THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO: 58/2005

In the matter between

ANDREAS PAPAGAPIOU
APPELLANT

and

SANTAM LIMITED
RESPONDENT

CORAM: **HOWIE P, SCOTT, MTHIYANE, NUGENT and MLAMBO JJA**

HEARD: **16 NOVEMBER 2005**
DELIVERED: **30 NOVEMBER 2005**

Summary: Insurance Contract – Interpretation of an exclusion clause – plaintiff's attempted fraud covered by the exclusion clause.

JUDGMENT

MTHIYANE JA:

MTHIYANE JA:

[1] This appeal turns on the interpretation of an exclusion clause in a contract of insurance concluded between the appellant (the plaintiff) and the respondent (Santam) on 1 June 2002. In terms of the contract the defendant undertook to cover the plaintiff's property, described as Erf 909, Onderlingstraat, Virginia, ('the property'), against loss or damage by fire. The clause reads:

'If any claim under this policy be in any respect fraudulent, or if any fraudulent means or devices be used by the insured or anyone acting on his behalf or with his knowledge or consent to obtain any benefit under this policy, or if any event be occasioned by the wilful act or with the connivance of the insured, the benefit afforded under this policy in respect of such claim shall be forfeited.' [English version]

[2] In October 2002 the plaintiff's property was extensively damaged by a fire and the damage was assessed at R164 149,00. The plaintiff claimed indemnification from Santam under the policy but liability was repudiated on the ground that the plaintiff had attempted to obtain a benefit under the policy by fraudulent means.

[3] The plaintiff instituted action in the High Court at Bloemfontein claiming indemnification under the policy but this also failed. Cillie J, before whom the matter served, upheld Santam's defence based on the exclusion clause, dismissed the claim with costs and granted leave to

appeal to this court.

[4] The attempted fraud relied on by Santam for its invocation of the exclusion clause emerged from the evidence of an assessor, Mr André Carstens, who was engaged by the company to assess the damage caused by the fire. Carstens testified that the plaintiff had approached him on two occasions with the request that he inflate the damage to the property. On the first occasion the plaintiff offered Carstens R50 000 if he assessed the damage at R500 000 and on the second occasion R10 000 if he assessed the damage at R165 000. On both occasions he refused. Subsequently Carstens assessed the damage at R164 149,00, which was the correct assessment of the damage. In due course Carstens submitted to Santam his assessment note which included a report concerning the two attempts by the plaintiff to improperly influence him in his assessment of the damage. The company duly repudiated the claim, citing the exclusion clause in its letter of repudiation sent to the plaintiff.

[5] On appeal Carstens' evidence concerning the plaintiff's fraudulent attempts to obtain a benefit under the policy was not challenged but his counsel argued that, since attempts were made before the claim was lodged, the plaintiff's conduct was not covered by the exclusion clause. For the clause to apply, argued counsel, the claim had first to have been

lodged (‘ingedien’).

[6] Before dealing with the plaintiff’s argument it would be as well to restate the main principles governing the interpretation of a policy of insurance, and to do so with reference to the decision in *Fedgen Insurance Ltd v Leyds*[1], where it was said:

‘The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd*1934 AD 458 at 464-5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (*Auto Protection Insurance Co Ltd v Hanmer-Strudwick* (1) SA 349 (A) at 354C-D); for it is the insurer’s duty to make clear what particular risks it wishes to exclude (*French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd* AD 60 at 65; *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* (*supra*at 354D-E)). A policy normally evidences the contract and an insured’s obligation, and the extent to which an insurer’s liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* , which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy (*Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* (1) SA 103 (A) at 108C).’
(See also *Van Zyl NO v Kiln Non-Marine Syndicate No 510 of Lloyds of London*[2]).

[7] The language of the clause is clear and unambiguous. There is therefore no reason not to give the words their ordinary meaning. Giving

[1] 1995 (3) SA 33 (A) at 38B-E.
[2] 2003 (2) SA 440 (SCA) at para 6.

the clause its ordinary meaning, three situations are in my view covered by it. The first deals with where a claim under the policy is in any respect fraudulent; the second is concerned with where fraudulent means or devices are used by the insured to obtain any benefit under the policy; the third covers a situation where any event is occasioned by the wilful act or with the connivance of the insured. In all these situations the benefit afforded under the policy is to be forfeited.

[8] It is therefore clear that the argument that the exclusion clause cannot be invoked where fraud is committed before the claim is lodged, loses sight of the fact that the clause deals with three different situations. The first situation does indeed deal with the case where a fraudulent claim has been lodged. But the second, relating to the prohibition of the use of fraudulent means or devices to obtain any benefit under the policy, presupposes that a claim has not been submitted (‘ingedien’). The second situation cannot refer to a fraudulent claim that has already been lodged as this is covered by the first situation contemplated in the clause and would therefore render the second one tautologous. Accordingly, in their context the words ‘to obtain’ mean ‘in order to obtain’. The third situation referred to in the clause deals with a fraudulent event that has been caused by the wilful act of the insured and has no application in the present matter. During argument counsel was unable to give examples of

when in the absence of a claim being lodged the second situation referred to in the clause (dealing with the attempted fraudulent means) would apply, if it were not to cover a situation such as the present. Even if one, therefore, gives the clause an interpretation most favourable to the plaintiff, the interpretation contended for on the plaintiff's behalf cannot be sustained and must accordingly be rejected.

[9] Counsel's second argument, which was related to the first, was that since Carstens had not acceded to the request to inflate the damage and Santam had not paid or would in any event not have paid more than the true value of the damage, the plaintiff had not obtained any benefit under the policy. Consequently, so the argument went, the exclusion clause had not been breached. For this argument, counsel relied on *Strydom v Certain Underwriting Members*[3], where Labe J was called upon to interpret and apply an identically worded clause.[4] In that case the insured had knowingly made a fraudulent statement aimed at showing that he had not been negligent in relation to the motor collision which had resulted in damage to his car. The fraudulent statement was, however, of no consequence, in that it did not affect the insurer's position to its prejudice and was therefore not material. It was not necessary for the insured to have made a fraudulent statement in the first place because he was

[3] 2000 (2) SA 482 (W).
[4] *Op cit* at 484F.

covered against his own negligence.

[10] The position is, however, different in this case. The exclusion clause covers the very situation which occurred here, namely use by the plaintiff of fraudulent means or devices in order to obtain an undue benefit under the policy. None of the contentions raised have any merit and the appeal must therefore fail.

[11] I turn briefly to the question of costs. Santam asked for costs of two counsel. On appeal it was represented by a silk and a junior who were not called upon to argue. The plaintiff was, on the other hand, represented by junior counsel. In my view the matter is simple and straightforward even if it does involve an interpretation of a policy clause in widespread use. I do not think this case warranted the briefing of two counsel and an order allowing costs of two counsel would therefore not be justified.

[12] In the result the appeal is dismissed with costs.

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KK MTHIYANE

JUDGE OF APPEAL

CONCUR:

HOWIE P
SCOTT JA
NUGENT JA
MLAMBO JA