

SOUTH AFRICA / JUDGMENT

Parsons Transport (Pty) Ltd v Global Insurance Ltd (345/2004) [2005] ZASCA 95; 2006 (1) SA 488 (SCA) (29 September 2005)

[2005] ZASCA 95

COURT

Supreme Court of Appeal

BEFORE

MPATI, MTHIYANE, NKABINDE, MAYA, CACHALIA

CASE / FILE NUMBER

345/2004

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REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number: 345/04

In the matter between: PARSONS TRANSPORT (PTY) LTD Appellant and GLOBAL INSURANCE COMPANY LTD Respondent

CORAM : MPATI DP, MTHIYANE JA, NKABINDE, MAYA and CACHALIA AJJA

HEARD: 19 AUGUST 2005 DELIVERED: 29 SEPTEMBER 2005

Summary: Insurance – contract providing for payment of annual premium after period of insurance commenced – effect of failure to pay premium on due date – whether insurer entitled to claim payment of premium.

JUDGMENT

_____ MPATI DP: [1] This appeal concerns the interpretation of certain clauses in a contract of insurance. On 18 December 2002 and pursuant to an oral agreement between the parties, the respondent (plaintiff a quo) issued an insurance policy in favour of the appellant (defendant a quo). In terms of the contract, the respondent undertook to insure and indemnify the appellant against any damage or loss caused to the latter's fleet of vehicles listed in a schedule to the policy, occurring 'during the period of insurance'. Although the 'effective date' is reflected

on the policy as 18 December 2002, the period of insurance is in fact recorded as ‘1 December 2002 to 30 November 2003’. The policy provided for an annual premium of R4 513 998.83, payable by the appellant in full by no later than 15 January 2003.[2] It is common cause that the appellant failed to pay the premium on due date. The respondent accordingly issued summons out of the Johannesburg High Court for payment of the premium and other ancillary relief. At the commencement of the trial the parties requested the court to first decide a preliminary issue in the form of an exception, viz; whether the appellant’s cause of action is sustainable. It was formulated thus:

‘4.3.1 Without admitting that a contract of insurance was concluded between Plaintiff and Defendant whether orally or in writing, that for purposes of argument it be accepted that a contract of insurance was indeed concluded . . . and that the Multimark III policy was to be incorporated as constituting the terms and conditions of the contract of insurance; 4.3.2 Whether on a proper interpretation of the Multimark III policy it, together with the “warranties”, permits the cause of action relied upon by the Plaintiff, ie. Whether the Plaintiff on a proper construction of the agreement concluded between Plaintiff and Defendant can claim payment of the premium; 4.3.3 Due regard being had to the term of insurance, namely from 1 December 2002 until 30 November 2003, whether the Plaintiff can enforce specific performance of the contract of insurance against the Defendant, ie. Whether the contract is capable of performance; . . .’

The court a quo (Bliden J) ordered a separation of issues in terms of Rule 33(4) and allowed the issue of the merits to stand over for adjudication at a later stage. Bliden J decided the issue in favour of the respondent and ordered the appellant to pay the respondent’s costs ‘as on exception’. This appeal is with his leave.

[3] Because paragraph 4.3.2 of the formulation of the issue (above) is inelegantly stated, counsel for the appellant reformulated the issue as follows: ‘whether payment of the annual premium on or before 15 January 2003 did not constitute a condition precedent or a suspensive condition so that non-compliance thereof would render the contract in-operative and of no force and effect and accordingly whether in the light of the foregoing the condition could be enforced by the respondent.’ [4] Counsel argued that the contract was conditional upon a suspensive condition. In other words, its operation was suspended until such time that the premium was paid. For this contention counsel relied on, inter alia, the introductory clause of the policy document and certain ‘warranties’ contained in the schedule thereto (the schedule). The clause, which follows immediately after the heading ‘GENERAL EXCEPTIONS CONDITIONS AND PROVISIONS’, reads as follows: ‘Subject to the terms, exceptions and conditions (precedent or otherwise) and in consideration of, and conditional upon, the prior payment of the premium by or on behalf of the insured and receipt thereof by or on behalf of the company, the company . . . agrees to indemnify or compensate the insured by payment or . . . repair in respect of the defined events occurring during the period of insurance . . .’ The clause forms part of a comprehensive 93 page standard document containing various clauses, some of which were of no application to the parties’ contract. It must be read together with the ‘warranties’. For present purposes I shall

list only the first six of a total of eleven such 'warranties': 'WARRANTIES IT IS STATED THAT THIS POLICY IS SUBJECT TO THE FOLLOWING WARRANTIES

1. THE PREMIUM IS PAYABLE BY AN ANNUAL BASIS FINANCED BY BOE AND PAID TO EMERALD BY 15/01/03.
2. FLEETNET IS TO CONTINUE SUPERVISING THE PARSONS CEHICLES AND DRIVERS INCLUDING ON SITE INSPECTION OF MAJOR ACCIDENTS.
3. PRETORIA LOSS ADJUSTERS TO ASSESS THE CLAIMS CONTACT HEREBY SCHAUER TELEPHONE 012 335 0175 CELL: 082 552 2621.
4. THIS POLICY IS UNDERWRITTEN ON CONDITION THAT THE PREMIUM IS ALWAYS BASED ON A LOSS RATIO OF BETWEEN 55% AND 60% AND WILL BE MONITORED ON A MONTHLY BASIS. SHOULD THE LOSS RATIO EXCEED THE REQUIRED 50% THE ADDITIONAL PREMIUM WILL BE PAID ON A MONTHLY BASIS UNTIL THE NEXT RENEWAL DATE OF THE POLICY.
5. THIS POLICY WILL RUN FOR A 12 MONTH PERIOD FROM 01/02/02 TO 30/11/03 AND IS NON-CANCELABLE BY PARSONS TRANSPORT.

(The first date is incorrectly reflected on the document as 01/02/02. It should be 01/12/02.)

6. NO VEHICLE CAN BE REPAIRED BY PARSONS UNLESS IT HAS BEEN ASSESSED AFTER THE ACCIDENT AND THE COST HAVE BEEN AGREED BY THE ASSESSORS AND EMERALD.

... '[5] It is true, as counsel for the appellant contended, that in contractual settings the phrase 'subject to' usually to creates a suspensive condition (*Badenhorst v Van Rensburg* 1986 (3) SA 769 (A) 777H-778A). But the same phrase, depending on the context, may indicate a resolute condition (*Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) 1182 (A) 1187I-1188B; *SA Eagle Versekeringsmaatskappy Bpk v Steyn* 1991 (4) 841 (A) 848B-D). Counsel submitted, however, that there are no other clauses in the contract relied upon by the respondent in the present matter, which are indicative of resolute conditions. He argued, as has been mentioned above, that the words 'subject to', as used in the policy document create a suspensive condition, resulting in the operation of the obligations flowing from the contract being suspended pending payment of the premium. Counsel's submission thus amounts to this: The respondent's obligation to indemnify the appellant is suspended until the happening of a stated event (payment of the premium); it is subject to a condition precedent. He referred to *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) 632 (A) 644E-F, where Hoexter JA quotes with approval the following passage from *Cheshire and Fifoot The Law of Contract* 5ed 118: 'To lawyers familiar with Roman jurisprudence and trained in modern continental systems the use of the word condition in this context must appear a solecism. By them a condition is sharply distinguished from the actual terms of a contract, and is taken to mean, not part of the obligation itself, but an external fact upon which the existence of the obligation depends. . . . The orthodox application of the word is by no means unknown to English lawyers. An obligation or a right, suspended until the happening of a stated event, is said in the common law to be subject to a

condition precedent.' Counsel therefore argued that whilst a contractual obligation can be enforced, no action lies to compel the performance of a condition, viz payment of the premium. He relied in this regard on *Scott and Another v Poupard and Another* 1971 (2) 373 (A) 378H.[6] The schedule containing the warranties makes the policy 'subject to' those warranties listed in it (see para [4] above).

Counsel for the appellant, relying on warranty 1 (providing for the date of payment of the premium) and cases such as *Norwich Union Fire Insurance Ltd v SA Toilet Requisite Co Ltd* 1924 AD 212 and *Kliptown Clothing Industry (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (AD) where it was said that warranties are to be construed favourably as regards the insured, submitted that a breach of a warranty exonerates the insurer and that in the present matter the operation of the whole policy was subject to payment of the premium. In *Sacks v Western Assurance Co* 1907 TS 257 Wessels J said (at 259): '[T]here are certain conditions inserted in policies of assurance which must be strictly adhered to, and if there is a failure on the part of the insured to adhere to these conditions the insurer can at his option refuse to carry out his part of the contract. If we restrict the meaning of the word warranty to such conditions as will render the contract void, if not adhered to, then there is some convenience in the use of the term. When, therefore, I speak of a warranty in this judgment, I mean a condition the breach of which on the part of the insured will enable the insurer to treat the policy as void. It is therefore the duty of the Court to inquire whether any particular condition inserted in a policy was intended by the parties to be such a material condition that the insurer is entitled to insist on its performance before he can be called upon to pay the amount of the policy.' See also *Oblowitz Bros v Norwich Union Fire Insurance Society Ltd*; *Oblowitz Bros v Guardian Assurance Co Ltd* 1924 CPD 349 at 351-2. As to the term 'void' used in the quotation, I agree with the observation in *Gordon & Getz The South African Law of Insurance* 4 ed by DM Davis, at 215, where the learned author says that the statement by Innes CJ in *Lewis Ltd v Norwich Union Fire Insurance Co* 1916 AD 509 to the effect that a warranty 'is a statement or stipulation upon the exact truth of which, or the exact performance of which . . . the validity of a contract depends', is somewhat misleading. I agree with the learned author that a breach of a warranty by the insured provides the insurer with a defence to any claim brought subject to a breach. As the learned author states, the policy is not automatically rendered void by the breach, but the breach entitles the insurer to elect to exercise his right to avoid the policy and repudiate liability. Of course a warranty can only be breached if the contract of which it forms part is valid. [7] In any event, Warranty 5 provides that the policy 'will run for 12 months from 1/12/02 (corrected date) to 30/11/03'. This warranty introduces nothing new, since the period of insurance is stipulated on the first page of the schedule, which goes further to state: 'both dates inclusive'. Warranty 5 proceeds to assert that the policy 'is non-cancellable' by the appellant. Warranty 1 stipulates that the premium is payable on an annual basis and was to be paid by 15 January 2003. In my view, both 'warranties' are not warranties in the sense described in *Sacks v Western Insurance*, supra, and *Lewis Ltd v Norwich Union*, supra. They are material terms of the contract. They do not become warranties merely because they are referred to as warranties in the schedule. Cf *Resisto Dairy v Auto Protection Insurance Co*, supra, where it was said (at 644F) that 'the terms of the contract cannot be changed into suspensive

conditions merely by calling them conditions precedent'.[8] But even accepting, as counsel for the appellant suggested, that an undertaking to pay the premium on a particular date after the commencement of the contract of insurance (warranty 1), or prior thereto, is a 'promissory warranty', that does not detract from the fact that the appellant enjoyed insurance cover from 1 December 2002. Counsel accepted in argument that there was insurance cover as from that date. (See also *Lake and others, NNO v Reinsurance Corporation Ltd and others* 1967

- (3) 124 (W) 127H, where Galgut J reasoned that in insurance contracts, in the absence of a provision that the policy is not to attach until payment of the premium, such a provision will not be implied.) And failure to pay the premium on due date does not suddenly wipe out the insurance cover that was enjoyed from 1 December 2002 and continued to be enjoyed for the period between then and the due date of payment (cf *SA Eagle Versekeringsmaatskappy Bpk v Steyn*, supra, at 848I-849B). In my view, counsel's reliance on the 'warranties' in support of the contention that the obligation flowing from the contract was suspended pending payment of the premium is misplaced.[9] This conclusion really disposes of all the arguments of counsel for the appellant. But for the sake of completeness I return to the phrase 'subject to' as used in the policy document. Counsel sought further support for his submission that the introductory clause of the policy document constitutes a suspensive condition or a condition precedent from clause 3B, which reads: 'Continuation of Cover (where premium is payable by bank debit order or by transmission account) The premium is due in advance and, if it is not received by the company 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, the first day of (a) each third (b) each sixth or (c) each twelfth calendar month following inception where premium is payable quarterly, half-yearly or annually.' Payment not having been received on or before 15 January 2003, the contract of insurance would have been deemed to have been cancelled at midnight on 31 December 2002, counsel contended.[10] I fail to appreciate how clause 3B is of assistance to the appellant's case. The clause speaks of a premium that 'is due in advance'. Warranty 1 stipulates clearly that the premium in respect of the policy was to be paid on 15 January 2003, more than a month after the commencement of the period of insurance. Furthermore, the premium was not payable by bank debit or by transmission account. It was to be 'financed by BOE and paid to Emerald'. In my view, clause 3B is of no application here.[11] Reference was also made to clause G of the policy document. It provides as follows: 'Premium payment Premium is payable on or before the inception date or renewal date as the case may be. The company shall not be obliged to accept premium tendered to it after inception date or renewal date as the case may be but may do so upon such terms as it at its sole discretion may determine.' Again the clause speaks of the premium being payable on or before the inception date. Warranty 1 departs from that stipulation and sets the due date as 15 January 2003 (of which there is no dispute), not the inception date, which was 1 December 2002. But even if the clause were applicable, the respondent would not have been

exonerated were the appellant to claim compensation for damage or loss to its fleet of vehicles during, for example, December 2002, precisely for the reason that the appellant enjoyed insurance cover under the policy.

[12] I accordingly agree with counsel for the respondent that the provisions of warranty 5 (stipulating the period of insurance), read together with warranty 1 (providing for due date of payment of the premium), are a clear indication that payment of the premium was never a prerequisite for the coming into existence of a valid and binding contract of insurance. It follows that on a proper reading of the introductory paragraph, together with the warranties, the words 'subject to' did not create a suspensive condition. What the paragraph did, regard being had particularly to the words 'in consideration of, and conditional upon, the prior payment of the premium', was merely to recite the corresponding obligation of the appellant, which the respondent might have been entitled to insist on, ie that the premium be paid, before compensating the appellant in the event of a claim for an occurrence before the premium was due. The words in no way suspended the operation of the contract (*British Oak Insurance Company Ltd v Atmore* 1939 TPD 9 at 15).

[13] Finally, counsel for the appellant submitted that no distinction can be drawn between the present matter and the decision in *National Employers' Mutual General Insurance Association Ltd v Myerson* 1938 TPD

11. I do not intend to set out the facts of that case. It will suffice to quote the following (appearing at p 15 of the judgment):

'It is not contended on the appellant's behalf that these documents constitute a contract of insurance, but merely a contract to insure, and if this be correct the so-called premium is the consideration (a) for the promise to insure if the event, namely the payment of the premium, takes place and (b) for the subsequent insurance.'

The proposal in that case expressly provided that 'liability of the Association does not commence till this proposal is accepted and the premium paid'. Clearly in *Myerson's* case the court was not dealing with a contract of insurance that had come into existence as in the present matter.

[14] The issue before this court is not whether or not the insurance contract was effective for the entire period of insurance as reflected in the policy document and thus whether or not the respondent is entitled to payment of the whole premium. The issue is merely whether the particulars of claim disclose a cause of action. Having found that the operation of the contract of insurance was not suspended, I conclude that the particulars of claim do indeed disclose a cause of action.

[15] The appeal is dismissed with costs.

L MPATI DP CONCUR:

MTHIYANE JA

NKABINDE AJA

MAYA AJA

CACHALIA AJA

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