

SOUTH AFRICA / JUDGMENT

Eckard and Another v Outsurance Insurance Company Limited and Others (74991/16) [2020] ZAGPPHC 392 (30 July 2020)

[2020] ZAGPPHC 392

COURT

North Gauteng High Court, Pretoria

BEFORE

MNGQIBISA-THUSI

CASE / FILE NUMBER

74991/16

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

Case

No: 74991/16

30/07/2020

In

the matter between:

GEORGE
NORMAN ECKARD
1st
Applicant
ARENDSE
SPORTSKOOL AVONTUUR SENTRUM
&
GAME LODGE
2nd
Applicant
and
OUTSURANCE
INSURANCE COMPANY
LIMITED
1st
Respondent
JOHANNES
PETRUS BOTHA
2nd
Respondent
GERNA
BOTHA
3rd
Respondent
INNOSPAN
INVESTMENTS (PTY) LIMITED
t/a
SOUTHDOWN COLLEGE
4th
Respondent
CORNELIUS
SERVAAS ECKHARD
5th
Respondent

JUDGMENT

MNGQIBISA-THUSI, J

[1] The first applicant, Mr George Norman Eckard, and second applicant, Arendse Sportskool Avontuur Sentrum & Game Lodge seek an order, in terms of Uniform Rule 13(3)(b), for leave to serve a third party notice on the first respondent, Outsurance Insurance

Company Limited, as the sixth third party to the main action (under case number 74991/2016). Further, the second applicant seeks a declarator for a contribution based on a conditional contractual claim under an insurance agreement with the first respondent.

- [2] The second applicant operates an adventure centre, which includes a camping site for school learners at its premises situated at Farm Kameeldrift, Brits. On 21 January 2016, the minor child, Carmen Botha ("Carmen"), was on a school camp at the second applicant's centre, when she fell from a 'foefie' slide operated by the second applicant at its premises. As a result of injuries sustained by the minor child in the fall, she became a paraplegic.
- [3] On 26 January 2016, the first applicant, representing the second applicant, informed the first respondent about the incident and

sought the first respondent to indemnify it against any damages that may be claimed as a result of the incident.

- [4] It is common cause that on 01 September 2008 the second applicant and the first respondent concluded an insurance agreement in terms of which the first respondent would provide public liability insurance cover to the second applicant against risk based on the terms and conditions as set out in the agreement. Amongst others, the insurance agreement provides that:

"You need to:

Report your claim or any incident that might lead to a claim to us as soon as possible, but not later than 30 days, after any incident. This includes incidents for which you do not want to claim but which may result in a claim in the future".

- [5] On 6 July 2016 the first respondent, however, repudiated the claim on the ground that the incident claimed for was not covered by the policy in that:

5.1 the second applicant failed to exercise due care and precaution in its business activities;

5.2 the incident is not covered by the policy;

5.3 there is material non-disclosure; and

5.4 the second applicant failed to provide true and complete information.

- [6] On 6 October 2016 the second applicant's attorneys wrote to the first respondent, disputing the repudiation of the claim.

- [7] On 23 September 2016 the minor child's parents, second respondent, Mr Johannes Petrus Botha, and the third respondent, Mrs Gerna Botha, issued summons ("the main action") against the second applicant (first defendant in the main action) and the fourth

respondent, Innospan Investments (Pty) Limited t/a Southdown College (second defendant in the main action), claiming delictual damages for loss suffered as a result of the injuries Carmen sustained. At the time of the accident Carmen was a learner at the Southdown College.

[8] In its particulars of claim the second and third respondents claim that the second applicant and the fourth respondent are liable in that Carmen's fall was caused by the failure of the safety equipment on the 'foefie slide'. It is alleged that the second applicant and its employees were negligent in the following respects:

8.1 that they failed to take reasonable precautions to ensure the safety and welfare of the minor child;

8.2 that the second applicant failed to use proper safety equipment for the safety of foefie users;

8.3 that they failed to adhere to proper safety procedures.

As against the fourth respondent it is alleged that:

8.4 it failed to take reasonable precautions to ensure the safety and welfare of its users;

8.5 it failed to investigate or ensure the safety of the use of the foefie slide;

8.6 it failed to investigate the history of fatalities or incidents at the premises.

[9] During November 2016 the second applicant filed its plea in the main application without joining the first respondent. It denied liability for the loss suffered as a result of the accident of 21 January 2016 and averred that it employed qualified facilitators and maintained proper safety standards.

[10] On 1 September 2017, the second applicant's attorneys requested the first respondent to provide it with documents and photographs in its possession upon which reliance was placed to repudiate its claim.

[11] On 6 September 2017 the first respondent's attorneys responded to the second applicant's request of 1 September 2017 that the documents sought are private and privileged and would only be provided to the second applicant on condition that the second

applicant indemnifies it and that it will not institute any proceedings against it in relation to the incident of 21 January 2016

and the second applicant's repudiated claim. Further that the second applicant agree that it will not in future make any claim against the first respondent in respect of the incident of 21 January 2016.

[12] On 7 December 2018, the second applicant served on the first respondent this application together with the proposed third party notice.

[13] The first respondent has raised a preliminary point that the first applicant has no locus standi as he is not party to the insurance agreement i.e he is not the insured. It is the respondent's contention that since the first applicant was not a party to the insurance agreement, he discloses no cause of action and that his application be dismissed

with costs.

- [14] On behalf of the first applicant it was submitted that the citing of the first applicant was a precautionary measure. In the main action the first applicant is cited as the fifth Third Party.
- [15] I am of the view that since what is sought is the joining in of the first respondent with a view of seeking an indemnity based on the insurance agreement between itself and the second applicant, it was not necessary to cite the first applicant as he is not party to the insurance agreement. However, I am of the view that even if the application on behalf of the first applicant ought to be dismissed, I am satisfied by the explanation given for citing the first applicant and do not deem it necessary to make a cost order against the first applicant.
- [16] In the third party notice the second applicant seeks, in terms of Uniform Rule 13(1)(a), a contribution or indemnification from the first respondent in the event that an order is made in terms of which the second applicant is found to be liable to pay damages to the second and third respondents in relation to the incident of 21 January 2016.
- [17] Uniform Rule 13(1) provides in part that:
- “Third party procedure*
- (1) Where a party in any action claims —
- (a) as against any other person not a party to the action (in this rule called a 'third party') that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or
- ...
- (3) (b) The third party notice, accompanied by a copy of all pleadings filed in the action up to the date of service of the notice, shall be served on the third party and a copy of the third party notice, without a copy of the pleadings filed in the action up to the date of service of the notice, shall be filed with the registrar and served on all other parties before the close of pleadings in the action in connection with which it was issued.
- (b) After the close of pleadings, such notice may be served only with the leave of the court”.
- [18] Rule 13 was designed to enable a litigant to avoid a multiplicity of actions, by joining in an action already instituted any other party against whom he may be entitled to a contribution or indemnification in respect of the relief being claimed. The party seeking to rely on the right of indemnity has to show that there is a right of indemnity arising from a contract, statute or implied by law and that such indemnity is in respect to the claim it seeks to be indemnified[1]. In *Wapnick and another v Durban City Garage and others*[2] the court held that the applicant should, in addition to furnishing reasons for the failure to serve the notice timeously, disclose a prima facie case against the third party by alleging facts which if established at the trial, would entitle it to succeed.

[19] In *Shield Insurance Co Ltd v Zervoudakis*[3] the court held that the third party joined in terms of Uniform Court rule 13 was not a defendant vis-à-vis the plaintiff and that a judgment sounding in money therefore cannot be granted against the third party in favour of the plaintiff. In *Callender Easby v Grahamstown Municipality*[4] it was held that a defendant cannot execute upon the declaratory order but will have to sue the third party in a subsequent action if such a party refuses to pay[5].

[20] The first respondent is opposing the granting of the order sought on the following grounds:

21.1 that the second applicant's claim has prescribed in terms of the conditions of the insurance policy;

21.2 that the second applicant has not provided a satisfactory explanation for failing to serve the third party notice before the close of pleadings;

21.3 that the second applicant has not made out a prima facie case on merits; and

21.4 that the first respondent and society stand to be prejudiced by allowing the claim to be heard with the main claim.

Contractual prescription

[21] It is the first respondent's contention that, in terms of the insurance agreement, the second applicant had the right to institute

proceedings within 90 days after lodging its objection. That since the second applicant failed to launch such proceedings, it had forfeited the right to challenge the repudiation.

[22] On behalf of the second applicant it was submitted that the request to indemnify it at the time it was made was not a demand for

indemnification since at the time it was made. The second applicant's liability and the extent of such liability, if any, had not been determined and that prescription could therefore not have started running.

[23] In terms of the insurance policy, the insured is obliged to claim compensation within 90 days from the date of the occurrence of the incident. In the event that the claim is rejected, the insured has to institute proceedings within 90 days of the repudiation of the claim.

[24] In *Magic Eye Trading 77 CC v Santam Limited*[6], the Supreme Court of Appeal, after quoting a list of cases where the issue of when an insurance company becomes liable to make payment to an insured, held that:

"[15] The principle emerging from this line of cases is clear. A claim to be indemnified against liability to a third party only arises once liability, in a fixed amount, has been established. The corollary, which applies to the present matter, is found in the third proposition set out in Pereira[7]:

‘That the disclaimer by the insurer, from which the period of three months allowed for the institution of action commences to run, must follow on a claim by the insured of the character described in (1) and (2) above. The condition does not admit of a general disclaimer of future claims at a stage when a precise claim in a fixed amount has not and cannot be made by the insure’.

[20] ... The claim we are dealing with in the instant matter is for a declaration of rights in respect of a contingent claim. Liability is dependent on the outcome of an uncertain future event, namely, a finding by a court holding the appellants liable to Imperial in a specified amount. It is no more than a contingent claim at this stage”.

[25] In light of the decisions in *Magic Eye* and *Pereira*, I am of the view that the second applicant, until such time that his liability to the second and third respondents has been confirmed,

only has a contingent claim against the first respondent. Therefore, first respondent’s objection to the relief sought by the second applicant on the basis of contractual prescription ought to fail.

Undue delay

[26] It is the first respondent’s contention that the second applicant has not provided a satisfactory explanation as to why the Third party notice was not issued before the close of pleadings. Further that the second applicant has not given sufficient reason why it took so long for it to launch these proceedings.

[27] It is the first respondent’s contention that, in terms of the insurance agreement, the second applicant had the right to institute

proceedings within 90 days after lodging its objection. That since the second applicant failed to launch such proceedings, it had forfeited the right to challenge the repudiation.

[28] On behalf of the applicants the following submissions were made. With regard to the second applicant’s failure to serve the Rule 13 notice earlier, the second applicant’s counsel submitted that the applicant was ill advised by its attorney at the time that it would not be successful in claiming indemnity from the first respondent on the basis that it was probably too late to institute proceedings against the first respondent. Counsel submitted that it was only when the second applicant was advised by senior counsel during late 2018 to the effect that the claim for indemnification only arises once the second applicant’s

liability is established either by agreement or by a court. Counsel further submitted that the first respondent’s letter of repudiation was misleading in making the second applicant believe that it had no claim against the first respondent.

[29] On behalf of the second applicant it was submitted that the delay in either issuing a Third Party notice or launching these proceedings

was mainly due to financial constraints and wrong advice that it would not succeed in suing the first respondent. It was not until it received advice from senior counsel that it decided to institute these proceedings.

[30] Even though the period which has elapsed appears to be long, I am of the view that the explanation given by the second applicant for the delay is reasonable under the circumstances. It is not as though the second applicant had not informed the first respondent of its discontent with its refusal to indemnify it. Further, I am of the view that since the second applicant only has a contingent claim against the first respondent, the first respondent cannot complain of any prejudice it might have been caused by the delay.

A prima facie case on merits

[31] On behalf of the first respondent it was submitted that in terms of the insurance policy, the second applicant was obliged to report any incident which may give rise to a claim within 30 days of the occurrence of such incident. It is the first respondent's

contention that second applicant has not made out a prima facie case with regard to its entitlement to be indemnified by the first

respondent. It was submitted that since the second applicant had failed to disclose certain crucial information to the first

respondent about two previous incidents which had occurred at its premises, the first respondent would not be liable to indemnify it.

[32] On behalf of the second applicant it was conceded that there had been an incident that occurred at its premises in which a person was injured and later died. However, counsel for the second applicant submitted that the incident was not reported to the first respondent in that the second applicant had an obligation to report an incident which could result in a claim in future. Since an investigation of the incident had revealed that the person involved had intended to commit suicide, it was unlikely that the incident would have given rise to a claim against the second applicant which could have led to a claim for indemnification from the first respondent. Further that the Department of Labour had conducted its own investigation of the second applicant's premises and could not identify any cause or fault in the safety aspects of the second applicant's equipment.

[33] Counsel for the second applicant argued that the first respondent was aware of the incidents but continued to cover the second applicant on the same premium and terms. Counsel further argued that the purpose of an insurance policy is to cover an insured against any negligent conduct leading to loss. Since there was no proof of any recklessness on the part of the second applicant or its employees, the first respondent would be obliged to indemnify it in the event it is found to be liable to compensate the second and third respondents.

[34] A contract of insurance is said to be one of good faith and that an insured has an obligation to disclose to the insurer any material

fact which could influence the insurer in its assessment of the risk it was covering and could have charged a different premium or decided against undertaking the risk. The fact that the first respondent was aware of the incidents it complains of and nevertheless continued to cover the second applicant by charging the same premium and on the same terms, is indicative of the fact that the first respondent did not regard the incidents as material that they would vitiate the policy. Further, the non-disclosure was not wrong in that the incident was not one which could in the future have resulted in a future claim as the victim had committed suicide. I am therefore of the view that the second applicant has made out a prima facie case for indemnification.

Prejudice

[35] I am of the view that the first respondent cannot complain of any prejudice as it was aware of the second applicant's objection

to its rejection of the request to be indemnified and of the ongoing litigation.

[36] In the result the following order is made:

1. The first applicant's application is dismissed. No order as to costs is made.
2. The second applicant is granted leave to serve a third party notice on the first respondent, Outsurance Insurance Company Limited, as the sixth third party to the main action (under case number 74991/2016).
3. Costs will be costs in the cause

NP MNGQIBISA-THUSI

Judge of the High Court

Appearances

For applicants and fifth respondent: Adv S J Coetzee (instructed by Oliver, Cronje & Stiglingh Attorneys)

For first respondent: Adv R C Jansen van Vuuren (instructed by Van Breda & Herbst Inc)

[1] Eimco (SA) (Pty) Ltd v P Mattioda's Construction Co (SA) (Pty) Ltd 1967

(1) SA 326 (N).

[2] 1984 (2) SA 414 (D) at 424-C.

[3] 1967 (4) SA 735 (E)

[4] 1981 (2) SA 810 (E).

[5] In *Smits v Member of the Executive Council: Police, Roads and Transport FS* (1657/2012) [2014] ZAFSHC 75 (12 June 2014) the court stated that: “[18] There is no lis between the plaintiff and the third party. No order can be made against the third party in favour of the plaintiff at the behest of the defendant in these proceedings. All that the plaintiff is possibly entitled to is an order as suggested in *Mr Reinders*’

heads of argument namely that in the event of the plaintiff succeeding against the defendant, the third party will indemnify the defendant”.

[6] (775/2018) [2019] ZASCA 188 (10 December 2019).

[7] *Pereira v Marine and Trade Insurance Co Ltd* 1975

(4) SA 745 (A). The third proposition as set out in *Pereira* reads as follows: “That the disclaimer by the insurer, from which the period of three months allowed for the institution of action commences to run, must follow on a claim by the insured of the character described in (1) and (2) above. The condition does not admit of a general disclaimer of future claims at a stage

when a precise claim in a fixed amount has not, and cannot, be made by the insured”.

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