REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 17/2004

Reportable

In the matter between:

THE SOUTHERN LIFE ASSOCIATION LIMITED **APPELLANT**

and

WILLIAM GERHARDUS MILLER **RESPONDENT**

CORAM: SCOTT, FARLAM, CAMERON, VAN HEERDEN JJA, et PATEL AJA

HEARD: 4 NOVEMBER 2004

DELIVERED: 1 DECEMBER 2004

SUMMARY: Insurance – disability insurance – clause in policy to the effect that insurer would only be liable if in its opinion claimant was totally and permanently disabled – interpretation of – necessity for claimant to establish that insurer's opinion on the point unreasonable.

JUDGMENT

FARLAM JA

[1] This is an appeal from an order made by Hattingh J, sitting in the Bloemfontein High Court. The learned judge ordered the appellant, a registered insurer, to admit liability for a claim brought by the respondent against the trustees of a provident fund (who were cited as the second defendant in the court *a quo*), together with interest on the claim calculated from 12 October 1993, and to pay the costs. The trustees of the provident fund were ordered to pay the amount of R205 920 to the respondent with interest, also calculated from 12 October 1993.

[2] The claim in respect of which the appellant was ordered to admit liability was for total and permanent disability benefit brought by the respondent against the provident fund, of which he was a member. The claim was based on the allegation that, as a result of a serious knee injury sustained by him on 25 March 1991, when a mandrill fell on his knees, he was totally and permanently incapable of engaging in his own occupation or in any other occupation for which he was (or could reasonably be expected to become) qualified.

[3] The reason that the appellant was called upon to admit liability for the respondent's claim was the following. With effect from 1 October 1991 the appellant had concluded a written agreement with the trustees of the provident fund in terms of which it agreed to provide them with risk benefit cover in respect of claims made against the fund by its members. (In what follows I shall refer to this agreement as 'the policy'.) The rules of the provident fund, which constituted a contract between the trustees and the respondent, contained a provision (clause 7.2.2) to the effect that payment to a member of a disability benefit would be:

> ‘subject to the Registered Insurer underwriting the benefit [in this case the appellant] admitting liability for the claim and subject to any restrictions imposed upon the benefit by the Registered Insurer’.

The respondent was thus unable to claim the disability benefit to which he alleged he was entitled from the trustees of the provident fund unless and until the appellant had admitted liability for the claim. Hence his prayer, which the trial court granted, for an order calling upon the appellant to admit liability to the trustees of the fund for the respondent’s claim.

[4] Clause 3.1.0 of the policy contains a definition of disablement. It reads as follows:

> ‘3.1.0 Definition of Disablement
>
> 3.1.1 A member will be regarded as totally and permanently disabled if in the opinion of the Southern he has been so disabled by injury or disease as to be continuously, permanently and totally incapable of engaging for remuneration or profit
>
> (a) in his own occupation or
>
> (b) in any other occupation for which he is or could reasonably be expected to become qualified by his knowledge, training, education, ability and experience.’

[5] Clause 2.3.0 of the policy, described as the ‘actively at work condition’, is also relevant. It reads as follows:

> ‘2.3.0 ACTIVELY AT WORK CONDITION
>
> 2.3.1 A member must be at work attending to and capable of attending to all his normal duties on the first working day on which his cover is due to start. If he is not so at work his cover will be delayed until he submits evidence of his good health and insurability or completes eight consecutive weeks’ service without absence.

2.3.2 The above condition applies separately at the commencement of each type of risk benefit cover.'

[6] On 25 March 1991, when the respondent sustained his knee injury, he was employed as a maintenance electrician by Unipipe (Pty) Ltd in Bloemfontein. It was common cause at the trial that as a result of the injuries sustained by him on 25 March 1991 the respondent is unable to carry on the trade of a maintenance electrician. He was unable to work for some time after the incident on 25 March 1991 but he returned to his employer in January 1992 where he took up a post described in the papers as that of a 'draughtsman'. At this stage he became a member of the provident fund. His duties included sorting and filing plans, tracing over plans which had become faint, writing water meter readings in a book, fetching post and parts, standing at a board tracing drawings, taking measurements and developing new control panels. He himself said he would not describe this job as being that of a draughtsman, stating that he felt like a messenger at that stage. He performed his duties in the post he took up in January 1992 until October 1993 when his post became redundant.

[7] On 30 October 1993 a letter was addressed to him by or on behalf of his employer in which an earlier discussion was confirmed in which he had been advised that his post had become redundant. He had been given the choice of taking a retrenchment package on termination of his service on 8 October 1993 or

requesting his employer to apply on his behalf for disability benefits from the provident fund and the Compensation Commissioner. He had, according to the letter, chosen the second option and understood that, irrespective of the decision of the trustees of the provident fund, his post had become redundant and his employment was accordingly regarded as terminated whether or not his claim was accepted.

[8] It is thus clear that the respondent's employment was terminated because his post became redundant. The respondent himself said that his employers were not dissatisfied with his performance in his position as a 'draughtsman'.

[9] In his particulars of claim, as amended during the trial, the respondent alleged that he became totally incapable of continuing with his own or any alternative occupation on 25 March 1991 (ie, the date he sustained his injuries), alternatively on 8 October 1993 [ie, the date on which his employment terminated when the post he was filling was declared redundant].

[10] The main defences raised by the appellant in its plea were the following:

(a) the respondent, not being party to the insurance contract between the appellant and the trustees of the provident fund, could not pursue a claim against the appellant arising out of his alleged disability; and

(b) the respondent was not disabled as defined under the policy.

The appellant amplified this denial by averring that the respondent was employed as at 8 October 1993, when his employment terminated, as a 'draughtsman' and not as a maintenance electrician (in respect of which occupation it was not denied that the respondent was totally and permanently disabled). The appellant also averred, relying on clause 2.3.1 of the policy (quoted in para [5] above), that it only came on risk in respect of the respondent, and then only in relation to his position as a 'draughtsman' after he had completed eight consecutive week's service as a 'draughtsman', after he returned to work in January 1992.

[11] In his replication the respondent alleged, *inter alia,* that the appellant was estopped from contending that it only came on risk in respect of him as regards his occupation as a 'draughtsman',

and not as a maintenance electrician, by reason of certain statements it made when handling his claim. He alleged further that, as a result of these statements, he did not timeously institute a claim in respect of his disability against the previous provident fund of which he was a member on 25 March1991 and its insurer.

[12] The respondent testified at the trial and also adduced the evidence of two expert witnesses, Dr JJ Swart, the orthopaedic surgeon who treated him from shortly after 25 March 1991 and who performed several operations on his knees thereafter, and Mrs Elana Human, an occupational therapist, who examined the respondent during 1995 and again in 1998. Three witnesses testified on behalf of the appellant, viz Professor JA Shipley, a principal specialist and associate professor in the Department of Orthopaedic Surgery at the University of the Free State, Mrs Hester van Biljon, an occupational therapist, and Mrs Lorraine van Eeden, the senior manager of the appellant's risk management consultancy.

[13] Dr Swart testified that the respondent could do sedentary work or a light type of work which does not require much sitting and standing; that he could perform the work of a draughtsman as long as it was not necessary for him to stand or walk for any length of time; that he could do office work, and that he could do what he was employed to do after January 1992. Dr Swart also testified that the only thing that prevented the respondent from fully carrying out what he regarded as all the duties of a draughtsman was his inability to work standing up. Dr Swart's evidence in this regard was based not on the respondent's actual duties when he started working as a 'draughtsman' in January 1992 but what he understood the full duties of an engineering draughtsman to be, based on what he had observed in the office of his son (a professional engineer).

[14] In examination in chief the respondent, in discussing the post he occupied when he returned to work in January 1992, stated that his employers told him that they would create a post for him so that he could sit in an office and work and they would then see if his injuries stabilised so that he could resume his occupation as an electrician. Describing what he did in this new post, he said that he refiled some of the plans and retraced plans that were faint. That was his basic work. He also stated that, when his employers were informed by Dr Swart that he would never be able to resume his occupation as an electrician, they decided to declare the post they had specially created for him redundant. He was given a choice of (a) taking a retrenchment package, negotiated by his trade union

or (b) instituting a disability claim against the provident fund and a claim against the Workman's Compensation Commissioner. He chose the second alternative. At the outset of his cross-examination the respondent conceded he could do sedentary work. He also stated that there was no dissatisfaction with the way he did his work and that he thought that his employer was satisfied with his work. Later he testified that he could not carry on the occupation of a 'draughtsman' as a result of the standing that was required.

[15] In her evidence Mrs Human stated that she was of the opinion after examining the respondent in 1995 that he could not perform a full day's work. In coming to this opinion she was influenced by the fact that, according to her information, which she acquired from a civil engineer, an electrical draughtsman has to stand for about half of his working day. She also stated that she examined the respondent again in 1998. She found that his condition had deteriorated since her earlier interviews with him from the point of view of his functional and general capabilities. She said that in her opinion he was not in a position to undertake an occupation similar to that of an electrician. Mrs Human's opinion that the respondent was not able to perform a full day's work was based on his incapacity to endure pain, particularly pain in his knee joints.

[16] Evidence was led at the trial regarding a videotape taken without the respondent's knowledge early one morning in August 1995, which apparently showed him walking with relative ease, in a manner differing markedly from the symptoms previously observed by Mrs Human. She explained the discrepancy on the basis that it was probable that the respondent's pain fluctuated from day to day. She conceded, however, that a person with osteo-arthritis, such as the respondent has, would have difficulty in walking on first rising, which on the evidence was when the video was taken.

[17] Professor Shipley's evidence was based on the video, the medical reports prepared by other experts who had examined the respondent and the x-rays which Dr Swart had handed in during his evidence. He stated that the medical reports to which he referred as well as the video were sufficient to enable him to form an opinion in relation to the respondent's condition. He was of the opinion that the respondent 'should be able to cope with some form of office work where a moderate amount of sitting, standing, moving around was required of him' but not with work where he was 'expected to perform any sort of heavy labour or to climb or to

get into difficult/awkward spaces or positions'. Professor Shipley was not aware of any reason that would prevent the respondent from working a five-day working week, eight hours a day.

[18] Mrs Van Biljon testified that in her opinion although the respondent could no longer work as a maintenance electrician, he could perform an alternative sedentary occupation, such as that of a draughtsman, electrician dealing with small components or an electronic technician. She stated that the respondent tended to malinger or exaggerate his symptoms. She said that in her opinion there was nothing wrong with the respondent's sitting endurance and that his conduct was not affected by his pain level. She testified further that the respondent needed psychiatric help to alleviate his depression and to help him cope with and accept his disabilities.

[19] Mrs Van Eeden testified about the appellant's original decision to repudiate the respondent's total disability claim as well as a temporary disability claim made on his behalf. (The appellant's decision to repudiate the respondent's temporary disability claim was subsequently reversed after the appellant had been incorrectly informed by representatives of the respondent's employer, some four months after he was retrenched, that he was 'battling at the moment as a draftsman'. The appellant declined to reverse its decision in respect of the respondent's permanent disability claim.) Mrs Van Eeden also testified about the various subsequent unsuccessful attempts made on the respondent's behalf to persuade the appellant to reverse its decision on the permanent disability claim.

[20] In his judgment the judge found that the policy between the appellant and the trustees of the provident fund included a contract for the benefit of a third party, namely the respondent, which he could and did accept. It was on this basis that the judge rejected the appellant's defence that the respondent could not bring a claim against it based on his alleged permanent disability because there was no contractual privity between the respondent and the appellant.

[21] The judge also held that the occupation in respect of which the respondent was to be regarded as permanently disabled for the purposes of his claim for total permanent disability benefits was that of a maintenance electrician. The judge's decision on this point was based on a finding that the respondent's employer gave him temporary office work when he returned to work in January 1992 on the condition that if his knees completely recovered he could resume his occupation as an electrician. The judge also

found that the respondent’s employer was of the view during October 1993 that the respondent as a result of his disability could not continue as a ‘draughtsman’ and that the employer associated itself with the medical report according to which the respondent was declared incapable of performing the work of a draughtsman. He also said that it appeared throughout that the appellant regarded the respondent’s occupation as that of an electrician for the purposes of determining the benefits to which he was entitled in terms of the insurance contract.

[22] As regards the respondent’s disability, the judge accepted the evidence of Dr Swart that the respondent is permanently disabled from engaging in his occupation as an electrician or another occupation within the meaning of clauses 3.1.1(a) and 3.1.1(b) of the policy. He also accepted in its entirety the evidence of Mrs Human, who (it will be recalled) had testified that in her view the respondent was unable to perform a full day’s work.

[23] The judge held that the evidence of Professor Shipley did not derogate from that of Dr Swart. He based this on a concession made by Professor Shipley that in the absence of a clinical examination his opinion would be less accurate than that of Dr Swart and that he could not pronounce upon *inter alia* Dr Swart’s findings in regard to the mobility that the respondent retained in his knees. He also stated that Professor Shipley had stated that he was not in a position to express an opinion regarding the respondent’s ability to perform tasks in his workplace. (In saying this he erred. Professor Shipley in fact said - and his evidence on the point was not challenged - that he was able to express an opinion on the point.) The judge also stated that Professor Shipley’s evidence had not been put to Dr Swart and said that as a result of this Dr Swart’s evidence had actually been admitted. (Here again he erred. Professor Shipley’s evidence was put to Dr Swart during cross-examination.)

[24] The judge rejected the evidence of Mrs Van Biljon, finding it to be unreliable. In particular he strongly criticised a statement that she made that although the respondent was unable to engage in his occupation as an electrician it could reasonably be expected of him by means of his knowledge, training, education, ability and experience to become qualified in another occupation. In this regard she had said that the respondent could join a pain clinic for treatment and therapy in respect of pain, could undergo extended and multi-professional psychiatric treatment for the stress and depression which results from his disability, and could study further and qualify amongst other things as a draughtsman. He described

this as ‘’n skynwerklikheid van wat moontlik kan wees’.
[25] He found corroboration for the findings of Dr Swart and Mrs Human in the fact that since the respondent left the service of his employer in October 1992 he had not engaged in any occupation and had not had any fixed employment and he remarked that Mrs Human had pertinently testified that the respondent was very keen to work but was not able to do so.
[26] Mr *Sholto-Douglas,* who appeared for the appellant, contended that the judge had erroneously found that the insurance contract had included a contract for the benefit of a third party, which it was open to the respondent to accept. He accordingly submitted that there was no contractual privity between the respondent and the appellant, with the result that there was no basis on which the respondent could sue the respondent on the insurance contract. He also argued that the respondent had in any event not succeeded in showing that he was entitled to any total and permanent disability benefits under the policy. In this regard he contended that the judge had erred in finding that the occupation in respect of which the respondent could claim disability benefits from the appellant was that of a maintenance electrician. He also submitted that the judge had failed to address the correct question on this part of the case because in order for the respondent to succeed he had to show that the appellant had not acted reasonably in forming the opinion that he was not disabled within the meaning of the policy. This, he contended, the respondent had not done. Counsel submitted further that the judge had erred in preferring the evidence of Dr Swart and Mrs Human to that of Professor Shipley and Mrs Van Biljon.
[27] As I am satisfied for the reasons that follow that the judge erred in holding that the respondent had succeeded in showing that he was entitled to total permanent disability benefits from the appellant, it is unnecessary to decide if the judge’s finding that the policy contained a contract for the benefit of a third party, namely the respondent, was correct. I shall assume in what follows, without deciding the point, that this portion of the judge’s decision was correct.
[28] It is convenient to deal first with the judge’s finding that the appellant had continuously regarded the respondent’s occupation as being that of an electrician. In support of this finding the judge referred to a disability claim admission form dated 11 November 1993, an internal document relating to the processing and assessing of the respondent’s claim based on his alleged total and permanent disability. It is followed in the record by another internal

document relating to the respondent's temporary disability claim. In both documents the respondent's occupation is reflected as that of a maintenance electrician. It is clear, however, that the claims were assessed on the basis that the respondent was a draughtsman. That this is so appears from the fact that as part of the assessment process a letter was sent on 19 November 1993 by a claims assessor in which it was said that before the claim could be assessed 'a full job description of [the respondent's] occupation *as a draftsman* with reference to time spent walking and standing' (my emphasis) was required. The judge also referred, in regard to the finding presently under discussion, to a confidential evaluation report prepared some time in approximately November 1994 (the actual date is illegible) by a occupational therapist, Ms Wilna Potgieter, who, at the request of Mr RJ Ferreira, acting on the respondent's behalf, saw the respondent and reflected the respondent's occupation in her report as that of a maintenance electrician. The fact that Ms Potgieter thought that the respondent's occupation was that of a maintenance electrician is not evidence to support a finding as to how the appellant regarded the respondent's occupation.

[29] Among the documents emanating from the appellant in the court record is a 'synopsis form' dated 10 February 1994 provided for the respondent by one of its assessors, in which his occupation is described as 'Electrician/Draftsman'. In his summary the assessor says:

'Post-Traumatic Osteo-Arthritis Both Knee joints.
Underwent a reconstruction both knee ligaments
Has performed office work (Draftsman) ever since.

Cannot perform his initial work of electrician well
but was able to work as a draftsman.

Scheme commenced	:	01.10.91
Joined Scheme	:	01.01.92
Date of Accident	:	25.03.91
Date of Disability	:	28.09.93

. . .
I think that member works industriously as a draftsman.
. . .
And I find him not totally and permanently disabled from following that occupation.'

[30] On 15 February 1994 a letter was written on behalf of the appellant to Alexander Forbes Consultants and Actuaries, the administrators of the provident fund, in which it was stated that the respondent's disability claims (both permanent and temporary) had been repudiated. The reason given was that the respondent was 'able to perform his own occupation'. The writer of the letter went

on to say:

‘This member [ie, the respondent] has been working as a draughtsman since March 1991 [this was, of course, incorrect: the correct date was January 1992], and this is the occupation for which this member was underwritten at the commencement of this scheme (1 October 1991)’.

[31] The judge also relied on a letter sent by Mrs Van Eeden on 13 October 1994 to Mr Ferreira in which Mrs Van Eeden said that ‘the medicals only indicate that [the respondent] is disabled from the occupation of an electrician’. She went on to say that the appellant agreed that the respondent’s disability was ‘probably permanent’ but added that ‘the medicals do not indicate that his disability totally prevents him from performing an alternative occupation’.

[32] This letter does indicate a measure of confusion on the part of Mrs Van Eeden, who at that stage appeared to regard the respondent’s position as a draftsman as an alternative occupation within the meaning of paragraph 3.1.1(b) of the policy. But this cannot alter the fact that the respondent was injured on 25 March 1991, over six months before the policy came into effect and that in para 2.3.1, the ‘actively at work condition’, of the policy the appellant only came on risk in respect of the respondent as regards the occupation of ‘draughtsman’ at about the beginning of March 1992 when he had completed eight weeks service as a ‘draughtsman’. His cover did not start on 1 October 1991, when the policy came into force, because he was absent. He returned to work in January 1992, when his normal duties were those of a ‘draughtsman’. He did not work as a maintenance electrician at any time after the policy came into operation and could never have enjoyed cover in respect of that occupation. The correspondence I have quoted certainly refutes the judge’s finding that the appellant throughout regarded the respondent’s occupation as that of an electrician. It is clear on the evidence that the appellant was only on risk in relation to the respondent in his occupation as a ‘draughtsman’.

[33] In support of his contention that the judge erred in not considering the question whether the appellant acted unreasonably in forming the opinion that the respondent was not disabled within the meaning of the policy, Counsel for the appellant referred to *Edwards v The Hunter Valley Co-op Dairy Co Ltd* (1992) 7 ANZ Ins Cas 61-113, a decision of McClelland J, sitting in the Supreme Court of New South Wales, Equity Division. In this case reference was made, *inter alia,* to a series of decisions given in England in the 19th century in which it was held that where, as here, a policy provides that an element of the insurer’s

liability depends on its being of a certain opinion, a claimant to succeed in obtaining judgment against the insurer must show that it did not act reasonably in forming or declining to form an opinion on the matter. Among the cases cited were *Moore v Woolsey* (1854) 4 E & B 243 (119 ER 93) and *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782 (121 ER 904). In addition reference was made to *dicta* by Lord Blackburn and Lord Selborne LC in *London Guarantie Co v Fearnley* (1880) 5 App Cas 911 (HL(I)) at 916 and 921, from which it is clear that they agreed with the law as laid down in the earlier cases cited. Another case cited on the point was *Doyle v City of Glasgow Life Assurance Co* (1884) 53 LJ Ch 527, in which North J said (at 529):

'The only question in the action is whether the dissatisfaction of the directors with the evidence of death adduced is unreasonable. Now, in respect of that, it must be observed that reasonable persons may reasonably take different views. It constantly happens that a Judge sitting in the Court below takes one view of evidence and the Judge sitting in the Court above takes another. But no one could suggest for a moment that the view taken by either the one or the other was unreasonable.'

McClelland J put the point thus:

'Unless the view taken by the insurer can be shown to have been unreasonable on the material then before the insurer, the decision of the insurer cannot be successfully attacked on this ground.'

The legal position set out in these decisions is in accordance with our law: see, eg, *Machanick v Simon* 1920 CPD 333 at 338-9, where *Braunstein's* case was cited with approval.

[34] Counsel also referred to *Damsell v Southern Life Association Ltd* (1992) 13 *ILJ* 848 (C) in which a claim for disability relief based on a similarly worded disability scheme was successfully resisted by the insurer, as it happens the present appellant, on the ground that it had not been shown that the insurer's opinion that the claimant was not disabled was not reasonable. In his judgment Foxcroft J referred to an earlier unreported judgment given on exception in the same matter in which Marais J, with whom Fagan J concurred, held that there was room for implying *ex lege* a term in the scheme that the insurer was required to exercise the judgment of a reasonable man. At page 13 of his judgment Marais J said:

'… I consider that those words do preclude plaintiff from seeking to challenge defendant's adverse opinion in legal proceedings simply because it is said to be wrong. That is, in my view, the true and only import of the words "in the opinion of the Southern" in clause 6.1.1. If the defendant's opinion is both honestly held and one which a reasonable person could arrive at on the evidence, then it seems to me that the opinion must stand. The mere fact, if fact it be, that the Court before which the question comes, would have decided it differently is not necessarily of itself sufficient to show that defendant's opinion is one which cannot reasonably be held thus enabling plaintiff to avoid the consequences of defendant's adverse opinion.'

[35] In the circumstances Counsel was correct in submitting that the question which has to be addressed, which was not considered by the judge, was whether the appellant was unreasonable in forming the opinion that the respondent was not totally and

permanently disabled within the meaning of the relevant clause of the policy.

[36] I do not think that it is possible to hold that the appellant was unreasonable in coming to the conclusion it did. What is important to bear in mind is that the question to be considered related to the respondent's ability to perform the duties of the job he held in January 1992: ie, the 'draughtsman' duties he was called upon to perform at that stage. He was clearly not a full engineering draughtsman of the kind considered by Dr Swart or an electrical draughtsman of the kind considered by Mrs Human. As I have said, it was not shown that he did not function adequately in the job he had or that his employment was terminated because of problems he was encountering. The respondent's evidence on the point was contradictory. As I have said his employment terminated for no other reason than because he was retrenched.

[37] As far as the respondent's attempt to invoke the doctrine of estoppel is concerned, I am satisfied that his counsel's contentions in this regard cannot be upheld. I say this for the simple reason that nowhere in his evidence did the respondent state that he relied on any representation by the appellant to the effect that it was on risk as regards his occupation as a maintenance electrician or that he did not timeously institute a claim in respect of his disability against the previous provident fund (of which he was a member on 25 March 1991) and its insurer because of anything said by the appellant.

[38] In the circumstances I am of the view that the appeal should be allowed.

[39] The following order is made:

The appeal succeeds with costs.

The order of the court *a quo* is set aside and altered to read:

'The plaintiff's claim is dismissed with costs.'

…………….

IG FARLAM

JUDGE OF APPEAL

CONCURRING

SCOTT JA
CAMERON JA
VAN HEERDEN JA
PATEL AJA