THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 96/2003

REPORTABLE

METCASH TRADING LIMITED **APPELLANT**

and

CREDIT GUARANTEE INSURANCE
CORPORATION OF AFRICA LIMITED **RESPONDENT**

Before: Howie P, Brand, Lewis JJA, Jones and Southwood AJJA

Heard: 9 March 2004

Delivered: 25 March 2004

Interpretation of insurance contract. Condition excluding liability of insurer not void for vagueness. 'Claim' means demand for indemnity in a particular amount. Failure to lodge claim timeously results in insurer being free of liability.

JUDGMENT

SOUTHWOOD AJA

[1] The issue in this appeal is whether the appellant (the plaintiff in the court *a quo*) failed to lodge its claim in terms of the investment insurance policy ('the policy') issued by the respondent (the defendant in the court *a quo*) timeously, and accordingly cannot hold the respondent liable under the policy.

[2] During 1991 the appellant was conducting business in Zaïre by means of an undertaking called Metro Zaïre SPRL. The appellant held an interest in Metro Zaïre and had granted medium-term and long-terms loans to the undertaking to enable it to carry on business. On 1 February 1991 the appellant arranged for insurance to cover this interest and the loans ('the insured investment'). The policy was issued on 21 February 1992 and was in force at all material times.

[3] In the policy the respondent agreed that in the event of the appellant sustaining monetary loss in respect of the insured investment due to a 'cause of loss', the respondent would indemnify the appellant in the manner stipulated in the policy. Causes of loss were defined in the policy to include expropriation, war and transfer restrictions.

[4] Although the parties called witnesses it is not necessary to consider their evidence. The facts are well documented in the correspondence which passed between the parties and their agents and are not in dispute. The only contentious issue in the court a quo was whether in August or

September 1992 the appellant delivered to the respondent a balance sheet containing details of the appellant's claim. In the court a quo the appellant's counsel conceded that this had not been proved and in this court he repeated the concession.

[5] On 21 September 1991 the store where Metro Zaïre conducted its business was burned down and looted in circumstances falling within the policy definition of war. On 23 September 1991 the appellant's agent, Tradegro Shipping Ltd, faxed a letter to the respondent informing the respondent that the Metro Zaïre store had been severely damaged and looted and recording 'our official notification of a pending claim, which will be raised as soon as details are received'.

[6] Thereafter a number of meetings were held between representatives of the parties and their agents and there was an extensive exchange of correspondence regarding the formulation and lodging of the claim. In this correspondence the respondent repeatedly referred the appellant to the necessity of lodging a claim timeously and the appellant repeatedly advised the respondent that the appellant was in the process of formulating its claim. Eventually on 1 October 1993 the appellant's agent, Dewar Rand Marine Services (Pty) Ltd ('Dewar Rand'), delivered to the respondent a letter dated 28 September 1993 in which the appellant claimed R72 000 for the loss of 'share capital' (in terms of definition 1.1.2 of the policy the

appellant's shareholding in Metro Zaïre) and R3 467 492 25 for the long-term loan. The letter also informed the respondent that the appellant was still waiting for information relating to its medium-term loan and would finalise that part of the claim as soon as that information had been received. The respondent took receipt of the letter and again there were meetings between the representatives of the parties at which various documents were handed to the respondent's representatives. There was also a further exchange of correspondence. On 9 February 1994, at one of the meetings held for the purpose of delivering documents to the respondent, the respondent's representatives handed to the appellant's representatives a letter in which the respondent pointed out that taking delivery of the documents would not constitute acceptance of the appellant's claim by the respondent, and the appellant was referred to Operating Condition 12.2 and definition 1.1.2 of the policy. Finally, on 3 October 1994 the respondent addressed a letter to the appellant informing the appellant that the respondent did not accept liability for the claim 'due to prescription' and referring the appellant to Operating Condition 12.2 read with definition 1.1.2.

[7] In March 1995 the appellant, relying on the policy, issued summons against the respondent in the High Court. The appellant claimed a declarator that the respondent was liable to indemnify the appellant in respect of the appellant's losses and payment of the sum of R3 483 701 15

together with ancillary relief. As foreshadowed in its letter dated 3 October 1994 the respondent pleaded that it was not liable for the appellant's claim because it had not been lodged timeously as required by Operating Condition 12.2 read with Operating Condition 8 of the policy. In its replication the appellant averred that Operating Condition 12.2 was void for vagueness and that in any event the appellant had lodged its claim timeously. At the commencement of the trial the court *a quo* made an order in terms of rule 33 (4) that these issues (and others not presently relevant) be decided first. The court *a quo* rejected the appellant's contentions, upheld the defence raised in the respondent's plea and dismissed the appellant's claims with costs. The appellant appeals against that judgment with the leave of the court *a quo*.

[8] Operating Conditions 8 and 12 read as follows –

'8. LODGING OF CLAIMS

Upon the occurrence of a Loss the Insured shall be entitled to make a claim under the Policy in respect of the Insured Investment and the Corporation shall pay to the Insured the Insured Percentage of the Amount of Loss within 30 days after the Insured has accepted the basis of settlement proposed by the Corporation. Provided, however, that the Corporation must first have received payment of the amount of the indemnity from the Government of the Republic of South Africa in terms of the Reinsurance Agreement entered into between the Corporation and the Minister of Economic Affairs in pursuance of Section 2 of the Export Credit Reinsurance Act no 78 of 1957 (as amended). Such claim shall be considered for settlement:

8.1 Where the Loss is due to expropriation or war 12 months after the occurrence of a Cause of Loss;

8.2 Where the Loss is due to transfer restrictions immediately after the occurrence of the Cause of Loss.

12. <u>REPUDIATION OF CLAIMS</u>

12.1 The Insured shall be advised by registered letter of any claim lodged by the Insured for which the Corporation does not admit liability. Should the Insured fail to institute proceedings disputing the Corporation's repudiation of such claim as aforementioned in a South African Court of Law within a period of six months after the date of the Corporation's relevant advice, the Insured's rights to any further action in connection with the claim will be forfeited and the Corporation will be absolved from all liability in respect of the claim repudiated by it.

12.2 Nor shall the Corporation be liable for any claim which is not lodged within a period of one year after the dates specified in Operating Condition 8.'

[9] On appeal the appellant's counsel contended, first, that Operating Condition 12.2 is meaningless as 'the dates specified in Operating Condition 8' cannot be related to identifiable dates in Operating Condition 8 and accordingly that Operating Condition 12.2 is void for vagueness; and secondly, that in any event the appellant had lodged a claim timeously within the proper meaning of clause 12.2. Both contentions necessitate the interpretation of the relevant Operating Conditions.

[10] 'According to our law … a policy of insurance must be construed like any other written contract so as to give effect to the intention of the parties

as expressed in the terms of the policy, considered as a whole. The terms are to be understood in their plain, ordinary and popular sense unless it is evident from the context that the parties intended them to have a different meaning, or unless they have by known usage of trade, or the like, acquired a peculiar sense distinct from their popular meaning' (*Blackshaws (Pty) Ltd v Constantia Insurance Co Ltd* 1983 (1) SA 120 (A) at 126H-127A). If the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the court may modify the words just so much as to avoid that absurdity or inconsistency but no more (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464-466; *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38B-E). It must also be borne in mind that –

'Very few words … bear a single meaning, and the 'ordinary' meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation and the nature of the transaction as it appears from the entire contract' (*Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646B). It is essential to have regard to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract (*Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768A-B; *Aktiebolaget Hässle and Another v Triomed (Pty)*

Ltd 2003 (1) SA 155 (SCA) para 1).

[11] In support of the appellant's first contention the appellant's counsel argued that Operating Condition 12.2 determines the period within which a claim must be lodged with reference to Operating Condition 8, but that the periods prescribed in clauses 8.1 and 8.2 are unrelated to the time within which the insured is required to make a claim under the policy. Operating Condition 8 contemplates a claim being made well before the dates specified in clause 8.1 and 8.2 in order for it to be considered and thereafter settled. But Operating Condition 12.2 contemplates that the period for the lodging of a claim is after the date stipulated in Operating Condition 8 for the consideration of the claim. According to the argument this results in an absurdity. The claim cannot be lodged after the time when it has to be considered. This argument presupposes a literal meaning being given to clauses 8.1 and 8.2: namely, that a claim will be considered once only, on the date specified in the clauses, irrespective of whether the insured has lodged a claim or not. Clearly that would be absurd.

[12] The purposes of Operating Condition 8 and Operating Conditions 12.1 and 12.2 are clearly different. Operating Condition 8 determines a timetable for the lodging of claims ('upon the occurrence of a loss'), payment to the insured of the insured amount ('within 30 days after the insured has accepted the basis of the settlement proposed by the

corporation provided the corporation has received payment of that amount from the Government of the Republic of South Africa') and when a claim shall be considered for settlement (where the loss is due to expropriation or war, 12 months after the occurrence of a cause of loss; where the loss is due to transfer restrictions, immediately after the occurrence of the cause of loss). Operating Condition 12 sets time limits for the institution for proceedings and the lodging of a claim failing which the corporation shall not be liable for such claim. Operating Condition 12.1 stipulates that the insured must institute proceedings within six months of the date of being notified that the insurer repudiates the claim. Operating Condition 12.2 stipulates that a claim must be lodged within one year after the dates specified in Operating Condition 8. It is clear that Operating Condition 8 specifies two dates by reference to two events – the dates of consideration of claims under the policy. In terms of clause 8.1, where the loss is due to expropriation or war, the date is 12 months after the occurrence of the cause of loss and in terms of clause 8.2, where the loss is due to transfer restrictions, the date of the occurrence of the cause of loss. There is therefore no difficulty about determining the dates specified in Operating Condition 8.

[13] When the two Operating Conditions are read together it is also clear that the relevant dates determined in clauses 8.1 and 8.2 are the dates *from which* a claim will be considered for settlement by the respondent.

Operating Condition 8 gives the insured the right to make or lodge a claim upon the occurrence of a cause of loss (ie immediately) but the insured is not obliged to do so. Operating Condition 12.2 gives the insured a period of 12 months from when the insurer becomes obliged to consider a claim, to lodge a claim. Where the loss is due to expropriation or war this period of 12 months runs from a date 12 months after the occurrence of the cause of loss (ie the insured has a period of 24 months within which to lodge a claim). Where the loss is due to transfer restrictions, this period of 12 months runs from the date of the occurrence of the cause of loss (ie the insured has a period of 12 months within which to lodge a claim). Clearly the insurer can consider a claim only after it has been lodged. A claim falling under clause 8.1 may be lodged at any time within 12 months after the occurrence causing loss but the insurer will not be obliged to consider the claim until 12 months after the date of the occurrence causing loss. If such a claim is lodged after 12 months have elapsed the insurer will be obliged to consider the claim immediately. A claim falling under clause 8.2 must be considered as soon as it is lodged. This interpretation makes the policy workable in practice and avoids the absurd result contended for by the appellant's counsel. The appellant's first contention therefore cannot be upheld.

[14] With regard to the appellant's second contention, that the appellant lodged a claim timeously, the appellant's counsel argued that to qualify as

a claim in terms of the policy a demand did not need to require payment of any particular amount. All that is required is that there be a communication of the insured's assertion of its right to indemnity under the policy. That, according to the argument, took place on 23 September 1991 when the appellant's agent notified the respondent of the occurrence of a cause of loss and informed the respondent that a claim would be made in terms of the policy.

[15] It is clear, as was conceded by the appellant's counsel, that the word 'claim' has the same meaning in Operating Conditions 8 and 12.1 and 12.2. Appellant's counsel contended, with reference to the dictionary meanings of the words 'lodge' and 'claim', that there is nothing in the grammatical meaning of the words, nor at common law, nor in the remainder of the contract that warrants that the ordinary meaning of Operating Condition 12.2 be extended to require any more than notification by the insured to the insurer that a claim was being made and that all that was required was that the insurer be notified that the appellant was asserting a claim for indemnification under the policy. Appellant's counsel also contended that although the phrase 'any claim' had been subject to judicial interpretation the cases deal with distinguishable provisions.

[16] I do not agree with these contentions. While it is true that the provisions considered in the cases were not identical to the present

Operating Condition 12.1, they were similarly worded and had the same effect. In each case the court had to decide whether a claim had been lodged in order to decide whether the plaintiff had instituted action timeously after the claim had been repudiated. In a number of cases (all referred to by the appellant's counsel) it was decided that a claim is a demand for an indemnity in a particular amount (*Le Voy v New Zealand Insurance Co Ltd* 1930 CPD 427 at 431-2; *Sinovitch v General Accident, Fire and Life Assurance Corporation Ltd* 1946 TPD 692 at 700-701; *Boshoff v South British Insurance Co Ltd* 1951 (3) SA 481 (T) at 487B-G; *Van der Westhuizen v 'De Zeven Provincien' Assuransie Maatskappy Bpk* 1959 (3) SA 690 (C) at 696A-698C). These decisions were considered by this court in *Pereira v Marine and Trade Insurance Co Ltd* 1975 (4) SA 745 (A) at 757F-758E and the court agreed that the words 'any claim' referred to a claim for indemnification by the insured in terms of the policy, and that such claim for indemnification must be for a fixed or specific amount. This court also expressed its broad agreement with the relevant reasons in the judgments in the *Boshoff* and *Van der Westhuizen* cases. In my view the reasoning is equally applicable to Operating Condition 12.1 and the same meaning must be given to the word 'claim' in Operating Conditions 12.2 and 8.

[17] In the present case the appellant failed to lodge with the respondent a demand for an indemnity in a particular amount before 21 September 1993.

The first demand for an indemnity in a particular amount was contained in the letter addressed to the respondent by Dewar Rand on 28 September 1993 and was received by the respondent on 1 October 1993. Accordingly, the appellant's second contention cannot be upheld.

[18] In the result, the appeal must be dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

B R SOUTHWOOD
ACTING JUDGE OF APPEAL

CONCUR:

HOWIE P
BRAND JA
LEWIS JA
JONES AJA