

SOUTH AFRICA / JUDGMENT

Mccarthy Contractors (Pty) Ltd. v Aegis Insurance Company Ltd. (374/92)

[1993] ZASCA 199 (1 December 1993)

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COURT

Supreme Court of Appeal

BEFORE

Corbett, Vivier, Nienaber, Nicholas, Howie

CASE / FILE NUMBER

374/92

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Case No 374/92. E du Plooy

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

MCCARTHY CONTRACTORS (PTY) LIMITED Appellant

and AEGIS INSURANCE COMPANY

LIMITED Respondent

Coram: CORBETT CJ, VIVIER, NIENABER JJA NICHOLAS et HOWIE AJJA.

Heard: Delivered:

8 November 1993. 1 December 1993.

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JUDGMENT HOWIE AJA: Appellant, a company carrying on business as a building contractor, sued the respondent insurance company in the Witwatersrand Local Division for payment in terms of a professional indemnity insurance policy. After the pleadings were closed the parties requested the Court below, in terms of Rule 33(4), to decide three questions of law separately from the other issues. The trial Judge (Cloete J) assumed an answer favourable to appellant on one question but answered the other, decisive questions in favour of respondent. He consequently dismissed the claim but granted leave to appeal to this Court.

For the purposes of deciding the questions raised the following facts were either agreed or assumed.

In August 1987 appellant contracted to perform certain construction work on an hotel in Somerset West.

This work ("the main contract") included the installation of an air-conditioning system. Later that month appellant engaged R & M Burrows Air-Conditioning

(Proprietary) Limited ("Burrows") as a sub-contractor to

install the system. In November 1987 Burrows and

respondent entered into an insurance agreement pursuant

to which the policy in question was issued.

In accordance with authorisation granted by

respondent to a company referred to in the policy as "the

underwriters", respondent undertook to provide Burrows

with two forms of insurance cover. The material

provisions of the policy in that regard (omitting

presently irrelevant wording) read thus:

"SECTION A - PROFESSIONAL LIABILITY.

The Underwriters agree to indemnify the Insured for the sums which the Insured shall become legally liable to pay arising from any claim or claims first made against them during the Period of Insurance as a direct result of negligence in the performance of the Insured's Professional Activities as specified in the Schedule by or on behalf of the Insured in the course of the Insured's business.

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SECTION B - DEFECT IN CONTRACT WORKS. The Underwriters agree to indemnify the Insured for costs incurred in rectifying defects in the Insured's contract works or in the design plans or specification of such works. PROVIDING

- (a) The Insured can prove to the reasonable satisfaction of the Underwriters that the defect was the direct result of negligence in the performance of the Insured's Professional Activities by or on behalf of the Insured in the course of the Insured's business.
- (b) Indemnity for the rectification of defects shall not extend to include the repair of damage to any other part of the contract works resulting from such defects."

In the schedule to the policy the insurance

period was stated to be from 13 November 1987 to 12 November 1988 and the insured's professional activities

were defined as meaning air-conditioning work undertaken by Burrows in its professional capacity. In addition, provision was made for what was called "the retroactive

date" and this was 1 November 1985. The importance of

that date was that in terms of an exclusionary clause in

the policy the underwriters were not liable in respect of

the performance of any of the insured's professional

activities prior to such date. Consequently, even if the sort of negligence referred to in the policy occurred prior to the insured period it could nonetheless lead to liability on the part of the underwriters if it occurred on or after the retroactive date.

As a result of negligence on its part which occurred between 1 November 1985 and 12 November 1988, Burrows failed to install the system in terms of the specifications of the main contract. Such negligence related to Burrows's defective design and installation of the system and constituted a breach of its professional duties in the conduct of its business activities.

Burrows did not renew the policy on expiry of the insurance period. It was later called on to rectify the defects but failed to do so.

On 21 February 1990 Burrows was provisionally liquidated and the provisional order was made final on 14 March 1990. Subsequently appellant itself incurred the cost of rectifying the defects and thereafter sued

respondent for reimbursement. Appellant relied on the terms of section B of the policy and claimed in Burrows's stead by invoking the substitutionary right of action afforded by s 156 of the Insolvency Act, 24 of 1936.

On the facts outlined, the questions for decision by the Court a quo were these:

1. Whether, on a proper construction of section B of the policy, respondent undertook to indemnify Burrows for the costs which a third party incurred in rectifying defects referred to in that section.
2. If so, whether respondent was obliged to indemnify Burrows if such costs were incurred after termination of the insurance period.
3. Depending on the answers to 1 and 2, whether the indemnity in section B was an indemnity within the meaning of s 156 of the Insolvency Act.

The trial Judge, having assumed an answer

favourable to appellant on question 1, held, as regards

question 2, that the costs referred to in section B had

to be incurred during the period that the policy was in

force. Consequently, because appellant's costs were incurred after that period had elapsed, respondent would not have been liable to Burrows under the policy. That, in turn, meant, as regards question 3, that respondent was not liable to appellant under s 156 of the Insolvency Act.

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