THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 86/2003

In the matter between :

UNITRANS FREIGHT (PTY) LTD Appellant

and

SANTAM LIMITED Respondent

Before: **HOWIE P, NUGENT, CLOETE, HEHER JJA & PONNAN AJA**

Heard: **15 MARCH 2004**

Delivered: **29 MARCH 2004**

Summary: **Extension clause in motor insurance policy – whether it obliges insurer to indemnify authorised user of insured vehicle as contemplated by s 156 of the Insolvency Act 24 of 1936**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] Because this appeal concerns an exception to the appellant's particulars of claim I will refer to the allegations in the particulars of claim as if they were established facts.

[2] The respondent (Santam) was the insurer of a motor vehicle that collided with a vehicle in which the appellant (Unitrans) had an interest thus causing loss to Unitrans. Unitrans sued Santam in the Johannesburg High Court for the recovery of the loss. Santam excepted to the particulars of claim on the grounds that they did not disclose a cause of action. The exception was upheld by the court *a quo* (Willis J) and Unitrans now appeals with leave granted by this court.

[3] The insured under the policy was a firm known as JG Olieverspreiders. In terms of the policy Santam undertook (subject to various limitations and exceptions that are not now relevant) to indemnify the insured against, amongst other things, liability incurred by the insured towards third parties for damage caused by a defined event. A defined event included any accident caused by or through or in connection with the insured vehicle.

[4] A clause in the policy (I will refer to it as the extension clause) extended that indemnity to 'any person who is driving or using [the] vehicle on the insured's order or with the insured's permission [when a defined event occurs]'.

[5] At the time of the collision the insured vehicle was being driven by a certain Mr Shai and it was his negligence that caused the loss to Unitrans. Shai was employed by a close corporation known as De Kroon Brandstofverspreiders CC (De Kroon) and he was driving the insured vehicle in the course and within the scope of his employment. De Kroon thus became vicariously liable to Unitrans for the loss. When the collision ocurred De Kroon was using the vehicle with the permission of the insured. De Kroon has since been placed under a winding up order.

[6] No doubt Unitrans thought it was futile to attempt to recover its loss from an insolvent close corporation and instead it sought to recover it directly from Santam in reliance upon s 156 of the Insolvency Act 24 of 1936. The section reads as follows:

> 'Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (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 [up to the limit of the indemnity].'

[7] The section does not add to the contractual liability of an insurer. It merely allows a person who is not a party to the policy of insurance to recover directly from the insurer in particular circumstances. It entitles a person who has a claim against someone who is indemnified against such liability by an insurer to pursue the claim directly against the insurer if the estate of the indemnified person is sequestrated. (The effect of s 66 of the

Close Corporations Act 69 of 1984 read together with s 339 of the Companies Act 61 of 1973 is to make s 156 applicable where the indemnified person is a close corporation that has been placed under a winding up order : *Supermarket Leaseback (Elsburg) (Pty) Ltd v Santam Insurance Ltd* 1991 (1) SA 410 (A) 411 I). Scott JA explained the purpose and effect of the section as follows in *Le Roux v Standard General Versekeringsmaatskappy Bpk* 2000 (4) SA 1035 (SCA) para 6:

'Artikel 156 van die Wet verleen aan 'n eiser die reg om in bepaalde omstandighede 'n bedrag direk van 'n versekeraar te vorder wat deur die versekerde aan die eiser verskuldig is. Soos uit die artikel blyk, ontstaan die reg by die sekwestrasie van die boedel van die versekerde. By ontstentenis van so 'n wetsbepaling sou 'n eiser in daardie omstandighede verplig gewees het om sy eis teen die versekerde se insolvente boedel in te dien en sou sy verhaalsreg beperk gewees het tot enige dividend wat die kurator aan konkurrente skuldeisers moes betaal. Die kurator sou op sy beurt verplig gewees het om ten gunste van al die skuldeisers die versekerde se reg op vrywaring uit hoofde van die tersaaklike polis teen die versekeraar af te dwing. Die gevolg van art 156 is dus om die eiser aansienlik te bevoordeel deurdat ander skuldeisers nie in die opbrengs van die polis kan deel nie (kyk *Woodley v Guardian Assurance Co of SA Ltd* 1976 (1) SA 758 (W) op 759E-G; *Supermarket Haasenback (Pty) Ltd v Santam Insurance Ltd* 1989 (2) SA 790 (W) op 793C-G; *Przybylak v Santam Insurance Ltd* 1992 (1) SA 588 (K) op 601J-602A).'

[8] A person who wishes to recover from an insurer in reliance upon the section must show not only that he has a good claim in law against the insolvent person but also that the insurer is obliged in law to indemnify the

insolvent person against the claim (*Le Roux's* case, *supra,* para 7; *Coetzee v Attorney's Insurance Indemnity Fund* 2003 (1) SA 1 (SCA) para 20).

[9] On the facts alleged in the present case Unitrans indeed has a good claim in law against De Kroon for recovery of its loss. The only remaining question is whether those facts establish that Santam was obliged under the policy to indemnify De Kroon against its liability to Unitrans.

[10] The exception that was taken by Santam was misconceived at the outset. In the relevant portion of the notice of exception it was alleged by Santam that the particulars of claim do not disclose a cause of action

> 'because no allegations are made that a contractual relationship existed between [Unitrans] and [Santam] in terms of which [Unitrans] is entitled to rely on the contract of insurance.'

That allegation rather misses the point. Section 156 does not require there to be a contractual relationship between Unitrans and Santam – it is precisely because there is no such relationship that s 156 was enacted so as to enable the person who has suffered the loss to pursue the claim directly against the insurer. What the section requires is only that the insurer is contractually bound to indemnify the person who is liable to make good the loss (in this case De Kroon). Moreover, the section does not apply only where it is the insured (the person who contracted with the insurer) who has incurred that liability to the plaintiff, for it applies expressly whenever the insurer is obliged to indemnify any person in respect of the liability that is the subject of the claim. Thus the question is not whether Santam was

obliged under the policy to indemnify Unitrans (clearly it was not) but rather whether Santam was obliged by the policy to indemnify De Kroon against De Kroon's liability to Unitrans. If the policy did oblige Santam to indemnify De Kroon then s 156 entitles Unitrans to pursue its claim directly against Santam now that De Kroon is in liquidation.

[11] In support of its submission that Santam was obliged by the policy to indemnify De Kroon against its liability for the claim Unitrans relied upon the terms of the extension clause which I referred to earlier (for it is not in dispute that at the time the collision occurred the insured vehicle was being used by De Kroon with the permission of the insured). It was submitted on behalf of Unitrans, in this court and in the court *a quo,* that the extension clause constitutes a stipulation for the benefit of third parties (including an authorised user like De Kroon) – a *stipulatio alteri* – which conferred a right upon De Kroon to enforce its terms. Santam's reply was that if the clause is a stipulation for the benefit of De Kroon there is no allegation in the particulars of claim that the benefit was accepted by De Kroon – a necessary precondition for Santam to incur contractual liability to De Kroon (*McCullogh v Fernwood Estate Ltd* 1920 AD 204 at 205; *Commissioner for Inland Revenue v Estate Crewe and Another* 1943 AD 656 at 674-5) and that without that allegation the particulars of claim are excipiable.

[12] Although that was not the ground upon which the exception was taken (I referred earlier to the relevant ground for the exception) I will deal with it nevertheless because it was advanced and argued both in this court and in the court *a quo*.

[13] The learned judge in the court *a quo* held that the extension clause 'does not apply to a person in the position of [Unitrans]' and for that reason he dismissed the exception. No doubt that finding was influenced by the form in which the exception was presented but again, in my respectful view, it rather misses the point: the question is not whether the extension clause afforded an indemnity to Unitrans (if the policy had indemnified Unitrans it would have had no need to resort to s 156) but rather whether it afforded an indemnity to De Kroon.

[14] Although De Kroon was indeed an authorised user as contemplated by the extension clause it does not follow that it acquired contractual rights against Santam as submitted by counsel for Unitrans. In order for such contractual rights to have arisen it was not enough that the clause purported to confer a benefit on De Kroon: what was required in addition was an intention on the part of the original contracting parties (the insurer and the insured) that the benefit, upon acceptance by De Kroon, would give rise to rights that were enforceable at the instance of De Kroon, for that intention is 'of the very heart of the s*tipulatio alteri'* (Ellison Kahn: 'Extension Clauses in Insurance Contracts' (1952) 69 *SALJ* 53 at 56). In *Total South*

Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A) 625D-G Smalberger JA expressed it as follows:

'As was pointed out by Schreiner JA in *Crookes NO and Another v Watson and Others* 1956 (1) SA 277 (A) at 291B-C, "a contract for the benefit of a third person is not simply a contract designed to enable a third person to come in as a party to a contract with one of the other two". The mere conferring of a benefit is therefore not enough; what is required is an intention on the part of the parties to a contract that a third person can, by adopting the benefit, become a party to the contract. (*Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 172D-E).'

[15] The intention of the contracting parties is to be determined upon a consideration of the policy as a whole. Attached to the particulars of claim was an extract from the policy containing the extension clause itself but we were provided by the parties with the remaining terms of the policy and it was agreed that they should be regarded as having been incorporated in the particulars of claim. That Santam did not intend to confer enforceable rights upon De Kroon is clear from Clause 11 of the General Exceptions Conditions and Provisions and the question whether Unitrans was obliged to allege that the benefit had been accepted simply does not arise. Clause 11 reads as follows:

'Unless otherwise provided, nothing in this policy shall give any rights to any person other than the insured. *Any extension providing indemnity to any person other than the insured shall not give any rights of claim to such person*, the intention being

that the insured shall claim on behalf of such person. The receipt of the insured shall in every case be a full discharge to the company.' (My emphasis).

[16] But it does not follow from the fact that De Kroon acquired no rights that it could enforce against Santam that Santam was not 'obliged to indemnify' De Kroon as that expression is used in s 156. For clause 11 also makes it clear that Santam intended the indemnity contained in the extension clause to be capable of being enforced: its reservation was only that it should not be enforced by anyone but the insured. As pointed out by A. Chaskalson 1963 *Annual Survey* 382 in relation to a similar clause in another contract:

> 'There seems to be no reason in principle to prevent parties to a contract from prescribing a specific procedure to be adopted in regard to the form of action. Nor, if the clause can be construed in this way, is there any reason for a court to decline to enforce the indemnity simply because it has been sued for in accordance with the prescribed procedure, which is different from the procedure normally adopted.'

In my view that is indeed the proper construction to place upon the clause. To construe the clause otherwise would be in conflict with Santam's expressed intention and would deprive it of effect.

[17] It has been suggested that an indemnity given in that form might be void for lack of an insurable interest on the part of the insured[1] – and that has been held to be the case in other jurisdictions[2] – but that is not a ground

[1] Ellison Kahn: 'Extension Clauses in Insurance Contracts' (1952) 69 *SALJ* 53; *Gordon and Getz on The South African Law of Insurance* 4ed by DM Davis 445. But see the contrary views of A. Chaskalson 1963 Annual Survey 381-2; MFB Reinecke: *'Versekering sonder versekerbare belang?'* 1971 *CILSA* 193 218-20.

[2] *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 (PC) 80-81; *Old Mutual Fire & General Insurance Company of Rhodesia (Pvt) Ltd v Springer* 1963 (2) SA 324 (SR) 329C-G.

upon which the particulars of claim were attacked and it has not been argued before us. Indeed, it would be surprising if an insurer who has given an earnest undertaking to indemnify a person in what is clearly a policy of insurance and not a gambling contract (as pointed out by Chaskalson, *loc cit*, the requirement of insurable interest is designed to ensure that insurance policies are not used as a basis of gambling) were to repudiate its obligations on those grounds.

[18] In my view Santam was indeed obliged to indemnify De Kroon against its liability for the loss as contemplated by s 156 (albeit that the indemnity was enforceable only by the insured) and Unitrans is entitled to enforce its claim directly against Santam now that De Kroon is in liquidation. Naturally that does not mean that Unitrans will necessarily succeed if the facts alleged in the particulars of claim are established for it is clear from the policy that a claim might yet be defeated for want of compliance by the insured with the conditions of the policy (the claim in *Le Roux's* case failed on those grounds). But the particulars of claim are not excipiable (see *First National Bank of Southern Africa Ltd v Perry NO & Others* 2001 (3) SA 960 (SCA) 965D) and the exception ought to have been dismissed.

[19] The appeal is upheld with costs. The order of the court *a quo* is set aside and the following is substituted:

'The exception is dismissed with costs'.

NUGENT JA

HOWIE P)
CLOETE JA)
HEHER JA) CONCUR
PONNAN AJA)