

SOUTH AFRICA / JUDGMENT

Birch trading as L F Birch & Son v Santam Ltd (CA105/2012) [2014] ZAECHGC 101 (2 May 2014)

[2014] ZAECHGC 101

COURT

Eastern Cape High Court, Grahamstown

BEFORE

B Sands, P W Tshiki, N G Beshe

CASE / FILE NUMBER

CA105/2012

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE DIVISION,
GRAHAMSTOWN
CASE NO: CA105/2012
Date Heard: 26/11/2012

Date Delivered:	02/05/2014
	In the matter between;
	BIRCH, SYDNEY BONNEN
	trading as
	L F BIRCH &
	SON
	Appellant
	and
	SANTAM
	LIMITED
	Respondent

JUDGMENT

SANDI J:

- [1] This is an appeal against the judgment of the court a quo in which the appellant's claim brought by way of motion proceedings was dismissed with costs. The appeal is before us with the leave of that Court.
- [2] Before the Court a quo the appellant brought an application seeking a declarator to the effect that an insurance policy ("policy") entered into between appellant and respondent was in force and binding between the appellant and the respondent at the time that the appellant's property, which formed the subject-matter of the policy, was damaged by fire. The appellant also claimed payment of an amount representing the value of the damaged property as well as costs of the application. The respondent refused to honour the terms of the policy alleging that it had been cancelled by the appellant.
- [3] Before the Court a quo a point in limine was raised by the respondent, namely that in view of the nature of the issues involved in this matter, it was inappropriate for the appellant to have proceeded against the respondent by way of motion proceedings. Respondent submitted that in view of the dispute of facts anticipated on the papers, the appellant was obliged to have proceeded by way of trial proceedings. The respondent's argument was based on the fact that the damages claimed by the appellant were illiquid in nature and that the Court a quo would have been unable to determine them without hearing oral evidence and that the appellant did not seek such an order despite such apparent dispute.
- [4] In my view the declaratory order sought by the appellant does not raise a dispute of fact. Moreover, the adjudication of this aspect of the matter is not dependent upon the determination of appellant's damages. These two issues could be conveniently dealt with separately. This could probably have been the result even if the appellant had proceeded by way of trial proceedings.
- [5] Relying on the judgment of *Cadac (Pty) Ltd v Weber-Stephen Products Co. and Others* 2011 (3) SA 570 SCA at paragraph 576B-C which provides as follows:

"One finds regularly that parties agree, or courts order, that issues concerning liability are to be decided first, and quantum thereafter. But the present rigid system requires of a plaintiff to particularise its damages when

instituting action, sometimes a costly exercise which may prove to have been unnecessary.

I cannot see any objection why, as a matter of principle and in a particular case, a plaintiff who wishes to have the issue of liability decided before embarking on quantification, may not claim a declaratory order to the effect that the defendant is liable, and pray for an order that the quantification stand over for later adjudication."

[6] in conclusion, on these issues the Court a quo held as follows at paragraph 6 of Its

judgment:

“[6] in casu, this is what the applicant has done (having considered that that monetary claim cannot be resolved on the papers) and I see no objection, in principle, against him doing so, provided it can be shown that there are no facts in dispute which are not capable of being resolved on the papers. In my view the question of liability in this matter depends largely on the interpretation and inferences to be drawn from undisputed facts and is capable of being determined on the papers.¹”

[7] In dealing with this matter in this fashion the Court a quo was invested with a discretion.

[8] From the above it is clear that the Court a quo separated the issues and dealt with the declarator only.

[9] Relying on the judgment of the Publications Control Board v Centra/ News Agency Ltd 1977 (1) SA 717 AD at 747 Mr Ford, SC for the respondent, submitted that the respondent is entitled, in support of the judgment given in its favour, to advance argument before this Court even on issues that were rejected by the Court a quo.

[9.1] The order and the judgment of the Court a quo are not final in form and can be revisited by the parties at a later stage, depending on the outcome of the appeal. However, this issue is not before us now.

[10] In *Nkwentsha v Minister of Law and Order and another* 1988 (3) SA 99 (SCA) at 117C-D it was held that:

... Rule 6(5)(g), ... is, however, of wide import, and empowers the Court, whenever an application cannot properly be decided on affidavit, to ‘make such order as to it seems meet with a view to ensuring a just and expeditious decision.’”

[10.1] In spite of the judgment delivered in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) the Court a quo decided to separate the issues in this matter. It was aware of the disputes apparent from the claim in respect of appellant’s damage.

[10.2] Before us respondent’s counsel submitted that the *Cadac* case does not apply in the present matter in that it dealt with issues different to the present matter.

[10.3] In my view, though the *Cadac* case applied to the set of facts different to the present matter the principle pronounced therein and it remains good law. The separation of issues is the matter which falls within the discretion of the Court a quo.

[11] In dealing with the matter in the manner it did, the Court a quo exercised its judicial discretion. It did so properly and cannot be faulted.

[12] If this Court were to reverse the decision of the Court a quo and grant the appellant the declarator it seeks, the dismissal of the matter would be prejudicial to the appellant.

[13] in the circumstances this Court has no ground to interfere with the discretion of the Court a quo.

[14] This Court is called upon to decide whether the court a quo was correct in holding that the policy was not in force at the time that the appellant's property was damaged by fire, It held that the appellant had taken a deliberate decision to cancel the policy. This part of the matter hinges on the interpretation of Clause 3B of the policy which is couched in the following terms:

“GENERAL CONDITION

- CONTINUATION OF COVER WHERE PREMIUM IS PAYABLE BY BANK DEBIT ORDER [this is the amended version of paragraph 3B applicable to the policy issued to appellant by the respondent].

General condition 3B - “Continuation of cover” is amended to read as follows:

- (a) If the premium is not paid to the company upon request (on submission of the debit order against the payer's bank account) then the insured will still have cover for the month for which no premium has been received. The premium is therefore still due to the company and can be settled in cash at any office of the company.
- (b) At the next request for payment two debit orders will be submitted (if the outstanding premium has not been settled in cash); the unpaid one, as well as the one for the new month. If only one debit order is paid, this money will be used to settle the original outstanding premium.
- (c) When an event occurs which results in a claim during the month for which the premium has not been paid, the insured will be required to first settle the outstanding premium before the claim can be processed.
- (d) If the premium for two consecutive months (on submission of two debit orders) are not paid, then the policy will be cancelled with retrospective effect from midnight on the last day to where the company received the premium. No further request for premium payment will be made.”

[15] Before the amendment this paragraph read as follows:

"3B. Continuation of cover (where cover is payable by bank debit order or transmission account)

“The premium is due in advance and, if it is not received by the insurer by due date, this insurance shall be deemed to have been cancelled at midnight on the last day of the preceding period of insurance unless the insured can show that failure to make payment was an error on the part of his bank or other paying agent. Due date will be the first day of every calendar month where premium is payable monthly,...”

[16] It is evident that the amendment to paragraph 3B is designed for the protection of the insured. To my mind it amounts to this that the obligation of the insurer to indemnify the insured should not be exercised lightly without regard to the provisions of paragraph 3B

above. The amended paragraph seems to acknowledge that non-payment of a premium could be as a result of various factors not amounting to an intention on the part of the insured no longer wishing to be bound by and to continue with his obligations in terms of the policy. I cannot enumerate all those factors save to refer to the facts placed before me in this matter. As is evident from this matter the appellant was experiencing cash-flow problems which resulted in him not being able to honour his debit orders. Hence, he requested FNB to return them until he was in a financial position to pay them.

- [17] The appellant, the sole proprietor of the farming business known as L F Birch and Son farmed in ostriches on the farm known as Van Aardt's Kraal in the Province of the Eastern Cape. Santam Limited, the respondent, was his short-term insurer. On 15 September 2010 some of the appellant's property covered by the insurance policy issued by the respondent in favour of the appellant was destroyed by fire. Subsequent thereto the appellant lodged a claim with the respondent in respect of the damaged property. The respondent denied liability on the ground that the insurance policy was not in force at the time the property was

damaged by fire because the policy had been cancelled as the appellant had no insurance cover in respect of the property in question.

- [18] It is for this reason that the appellant instituted motion proceedings out of this Court seeking a declarator that the policy was in force and binding on the parties at the time of the fire, as well as payment of the replacement value of the damaged property.

- [19] The appellant had been involved in the farming business for a period of about twenty-four years. Up till the date of the fire one Dorothy Lombard acted as appellant's broker ("the broker"). Initially, the appellant's property was insured with Mutual and Federal Insurance Company. Because the respondent charged lesser premiums than Mutual and Federal insurance Company, Lombard advised the appellant to take the insurance with the respondent in April 2010, the appellant cancelled that insurance and took out a new policy with the respondent, in the same month his broker arranged insurance cover for the appellant's property with the respondent.

- [20] it is common cause that in 2008 the appellant's family trust sold certain of its farm properties to the Middleton Workers' Trust, a black empowerment project involving about one hundred farm employees. The appellant entered into a joint venture agreement with the Middleton Workers' Trust which was financed by the Department of Rural Development and Land Reform. The appellant averred that the department did not fulfil its financial obligations. The end result thereof was that the appellant experienced financial difficulties. Though he sold some of his property to finance the project, this proved unsuccessful. Besides this he had other financial obligations.

- [21] Debit orders for payment of premiums were honoured by his bank, FNB at the beginning of the months of June and July 2010.

[22] By the end of July 2010 the appellant realised that his overdraft facilities would not meet his financial obligations, including the premiums payable to the respondent in respect of his insurance policy.

[23] On Sunday 01 August 2010 the appellant telephoned his bank manager and confirmed the telephonic discussion in an e-mail dated 02 August. 2010, the relevant portion of which read as follows:

“Hi Gavin

As discussed telephonically yesterday afternoon, could you please return all the debit orders that came through on our account today.

We are experiencing cashflow problems at present and we have had to finance expenses on behalf of the Middleton Workers Trust because the Dept of Rural Dev and Land Reform have refused to make payments of amounts due to us by them.

.. i am hoping to rectify that as soon as possible. — We are hoping

to negotiate a deal with them (ie Dept of Rural Dev and Land Reform) in which they will make a payment of the outstanding invoices as well as to purchase all our farming assets.”

[24] The meeting referred to above was to take place on the morning of 02 August 2012. The e-mail suggests that payment by the Department would be negotiated on that day with the assistance of his attorney at the said meeting,

[25] On 07 August 2012 the respondent wrote to the appellant as follows:

“Dear Policyholder CANCELLATION OF POLICY

The premium in respect of the above-mentioned policy, which was payable by a financial institution on your behalf, was not remitted to us. This has resulted in your policy being cancelled.

in terms of your contract you do not have cover from the cancellation date below.

Please contact your broker or nearest Santam office if you have any queries.

[26] Clause 3B of the policy; the e-mail addressed by the appellant to First National Bank; and respondent's letter of 07 August 2010 cancelling the policy, raise the following issues for determination by this Court:

- (a) The nature of the communication by the Appellant to FNB.
- (b) The significance of the reliance by the Respondent on the incorrect policy wording in the formulation of the purported cancellation letter.
- (c) The legal status of the Respondent's purported cancellation letter dated 7 August 2010 received on 25 August 2010.

- (d) The effect of the failure by the Respondent to attempt to collect the double premium at the end of August 2010.
- (e) Whether the insurance policy was still in force on 15 September 2010.
- (f) The significance of the Appellant's tender to make payment prior to any valid act of cancellation by the Respondent.
- (g) The legal effect of the absence of any further act of cancellation by the Respondent.

[28] The respondent does not deny that FNB did not pay the premium due to it by the appellant. Its case is that the instruction to FNB to "stop payment" emanated from the appellant. It contends that once it received the "stop payment" notification from FNB their computer system generated the letter dated 07 August 2010 as acknowledgement of the cancellation.

[29] Neither the telephone call made by the appellant to FNB on 01 August 2010 nor the contents of the e-mail sent by the appellant to FNB is denied by the respondent. Both these communications to FNB are admitted by the respondent.

[30] in neither of them is FNB instructed to cancel the contract. Respondent mentioned his cash-flow problems and his intention to rectify the situation "as soon as possible."

[31] The appellant's contention that it never issued a "stop payment" to FNB is supported by the affidavit filed by the bank manager, Gavin Rowan Crawford ("Crawford"), who spoke to the appellant on Sunday, 01 August 2010. in his affidavit filed in reply to the respondents answering affidavit says the following:

"5. On Sunday, 01 August 2010, applicant phoned me on my mobile phone,

and, inter alia, advised me that debit orders that were due to come off his account would be catered for and requested me to return the debit orders,

- 6. I requested the appellant to put his request in writing to enable FNB to comply with his request.
 - 7. On Monday, 02 August 2010, I received an e-mail from applicant requesting FNB to return all the debit orders that came through the account that day, which I duly did.
 - 8. FNB, nor I certainly did not cancel any policy on behalf of the applicant, did not act as his agent or broker and only complied with applicant's request to return his debit orders."
- [32] Crawford's affidavit confirms appellant's case materially. The debit orders were to be returned for the reasons set out in the e-mail of 02 August 2010. Nowhere in the telephonic discussion of 01 August 2010 and the e-mail of the following day was it ever intimated by appellant that the contract had to be cancelled. The return of the stop orders was as a result of the fact that applicant had cash-flow problems.

- [33] Moreover, FNB was not appellant's agent, nor was it its broker. FNB's duty was to remit payments to the respondents on behalf of the appellant and nothing else.
- [34] On the other hand, the respondent's case is that the appellant "deliberately" cancelled the contract which cancellation was accepted by the respondent. This contention is not supported by the evidence and the terms of the policy contract.
- [35] The August debit order was not honoured. In terms of the policy contract the respondent was obliged to send a double debit order during the following month. The respondent did not comply with this term of the contract
- [36] The Rules of the Policyholder's protection plan set out in the Government Gazette No. 26853 dated 30 September 2004 provide as follows:

"Debit

orders

7.2 An insurance party involved -

- (b) shall not unilaterally terminate any current debit order signed by a policyholder without having informed the policyholder in writing of the intentions to terminate the debit order at least 30 days before the effective date of such envisaged termination.

Unilateral termination of policies

7.3

- (a) An insurer shall not unilaterally terminate any policy without giving notice as set out in paragraph (b) of this Rule.
- (b) The insurer may give notice either -
- (i) direct to the policyholder 30 days prior to the cancellation date, or
- (ii) by satisfying itself that notice has been given in accordance with subparagraph
- (i) to the policyholder by the independent intermediary; or
- (iii) if compliance with subparagraphs (i) or (ii) is not possible, by publication of such notice in two editions of a newspaper circulating in all areas in which it is reasonably believed that relevant policyholders reside, and by forwarding a copy of such notice to the registrar prior to publication."

"Periods of grace

7.5 An insurer shall ensure that a policy contains a provision for a period of grace for the payment of premiums of not less than 15 days after the relevant due date; Provided that in the case of a monthly policy, such provision must apply with effect from the second month of the currency of the policy.”

- [37] In its judgment the Court a quo found that the policy had been cancelled at the time of the fire. Hence, the claim was dismissed with costs.
- [38] Respondent’s argument is that the use of motion proceedings is fatal to applicant’s case. This cannot be so. If, for instance the declarator is granted it would be open for the appellant to proceed to the next stage.
- [39] Turning to the merits of the matter, I make the following observations: while the court a quo accepted the contents of the telephonic discussion of 30 July 2010 between the appellant and the bank manager, Mr Crawford, as well the e-mail of the following day, i.e. 01 August 2010, it inexplicably found that the appellant deliberately cancelled the policy. This is in spite of the appellant stating pertinently in the e-mail to the bank that “I am hoping to rectify that as soon as possible”. To my mind this is not the language used by someone deliberately cancelling or intending to cancel a policy. On the contrary, it evinces an intention to comply with his obligations in terms of the policy.
- [40] Moreover, the communication was between the bank and appellant, and not the appellant and the respondent. The bank was not the appellant’s agent and there is nothing in the e-mail instructing the bank to cancel the policy. The role of the bank was merely to transmit premiums to the respondent. Crawford stated in his affidavit that the bank never gave such instruction to the bank. He confirmed the telephonic discussion he had with appellant on Sunday, 01 August 2010, as well as the contents of the e-mail of 02 August 2010. He concluded his affidavit by stating the following:
- “FNB, nor I certainly did not cancel any policy on behalf of the appellant, did not act as his agent or broker and only complied with the applicant’s request to return his debit orders.”*
- [41] It is also significant to note that when asked by the appellant to furnish him with a copy of the contract it made available to him the old paragraph 3B referred to in paragraph 3 above. Obviously that paragraph is not applicable in this matter
- [42] It seems clear to me that the letter of cancellation set out in paragraph 25 above was based on this clause.
- [43] Another aspect of the matter I need to deal with is the failure by the respondent to attempt to collect a double premium from the appellant’s account. The policy obliges it to do so. Apart from this the policy requires the respondent to give appellant a 30 day period of grace before cancelling the contract. This, it failed to do so.
- [44] By the time the policy was cancelled the appellant was still within the period of grace. His tender to pay the outstanding premiums was rejected by the respondent.

[45] In my view the respondent has failed to comply with the terms of the policy and, consequently I come to the conclusion that the policy was in force and binding at the time of fire.

[46] What is also of note is the language in which the respondent alleges FNB communicated with it when it advised to stop payment. The manager of the respondent stated the following:

“20.3. In this regard it is appropriate to point out that the Respondent runs ACB collection program with all banks nationwide. The various codes which are utilised in order to reflect non-payment of a debit are the following:

B - insufficient funds

C - stop payment

D ~ account dosed

F- insured deceased

When ACB is presented to the banks and a premium is not met, the bank in turn notifies the Respondent with reference to one of the foregoing codes which of the reasons is applicable.

20.4 If the reason for non-payment is B or D the issue is dealt with in accordance with the amendment of the General Condition 3B and a letter, an example of which is Exhibit “O”, is sent out.

20.5 If the reason for non-payment is F the matter is dealt with differently as a letter from the executor of the deceased estate is awaited before the matter is finalised.

20.6 If the notification is C (stop payment) the Respondent accepts this as a notification by the insured in terms of clause 3A of the general terms of the policy for immediate cancellation of the policy.

20.7 In the circumstances such as this it is only the insured who can instruct the bank to stop payment and it follows that, particularly absent any alternative arrangements for payment, it serves as a clear notification by the insured that he does not intend to continue honouring his obligations in terms of the policy and that accordingly he intends to cancel the policy or at least, repudiate it.

20.8 In circumstances such as the foregoing the “cancellation letter”, an example of which is Annexure “G” to the Applicant’s affidavit, is generated automatically by the computer system of the Respondent. This does not constitute a cancellation of the policy by the Respondent but rather an acknowledgement of the cancellation of the policy by the insured (in this case the Applicant).”

[46.1] The appellant did not communicate with the respondent neither did it use the language contained in the paragraphs referred to above. FNB also denies having communicated to the respondent that the policy was being cancelled.

[47] The instruction of the appellant to the bank is to return the debit orders and not stop payment. This is confirmed by FNB.

[48] (n the alternative the respondent alleges that the effect of the stop payment was to repudiate the policy which repudiation was accepted by the respondent.

[49] Having considered all the circumstances of this case I have come to the conclusion that the appeal should succeed.

[50] In the circumstances the following order is made:

(1) The appeal succeeds with costs save the costs relating to the following documents, volume 1: paragraphs 44.2 and 44.3;

volume 1 :paragraph 51; volume 1: paragraph 71 and 72; volume 4 pages 305 - 369 which are disallowed;

(2) The order of the Court a quo is set aside and is substituted with the following:

“(a) It is declared that the insurance policy entered into between the applicant and the respondent was in force and binding between them when the applicant’s property was damaged by fire on 15 September 2010,

(b) The respondent is ordered to pay the applicant’s costs.”

B. SANDS

JUDGE OF THE HIGH COURT

I agree

P. W. TSHIKI

N. G. BESHE

APPEARANCES:

Counsel for the Appellant: Adv Van Huyssteen Instructed by: J D Haydock Attorneys

Counsel for the Respondent: Adv Ford, SC Instructed by: Netteitons Attorneys

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