REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 373 / 03

In the matter between

MUTUAL AND FEDERAL LIMITED **APPELLANT**

and

RUMDEL CONSTRUCTION (PTY) LIMITED **RESPONDENT**

Coram : HARMS, FARLAM, CONRADIE JJA, PATEL et PONNAN AJJA

Date of hearing : 24 AUGUST 2004

Date of delivery : 21 SEPTEMBER 2004

SUMMARY

Insurance – contract works damaged by cyclone – insurer's contention rejected that contractor not liable to repair damage and hence had no insurable interest in works – claim not excluded by special exception relating to defective design of contract works.

J U D G M E N T

CONRADIE JA et PATEL AJA

[1] During the week of 21 to 28 February 1997 tropical cyclone Lizette inundated Nampula Province in Mozambique. Over a long distance it severely damaged roads that the respondent ('the contractor') was about to hand over to its employer, the Mozambican Directorate of National Roads and Bridges ('the employer'). The storm damage led to an insurance claim that the appellant ('the insurer') repudiated. The insurer lost before Gildenhuys J in the Johannesburg High Court. The court found the insurer liable and ordered it to pay to the contractor R2.5m plus whatever value added tax might have been paid by the contractor. It is against this award that the insurer, with leave of the trial court, appeals. The contractor, also with leave, cross-appeals against the failure of the trial court to award it interest on this amount.

[2] The contractor's claim was made under an insurance policy in terms of which the insurer indemnified both the contractor and the employer in respect of fortuitous physical destruction of or damage to works to be undertaken by the contractor in these words:

> 'THE COMPANY HEREBY AGREES subject to the terms exceptions limits

> and conditions contained herein or indorsed hereon that if during the Period of Insurance or during any further period in respect of which the Insured shall have paid and the Company shall have accepted the premium required any part of the Property Insured shall be lost destroyed or damaged as referred to in Part 1 hereof…the Company will indemnify the Insured as provided hereinafter.'

Part 1 circumscribes the indemnity:

> 'The Company will by payment or at its option by repair or reinstatement indemnify the Insured in respect of fortuitous physical loss or destruction of the Property Insured arising from any cause (other than as provided in the General Exceptions or in the Exceptions to this Part contained hereinafter) whilst at the Situation of the Contract.'

[3] The property insured comprised two rural roads in Nampula province, the one from Liupo via Corrane to Nampula and the other from Momo Junction to Nametil. The description of the works in the schedule to the insurance contract is worth recording:

> 'Contract no. bid 107/0b/94: opening of rural gravel roads and rehabilitation and constructions of bridges in Nampula province'.

[4] The contractor sought an indemnity for the repair costs of 101,88 kilometres of the road works that had sustained storm damage. The insurer raises two defences. First it maintains that a proper construction of the building contract leads to the conclusion that the contractor was not liable to repair the roads. It therefore did not have an insurable interest in their restoration and

could only validly have insured the works up to the extent of its interest, that is to say, for loss or damage that it was obliged to make good at its own expense. Second it maintains that the roads were defectively designed and that the damage suffered therefore fell outside the policy indemnity.

[5] For the first defence the insurer relies on the terms of the construction contract contained in clauses 10 and 11 thereof:

> '**10 Contractor's Risk**
>
> 10.1 All risks of loss or of damage to physical property and of personal injury and death which arise during and in consequence of the performance of the Contract other than the excepted risks are the responsibility of the Contractor.
>
> **11 Employer's Risk**
>
> 11.1 The Employer is responsible for the excepted risks which are (a)…the risks of war…,or (b) a cause due solely to the design of the Works, other than the Contractor's design.'

[6] We assume in favour of the insurer the correctness of its proposition that the contractor insured only its interest in the works. On this assumption it would not be liable to repair damage to the works caused solely by their design by someone other than the contractor. The roads were not designed by the contractor but by the employer. But the damage to the roads was not caused solely by their design. The damage was caused by an unusually heavy downpour. The contractor was therefore responsible for their repair. Clause 11 was meant to safeguard the contractor against the cost of remedial work to a

defective design by someone other than himself. To try to invoke it in the context of an insurer's liability for storm damage is to misconstrue its scope and purpose.

[7] The insurer's obligation to indemnify in the insurance policy is subject to the usual general exceptions to liability such as damage or loss due to war and confiscation. They do not concern us but special exceptions 4 and 5 to Part 1 do:

> 'The indemnity expressed in this Part shall not apply to or include
>
> 4. Loss destruction or damage due to:-
>
> (a) wear and tear rust mildew or deterioration
>
> (b) insects larvae or vermin of any kind
>
> (c) acts of the Insured or his competent or authorized agent or representative which are contrary to the recognized rules of engineering or to any legislation or regulations issued by an authority
>
> (d) cessation of work whether total or partial
>
> 5. (a) repairing replacing reinstating or making good any part of the Property Insured which is defective in material workmanship plan or specification…
>
> (b) re-design improvement betterment or alteration on the occasion of repair replacement or reinstatement of loss or damage
>
> (c) defective design.'

[8] The insurer submits that the word 'design' is used in the policy in relation to the suitability of the roads for their intended purpose. We would not quarrel with that. The intended purpose of the project was the emergency opening of

roads in Nampula province. It was intended that what remained of road links in the province after the civil war should be rehabilitated. It is common cause that the roads were low cost, high risk, high maintenance, low volume, all weather roads the main purpose of which was, in words borrowed by the insurer’s expert from a CSIR report on that kind of road in Kwa-Zulu Natal 'to get the people out of the mud'. The roads were built according to a design philosophy 'as low as you can go for a public road' according to one of the contractor’s experts and were meant to be degraded by the weather and repaired by regular maintenance.

[9] The insurer’s expert on road construction repeatedly said that the drainage, but also other aspects of the construction such as the wearing layer on the road, should have been better designed. Much stress was laid on how flood returns – the statistical frequency with which a storm of a particular severity might be expected to recur – ought to have been calculated and incorporated in the design. Only then would the design not have been defective.

[10] In effect the appellant’s argument amounts to this: that if the respondent hoped to be entitled to an indemnity under the policy for storm damage to the works, it was not good enough for it to construct, as it did, the works to the satisfaction of the employer: it had to construct the works to the satisfaction of the insurer.

[11] What standard of design the insurer demanded before it would pay, did

not become clear during the trial. Its expert criticized various aspects of the drainage, but did not state to what standard it should have been designed. He thought that the drainage should have been designed to withstand the impact of cyclone Lizette but since we do not know what the return period of Lizette was that does not set an ascertainable design standard. Without having established a standard the insurer could not maintain that the design was defective.

[12] Moreover, there is no suggestion that the insurer did not know the nature of the unsophisticated contract works it was insuring. It cannot now as a prerequisite to accepting liability demand that they should have been of a higher quality than the employer was prepared to pay for.

[13] There is no acceptable evidence that the roads, for what they were, were poorly designed. The employer was represented on site by its resident engineer, Mr AJ Kruger. He worked for a firm of consultants, Provia/Van Wyk and Louw International, engaged by the employer to supervise the construction of the roads. The project was so unsophisticated and the funding so restricted that Kruger himself, guided by the contract documents, was obliged to design drainage works for the contactor as the roads progressed. He did this by directing the installation of drains, culverts and drifts, using as guidelines his own observations of the topography, evidence of previous flood levels and local knowledge of flow patterns and soil conditions. He did not work to a statistically calculated flow return period. There is no suggestion that such

information was available for Nampula province, but even if it had been, technological advances in road design were largely irrelevant to the rudimentary drainage structures that were all the employer could afford. The contention that the design of the contract works was defective accordingly fails.

[14] The trial court failed to award the contractor interest. Such interest was claimed on the damages at the legal rate of interest according to law. Since the prayer for interest was not dealt with in the court's order the contractor after judgment brought an application for supplementation of the order to include the interest.

[15] The trial court was not at the close of the case addressed on the contractor's entitlement to interest but the particulars of claim clearly accommodated the payment of mora interest as envisaged by the Prescribed Rate of Interest Act 55 of 1975 and the claim was not abandoned.

[16] The application was opposed by the insurer who maintained that the interest claim had been compromised when the quantum of damages was agreed between the parties. However, Gildenhuys J was not willing to amend his order to include an award of interest on the essential ground that he was *functus officio*. No doubt in coming to this conclusion he was mindful of the requirements of Rule 42 of the Uniform Rules of Court and the common law exceptions to the well-established rule that once a court has pronounced a final

judgment or order it has itself no authority to correct, alter or supplement it (see *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306G-308A).

[17] We however are at large to order interest to run on the amount awarded, although the issue of interest was not dealt with in the court *a quo*, if we are of the view that the contractor is entitled to it (*Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA)). We consider that the probabilities do not favour the conclusion that the contractor settled the interest claim.

[18] First, on 31 October 2002, while the contractor's counsel was leading the evidence of a Mr McDowell, who had been called to establish the quantum of the contractor's loss, the parties reached a settlement and agreed the loss at R2 500 000. Insurer's counsel informed the court that in view of the settlement of the quantum it was no longer necessary to proceed with the evidence of McDowell. The words used by the insurer's counsel were 'quantum of the total loss suffered by the plaintiff is R2,5 million'. Although language is not an instrument of mathematical precision there is no ambiguity in these words. If the quantum included interest the onus rested on the insurer's counsel to clarify this since as a general rule a claim for damages would attract interest, if not before then after judgment.

[19] Secondly, this interpretation is strengthened by the insurer's counsel

informing the court that the agreement was subject to the right of the insurer 'to identify three components of the total loss, these being damage to and fixing of drains, damage to and fixing of culverts and washaways, and general damage to the rest of the road.' After evidence and arguments were concluded and judgment reserved, the insurer's attorney informed the trial judge that the insurer did not 'intend proceeding with any apportionment of the settlement amount amongst the three components of the loss as envisaged in the agreement reached in court'.

[20] Lastly, that this is what the parties must have envisaged is further borne out by the fact that after quantum was agreed the insurer admitted that the contractor had made a formal demand on 14 October 1997. If the interest claim had been compromised it would have been unnecessary for the parties to agree on the date of demand. The admission was clearly sought and made in order to fix a date from which interest might be considered to run in accordance with the provisions of section 2A(1) and 2A(2)(a) of the Prescribed Rate of Interest Act 55 of 1975:

[21] The relevant provisions of this Act are:

'1 **Interest on a debt to be calculated at a prescribed rate in certain circumstances**

(1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection (2)

as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.

.....

2A. **Interest on unliquidated debts**

(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.

(2) (a) Subject to any other agreement between the parties the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is earlier.

(b)…..'

[22] In terms of the Act the contractor would be entitled to interest on the sum awarded by the court *a quo* at the prescribed rate from the date of summons or from the date of the earlier demand provided that the demand was in writing and set out the creditor's claim 'in such a manner as to enable the debtor to reasonably assess the quantum thereof'.

[23] The letter of demand with its annexure clearly sets out the loss suffered by the contractor and minutely describes the manner in which it was computed. It was on the basis of this letter of demand that the insurer had earlier made a (wholly inadequate) settlement offer to the contractor. It obviously did not then consider that it was unable to assess the loss and that was also not argued in this

Court. It was not disputed that the applicable prescribed rate of interest is 15,5% per annum.

[24] 1 The appeal is dismissed with costs, which include the costs of two counsel.

2 The cross appeal succeeds with costs. The order of the trial court is amplified by the insertion therein of a paragraph (*b*bis) reading:

‘(*b*bis) interest on the amount of R2 500 000 at the rate of 15,5% per annum is to be paid by the defendant as from 14 October 1997.’

J H CONRADIE
JUDGE OF APPEAL

C N PATEL
ACTING JUDGE OF APPEAL

CONCURRING:

HARMS JA
FARLAM JA
PONNAN AJA