REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 565 / 03

In the matter between

SAMANCOR LIMITED — **Appellant**

and

MUTUAL & FEDERAL INSURANCE COMPANY LIMITED	**First Respondent**
ALLIANZ INSURANCE LIMITED	**Second Respondent**
SA EAGLE INSURANCE COMPANY	**Third Respondent**
GUARDIAN NATIONAL INSURANCE COMPANY LIMITED	**Fourth Respondent**
AIG SOUTH AFRICA LIMITED	**Fifth Respondent**
ACE INSURANCE COMPANY LIMITED (formerly CIGNA INSURANCE COMPANY LIMITED)	**Sixth Respondent**

Coram : **MPATI AP, STREICHER, CONRADIE, CLOETE JJA and COMRIE AJA**

Date of hearing : **1 NOVEMBER 2004**

Date of delivery : **30 NOVEMBER 2004**

SUMMARY

Two insurers indemnifying insured against damage to same equipment – insurer who paid insured's claim seeking recovery from co-insurer – whether subrogation or contribution correct remedy against co-insurer.

J U D G M E N T

CONRADIE JA

[1] Seven years ago an emergency pump that was to deliver oil to the bearings of an alternator failed. Both had been supplied by IMS Engineering (Pty) Ltd. The alternator was damaged. It was insured under two policies. One was called a 'Principal Controlled Construction Risks and Public Liability Insurance Policy', underwritten by the respondents ('the works policy'). The other was an 'Assets Insurance Policy' underwritten by Westchester Insurance Company (Pty) Ltd ('the assets policy'). Under the assets policy Westchester fully indemnified the appellant for the losses it had suffered as a result of the disablement of the alternator.

[2] The appellant's claim, the stated case tells us, is a claim pursued by Westchester by way of a subrogation action in the name of the appellant. The respondents' special plea to the claim avers that having been fully indemnified under the assets policy the appellant cannot seek another indemnity from them for the same loss; nor can Westchester by invoking a right of subrogation recover from them what it has paid to the appellant: the only permissible claim, they maintain, would be one for a contribution by Westchester in its own name against the respondents as a co-insurer.

[3] The respondents' point of view was upheld by the court *a quo* (Malan J) who, after a scholarly review of English and Commonwealth decisions, concluded on the facts of the stated case before him that the obligations of Westchester and the respondents were secondary and co-ordinate and that the payment by Westchester discharged the respondents.[1] He upheld the respondents' special plea to the *locus standi* [2] of the appellant and consequently dismissed its claim with costs. It is with his leave that the appeal is before us.

[4] It is often said that payment by an insurer to his insured cannot be relied upon by a wrongdoer because it is *res inter alios acta,* which of course it is, but that does not seem to be the best way of looking at it. A better way of looking at it is that proposed by Lord Hoffman in *Caledonia North Sea Limited v British Telecommunications plc (Scotland) and Others* [2002] 1 All ER (Comm.) 321 (HL) at para 92:

'Mr Keene deduces from this and other similar statements the general rule that when two or more persons have separately agreed to indemnify someone against the same risk, payment by one discharges the others .… It is certainly a general principle, as he says, that a person who has more than one claim to indemnity is not entitled to be paid more than once. But there are different ways of giving effect to this principle. One is to say that the person who has paid is entitled to be subrogated to the rights against the other person liable. The other is to say that one

[1] The judgment is reported as *Samancor Ltd v Mutual and Federal Insurance Co Ltd* (2003) CLR 349.
[2] The true issue is not whether the appellant has *locus standi* but whether its particulars of claim disclose a cause of action.

payment discharges the liability. The authorities show that the law ordinarily adopts the first solution when the liability of the person who paid is secondary to the liability of the other party liable. It adopts the second solution when the liability of the party who paid was primary or the liabilities are equal and co-ordinate.'

[5] As a typical secondary debtor, an insurer may be in a position to reclaim what it has paid.[3] Where it can and does exercise a right of subrogation, insurance law demands that it does so in the name of the insured. A right of subrogation can be exercised against a primary debtor whether the latter is a delictual wrongdoer or a contractual defaulter.[4] But it cannot be exercised by one secondary debtor against another because payment by the one discharges the other. A subrogated claim against a co-insurer would only be competent if the latter had undertaken primary responsibility for a debt**.**[5] Of course, the person whose wrongdoing brought the debt into existence would also bear primary responsibility but nothing prevents one debtor from undertaking primary liability with another. Thus a contractual indemnifier may competently undertake primary liability for a debt created by another. Where such a (primary) indemnifier happens to be an underwriter it is in the same position as any other primary debtor. The insurer and the wrongdoer become co-principal debtors each primarily liable for the whole

[3] Where loss or damage is caused by an act of God there is no debtor other than the underwriter himself who is then effectively a primary debtor.

[4] *Caledonia North Sea Ltd v London Bridge Engineering Co and Others* [2000] Lloyd's Rep IR 249 at 261 (2nd col) 263 (1st col) (per Lord Rodger); 277 (1st col) (per Lord Sutherland).

[5] *Caledonia North Sea Ltd v London Bridge Engineering Co and Others* [2000] Lloyd's Rep IR 249 at 283 (2nd col) (per Lord Coulsfield).

debt. In such a situation a secondary insurer who pays an insured's claim acquires a subrogated claim against the wrongdoer as well as against the insurer primarily liable. A secondary insurer may also have a subrogated claim against an indemnifier where the liability of the indemnifier is not primary in the sense discussed above provided that the liability of the indemnifier is not equal and co-ordinate with that of the secondary insurer. That was the position in the *Caledonia North Sea* case. The insurer of the operator of an oil platform that had been extensively damaged in an explosion sought to be indemnified by contractors working for the operator on the oil platform for payments made in the settlement of death and injury claims in respect of these contractors' employees killed or injured in the disaster. These claims were made on the basis of indemnity provisions in the contracts entered into between the operator and the contractors. As between the insurer which had undertaken secondary liability and the contractor-indemnifier the latter was primarily liable although as between the indemnifier and the person responsible for causing the explosion the latter was primarily liable. It is instructive to have regard to the English authorities that deal with when a claim based on subrogation is competent and when a claim for a contribution must be brought. The following is said in *MacGillivray on Insurance Law* 10 ed in para 22 – 24 at [569] :

'Accordingly the insurer may require the assured to enforce a right to be indemnified against the loss under an indemnity clause contained in a contract between the assured and the indemnifier,

so long as the indemnifier is the party with primary responsibility for the loss in question. Where the insurer and indemnifier have co-ordinate obligations to indemnify the assured, as where both are insurers, the insurer who has paid the assured should claim contributions from the other indemnifier in his own name, since the assured no longer has a claim for indemnity.'

Bovis Construction Limited and Another v Commercial Union Assurance Company plc [2001] 1 Lloyd's Rep 416, a decision of the Queen's Bench Commercial Court, followed *The Sickness and Accident Assurance Association v The General Accident Assurance Corporation Limited* XXIX Scottish Law Reporter 836, and in doing so quoted from it the following paragraph:

'In marine insurance a rule which has long been recognised is that when the insured has recovered to the full extent of his loss under one policy, the insurer under that policy can recover from other underwriters who have insured the same interests against the same risks a rateable sum by way of contribution. The foundation of the rule is that a contract of marine insurance is one of indemnity, and that the insured, whatever the amount of his insurance or the number of underwriters with whom he has contracted, can never recover more than is required to indemnify him …. There is no reason in principle in my opinion why the same rule should not be applied to other classes of insurance which are also contracts of indemnity …. The right of an underwriter who has indemnified the insured to claim contribution from the other underwriters cannot be founded upon the doctrine of subrogation, because an assignee can have no higher right than his cedant and a shipowner who has received full indemnity from an underwriter can never make a claim against another underwriter. The answer, therefore, to the claim of an underwriter who had paid, if made only in the right and as assignee of the assured, would be that the contract was one of indemnity, and that the insured had already been indemnified.'

Lord MacKay in his speech to the House of Lords in *Caledonia North Sea Limited v British Telecommunications plc (Scotland) and Others* [2002] 1 All ER (Comm.) 321 (HL) para 63 also commented on the *The Sickness and Accident Assurance Association* case in these words:

'Where there are co-ordinate indemnities for the same loss it is clear that the doctrine of subrogation cannot provide an answer, and that where one of the indemnifiers pays, the way their liabilities *inter se* are decided is by an action of relief [for a contribution]. The principle of res inter alios acta will not be of relevance in that situation where the overriding principle is that a person cannot be indemnified twice over for the same loss, and therefore if one indemnifier has made good the loss to the indemnified the rights of the indemnified are no longer useful in deciding questions between the indemnifiers.'

(See also Malcolm Clarke *The Law of Insurance Contracts* 4 ed para 28 – 29 at 945.)

[6] The appellant accepted that its case depends on establishing that the respondent's liability is not equal and co-ordinate with that of Westchester. The clause in the works policy on which the appellant relies for its contention that the liabilities are not equal and co-ordinate is to be found among the General Memoranda. It is headed 'Memorandum 4 – subrogation' and reads as follows:

'It is hereby declared and agreed that notwithstanding anything stated in the policy and subject always to General Memorandum 1 and subject to the Conditions of the Contract, this policy shall take precedence over any other insurance arranged by or on behalf of the Employer. In the event

of loss or damage which may be insured under any other policy of insurance effected by the Employer, the Insurers shall indemnify the Insured as if such other insurance did not exist.

Unless otherwise agreed by the Employer, the Insurers waive all rights of subrogation or action which they may have or may acquire against any of the parties comprising the Insured or their directors, agents or employees or their Insurers arising out of any occurrence on the Contract Site in respect of which any claim is admitted hereunder or which but for the application of the Deductible mentioned in the Schedule hereto would be made hereunder.'

[7] This clause, it is argued on behalf of the appellant, creates a hierarchy of liability between insurers: any loss indemnifiable under the works policy should first be satisfied by the respondents irrespective of other policies covering the same loss. From this it follows, so the argument proceeds, that had the appellant sought an indemnity from the respondents they would not have been entitled to raise the existence of the assets policy as a defence. The appellant called this 'layered insurance'. It undoubtedly is layered insurance but only in the sense that the respondents and Westchester undertook sequential liability. The structure of the insurance cover taken by the appellant made the respondents first-in-line and Westchester second-in-line underwriters.

[8] **A**s we have seen, only a secondary debtor has a right of subrogation and then only against a debtor whose liability is not equal and co-ordinate. If the respondents are shown to have renounced subrogation[6] they would have renounced

[6] Something that they were perfectly entitled to do: *MacGillivray on Insurance Law* 10 ed para 22 - 33 at [582].

a right that goes hand in glove with and depends upon secondary liability. That would go a long way towards showing that they are not to be regarded as secondary debtors but undertook primary liability.

[9] The 'Insured' in the works policy includes Gencor Limited and Billiton plc and their controlled, managed, administered and subsidiary companies, as well as persons and entities for whom they act as consultants and for whom they have the authority to arrange insurance. All of them are collectively referred to as 'the Employer'. Covered by the same insurance are all contractors and sub-contractors undertaking work for and on behalf of the Employer; added to these are, to the extent required by any agreement, persons like manufacturers or those undertaking work at a contract site, transporters and persons providing storage facilities and so on, right up to project managers, architects, engineers and other professionals.

[10] Whilst it is true to say that, having regard to the very wide ambit of the insurance cover under the works policy, there are not many persons left against whom a right of subrogation might be exercised, there is no renunciation in General Memorandum 4 of the respondents' right of subrogation generally. Against any wrongdoer who might happen not to be insured under the works policy (and who is not a director, agent or employee of an insured) the right remains unaffected. Except for directors, agents or employees, no wrongdoers are

exempt from facing a subrogated claim and even the exempted category only enjoys immunity so long as the Employer (which means any one of the many companies comprised by this description and includes the appellant) does not consent to their being sued by the respondents. The provision accordingly does not go nearly far enough to establish that the respondents had, exceptionally for an insurer, accepted primary responsibility.

[11] The appellant contended that acceptance of primary responsibility by the respondents as between themselves and Westchester is indicated by the use in General Memorandum 4 of two phrases: ' .... *this policy shall take precedence over any other insurance arranged by or on behalf of the Employer'* and ' .... *the Insurers shall indemnify the Insured as if such other insurance did not exist.'*

[12] Since an insured may, in the absence of a *pro rata* contribution clause or an excess clause, freely choose which one of two or more co-insurers to sue,[7] each policy issued by an insurer, in that sense, takes precedence over any other. It is the insured who determines the precedence by deciding which of several insurers to sue. Once he has fixed his sights on an insurer of his choice that insurer must, under the common law, and up to the limit of the insurer's liability under the policy, indemnify him as though there were no other insurance. Had a claim first been made on the respondents they would, even in the absence of General

[7] *MacGillivray on Insurance Law* 10 ed para 23-1 at [613].

Memorandum 4, not have been entitled to raise the existence of the assets policy as a defence. It seems, however, that the appellant in effect contends that the phrase 'as if such other insurance did not exist' should be read to mean 'as if the insured had not been indemnified by another insurer'. In my view the phrase is not capable of bearing such a meaning. It would offend against one of the basic tenets of indemnity insurance namely that an insured is not permitted to recover more than he has lost. The argument that these provisions were intended to introduce into the policy a departure from the common law, and a radical departure at that, can therefore not be accepted.

[13] The respondents' approach has all along been that they and Westchester were (secondarily liable) co-insurers, that their liabilities were equal and co-ordinate, that a contribution action was the correct and only remedy and that, if Westchester had claimed a contribution from them, and provided that their liability was established, they would have had to make an appropriate contribution. To meet this contention the appellant's argument is that Westchester has no right to claim a contribution: it was contractually so arranged that there would be no overlap between the cover afforded by its policy and that afforded by the respondents' policy; there would accordingly be no double insurance.

[14] It is trite that indemnity policies may validly contain terms excluding rights of contribution.[8] The provisions on which the appellant relies are the phrases quoted in para [11] read with clause 13 of the assets policy. The only relevant part of clause 13 of the assets policy is sub-paragraph [a] :

‘13. OTHER INSURANCES

[a] If the Insured holds any other valid and collectable insurance or which, but for the application of any deductible, would have been collectable, with any other insurer covering a loss also covered by this policy, other than insurance that is specifically stated to be in excess of this policy or issued as a co-insurance of any peril insured hereby, the insurance afforded by this policy shall be in excess of, and shall not contribute with, such other insurance.’

[15] The indemnity scheme adopted by the parties is uncomplicated. The provision in the works policy that the Employer has to be indemnified ‘as if there were no other insurance’ indicates that the works policy is a first-in-line and not an excess policy. Read together with the provision that the respondents’ cover takes precedence over other insurance, the clause also serves to emphasize that there is no question of an insured having to sue each insurer separately for its proportionate share.[9] The clause does not register a refusal to contribute to a claim paid by another insurer.

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[8] *Welford and Otter-Barry on Fire Insurance* 4 ed 379; Malcolm A Clarke *The Law of Insurance Contracts* 4 ed 28-9 at 945 and 28-9B at 948; *Colinvaux’s Law of Insurance* 7 ed para 8-41 p 190; *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1991] 2 Lloyd’s Rep 36 at 39.

[9] According to Reinecke et al. *General Principles of Insurance Law* para 519, this type of provision is common in insurance contracts. *MacGillivray on Insurance Law* 10 ed para 23-2; the authors of the chapter on Insurance in *Lawsa* vol 12 para 519 agree.

[16] If the appellant were to claim an indemnity from the respondents they would themselves be liable for claims up to their indemnity limit of R135m without being entitled to a contribution from Westchester. Beyond that they would no longer be liable but Westchester, whose liability under the assets policy is unlimited, would. Clause 13 of the assets policy plainly means that the respondents can recover no contribution from Westchester for any claim paid by the former. The converse is not the case. Contribution is an equitable remedy and although not based upon any contractual relationship between co-insurers, a court may nevertheless consult the relevant insurance contracts in order to determine what contribution a co-insurer who has paid should in fairness be allowed to recover.[10] I agree with the judge *a quo* (at para [11] of his judgment) that precedence provisions and excess of loss clauses determine relative contribution rights and do not convert the liability of a co-insurer into a liability that is not equal and co-ordinate with that of another co-insurer.

[17] There is therefore no merit in the contention that there was not double insurance. Westchester fully indemnified the appellant in respect of the loss that it had suffered. The appellant does not contend that Westchester was not obliged to

[10] Gordon and Getz *The South African Law of Insurance 4 ed 287;* Reinecke et al, *General Principles of Insurance Law* para 516 p 367, para 520 p 369*; Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1991] 2 Lloyd's Rep 37 at 38. *Eagle Star Insurance Co Ltd v Provincial Insurance Plc* [1993] 3 All ER 1 (PC) at 8b-g; *Seagate Hotel Ltd v Simcoe & Erie General Insurance Company* and *Traders General Insurance Company* (1980) 22 BCLR 374 at 378 confirmed on appeal (1981) 27 BCLR 89 (CA British Columbia); *Family Insurance Corp. v Lombard Canada Ltd* (2000) 187 DLR (4th) 605 (CA, British Columbia) para [9] at 609-610.

do so. On the appellant's own case the loss was recoverable from either the respondents or Westchester. It is plain that as co-insurers the liability of Westchester and the respondents was equal and co-ordinate. In these circumstances Westchester by its payment in terms of the assets policy discharged not only its liability to the appellant in terms of that policy but also the respondents' liability to the appellant in terms of the works policy. Having paid a claim within the respondents' liability range because the respondents refused to do so, and being co-ordinate debtors, Westchester should have brought a claim for contribution and not a subrogated claim.[11]

[18] The appeal is dismissed with costs which include the costs occasioned by the employment of two counsel.

J H CONRADIE
JUDGE OF APPEAL

CONCUR:

MPATI AP
STREICHER JA
CLOETE JA
COMRIE AJA

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[11] *MacGillivray and Parkington on Insurance law relating to all Risks other than Marine* 8 ed 761; *Pacific Forest Products Limited v AXA Pacific Insurance Co 2003 BCCA 241(CA,BC)(British Columbia)*.