

SOUTH AFRICA / JUDGMENT

Supermarket Leaseback (Elsburg) (Pty) Ltd. v Santam Insurance (329/89) [1990] ZASCA 131; 1991 (1) SA 410 (AD); (13 November 1990)

[1990] ZASCA 131

COURT

Supreme Court of Appeal

BEFORE

Goldstone, Hoexter, E.M Grosskopf, Milne, Steyn

CASE / FILE NUMBER

329/89

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION) CASE NO: In the appeal of: SUPERMARKET LEASEBACK (ELSBURG) (PTY) LTD APPELLANT

and

SANTAM INSURANCE RESPONDENT

Coram: HOEXTER, E.M GROSSKOPF, MILNE, STEYN et GOLDSTONE JJA.

Date heard: Tuesday 13 November 1990

Transcript of extempore judgment delivered by Goldstone JA

and concurred in by Hoexter, E. M. Grosskopf, Milne and Steyn

JJA on Tuesday 13 November 1990.

2 JUDGMENT

GOLDSTONE JA:

The appellant is Supermarket Leaseback (Elsburg) (Pty) Ltd ("the Landlord"). At all material times it was the owner of erven 45, 46, and 47 in the township of Elsburg, Germiston ("the premises"). The appellant let the premises in terms of a written deed of lease to Hoses and Hoses (Pty) Ltd. ("the tenant"). On 11 October 1983 a fire broke out at the premises causing extensive damage thereto. The fair and reasonable cost of reinstating the premises amounted to R 40788,00.

In terms of clause 1.1 of schedule "A" to the lease, the tenant undertook:

3 "in favour of the Landlord to insure the premises against fire... Any capital sum receivable by the Tenant in respect of a claim on the said insurance policies shall be payable to the Landlord by the Tenant immediately on demand."

Acting pursuant to that provision of the lease, the tenant insured the premises with the respondent, Santam Insurance Ltd ("the Insurer").

In terms of the insurance policy issued by the insurer it undertook to indemnify or compensate the tenant for damage caused to the premises, inter alia, by fire. The insurer admits that pursuant to the terms of the policy, it became liable to pay the tenant the aforesaid amount of R 40788,00.

On 17 April 1984, the tenant was wound up. In reliance⁴ upon the provisions of section 156 of the Insolvency Act, 24 of 1936 ("the Act") the landlord claimed payment from the insurer of the amount of R 40788,00. In that section it is provided as follows:

"Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured."

By agreement no evidence was led by either party at the trial.⁵ The action proceeded on the basis of the admissions made in the plea and at the pre-trial conference.

The claim was dismissed with costs by Coetzee J sitting in the Witwatersrand Local Division. With leave of the Court a quo the landlord now comes on appeal to this Court.

That the provisions of section 156 apply in the winding up of a company unable to pay its debts was not in issue. Indeed it follows from the provisions of section 339 of the Companies Act 61 of 1973: see *Woodley v Guardian Assurance Co. of S.A Ltd* 1976 (1) SA 758 (W). However, Coetzee J non-suited the landlord because he held that it had not been established by the landlord that there had been compliance with the obligations resting upon it in terms of General Condition A.3(a) of the policy. It is unnecessary to set out those provisions. Suffice it to say that it was there required⁶ of the insured that it should perform a number of acts and comply with a number of formalities. It is unnecessary to consider the correctness or otherwise of this finding by the trial Court because in my opinion the short answer to the claim of the landlord is that in this case the provisions of section 156 of the Act are not of application. They apply only to the situation where an insurer indemnifies an insured "in respect of any liability incurred by the insured towards a third party". The policy of insurance issued by the insurer in the present case was in favour of the tenant and in terms thereof the insurer undertook to indemnify or compensate the tenant for damage caused to the premises. It contains no obligation to indemnify or compensate the tenant in respect of any liability incurred by the tenant towards the landlord. Indeed in the policy one finds no reference to or mention of the landlord at all.⁷ It follows that the appeal cannot succeed. The following order is made:

The appeal is dismissed with costs.

GOLDSTONE JA

HOEXTER)

E.M GROSSKOPF)CONCUR

MILNE)

STEYN)

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