REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: **05836/15**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE 03/09/2016 DATE

In the matter between:

EXPECTIO PROPERTIES (PTY) LIMITED Plaintiff

and

MUTUAL FEDERAL INSURANCE COMPANY LTD Defendant

JUDGMENT

MATOJANE J

Introduction

[1] This judgment deals with four separate exceptions that have been raised against the plaintiff's amended particulars of claim on the basis that it is vague and embarrassing, alternatively that it lacks averments necessary to sustain a valid cause of action, further and or alternatively that it is bad in law.

[2] The plaintiff's main claims against the defendant have been framed in contract and in delict in the alternative. The exceptions are not only directed at the contractual claims but also to the claim in delict on the basis, first that it lacks averments necessary to support a cause of action; and secondly, that the claim in delict is in any event excipiable as being vague and embarrassing.

The parties

[3] In terms of the allegations contained in the particulars of claim, the plaintiff is a company with its registered office at 103 Avalon Building, 123 Hope Street, Cape Town.

[4] The defendant is Mutual and Federal Insurance Company Limited, a company carrying on business *inter alia,* as an insurer, with its registered address at Mutual and Federal Building, 75 President Street, Johannesburg, Gauteng.

The plaintiff's particulars of claim

[5] A broad outline of, the allegations made in the plaintiff's particulars of claims are that on or about 18 January 2013, the joint liquidators of King Trade Invest 1001 (Pty) Limited (In liquidation) ("the liquidators") and the defendant concluded a written agreement of insurance in respect of an immovable property.

[6] The property was damaged by fire on 1 February 2013 and on 18 March 2013 the liquidators lodged a claim arising from the fire with the defendant's agent.

[7] On 24 September 2014 the liquidators concluded an agreement of cession ("the cession") with the plaintiff, pursuant to which they ceded, transferred and made over to the defendant all right, title and interest that they may have in the property and to the proceeds of the claim.

[8] On 2 February 2015 the liquidators concluded an addendum to the cession agreement with the plaintiff and in terms of which the cession was amended now to provide for the liquidators to cede, transfer and make over to the plaintiff all of their rights, title and interest in and to the proceeds of their claim arising from the fire to the property.

[9] The property was registered in the name of the plaintiff on 26 March 2013.

[10] The plaintiff asserts that it is entitled to payment under the agreement of the following amounts:

6.1 Claim A: an amount of R5 062 823.00 being the reinstatement cost of the property which the plaintiff is allegedly obliged to pay but which it has refused to do.

6.2 Claim B: payment of the sum R2 727 000.00 in respect of rental which it would have earned, but for the defendant's failure to timeously assess and reinstate the property; and

6.2.1 payment in the amount of R189 000.00 per month, from 1 January 2015 until such time as the property is reinstated.

6.3 Claim C: payment in the amount of R50 000.00 for preparation costs.

The plaintiff's contentions

[11] The plaintiff takes the view that, firstly, certain of the exceptions rely on the interpretation of the relevant agreement. The exceptions themselves, the argument goes, demonstrate that there is ambiguity in the agreement and it is therefore not appropriate that the matter be considered at the stage as an exception. Secondly, the plaintiff avers that it has set out sufficient facts to establish a duty of care pleaded by it in relation to its alternative Claim B as such there is no basis for the exception in that regard. Thirdly, as regards time-baring argument raised by the defendant, it is not appropriate that this issue be dealt with in an exception.

[12] When construing a plaintiff's particulars of claim for the purposes of an exception, it is well-established that all reasonably possible meanings must be taken into account, and if on any such construction a cause of action is fairly disclosed, an exception cannot succeed [1]. The object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not to be taken by surprise[2].A pleading which fails to meet this standard is therefore excipiable. On the question whether or not our courts should decide upon exceptions relating to or concerning the interpretation of an agreement, it seems this will depend on whether the meaning of the agreement is certain or not. Nestadt JA in **Sun Packaging (Pty) Ltd v Vreulink**[3] held:-

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[1] See, for example, Coronation Brick (Ply) Ltd v Strachan Construction Co (Pty) Ltd 1982 (4) SA 371(D), at 378C – D. Trustees, BIR Fund v Breakthrough Investments CC 2008 (1) 67 (SCA) 71.1996(4)SA 176 (A) at 186J-187B

[2] Persons listed in schedule A v Discovery Health [2009]2 All SA 479(T) at 210F-J

[3] 1996(4)SA 176 (A) at 186J-187B

> "as a rule, courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where its meaning is uncertain. In this case the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous.... Contracts are not rendered uncertain because parties disagree as to their meaning."

[13] In **Picbel Groep Voorsorgfonds v Somerville**[4] Plasket AJA held that if the relevant clauses of an agreement, that is, the subject matter of an exception can only reasonably bear meaning attributed to them by the excipient and they are incapable of sustaining a cause of action, the exception must be upheld.

[14] It follows that relevant clauses of the agreement cannot be construed in isolation and must be interpreted in the light of the full context of the particulars of claims, including the relevant contractual claims. I therefore proceed to consider the context in which relevant paragraphs excepted to have been used.

The first exception

[15] The first exception is directed towards claim B of the particulars of claim which relates to the claim for the alleged loss of rental income suffered by the plaintiff as a result of the defendant's alleged failure to timeously assess the liquidators claim and to reinstate the property. Paragraph 23 states:

> "23. On a proper construction of the agreement:
>
> 23.1 The defendant should act with reasonable despatch, and the assessment of the claim should occur with reasonable despatch;

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[4] [2013] 2 All SA 692 at 702, para [27]

23.2 The reinstatement of the insured property should be commenced with, and carried out, with reasonable despatch; and

23.3 In the event that this did not occur as a result of the failure on the part of the Defendant to assess the claim with reasonable despatch – and hence to enable the reinstatement of the property with reasonable despatch – the Defendant would be liable to compensate the liquidators for any loss of rental suffered by them.

[16] At paragraph 24 of the particulars of claim the plaintiff pleads as follows;

"In breach of its obligations under the agreement, the Defendant failed to act with reasonable despatch, which breach has caused the Plaintiff to suffer damages."

[17] In terms of the reinstatement clause in the policy, the defendant has the option on the happening of the insured event and a claim being submitted either of indemnifying the plaintiff in money; or of replacing or repairing the damaged property. This election lies entirely with the defendant as the insurer[5]; the insured can claim nothing other than payment unless the insurer has exercised an election in favour of reinstatement.

[18] If the insurer elects reinstatement, it has the further option either of replacement of the object with a similar object; or of restoration of the object to its condition before the risk occurred. If the insurer elects to restore an object, it would appear also to have the right to choose who will undertake the restoration or repairs.

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[5] South African Insurance Law 2013 by Reinecke et al at p471

[19] The plaintiff does not allege that the defendant has exercised any election, in particular reinstatement. Where the insurer has not elected to reinstate, the plaintiff is only entitled to be indemnified in money. In the absence of an election, the particulars of claim do not disclose a valid cause of action.

[20] In paragraph 17 plaintiff states that it has complied with its obligations under the reinstatement value conditions of the agreement and states that it: -

> "17B(1) has complied with its obligations to intimate to the defendant – within six months of the date of the fire- its intention to reinstate the insured property; and
>
> 17B(2) Has otherwise indicated its ability and willingness to reinstate the insured property on the same site."

[21] The reinstatement value condition clause of the policy provides for the basis of the calculation of the indemnity to be provided to an insured in the event of the insured electing to replace or reinstate the damaged property.

[22] In the absence of the allegation in paragraph 17 as to when and whether plaintiff has in fact commenced with the work of replacement or reinstatement and that it has incurred expenditure in relation thereto, the particulars of claim are rendered vague and embarrassing and do not comply with Rule 18(4) of the Uniform Rules of Court which provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto.

[23] In paragraph 25 of the particulars of claim plaintiff alleges that had the defendant acted with reasonable despatch as required under the agreement, the claim would have been assessed, and the insured property reinstated, within no more than six months from 18 March 2013.

[24] The liquidators ceded their rights, title and interest into their claim against the defendant on 29 September 2014 by that time the property had already been registered into the name of the plaintiff on 26 March 2013. The liquidators would not have had right to any rental after the property was transferred to plaintiff on 26 March 2013 and the cession of the claim to the plaintiff six months later would not have included any such right. I find that the particulars of claim do not demonstrate a valid cause of action in respect of the alleged loss of rental for the period 26 March 2013 to 1 October 2013.

The second exception

[25] The second exception is directed towards the alternative claim under claim B in which plaintiff pleads a breach by the defendant of a duty of care to both the liquidators and prospective purchasers of the property to ensure that the assessment of the claim should occur with reasonable dispatch, and that the reinstatement of the property should be commenced with, and carried out, with reasonable dispatch.

[26] This claim is based in delict and is mainly one of pure economic loss therefore wrongfulness must be positively established[6].

[27] In paragraph 33 of the particulars of claim plaintiff pleads:

> "At the time of the conclusion of the agreement it was within the knowledge and contemplation of the liquidators and the defendant:
>
> 33.1That the insured property was part of the insolvent estate of King trade Invest 101 (Pty) Limited (In Liquidation) ("King Trade");
>
> 33.2 That the liquidators were the liquidators of King trade;
>
> 33.3 That the insured property was a commercial property;
>
> 33.4 That in the course of performing their obligations as the liquidators King Trade, the liquidators would seek to dispose of the insured property as expeditiously as possible; and
>
> 33.5 That any prospective purchaser of the insured property would wish to utilise the insured property *inter alia* for the purposes of generating a rental income.

[28] The plaintiff does not allege any contemplation of how and by when the claims would be assessed by the defendant under the policy. In terms of the policy, the defendant has an option whether to replace, reinstate or repair the insured property. The policy does not stipulate the date and time for performance, the assessment had presumably to be carried out within reasonable time. The defendant ought to be placed in *mora* first before a legal duty to be plaintiff can be said to have arisen. It follows, in my view that the plaintiff has failed to positively establish wrongful breach by the defendant of the alleged legal duty of care to the liquidators and the plaintiff.

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[6] Country Cloud trading v MEC Department of Infrastructure Development 2015(1)SA 1 CC at para [22] and [23]

The plaintiff's allegation of a legal duty is accordingly bad in law for the above reasons.

The third exception

[29] Third exception is directed towards claims A and C of the plaintiff's particulars of claim. Claim A relates to the reinstatement costs in respect of the insured property and Claim C to claim preparation costs.

[30] Clause 5(b) of the policy under the heading claims provides: -

"No claim shall be payable after the expiry of 24 months or such further time as the company may allow from the occurrence of any event unless the claim is the subject to a pending legal action or is a claim in respect of the insured's legal liability to a third party".

[31] The property was damaged by fire that occurred on the 1 February 2013. The plaintiff issued summons after the expiry of the 24 months from such fire on the 18 February 2015. There is no allegation by the plaintiff that there is an extension of the 24 months' period or that the defendant is not permitted to rely on the time barring clause. It would appear that claims A and B are time barred.

The fourth exception

[32] The fourth exception is directed towards the plaintiff's claim for the sum of R50 000.00 in respect of a claim for preparation costs. The plaintiff alleges that it incurred the following costs in preparing its claim:-

a. R88 447.91 for work done by a loss adjuster in preparing reports in respect of the costs of reinstating the fire damage to the insured property;

b. R2 800.00 paid to the plaintiff's engineer for inspecting and reporting on the fire damage to the insured property;

c. R30 723.00 paid to plaintiff's attorney and counsel for advice and assistance in relation to the preparation and prosecution of the claim.

[33] Clause 1 of the general conditions of the policy which is headed CLAIMS PREPARATION COSTS provides: -

"The insurers will pay any amount actually expended by the insured in producing and certifying any particulars or details required in terms of General Condition 5, but limited to R50 000.00 or the sum stated in the schedule".

[34] General condition 5 headed CLAIMS provides: -

"On the occurrence of any event which may result in a claim under this policy the insured shall, at their own expense:

(2) give notice thereof to the company as soon as possible...

(ii) as soon as practicable after the event inform the police of any claim involving theft.....

(iii) As soon as practicable after the event, submit to the company full details in writing of any claim;

(iv) give the company such proofs, information and sworn declarations as the company may require..."

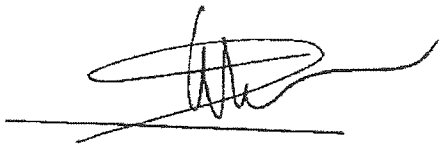
[35] It is clear that clause 5(a) is aimed at compensating the insured in respect of those particulars or details that the defendant requested and not those costs that the plaintiff incurred of its own accord in order to determine the costs of reinstating the property. The plaintiff's claim does not fall within the provisions of clause 1 of the general conditions of the policy.

Order

[36] For the reasons set out above, I make the following order;

1. The defendant's exceptions that the plaintiff's particulars of claim are vague and embarrassing is upheld.

2. Costs



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JUDGE OF THE HIGH COURT