statutory right granted against one who was formerly a

stranger. This argument is contrary to the terms of the section, which refers to 'the maximum amount for which the insurer has bound himself to indemnify the insured'. This liability arises out of the policy, including all its terms and conditions.

[23] Moreover, the consequence of the argument's succeeding would be that the insurer's liability would be increased. I can see no basis for such a result in the section. Indeed the contrary. The section is assiduous to assert that the insurer's liability is limited to the amount stated in the policy.

[24] A justification for reading the section so as to allow the insured's liability to be increased is said to be this. An unscrupulous or foolish insurer may allow litigation to drag on and costs to be incurred until the limit of the policy is reached, then stop, leaving the insured with nothing. In other words insurers would be encouraged to litigate not at their own, but at their insureds' expense. Though a possible scenario I do not find it a likely one. An insurer who behaved in this way would in time find itself in trouble. Moreover, if such a case should arise it would not arise because of s156 but because of the policy. The policy does indeed envisage that the costs of defending a claim unsuccessfully will eat into the capital portion of the indemnity.

[25] The point was also made that at least to the extent of the taxed costs of R49 619,13 mentioned in paragraph [3] the limit should be exceeded because, so it was argued, there was a separate source of liability based on a court order between two litigants. There is no substance in this point. There is no issue

about the liability. The question is whether the amount must be deducted from the limit. As these costs are part of Coetzee's costs the answer to that question is yes.

[26] The appeal is dismissed with costs.

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W P SCHUTZ

JUDGE OF APPEAL

CONCUR

NIENABER JA
NAVSA JA
MTHIYANE JA

MARAIS JA/

MARAIS JA:

[1]I have had the benefit of reading the judgment of my brother Schutz. I am unable to share his view that the appeal should fail. I agree that Coetzee had no greater rights against the Fund than Botha had under the policy but, in my view, that has little, if any, relevance to the resolution of the issue which arises in this case.

[2] That issue is confined to the costs which were ordered to be paid by the Fund as an unsuccessful litigant in an action which Coetzee was obliged to pursue because of the Fund's wrongful refusal to pay even the R1 million which it was liable to pay in terms of the policy. The Fund claims to be entitled to have those costs included in the maximum amount of R1 million to which Botha was entitled in terms of the policy.

[3] As I see the position these costs are not costs with which the policy deals. They are extraneous to it. The costs with which the policy deals are costs incurred by Botha in defending a claim made against him and costs ordered to be paid by him in the event of the claim succeeding. Whatever the position may be regarding these costs and the applicability of the limitation provision to them as between Botha and the Fund, once insolvency supervenes and the Fund is called upon by Coetzee to pay by virtue of s 156, its position is no different to that of any other litigant. If it is liable, it must pay what the policy obliges it

to pay. If it considers it is not and contests the entire claim but does so unsuccessfully, it will be mulcted in costs.

[4] In the present case the position is that no costs have been ordered to be paid by Botha and any costs which may have been incurred by Botha prior to the Fund being substituted as the defendant are not in issue. The costs which the Fund have been ordered to pay are Coetzee's costs. Those costs were incurred by Coetzee because the Fund, instead of accepting that Botha was liable to Coetzee and that by virtue of s 156 it was liable to Coetzee to the extent of the limitation of liability in the policy, elected to resist Coetzee's claim against it entirely, thus compelling him to seek relief from the court. He succeeded in establishing that the Fund was indeed liable to him and, in conformity with the practice of the courts in South Africa for more than a century, the Fund was ordered to pay his costs. They were not costs contractually recoverable by Botha under the policy. They were neither Botha's own costs of defending Coetzee's claim nor were they costs awarded to Coetzee in an action against Botha. No question of indemnification under the policy for any such costs arises. The limitation of liability in the policy cannot and does not apply to them. They stand outside the policy.

[5] An insurer faced with a claim under s 156 is in no better position than anyone else faced with a claim. It is its right to resist the claim if it so chooses but it must take the ordinary consequences of having to pay the costs of the ensuing lawsuit if its resistance is not well-founded. If it is well-founded the claimant will have to pay its costs. There is no "free ride" for either the third party claimant who fails in establishing liability or the insurer who fails in resisting liability. In a s 156 situation the insurer is in the fullest sense of the term *dominus litis* in so far as the decision whether or not to resist the third party's claim is concerned.[1] The insured's wishes are legally irrelevant to the insurer's undoubted right under s 156 to raise whatever defence it thinks fit against the third party's claim. In my view, neither this policy nor s 156 immunised the Fund from the potential liability for costs of the ensuing litigation. I think that this is so is shown by a consideration of this hypothetical case.

[6] Coetzee sues Botha and obtains judgment against him for R1 million and costs. Botha is sequestrated before payment. Coetzee then sues the Fund for R1 million and these costs. The Fund resists the entire claim on the ground that, as against Botha, it was not liable under the policy. It fails in that defence. Whether it is then ordered to pay only R1 million or both R1 million and the costs which were ordered to be paid by Botha, the fact

[1] CF *Nairn South East Lancashire Insurance Co* 1930 SC 606 at 614, 615 and 617.

remains that, at best, Coetzee's claim was justified; at worst, his claim was a *plus petitio*; the Fund's rejection of the entire claim was not justified, and Coetzee had to resort to litigation to obtain what s 156 intended him to have. To deprive Coetzee of the costs of establishing that the Fund was indeed liable to him would undermine the manifest purpose of s 156 and diminish the sum which would have been payable to him had the Fund accepted that it was liable and paid him on demand. Whether that sum should have been R1 million or R1 million plus the costs of the action against Botha I need not decide on the view I take of the matter; whatever the sum it would have been diminished by the refusal of the Fund to pay what it should have paid when demand was made. That cannot have been the intention of the legislature in enacting s 156 and it is the interpretation of that provision which is ultimately relevant when considering questions of costs arising from its invocation by a third party.

[7] In the hypothetical example posed, if the Fund had not disputed liability entirely but had confined itself to resisting the claim for payment of the costs which Botha had been ordered to pay and succeeded in its resistance, the result would of course be different. Coetzee would have gone to court to recover money to which he was not entitled. He would obviously have to pay the Fund's costs.

[8] To my mind, it matters not what the ground is upon which the Fund chooses to resist Coetzee's claim. If it relies upon an alleged failure by Botha to comply with a condition precedent to liability set by the policy but fails in the defence it cannot be doubted that it would be liable for Coetzee's costs of establishing that it is indeed liable under the policy. If it relies upon an argument that the conduct of the insured of which Coetzee complains is not conduct of a kind covered by the indemnity provided by the policy and the court holds that it is covered, it would be equally liable to pay those costs. If it concedes that conduct of the kind complained of is covered by the policy but denies that such conduct occurred and the court finds that it did indeed occur, I can see no reason why the result should be any different.

[9] To take another hypothetical case: if Botha became obliged to sue the Fund because it refused to indemnify him in the sum of R1 million for which he was liable to Coetzee and Botha succeeded with costs, it could not be argued successfully that those costs were part of Botha's liability to Coetzee arising out of the happening of the event insured against and that they were therefore included in the R1 million limit. The liability to pay those costs arose out of the unmeritorious resistance by the Fund of a claim *under the policy*. The effect of s 156 is to allow Coetzee to exercise Botha's rights against the Fund. If the Fund

resists payment it is of no consequence whether the reason why it does so is what it believes to be a lack of merit in Coetzee's claim against Botha or the supposed existence of one or other contractual defence available against Botha. In both instances the liability to pay Coetzee's costs is not attributable to any liability of Botha arising from the happening of the event insured against. It is solely attributable to the Fund's intransigence in refusing to pay what it should have paid to Coetzee. In effect, Coetzee is enforcing Botha's right to be indemnified under the policy. Botha would have been entitled to his costs if he had had to do so; so should Coetzee be.

[10] I would allow the appeal with costs. As this is a minority judgment there is no point in my formulating the orders which should have been made in the Court *a quo*.

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R M MARAIS
JUDGE OF APPEAL