THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 197/06

In the matter between:

IMPERIAL GROUP (PTY) LIMITED **APPELLANT**

and

NCS RESINS (PTY) LIMITED **RESPONDENT**

CORAM: **SCOTT, CAMERON, CLOETE, PONNAN *et* MLAMBO JJA**

DATE OF HEARING: **15 February 2007**

DATE OF DELIVERY: **20 March 2007**

Summary: Interpretation of warehousing contract – Obligation to insure against fire not giving rise to inference that risk of loss lay with the insured.

Neutral citation: This judgment may be referred to as *Imperial Group (Pty) Ltd v NCS Resins (Pty) Ltd* [2007] SCA 13 (RSA).

JUDGMENT

SCOTT JA/…..

SCOTT JA:

[1] The appellant carries on business as a supplier of transport and warehousing services. In August 2000 it entered into a written contract, styled a 'Logistic Services Agreement', with Sentrachem Limited in terms of which it undertook for reward to provide *inter alia* warehousing and transport services to a division of Sentrachem called NCS Resins. Subsequently, Sentrachem, with the written consent of the appellant, assigned its rights and obligations under the contract to the respondent, NCS Resins (Pty) Ltd. I shall refer to the appellant as Imperial and to the respondent as NCS. On about 22 March 2002 there was a fire at Imperial's warehouse in Wadeville, Gauteng, resulting in destruction of and damage to NCS's property. NCS sued Imperial for its loss in the Johannesburg High Court alleging that the loss was due to Imperial's negligence and breach of contract. One of the defences raised in Imperial's plea was that on a proper construction of the contract, NCS, and not Imperial, bore the risk of loss by fire and that accordingly the claim had to fail even if it were established that the fire was caused by a breach of contract on the part of Imperial. By agreement between the parties it was ordered in terms of Rule 33(4) that this issue was to be disposed of first and that the other issues, including the question of Imperial's negligence, would stand over for later determination. Goldstein J, who heard the matter, found for NCS but granted Imperial leave to appeal.

[2] Both parties rely upon the express terms of the contract in support of their competing interpretations, NCS principally on clause 9.6 and Imperial on clause 11.6. Before referring to these provisions it is necessary to make certain general observations regarding the contract and its structure so that the provisions in issue may be understood in their contextual setting.

[3] The contract is a bulky document with many annexures and contemplates further 'service agreements' which, it is recorded, are to form 'part of this agreement'. The contract itself is divided into chapters which deal with a complex business relationship between the parties covering a wide range of activities including transport, warehouse

stock rotation, inventory management, decanting and the use of computer programmes. The language used appears to be that of businessmen rather than lawyers. It is not particularly well drafted. Clauses are frequently out of place and the impression created is that an initial draft was subsequently altered by the insertion of additional provisions. The words ‘damage’ and ‘damages’ are used interchangeably and often incorrectly. Imperial was represented by one of its divisions, IWL Warehousing and Logistics, and the abbreviation ‘IWL’ used in the contract is in reality a reference to Imperial.

[4] Chapter 9 is headed ‘Liabilities’. Clauses 9.1 and 9.3 contain warranties which are not relevant to the present case. Clause 9.2 is similarly not relevant and appears to be out of place. Clause 9.4 deals with ‘damage to and/or loss of goods during transport, including loading and unloading’. Clause 9.5 deals with ‘damages (sic) to third parties, such as but not limited to movable or immovable goods, personal injuries, environmental damages’. Clause 9.6, being the clause relied upon by NCS, reads:

‘In case of damages (sic) other than covered hereabove, and caused by IWL [‘s] breach of this Agreement and corresponding Service Agreements, IWL will assume full liability except if IWL provides the proof that this damage has been caused by NCS’ fault. IWL will assume same liability in case its activities and services are carried out by Sub-contractors.’

It is common cause that the ordinary meaning of this clause is wide enough to include damage by fire and, subject to any other provision to the contrary, the clause would therefore have the effect of rendering Imperial liable for the damage suffered by NCS in the instant case. In passing, it should also be noted that the reference to damage ‘other than covered hereabove’ is a reference to the damage referred to in clauses 9.4 and 9.5, being the only damage dealt with ‘hereabove’.

[5] Chapter 11 is headed ‘Insurance’. The relevant part of the introductory clause provides:

‘IWL, its subsidiaries and potential sub-contractors *shall* maintain in effect the following insurance, at their own expense, with reputable and solvent insurance Companies, ...’ (Emphasis added.)

Clauses 11.1, 11.2 and 11.3 make provision respectively for ‘corporate Third Party/Operations insurance’, ‘insurance against accidental pollution’ and ‘motor third party liability insurance’. Clause 11.4 deals with excess clauses. Clause 11.5 deals with subrogation in relation to insurance policies taken out by Imperial. It reads:

‘All IWL insurance policies must contain clauses whereby IWL and the insurance companies waive their subrogation rights against NCS and the latter’s insurers throughout the duration of the Agreement with regard to any damage or loss submitted by equipment and plant whether these are or not owned by IWL. All IWL insurance policies will name NCS as an additional insured.’

Clause 11.6, being the clause relied upon by Imperial reads:

‘NCS will insure its stock against fire and natural disasters at their cost whilst in the IWL warehouse.’

Clause 11.7 reads:

‘IWL will at its own cost insure the NCS stock against stock losses and theft.’

It will at once be observed that clause 11.6 is out of place in relation to the introductory clause; it deals with insurance at the instance of NCS and not Imperial. In clause 11.7 the word ‘will’ is used, as opposed to ‘shall’ in the introductory clause, without any apparent reason.

[6] Imperial’s case, in a nutshell, is that clause 11.6 by necessary implication imposes the risk of damage by fire on NCS and to this extent qualifies clause 9.6. In other words, it is contended that clause 9.6, when read with clause 11.6, must be construed as meaning that if the damage is caused by fire, NCS is to bear the loss even if it is occasioned by Imperial’s negligence and breach of contract. This construction did not find favour with the court *a quo* which held that by applying the *eiusdem generis* rule the word ‘fire’ had to be restrictively interpreted so as to cover only a fire which Imperial could not have controlled or prevented. Accordingly, so the court reasoned, a fire

caused by a breach of contract on the part of Imperial was not covered by clause 11.6 and the defence raised by Imperial had to fail.

[7] In this court counsel for Imperial criticised the court *a quo* for its reliance on the *eiusdem generis* rule. He submitted that it was well-established that where specific words were followed by general words the rule could be invoked, when appropriate, to confine the general words to things of the same kind as those specified; however, the rule could not be invoked to give a restricted meaning to a specific word which preceded the general words. Counsel is undoubtedly correct. See eg *Rex v Nolte* 1928 AD 377 at 382. Indeed, counsel for NCS did not attempt to argue the contrary but supported the order granted by the court *a quo* for different reasons. In short, counsel for NCS submit that the express provision dealing with liability for damage, ie clause 9.6, precludes an inference arising from clause 11.6 that NCS is to bear the risk of loss by fire and that there is no room for the qualification of clause 9.6 contended for by Imperial.

[8] In advancing the interpretation of clause 11.6 for which he contends, counsel for Imperial placed much reliance on *Mensky v ABSA Bank Ltd t/a Trust Bank* [1997] 4 All SA 280 (W). In that case the plaintiff had hired a safety deposit locker in terms of a written agreement which provided (at 282f):

'While the Bank will exercise every reasonable care for the security of the Locker Area, it is a special term and condition of the acceptance thereof that no responsibility for loss or damage of the contents of the Locker whether partial or total, from whatever cause, whether by theft, fire, water, explosion, war, riot or otherwise, is accepted *and that the client himself shall be responsible to insure the contents of the locker*.' (Emphasis added.)

The locker went missing when the Bank relocated to different premises. The court found it unnecessary to decide whether the loss following the removal of the safety locker to other premises fell within the scope of the disclaimer as 'in the context of the defendant's disclaimer clause the stipulation that the plaintiff was to insure her goods amounted to an allocation to her of all risks or loss or damage which could be insured against' (at 299d). Counsel argued that the same meaning had to be given to clause

11.6 in the present case. In my view, the *Mensky* case is distinguishable. Clause 11.6 is not to be read in the context of a disclaimer of liability by Imperial. On the contrary, the very opposite is true. Clause 9.6 in express terms imposes liability on Imperial. The implication sought would therefore require a qualification to that clause. But there is nothing in the clause itself which is indicative of such a qualification, for example, a phrase commencing with 'subject to . . .' or similar words. On the contrary, as noted in para 4 above, clause 9.6 places full liability for damage upon Imperial save for damage 'covered hereabove'. The clause therefore expressly precludes any other limit to its application.

[9] Counsel for Imperial readily conceded that fire can be caused in any number of ways not involving a breach of contract on the part of Imperial and that it accordingly made good commercial sense for NCS to insure its property against fire while stored in Imperial's warehouses. He acknowledged, too, that had clause 11.6 contained merely a recommendation that NCS insure against fire, the clause would have been a neutral factor and would not have justified the inference that NCS was to bear the risk of loss by fire. He referred in this regard to *First National Bank of SA Ltd v Rosenblum and another* 2001 (4) SA 189 (SCA) where a clause to the effect that a client of a bank 'should arrange suitable insurance cover' for the contents of a safety deposit box (para 3 at 144D) was held to be a neutral factor and not to give rise to an inference of a transfer of risk to the client (para 24). Counsel emphasized the use of the word 'will' in clause 11.6 in the present case and the obligation it imposed on NCS to insure. It was this obligation, he submitted, that distinguished the present case from the *Rosenblum* case and it was this that justified the inference that NCS was to bear the risk of fire.

[10] As previously observed, the contract in question is essentially a businessman's rather than a lawyer's contract. Clauses frequently appear to be out of place and there is often a lack of consistency in the manner in which the contract is drafted. Chapter 11 is itself a good example of this. In such circumstances it is important for a court to adopt a common sense approach to the matter of interpretation and to recognise that the parties through lack of experience or skill in draftsmanship may use a word or language

which is not always the most appropriate. A court should therefore not be astute to draw an inference from the use of language in one clause if that inference would be contrary to a meaning unequivocally expressed in another.

[11] No doubt in appropriate circumstances an obligation to insure may give rise to an inference that the party so obliged is to bear the risk. But there can be no hard and fast rule to this effect. In each case the clause in question must be examined in its contractual setting to determine whether such an inference is to be drawn. In the present case clause 11.6 does not stand alone. Clause 9.6 in express terms imposes liability on Imperial for loss, including loss by fire. Imperial, therefore, seeks not only to draw an inference of a transfer of risk from clause 11.6 but also to infer a far-reaching qualification of the express terms of clause 9.6. In my view, the use of the word 'will' in clause 11.6 is insufficient to justify such a construction.

[12] A final argument advanced on behalf of Imperial was that the insurance contemplated in clause 11.6 had to be construed as being for the benefit of both parties in the sense that each intended that both would be protected against the loss and that accordingly NCS's insurers who had indemnified NCS were precluded from proceeding against Imperial by subrogation in the name of NCS. The insurable interest which Imperial had in the loss, counsel submitted, arose by reason of clause 9.6 which in the absence of the insurance would render Imperial liable for the loss suffered. In support of this submission counsel relied largely on *Commercial Union Assurance Co of South Africa Ltd v Golden Era Printers and Stationers (Bophuthatswana) (Pty) Ltd* 1998 (2) SA 718 (BPD), being a case concerning a lease which contained both a provision requiring the lessor to insure against fire and a provision requiring the lessee to return the premises in the same good condition as when they were received. There is much that distinguishes the *Commercial Union* case from the present one but it is unnecessary to embark upon an analysis of the former. It is enough to refer to clause 11.5 of the contract in the present case (reproduced in para 5 above). This clause, it will be observed, requires the insurance policies taken out by Imperial to contain provisions in which the insurers waive their rights of subrogation against NCS and nominate NCS as

an additional insured. It is clear, therefore, that both NCS and Imperial were alive to the benefits of insurance and the right of an insurer to proceed by subrogation against a party responsible for the loss covered by the insurance. Nonetheless, there is no clause in the contract requiring similar provisions in the policies taken out by NCS. This to my mind is the clearest indication that the parties contemplated that NCS's insurers would have the right to recover by subrogation any loss for which Imperial was liable and which was covered by a policy issued to NCS. Counsel's contention must therefore fail.

[13] It follows that in my view clause 9.6 is not to be construed as being qualified by clause 11.6, nor is the latter clause to be construed
as protecting Imperial as well as NCS against the loss covered by a policy contemplated in that clause.

[14] The appeal is dismissed with costs, including the costs of two counsel.

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D G SCOTT
JUDGE OF APPEAL

CONCUR:

CAMERON JA
CLOETE JA
PONNAN JA
MLAMBO JA