



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 534/2022

In the matter between:

DISCOVERY INSURE LIMITED

APPELLANT

and

TSHAMUNWE MASINDI

RESPONDENT

Neutral citation: *Discovery Insure Limited v Masindi* (534/2022) [2023] ZASCA 101
(14 June 2023)

Coram: PETSE AP and SALDULKER, MABINDLA-BOQWANA and
WEINER JJA, and MASIPA AJA

Heard: 10 May 2023

Delivered: 14 June 2023

Summary: Insurance policy – interpretation of terms of policy providing for forfeiture of benefits under policy – enforceability of such terms – whether a partly fraudulent and partly genuine claim results in forfeiture of entire claim, retrospective from either date of

reported incident or actual incident date, entitling insurer to repayment of amounts already paid arising from such incident.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Khumalo J, sitting as court of first instance):

- 1 The appeal is upheld with costs.
- 2 Paragraphs 1, 2 and 3 of the order of the high court are set aside and substituted with the following:
'1 Judgment is granted against the defendant in favour of the plaintiff for:
 - (a) Payment of the sum of R1 594 980.12.
 - (b) Interest on the aforesaid amount at the rate of 10.25% per annum calculated from 8 June 2017 to date of final payment.'

JUDGMENT

Petse AP and Masipa AJA (Saldulker, Mabindla-Boqwana and Weiner JJA concurring):

Introduction

[1] This appeal raises a crisp and interesting interpretation issue, namely whether a partly fraudulent and partly genuine claim arising from the same incident results in the forfeiture by the insured of the claim in its entirety. An allied issue, if the principal question is answered in the affirmative, is this: Is the insurer, in that event, entitled to repayment of the amounts already paid to the insured, in settlement of the insured's claim, arising from the same incident, when it is subsequently discovered that part of the claim was tainted by fraud?

[2] The appellant, Discovery Insure Limited (Discovery), says that both questions must be answered in the affirmative. For his part, the respondent, Mr Tshamunwe Masindi, says the answer to both questions is No. The answer to these questions hinges on the interpretation of the terms of Discovery's insure plan policy contract

(the policy) that the respondent took out with Discovery during April 2016, with effect from 1 May 2016.

[3] On 14 December 2017 Discovery commenced the present proceedings in the Gauteng Division of the High Court, Pretoria (the high court) against the respondent in which Discovery sought repayment of the sum of R1 647 592.67 together with ancillary relief and costs of suit. The respondent resisted the claim on various grounds. In due course the action came on trial before Khumalo J. The learned Judge allowed the claim in part and ordered the respondent to pay a sum of R675 000 to Discovery together with interest thereon and costs of suit on the scale as between attorney and client. With leave of the high court, Discovery now appeals against part of the judgment to this Court.

Background facts

[4] The essential facts, which are largely common cause, are the following. As already indicated above, the respondent took out the policy for specified insured risks, described as a Discovery Insure Plan, to insure, *inter alia*, his dwelling in Pretoria and household contents, against certain risks resulting in total loss or damage howsoever caused. The policy provided, amongst other things, that if the risks insured against eventuated, resulting in damage to his residence, rendering it unsuitable for human habitation, Discovery would be obliged to compensate the respondent for the resultant damage to the buildings and household contents, and, where applicable, to reimburse the respondent for his out of pocket expenses incurred for what the policy described as emergency accommodation.

[5] It is common cause that the policy further provided, amongst other things, that: if any portion of a claim lodged with Discovery by the respondent is fraudulent, Discovery would be entitled to cancel the policy with retrospective effect from the date of the reported incident, or alternatively the actual date of the incident – whichever was the earlier. Consequently, Discovery asserted that it had a right to reclaim all amounts paid to the insured, ie the respondent in this instance, subsequent to the retrospective cancellation date.

[6] On 11 November 2016, following the occurrence of the risk insured against, the respondent submitted a single claim under the building section of the policy for losses caused by storm damage to his residence. The claim was made up of two components. The first represented costs of repairs to the respondent's residence and damage to household contents. The second was for emergency accommodation. Consequently, at various times between 7 December 2016 and 25 May 2017, Discovery paid to the respondent the aggregate amount of R1 594 980.12 in settlement of both components of the claim. We pause here to mention that the sum of R675 000 represented the amount claimed in respect of emergency accommodation. This was the portion of the claim tainted by fraud. This is not in dispute. The sum of R972 597.67 was paid by Discovery to the respondent in settlement of the damage to the respondent's residence and household contents component. This component of the claim, it is common cause, was untainted by fraud and therefore legitimate.

[7] When evidence of the fraud came to light, following investigations undertaken by Discovery, Discovery notified the respondent that it was exercising its right, as it was entitled in terms of the policy, to cancel the policy with retrospective effect from the date of the incident, ie 10 November 2016, that had triggered the claim. In addition, Discovery claimed repayment of the full amount it had already paid out to the respondent between 7 December 2016 to 25 May 2017. As already mentioned, the respondent failed to repay the amount reclaimed, prompting Discovery to institute the action mentioned in paragraph 3 above against the respondent.

[8] As already indicated above, the respondent resisted the claim on various grounds. In particular, the respondent asserted that nowhere does the policy contain an express provision to the effect that on the retrospective termination of the policy, the insured would be liable to repay all the benefits already paid by the insurer before termination including benefits relating to claims not tainted by fraud. We pause here to mention that it was, however, not in dispute that on the occurrence of any of the events stipulated in clause 5.13 of the policy plan, Discovery would acquire a right to cancel the policy retrospectively at its sole discretion. Following a trial, the high court was satisfied that part of the claim lodged by the respondent was fraudulent.

[9] In the event, and contrary to what Discovery had asserted, the high court held that Discovery was not entitled to repayment of the full amount claimed. Rather, the high court held, Discovery was entitled to repayment of only that portion of the claim that was tainted by the undisputed fraud. The underlying reasoning of the high court was, in essence, predicated on two bases. First, the high court held that the insured had acquired accrued rights to the payment of the genuine portion of his claim, and that those rights remained intact, unaffected by the subsequent fraud. Secondly, it held that the policy clause that provided for forfeiture of claims tainted by fraud was, for all intents and purposes, a penalty clause, in terms of the Conventional Penalties Act (the Act).¹ Thus, the high court concluded, its enforcement would – to the extent that to do so would enable Discovery to recoup even the amount paid in settlement of the genuine portion of the insurance claim – result in disproportionate prejudice to the respondent. Consequently, the high court declined to enforce the clause.

[10] In this regard, it bears mentioning that in coming to this conclusion, the high court heavily relied on the decision of this Court in *Lehmbecker's Earthmoving and Excavators (Pty) Ltd. v Incorporate General Insurances Ltd.*² There, this Court held that the words 'all benefits under this policy shall be forfeited' upon the making of a fraudulent claim were clearly capable of bearing the meaning that, as from the time that a fraudulent claim was made, the insured should have no further benefit or claim under the policy, and, therefore, valid claims already accrued and those already paid out to the insured, remain intact and unaffected by subsequent, unrelated fraudulent claims. In *Lehmbecker's Earthmoving* this Court, in essence, held that the comparable clause there under consideration could not be said to have unequivocally provided for forfeiture of valid claims which had already accrued prior to the fraudulent claim.³ We shall revert to this aspect later.

Issues

[11] There are three cardinal issues that fall to be determined in this appeal. They are:

¹ The Conventional Penalties Act 15 of 1962.

² *Lehmbecker's Earthmoving and Excavators (Pty) Ltd. v Incorporate General Insurances Ltd* 1984 (3) SA 513 (A) (*Lehmbecker's Earthmoving*).

³ *Ibid* at 522A-D.

(a) First, the interpretation of clause 5.13 read with clause 5.5 of the Plan Guide – which is the schedule to the policy – and the Agreement of Loss, which is an integral part of the Plan Guide. More pertinently, the appeal raises the question whether these clauses, properly construed, entitle Discovery to repayment of all amounts paid to the respondent subsequent to the insured event, when the insured, ie the respondent, with full knowledge of his misrepresentation, submitted a partly fraudulent claim;

(b) Secondly, whether the doctrine of accrued rights finds application in the context of the facts of this case, and if so, whether the relevant clauses, which are central to this appeal, operate to disgorge the compensation already paid to the respondent in respect of the genuine portion of his claim;

(c) Thirdly, whether the high court was correct in its characterisation of the relevant clauses of the Plan Guide, ie clauses 5.13 and 5.5, as constituting penalty clauses, thereby justifying the high court's refusal to enforce the clauses in question. We pause here to mention that insofar as the third issue is concerned, neither party had raised it before the high court. Nor did the high court afford the parties the opportunity to address the issue. We shall revert to this aspect later.

[12] It is convenient at this stage to set out the two clauses which are central to the outcome of this appeal. These are clauses 5.13 and 5.5 of the Plan Guide. Clause 5.13, which is headed 'Fraud, misrepresentation and inaccurate information', reads as follows:

'All benefits in terms of this Plan in respect of any claim will be lost and this plan may be voided or cancelled at our discretion:

- Where there is a misrepresentation, non-disclosure, misdescription by you or anyone acting on your behalf; or
- If false or incomplete information is supplied for any fact and/or circumstance in connection with an application for cover or in connection with a claim in terms of this Plan by you or anyone acting on your behalf; or
- If any claim or part thereof under this Plan is in any way fraudulent, or if fraudulent means or devices are used by you or any acting on your behalf to get any benefit under this Plan is occasioned by your intentional conduct or any person acting on your behalf or with your involvement;

- If any fraudulent information and/or document whether created by you or any other party is provided to us by you or anyone acting on your behalf or with your involvement in support of any claim under this Plan and whether or not the claim is itself fraudulent.
- If the size of any claim is inflated by you or anyone acting on your behalf or with your involvement, for any reason whatsoever, and whether the claim itself is fraudulent.

Where any benefit under this Plan is forfeited in circumstances set out in this section, we will have the right to cancel your Plan retrospective to the reported incident date or actual incident date, whichever is the earliest.'

[13] Clause 5.5, which is headed 'Breach of conditions requiring your assistance', reads as follows:

'We reserve the right to cancel your Plan and claim repayment from you for any amounts we have paid in settlement of your claim if you breach or fail to comply with our procedure and the rules set out in this Plan Guide.'

[14] It bears mentioning that our courts have on numerous occasions in the past pertinently observed that fraudulent insurance claims are not a rare phenomenon. Regrettably, such claims appear to be rising unabated. In order to protect themselves against fraudulent claims, insurers 'as masters of their own policies'⁴ have now resorted to incorporating in their policy contracts appropriate clauses designed to protect themselves against such claims. Such clauses, as a general rule, provide for forfeiture of the benefits that the insured would ordinarily derive from the policy in the absence of fraud or misrepresentation of the true facts. This then raises the question whether clauses 5.5 and 5.13 of the Plan Guide quoted above go far enough to achieve this purpose.

[15] In the high court, as in this Court, the fate of the litigation hinged on the meaning and import of clauses 5.5 and 5.13 of the Plan Guide. Thus, it is necessary to say something about the proper approach to interpretation of documents, whether statutes, or contracts, or other documents. This approach was restated and clarified in the oft-cited decision of this Court in *Natal Joint Municipal Pension Fund v*

⁴ *Schoeman v Constantia Insurance Co Ltd* [2003] ZASCA 48; [2003] 2 All SA 642 (SCA) para 24 (*Schoeman*).

*Endumeni Municipality*⁵ in which Wallis JA, writing for the unanimous court, put it thus:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production...A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'⁶

[16] The learned Judge of Appeal continued:

'In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'⁷

[17] There are also decisions that have emphasised that the process of interpretation is a unitary exercise, not a mechanical consideration of the text, context and purpose of the instrument under consideration.⁸ Most recently, the essence of what the interpretative exercise entails was explained by Unterhalter AJA in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*⁹ thus:

'It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*).

⁶ *Ibid* para 18.

⁷ *Ibid* para 26.

⁸ See, for example, in this regard: *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) para 52; *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 65.

⁹ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).

instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined.¹⁰

[18] It is against this backdrop, and bearing in mind the principles of interpretation discussed above, that we now turn to the merits of the case.

[19] In the high court the fate of the litigation hinged on the question whether clauses 5.13 and 5.5, on their proper interpretation, had the effect of depriving the respondent of 'accrued rights'. We have put the words 'accrued rights' in inverted commas for reasons that will become apparent later. As the high court saw it, the question was whether the respondent was liable to refund the moneys already paid to him by Discovery, in settlement of his claim for loss and emergency accommodation, even in respect of items that were not tainted by fraud, before the cancellation of the policy. The high court accepted that the respondent was not entitled to any benefits under the policy after the cancellation of the policy. Therefore, the high court, in the view it took of the matter, proceeded to consider whether Discovery was, on the evidence presented, entitled to re-imbusement of the amounts already paid in respect of the genuine portion of the claim prior to cancellation of the policy. In this regard, the high court appeared to have taken the view that the termination of the policy took place after payment in settlement of the claim had already been made to the respondent. Hence, its decision against Discovery on this score.

[20] Relying on two decisions of this Court in *Lehmbecker's Earthmoving*¹¹ and *Schoeman*¹² the high court found, in the first place, that the cancellation clause upon which Discovery relied did not affect the respondent's genuine claims. Secondly, the high court held that the relevant clauses did not affect rights that had already accrued to the respondent. In the third place, the high court opined that clauses 5.13 and 5.5, in any event, amounted to penalty clauses and therefore fell foul of the provisions of the Act. Thus, the high court concluded that clauses 5.13 and 5.5 were, by virtue of being penalty clauses, not enforceable. We consider all three bases that

¹⁰ Ibid para 25.

¹¹ Footnote 1 above at 522E-F.

¹² *Schoeman* para 24.

were the pillars on which the edifice of the high court's reasoning rested, in turn, below.

[21] By way of prelude it is apposite at this juncture to say the following. As a general rule insured persons are under a duty to act in good faith in their dealings with insurers. And that, ordinarily, a wilful lodgement of a false claim by the insured constitutes a breach of that duty of good faith which entitles the insurer to terminate the policy. That eventuality would then relieve the insurer, in the absence of an express term to the contrary, of liability under the policy from the time of termination of the policy. The effect of this would be that rights and obligations that had accrued before termination would remain unaffected by the termination.¹³

[22] But as we now know, in this case Discovery seeks more than what has been stated in the preceding paragraph. Pinning its faith on clauses 5.13 and 5.5, Discovery requires of this Court to ascribe a meaning to clause 5.13 that recognises the right to terminate the policy with retrospective effect from the date, not of the discovery of the respondent's fraud, but from the date on which the incident that gave rise to the claim occurred, namely 10 November 2016. If Discovery's contention is upheld it would result in the respondent also forfeiting entitlement to all the amounts already paid to him between 5 December 2016 and 26 April 2017. This then raises the question whether, in the context of the facts of this case, this is legally and contractually tenable. In this regard clauses 5.13 and 5.5 take the centre stage.

The parties' contentions

[23] The submissions advanced on behalf of Discovery may, for convenience, be shortly summarised as follows:

- (i) clause 5.13 explicitly provides that lodgement of a fraudulent claim by the insured results in the benefits under the policy being forfeited if the insurer elects to cancel the policy;

¹³ See, for example, in this regard: *Nash v Golden Dumps (Pty) Ltd* [1985] ZASCA 6; [1985] 2 All SA 161 (A) at 22D-I; *Thomas Construction (Pty) Ltd. (in Liquidation) v Grafton Furnitue Manufacturers (Pty) Ltd* 1988 (2) SA 546 (AD) at 563J-564D.

- (ii) the forfeiture of benefits under the policy entailed that the insured would not only lose the right to claim insurance benefits under the policy but would also lose the right to retain the proceeds if the benefits have already been paid out;
- (iii) having regard to the fact that termination of the policy would be retrospective from the date on which the incident which gave rise to the claim arose, (ie 10 November 2016), the insurer is entitled to reclaim the full amount if part of the claim was tainted by fraud.

[24] In support of its contentions in relation to (i) and (ii) in the preceding paragraph, Discovery called into aid *Santam Bpk v Potgieter*.¹⁴ In *Santam* it was held that the fact that the insured forfeited all the benefits under the policy with retrospective effect meant, as its corollary, that the insurer was entitled to the repayment of all the amounts previously paid to the insured pursuant to the latter's claim.

[25] We have earlier noted that forfeiture clauses of the kind like the ones under consideration in this case are now a common feature in insurance contracts.¹⁵ And the rationale for such clauses was explained in *Schoeman*.¹⁶ As a general rule such clauses are viewed as valid and therefore enforceable.¹⁷ As *Lehmbecker's Earthmoving* tells us, they are designed to protect the insurer against fraudulent claims and, in the words of Miller JA, to 'discourage attempts to gain undue advantage [by the insured] by lodging falsely inflated claims'.¹⁸ Thus, if unbeknown to the insurer, the insured submits a fraudulent claim which is then paid out, the former would be entitled to recover the full amount paid out to the latter.¹⁹

[26] On behalf of the respondent it was accepted that the issues raised in this case fall to be determined with reference to clause 5.13 of the Plan Guide. Furthermore, counsel for the respondent readily acknowledged without question that, insofar as the fraudulent component of the respondent's claim is concerned, the respondent is

¹⁴ *Santam Bpk v Potgieter* 1997 (3) SA 415 (O) (*Santam*).

¹⁵ See, for example, *Lehmbecker's* at 519B-E.

¹⁶ *Schoeman* para 25.

¹⁷ *Lehmbecker's Earthmoving* at 520F-G.

¹⁸ *Ibid* at 520F-G.

¹⁹ See generally, for example, *Santam* at 423E; E.R Hardy Ivamy *General Principles of Insurance Law* 6ed at 114 para 176.

liable to pay back the ill-gotten gains because he was not entitled thereto in accordance with the ordinary principles of our law.

[27] However, to the extent that Discovery invokes clause 5.13 of the policy to seek repayment of the untainted component of the claim, the respondent contended that this particular clause does not provide such a remedy. Counsel for the respondent laid great stress in his heads of argument upon the fact that clause 5.13 'does not contain an express provision that determines that on the retrospective termination of the policy the defendant becomes liable for the repayment of any or all benefits paid by [Discovery] in respect of claims not tainted by fraud'. Much was also made of the fact that the 'express wording of clause 5.13 is not wide enough to allow an interpretation of this clause to include a repayment of claims not tainted by fraud'.

[28] According to the respondent, Discovery might well have had a point if it had incorporated an express clause 'as [insurers are] masters of their policies' entitling it to validly reject a partly fraudulent claim and thereby obliging the insured to repay even the portion of the claim not tainted by fraud. On its terms, so the argument went, clause 5.13 does not permit the importation of a tacit term to this effect. It was then argued, with reference to *Lehmbecker's Earthmoving* and *Schoeman*, that Discovery's reliance on clause 5.13, in particular, was misplaced.

[29] The contentions advanced by counsel for the respondent relying on *Lehmbecker's Earthmoving* and *Schoeman* render it necessary to analyse those decisions to determine whether they support those contentions in the context of the facts of this case. As we see it, those cases are materially distinguishable on their facts from the facts of this case. The relevant clause under consideration in *Lehmbecker's Earthmoving* reads as follows: '... if any claim be in any respect fraudulent ... "all benefit under this policy shall be forfeited".' It was not in dispute in *Lehmbecker's Earthmoving* that the insured had submitted a fraudulent claim in relation to an incident different to the one in respect of which the insured had submitted a genuine claim. The question then arose as to whether the fact that the insured had lodged a fraudulent claim under the same policy, albeit arising from a different incident, had the effect of depriving the insured of his entitlement to compensation for the genuine claim. This Court recognised that the answer to this

question depended on whether the relevant clause providing for forfeiture went far enough to support the contentions of the insurer. This Court acknowledged that the clause there under consideration was designed to 'lend protection to the insurer against fraudulent claims and to discourage attempts to gain undue advantage by lodging falsely inflated claims'.²⁰ After analysing various judgments here and abroad, Miller JA, whilst accepting that the language of the clause was undoubtedly wide, nevertheless opined that 'in the absence of clear and entirely unambiguous provision therefor in the contract' the clause he considered in that case did not affect rights 'which had accrued and became due and payable prior to the subsequent breach causing the premature termination of the policy...'.²¹

[30] The next decision to be mentioned and heavily relied upon by the respondent is *Schoeman*. There, this Court had to consider whether it could as a matter of principle import penalty principles of English law to address the question whether the insured could be absolved of liability in circumstances where the insured had inflated the amount of her claim. In declining this invitation, this Court held that there would be no justification for doing so.

[31] Writing for the unanimous court, Marais JA said the following:

'The implications of that judgment upon a case where there is only one incident giving rise to a claim and that claim is partly, but not wholly, fraudulent are not entirely clear. By parity of reasoning it can be argued that the right to claim the indemnity accrued before the making of the partly fraudulent claim and that the subsequent fraud cannot preclude the insured from claiming what was truly due under the policy. Such an argument could not succeed in the face of an express clause such as there was in *Lehmbecker's* case for it would render the clause entirely nugatory. But where there is no such clause it is difficult to see why the reasoning based upon the accrual of the liability to indemnify prior to the fraud should not lead to the same conclusion.'²²

Emboldened by the last sentence of what Marais JA said in the above quoted passage, counsel for the respondent argued that in the present case clause 5.13 does not go far enough so as to encompass genuine claims to absolve the insurer of liability to indemnify the insured in respect of rights that had already accrued prior to

²⁰ *Lehmbecker's Earthmoving* at 520F-G.

²¹ *Ibid* at 522E-F.

²² Para 20.

the fraud that led to the retrospective termination of the policy by the insurer. In this case, it will be recalled that the total proceeds of the genuine component of the respondent's claim in respect of the damage to his residence and household contents amounted to R972 592.67. It is this amount that the respondent asserted is not recoverable by Discovery because it had not only already accrued but also paid out to him at the time when Discovery terminated the policy.

[32] Counsel's argument is plainly unsustainable. The answer to it is to be found in clause 5.13 itself. In our view the clause is clear and unambiguous. Thus, effect must be given to it. In addition, to construe clause 5.13 as the respondent would have it, would subvert the well-established tenets of interpretation of documents. What is more, the underlying purpose that clause 5.13 was designed to serve, namely to protect Discovery against fraudulent claims and 'discourage attempts [by insured persons] to gain undue advantage by lodging falsely inflated claims' would be undermined. As Wallis JA pertinently observed in *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* '...context is as important in construing statutes as it is in construing contracts or other documents...'²³ And, more than a decade previously in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others*,²⁴ the Constitutional Court made plain that 'the emerging trend in the interpretation of documents is *to have regard to the context in which the words occur*, even where the words to be construed are clear and unambiguous'.²⁵ (Emphasis added.)

[33] What is more, the respondent's contentions to the contrary conveniently ignore what Marais JA said in *Schoeman* that:

'When there is added to that the fact that insurance companies are masters of their own policies in the sense that they are free to unilaterally devise them, the insured has no say in the process, and that it is a simple matter to include an appropriate clause to protect the insurer against fraudulent claims by providing for forfeiture...'²⁶

Consequently, in incorporating clause 5.13 in the policy in issue here, Discovery did precisely what Marais JA had in mind when he made the remarks just quoted above.

²³ *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 17.

²⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC).

²⁵ *Ibid* para 90.

²⁶ *Schoeman* para 24.

And we can conceive of no cogent reasons why full effect should not be given to this clause.

[34] In sum, when the respondent purported to submit his claim on 11 November 2016 there was no longer an extant insurance policy because it had already been terminated with retrospective effect from 10 November 2016 – the date of the incident – pursuant to clause 5.13. Therefore, to ascribe to clause 5.13 the meaning for which the respondent contended would, as Marais JA put it in *Schoeman*, 'render the clause entirely nugatory'.²⁷

[35] It remains briefly to deal with the final argument advanced on behalf of the respondent. It is this. The forfeiture clause (ie clause 5.13) is to all intents and purposes a penalty clause which is, for that reason, not enforceable. It is not necessary to delve into this aspect. It suffices merely to point out that neither party raised this issue in their pleadings. Nor was it canvassed at the trial. It emerged for the first time in the judgment of the high court. The parties were at no stage alerted to it. It bears repeating that this Court has more than once cautioned against Judges straying outside of the facts presented to the court by the litigants. In *Fischer and Another v Ramahlele and Others*²⁸ this Court said the following on this score:

'Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

²⁷ *Schoeman* para 20.

²⁸ *Fischer and Another v Ramahlele and Others* [2014] 3 All SA 395 (SCA) (*Fischer*). See also: *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* [2022] ZASCA 51; [2022] 2 All SA 607 (SCA); 2022 (4) SA 57 (SCA) paras 9-10.

It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.²⁹ [Citations omitted.]

[36] For all the foregoing reasons, we do not agree with the interpretation of clause 5.13 favoured by the high court. As already stated, its interpretation entirely overlooked the fact that clause 5.13 explicitly provides that upon breach of its terms, Discovery would be entitled to terminate the policy with retrospective effect from the date of the incident giving rise to the claim, ie 10 November 2016. Bearing in mind this crucial consideration, we are driven to the conclusion that when the respondent lodged the claim on 11 November 2016, he had already forfeited all the benefits under the policy. Simply put, once the policy was terminated on 10 November 2016 there was no policy in extant under which the respondent could claim any of the benefits that would otherwise have been available to him had the policy not been terminated a day earlier. Concomitantly, Discovery was under no obligation to pay out any moneys to the respondent on 5 December 2016 onwards because the policy had, on 10 November 2016, already terminated.

[37] Accordingly, we consider that Discovery was entitled to a refund of all the moneys previously paid out by it to the respondent and, thus, to the relief it sought in the high court. In these circumstances the appeal should, therefore, succeed. There was no issue in relation to costs, which must therefore follow the result.

Order

²⁹ Ibid paras 13-14.

[38] In the result, the following order is made:

- 1 The appeal is upheld with costs.
- 2 Paragraphs 1, 2 and 3 of the order of the high court are set aside and substituted with the following:

'1 Judgment is granted against the defendant in favour of the plaintiff for:

- (a) Payment of the sum of R1 594 980.12.
- (b) Interest on the aforesaid amount at the rate of 10.25% per annum calculated from 8 June 2017 to date of final payment.'

X M PETSE
ACTING PRESIDENT OF
THE SUPREME COURT OF APPEAL

M B S MASIPA
ACTING JUDGE OF APPEAL

APPEARANCES

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