

SOUTH AFRICA / JUDGMENT

Incorporated General Insurance Ltd v Fisheries (133/86) [1986] ZASCA 127 (20 November 1986)

[1986] ZASCA 127

COURT

Supreme Court of Appeal

BEFORE

Rabie, Jansen, Viljoen, Van Heerden, Galgut

CASE / FILE NUMBER

133/86

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Source record**IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)**

In the matter of:

INCORPORATED GENERAL INSURANCES LTD

....appellant

and

A.R. SHOOTER t/a SHOOTER'S

FISHERIES

....respondent

Coram: RABIE CJ,

JANSEN, VILJOEN, VAN HEERDEN JJA, et GALGUT AJA.

Date of Hearing: 15 August 1986. Date of Judgment: 20 November
1986**JUDGMENT****GALGUT AJA:**

This is an appeal from a judgment of FRIEDMAN J sitting in the Durban and Coast Local Division in which he gave judgment in favour of the respondent (plaintiff in that Court) in the sum of R300 000 plus interest and

/ costs

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costs of suit. That judgment is reported as *Shooter trading as Shooter's Fisheries v Incorporated General Insurances Ltd* 1984 (4) SA 269 (D). I shall refer to it as the reported judgment. The facts pursuant to which the action was instituted are set out at p 271 D to 272 H. The legal issues canvassed in that Court are fully set out in the judgment. I will, therefore, set out only so much as is necessary to facilitate the reading of this judgment and will confine myself to the submissions made in this Court.

I shall refer to the appellant as the defendant and the respondent as the plaintiff. The plaintiff was the owner of a fishing trawler, the "Morning Star". On 12 April 1983 whilst it was trawling for fish near Maputo harbour it was intercepted by two trawlers of the People's Republic of Mozambique (Mozambican Government) and taken in-to Maputo harbour. The skipper and engineer were there-after brought before a tribunal. They were prosecuted on

/ a 3 a charge of illegal fishing. It is not clear whether the charge was that they had fished illegally within Mozambican territorial waters, ie, within 12 nautical miles from the Mozambican coast or fished illegally within the declared Mozambican exclusive economic zone, ie, within 200 nautical miles off the Mozambican coast. They were found guilty and fined the equivalent of R167 000. They were advised that if the fine was not paid within 15 days the trawler would be confiscated.

There were in existence at the time two insurance policies, each for R300 000, issued by the defendant as insurer. These policies were referred to as the "Hull" policy and the "War Risks" policy in the Court a quo.

Neither the skipper nor the engineer was able to pay the fine. The plaintiff also was unable to pay it. He endeavoured to persuade the defendant to pay it and thereby obtain the release of the vessel. This the

/ defendant 4 defendant refused to do alleging that it was under no obligation to do so and also that in any event no liability attached to it in respect of the seizure of the trawler under either policy. In the result the fine was not paid and the trawler was confiscated. It was sold, so the evidence indicates, to "the Spaniards".

Plaintiff sued the defendant and obtained judgment for R300 000 being the insured value of the trawler.

The appeal is against the whole of the judgment.

The Admiralty Jurisdiction Regulation Act No 105

of 1983 ("the Act") provides for "the vesting of the powers of the Admiralty Courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa". Sec. 2 provides that these courts have jurisdiction to hear and determine any maritime claim. A claim relating to marine insurance is a maritime claim - see sec. 1(r). Hence the Court a quo had jurisdiction to deal with the

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matter.

The two policies with which we are concerned

follow the standard wording of the Lloyds S-G policy which until recently had been used in the United Kingdom and internationally for over 200 years. The wording is in many respects archaic. The defendant carries on business and has its registered office in Johannesburg. The plaintiff carries on his business in Durban. In terms of sec. 6(1)(b) of the Act, the law to be applied by a Court in the exercise of its admiralty jurisdiction is the Roman-Dutch law applicable in the Republic. Sec 63(1) of the Insurance Act No 27 of 1943 reads:

"(1) The owner of a domestic policy issued after the first day of January, 1924, shall, notwithstanding any contrary provision in the policy or in any agreement relating thereto, be entitled to enforce his rights under the policy against the insurer concerned in any court of competent jurisdiction in the Republic, and any question of law arising from any such policy shall be decided according to the law of the Republic:

/ Provided

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Provided that such a policy may validly provide that the amount of any liability under the policy shall be determined by arbitration in the Republic, if the insurer demands that the said amount be so determined."

The two policies in this case are domestic policies - see the definition in sec. 1 of the said Act. In *Blackshaws (Pty) Ltd v Constantia Insurance Co Ltd* 1983 (1) SA 120 (A) at p 126 F it was said that the interpretation of the clauses in an insurance policy is, generally speaking a question of law. It follows that in interpreting the policies the law to be applied is the Roman Dutch law but that English decisions as to the meaning of expressions used in the policies is of assistance and is persuasive authority - cf. the *Blackshaws* case *sup. cit.* at p 126 F-H. At pages 273 and 274 of the reported judgment the learned Judge *a quo* sets out the terms of two clauses which

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are referred to as the "risk" clause and the "fire and theft" clause. These appear in both policies. He also refers to a schedule and certain "Institute war and strikes" clauses annexed to the War Risks policy and concludes that it is this policy which applies to plaintiff's claim. That, in fact, was common cause in the Court *a quo* and still is in this Court. The relevant clause is the risk clause. It is set out in full on page 273 of the reported judgment. The portion thereof which is relevant to the peril insured against reads:

"And touching the Adventures and Perils which the said Company is contented to bear and does take upon itself in the Voyage so insured as aforesaid they are

Takings at Sea Arrests Res-traints and Detainment of all KingsPrinces and People of what Nation Condi-tion or Quality soever "

It is convenient at this stage also to mention

two further provisions contained in the policies. The

first is that the trawler was insured only "against the

risk of Actual Total Loss and/or Constructive Total Loss

/ of

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of the vessel". The second is what is commonly called

the "sue and labour" clause. This reads:

"And in the case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labour and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance the charges whereof the said Company will bear in proportion to the sum hereby insured".

I turn now to discuss the effect of the above passages in the War Risks policy.

Ad Arrests, Restraints and Detainments of all Kings, Princes and People of what Nation, Condition or Quality soever.

In England, Schedule 1 to the Marine Insurance Act of 1906 ("the 1906 Act") is headed "Rules for Con-struction of Policy". These Rules are in effect a codification of what had been decided in the English courts over the years. As stated earlier, what has been said in those courts is persuasive authority. Rule 10

/ declares

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declares the above words to refer to "political or execu-tive acts" and does not include a "loss by riot or judi-cial process". Ivamy in his Marine Insurance 3rd ed.,

("Ivamy") states (and quotes authority) at p 171 that —

"Whenever the ruling power in a State prevents the owner or his agents from enjoying the lawful right of user of the property insured, by an act which is not — as against the State of which the assured is a subject — an act of war, the assured is entitled to recover any loss occasioned thereby from the insurer under those words. The clause imports an unusual interference by the ruling authority, and does not apply to an arrest by the order or judgment of any judicial authority in the ordinary course of litigation."

Arnould in Law of Marine Insurance and Average

16th ed. Vol. 2 at para. 886 ("Arnould") states (and quotes authority) that by the word "people" is meant the ruling power of the country. The learned author goes on to say in para. 886:

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"The words 'ordinary judicial process' relate to the administration of justice in civil proceedings. The arrest or detention of a ship by judicial process for the purpose of enforcing the public or criminal law of a country is not excluded under rule 10, and the fact that a judicial process is in operation does not deprive the restraint of its character as a political or executive act."

The author relies for this latter statement on

dicta by MOCATTA J in *Panamanian Oriental S.S. Corporation v Wright* (1970) 2 Lloyd's Rep. 365 ("the Anita case"). The defendant, as will be seen later, did not accept in the Court a quo and still does not accept that the words "ordinary judicial process" refer only to civil proceedings.

In the Republic the rule of interpretation in

regard to insurance policies was clearly stated by KOTZEJA in *West Rand Estates Ltd v New Zealand Insurance Co Ltd*. 1925 AD 245 at p 261. He said:

"The parties by entering into the contract of insurance must be taken to have intended that they were to be bound by the terms

/ contained

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contained therein. The mere use.....of words, which in their strict and grammatical meaning sound strange and novel in our country, can and does not render them meaningless. The parties must be regarded as having meant a business transaction; and it is the duty of the Court to construe their language in keeping with the purpose and object which they had in view, and so render that language effectual. Such is the clear principle of our law."

Due regard being had to the above I have no doubt that "detainments of all kings, princes and people" would, in the Republic, be interpreted to mean the ruling power of the country.

Ad Insurance against Actual Total Loss and/or Constructive Total Loss only.

This phrase limits the liability of the insurer.

He is not liable to the insured for any partial loss sustained.

"Actual total loss" and "constructive total loss" have been defined in secs. 56(3) and sec. 60(1) of the 1906 Act. These definitions are helpful but

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I do not find it necessary to set them out. It is sufficient to say that prior to the expiry of the 15 days there was no actual total loss. The fine was not paid and the trawler was confiscated and sold to the "Spaniards". It thus became an actual total loss.

In England, where there has been a constructive total loss, the assured is entitled to abandon the subject-matter to the insurer and claim for a total loss. See Ivamy, p 410 and secs. 62(1) and 62(7) of the 1906 Act. In England the question in what cases the law requires notice of abandonment to be given has been much debated. See Ivamy, p 414. There is no statutory requirement in the Republic requiring notice of abandonment when the insured claims for a total loss.

/ The Sue and

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The Sue and Labour Clause

The wording of this clause is as it appears

in the standard form of the English marine policy, as to which see Arnould at para.

909. The clause, it is to be noted, does not compel the insured (here the plain-tiff) to "sue and labour". It permits him to incur expenses for the purpose of averting the loss covered by the policy and thereafter to recover such expenses from the insurer. Despite the permissive wording of the clause, sec. 78(4) of the 1906 Act, in relation to contracts containing this clause, reads:

"it is the duty of the assured

to take such measures as may

be reasonable for the purpose of averting or minimising a loss".

Arnould, sup. cit. at para 770 states:

"It has, however, long been recognised, both in England and in the United States, that the assured is under a duty to sue and labour".

/ There

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There is no statutory provision nor have we been referred to any case in the Republic dealing with the effect of a sue an labour clause. In the Republic an insured is under an implied duty to minimize his loss.

Mozambican legislation relevant to the issues. The extracts from this legislation set out here-under are English translations.

In a Government Gazette of the People's Republic

of Mozambique dated 19 August 1976 Decree-Law No 31/76 was proclaimed. The opening paragraph reads:

"It has become imperious to define the rights of the People's Republic of Mozambique with respect to the economic resources of the sea adjacent to the coast."

There is no need to set out all the details of the

proclamation. It is sufficient to say that "the Council of Ministers" decreed inter alia that Mozambique's ter-

ritorial waters would extend for 12 nautical miles and

its exclusive economic zone for 200 nautical miles.

/ Thereafter

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Thereafter Act 8 of 1978 was proclaimed by the

Mozambican Government in a Government Gazette of 24 April 1978. This Act contained the following articles and provisions:

"Article 1. For the purposes of the provisions of this Act:

- (a) 'jurisdictional waters' means the zone comprising the territorial waters and the exclusive economic zone, as they are defined in the Decree-Law No 31/76 of 19 August;

Article 3 (1). As from the date when this Act comes into effect, the Minister of Industry and Energy will be competent to determine which foreign vessels or crafts shall be authorized to fish in the jurisdictional waters, and he will further determine, according to the circumstances, the appropriate conditions for the conduct of such an activity."

Articles 5 to 8 provide for inspection and impounding of foreign vessels found fishing in the prohibited

/ jurisdictional

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jurisdictional waters and the penalties and fines which can be imposed.

Articles 12 to 15 provide that a "court consisting of" a Judge, nominated by the Provincial Court, and two as-sessors is to be established by the "maritime authority" to try an. alleged fishing offence.

Article 17(b) reads:

"If the accused is convicted and if the fine imposed is not paid within fifteen days counting from the date of the passing of the sentence, the vessel or craft involved in the offence shall be confiscated."

The above provisions are not unusual. In the Republic, save for the constitution of the court, there are similar

statutory provisions relating to illegal fishing in territorial waters (12 nautical miles) and in a prohibited

fishing zone of 200 nautical miles from the coast.

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In the Court a quo and in the heads of argument filed in this Court counsel for the defendant sought to rely on a clause in the policy in terms of which plaintiff had warranted that the trawler would not fish within Mozambican territorial waters. He further submitted, in the alternative, that if it was not shown that the warranty had been breached, it was not disputed that the trawler had fished illegally in the Mozambican exclusive economic zone. In either event, so he urged, the plaintiff's claim had to be dismissed. The warranty, counsel's

submissions

and the Court a quo's ruling thereon are fully set out at p 279 C to p 284 A of the reported judgment. It is not necessary to repeat what is there said. Counsel (he did not draw the heads of argument) who appeared in this Court stated, wisely in my view, that he was not urging the above submissions. He then went on to submit that the appeal should be allowed on either of the following two grounds:

/ A. That

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A. That the plaintiff had not discharged the onus of showing that the events which resulted in the loss of the trawler were covered by one or other of the risks enumerated in the "Risks Clause"; or B. That plaintiff's claim could not succeed because, despite the fact that there was no such requirement in the contract of insurance, no notice of abandonment had been given by plaintiff to defendants.

Ad A above: It must be accepted, having regard to the Mozam-bican legislation, that the trawler was not wrongly inter-cepted and impounded by officials acting on behalf of the Mozambican Government. It was not suggested that this "arrest and detainment" did not fall within the risks covered

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by the Risk Clause. Counsel for defendant urged that the loss of the trawler did not result from that arrest and detainment but followed from the decision of the Mozam-bican tribunal; that the loss was pursuant to "judicial process" and not to the original arrest and the detention of the vessel. He relied on the aforementioned Rule 10: see also pp 274 D to 276 G of the reported judgment. He submitted that the words "ordinary judicial process" should not be limited to civil proceedings, that the statement by Arnould at para. 886 was wrong and that the decision on this point in the Anita case should not be followed. The reasoning in the Anita case appealed to the learned Judge a quo (see p 276 G) and he accordingly rejected this submission. He went on to hold, as I read his judgment at p 276 H, that when a court in criminal pro-ceedings has found that the precedent arrest and deten-tion were justified and then makes, as in this case, a

/ confiscatory...

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confiscatory order, the State "is asserting and enforcing its own authority", in short that the loss results be-cause the court has confirmed the arrest.

The Court a quo (at p 276 I - p 277 A) found as a fact that the tribunal which made the order for confis-cation was not an independent tribunal and not staffed by judicial officers and that "in these circumstances there is probably much to be said for the view that the continued detention and confiscation of the vessel was not the result of ordinary judicial process at all but rather the result of the actions of officials forming part of the Mozambican Government. I have examined the evidence considered by the learned Judge a quo, viz, that of the skipper and of a Mr Dreyer who attended the trial. I, with respect to the learned Judge a quo, am unable to agree that the evidence shows that the tribunal was not constituted in terms of the Mozambican legislation. A fine was

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imposed. Had it been paid the vessel would not have been confiscated.

Counsel recognized that the plaintiff could not have claimed and could not now claim the R107 000 as a partial loss. He did, however, urge that the plaintiff in terms of the policy was permitted to sue and labour; that in the circumstances of this case it was his duty to have done so, ie to have incurred the expense; that had he done so and paid the R167 000 he could, under the sue and

labour clause, have claimed a refund of the said expense. The defendant did not, in the Court a quo, rely on the sue and labour clause. We thus do not have the benefit of the views of the learned Judge on this aspect. We were not referred to any case in our courts in which a sue and labour clause and its effects were considered. Nor do

/ I know

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I know of one. It will be seen from p 277 D that in the Court a quo counsel for the defendant argued that the proximate cause of the loss of the trawler was not the arrest of the vessel; that the loss, ie the confiscation, was due to the failure of the plaintiff to pay the fine. If this argument is correct there is no need to discuss the effect of the sue and labour clause. The learned Judge a quo rejected the argument. At p 277 B he said:

"The confiscation order was one made in respect of the plaintiff's vessel by reason of the failure of the skipper and engineer to pay the fine imposed upon them. But in any event it seems to me that the initial arrest and subsequent restraint and detainment of the vessel was an act of "kings princes and people of what nation condition or quality soever" within the meaning of the risk clause; it was a continuous process commencing with the initial arrest of the vessel and resulting in its ultimate confiscation and loss and it would be artificial to regard it in any other manner. The interposition of the decision of the court between its initial arrest and its subsequent loss does not, in my view, alter the position".

/Counsel

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Counsel for plaintiff accepted that for the plaintiff to recover under the policy the occurrence of the insured peril must be the proximate cause of the loss. He urged that the Court a quo was correct in holding that the interception and arrest of the vessel and its continued detention by the Mozambican Government until its confiscation and sale by that Government was a single continuous process. He then went on to submit that if the plaintiff was not obliged to sue and labour that obligation cannot be reimposed indirectly in the guise of a contention that the failure to pay the fine was the proximate cause of the loss. The submission loses sight of the concession which counsel made at the outset, viz, that in order to succeed plaintiff must show that the loss was proximately caused by the peril insured against. In *Becker, Gray and Company v London Assurance Corporation* [1918] AC 101 at p 11 Lord SUMNER put it as follows:

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"In a contract of indemnity the insurer promises to pay in a certain event and in no other, namely, in case of loss caused in a certain way, and the question is whether the loss was caused in that way, "

No difficulty arises when one cause only has to

be considered. The difficulty arises when there are two or more possible causes. In such a case the proximate or actual or effective cause (it matters not which term is used) must be ascertained, and that is a factual issue. I cannot put it better than is done by Ivamy at p 255, where it is said that an earlier event may be a dominant cause in producing the damage or loss; it may be the *causa sine qua non* but the issue is, is it the *causa causans*? Ivamy at the above page, Arnould at p 773 and Gordon and Getz at p 383] all stress that the rule to be applied is *causa proxima non remota spectatur*.

Counsel for plaintiff does not dispute what is

/ said 24 said by the learned authors. He contends that the loss was the result of the continuous process set out above and that one cannot single out any one event as being the proximate cause - the *causa causans*. He sought to rely on the following statement by BAILLACHE J in *Fooks v Smith* (1924) 2 KB 508 at p 514:

" if in the ordinary course of an

unbroken sequence of events following upon the peril insured against the constructive total loss becomes an actual total loss - as, for instance, if there is a capture followed by confiscation - the underwriter is liable in respect of the total loss. If, however, the ultimate total loss is not the result of a sequence of events following in the ordinary course upon the peril insured against, but is the result of some supervening cause, the underwriter is not liable."

That case does not support his contention. It is in fact

against him. There the Austrian Government, because of the imminence of war, ordered all Austrian ships to put their

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ships in safety. The ship in issue in the above case put into Trieste and did not complete its journey. The goods on board were landed there. That was held to be a constructive loss. No notice of abandonment was given. A year later the Austrian Government requisitioned the goods and sold them. This resulted in a total loss. It was held that the confiscation was not an event which in the ordinary course of events followed the restraints of princes and the underwriter was not liable.

I am, with respect, unable to agree with the finding of the Court a quo that the loss of the trawler was due to a continuous process. The Mozambican tribunal imposed a fine. Had that fine been paid the loss would not have resulted. In my view the confiscation did not result from the arrest of the trawler, it resulted from the failure to pay the fine. That failure was therefore the proximate cause of the confiscation of the trawler. The fact that the plaintiff was unable to pay the fine is

/ irrelevant

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irrelevant. The issue is not his ability to pay the fine. The issue is what caused the confiscation. That, as we have seen, was the fact that the fine was not paid. That was not a peril covered by the Risk Clause. Because of the above finding it is not necessary to discuss the abandonment issue raised in B above.

In the result the appeal must succeed. The order made is:

1. The appeal succeeds with costs;
5. The order of the Court a quo is set aside

and there is substituted an order which

reads: "Plaintiff's claim is dismissed

with costs."

O. GALGUT.

RABIE CJ)JANSEN JA) CONCUR. VAN HEERDEN JA)

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