



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 300/08

ST PAUL INSURANCE CO SA LIMITED

Appellant

and

EAGLE INK SYSTEM (CAPE) (PTY) LTD

Respondent

Neutral citation: St Paul Insurance Co SA Ltd v Eagle Ink System (Pty) Ltd
(300/08) [2009] ZASCA 53 (27 May 2009).

Coram: FARLAM, CLOETE, LEWIS, MHLANTLA JJA *et* TSHIQI AJA

Heard: 11 MAY 2009

Delivered: 27 MAY 2009

Summary: Continuation of a trial when the judge has died; interpretation of 'contaminated' in a public liability insurance policy; effect of exclusion in extension clause.

ORDER

On appeal from: the Cape High Court (Griesel J sitting as court of first instance).

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the Cape High Court is set aside and the following order substituted:

'The plaintiff's claim is dismissed with costs, including the costs of the proceedings before Knoll J and the costs of two counsel at both stages of the proceedings.'

JUDGMENT

CLOETE JA (FARLAM, LEWIS, MHLANTLA JJA *et* TSHIQI AJA concurring):

[1] The appellant, St Paul Insurance Company SA Ltd, is, as its name suggests, an insurance company and I shall refer to it as such. The respondent, Eagle Ink System (Cape) (Pty) Ltd, to which I shall refer as Eagle Ink, is a manufacturer, importer and distributor of printing inks and related products. The insurance company issued a policy of insurance to Eagle Ink which, as the plaintiff, sued the insurance company in the Cape High Court for indemnity under the policy. Knoll J presided at the trial but died before she could deliver judgment. By agreement between the parties a transcript of the evidence together with the documentary exhibits were placed before Griesel J who heard further argument. There is precedent for such a procedure, and it is eminently sensible: *Mhlanga v Mtenengari* 1993 (4) SA 119 (ZS). Griesel J found in favour of Eagle Ink but subsequently granted leave to appeal to this court.

[2] I shall first deal briefly with the facts and thereafter with the relevant terms of the insurance policy. One of Eagle Ink's customers to whom it supplied ink was Nampak Products Ltd, which trades as Nampak Polyfoil

('Polyfoil'). Polyfoil concluded a contract with an American entity known as Bunzl Distribution Southeast Inc ('Bunzl') for the supply of several million plastic shopping bags destined for the supermarket chain WalMart in the USA. It was a term of the contract between Bunzl and WalMart that the plastic bags would be free of heavy metal, including lead. This requirement was communicated to Polyfoil and at the latter's request, Eagle Ink gave a written assurance (which Polyfoil passed on to Bunzl) that 'all inks supplied for export work are heavy metal free'.

[3] Due to the negligence of Mr Matthews, an employee of Eagle Ink who worked at the Polyfoil plant, some of the ink supplied to Polyfoil contained lead. What Matthews did was to take ink containing lead that had been recovered from Polyfoil's printing presses after jobs for customers other than Bunzl had been completed, and mix it with the lead free ink delivered to Polyfoil's premises by Eagle Ink for the Bunzl contract. Matthews was actuated by the best of intentions — he wanted to save Polyfoil money. The consequence of his actions was that Bunzl rejected the bags manufactured by Polyfoil because of the lead in the ink and claimed from the latter the return of the purchase price it had paid, together with damages. Polyfoil in turn claimed from Eagle Ink; and Eagle Ink claimed indemnity, up to the limit of the policy, from the insurance company, which repudiated the claim.

[4] The insurance policy was a public liability (claims made) policy. It comprised, in addition to a schedule and the definitions section, a section which contained the operative clause; a section which contained exclusions and another which contained conditions; and various extensions, including a products liability extension. The operative clause read:

'The Company will indemnify the Insured against their legal liability to pay compensation for claims first made against the Insured during the Period of Insurance in respect of Injury and/or Damage arising out of the performance of the Business within the Territorial Limits on or after the Retroactive Date stated in the Schedule.'

'Damage' was defined as 'loss of or damage to tangible property' and the 'Business', according to the business description in the schedule, was that of

'Manufacturers, Importers & Distributors of Printing Inks and Related Products'. Exclusions 7.5 and 10 read:

'The Company will not indemnify the Insured in respect of

...

7. any liability caused by or arising from claims for

...

7.5 products sold or supplied by the Insured

...

10. claims arising out of

10.1 liability directly or indirectly caused by seepage pollution or contamination provided that this exclusion shall not apply where such seepage pollution or contamination is caused by a sudden unintended and unexpected event

10.2 the cost of removing nullifying or cleaning up seeping polluting or contaminating substances unless the seepage pollution or contamination is caused by a sudden unintended and unexpected event'.

Product liability was therefore excluded by clause 7.5 of the exclusions in absolute terms. But the products liability extension formed part of the policy. It read:

'The following Extension is deemed to apply only if so stated in the Schedule and unless specifically varied herein shall be subject to the terms exclusions and conditions of this policy. . .

PRODUCTS LIABILITY EXTENSION

Notwithstanding anything to the contrary contained in exclusion 7.5 the Company will indemnify the Insured in terms of this Policy anywhere in the Territorial Limits as stated in the schedule and caused by products sold or supplied by the Insured

...

Exclusions

This extension does not cover liability:

...

iii) arising from defective or faulty design formula plan or specification (unless due to negligence in following same) treatment or advice by or on behalf of the Insured

iv) arising from inefficacy or failure to perform or conform to specification (unless due to negligence in following same) or fulfil its intended function as specified or guaranteed but this exclusion shall not apply to consequent injury or damage

...!

[5] One of the defences raised by the insurance company was based on exclusion 10.1, the insurance company contending that Polyfoil's claim against Eagle Ink was one 'arising out of liability directly or indirectly caused by . . . contamination' of the ink with lead. *The Oxford English Dictionary* (2 ed) gives 'contaminate' the meaning 'To render impure by . . . mixture; to . . . pollute' and 'pollute', the meaning 'To make physically impure . . . To contaminate (the environment, atmosphere etc) with harmful or objectionable substances'. On these definitions, the ink supplied by Eagle Ink to Polyfoil could undoubtedly be said to have been 'contaminated' with lead. Indeed, Eagle Ink could hardly contend the contrary as the claim form prepared by Mr Groenewald, its group financial director, said that the loss to Eagle Ink had been caused by 'mixing of contaminated ink with heavy metal free ink for export work'; and Eagle Ink's pleadings repeatedly used the word 'contaminate' and 'contamination' to describe the presence of lead.

[6] Eagle Ink's counsel nevertheless argued, and the court a quo upheld the argument, that what exclusion 10.1 envisaged was contamination of something else by the ink, not contamination of the ink itself. The court a quo reached this conclusion by invoking the *eiusdem generis* rule in regard to the phrase 'seepage pollution and contamination' in exclusion 10.1 and also by having regard to exclusion 10.2 which, Eagle Ink's counsel argued, meant that 'a "mess" of some sort is envisaged, not a mere incorrect mixing of a formula'. The court a quo accordingly concluded that the parties did not intend the word 'contamination' to be understood in the sense set out in the previous paragraph above.

[7] I am unable to support this conclusion. Although 'pollution' and 'contamination' have similar meanings, 'seepage' does not. 'Seepage' connotes a gradual leak. It may or may not produce pollution or contamination. None of the three words necessarily denotes a mess. Nor does exclusion 10.2: that clause excludes inter alia 'claims arising out of the cost of removing . . . contaminating substances', which would cover the cost of removing the lead from the ink, and the ink from Polyfoil's presses, both of

which could result in delay and a claim for damages. In my view there is no warrant for confining exclusion 10.1 to claims arising out of contamination by, and excluding contamination to, inks supplied to Polyfoil by Eagle Ink. The exclusion covers both.

[8] The court a quo, again following the argument advanced by counsel for Eagle Ink, found that exclusion 10.1 did not apply for another reason. The court had regard in particular to exclusions (iii) and (iv) of the products liability extension and reasoned as follows:

'On the evidence as a whole, there can be little doubt that the mixing of pigments containing heavy metals with the plaintiff's carbon-based black ink was contrary to the specification of heavy metal-free inks for the export market, and that the mixing was an act of negligence on the part of Matthews in following such specification. Similarly, the inefficacy or failure to conform to specification was due to the same negligence. Finally, the damage did not cause the plaintiff damage to its property or plant itself, but was clearly consequential damage as envisaged in the expression "consequent injury or damage" in exclusion (iv).

The express inclusion within the products liability extension of liability arising from defective specification or a failure to conform to specification where due to negligence can only be taken to be a specific variation of other general terms and exclusions where such might otherwise have been applicable, such as clause 10.1 of the general exclusions.'

[9] Again, I am unable to support this conclusion. Ink which does not conform to specification is not necessarily contaminated. Exclusions (iii) and (iv) cover the former possibility and exclusion 10.1, the latter. Effect must be given to all provisions of the policy particularly as the introductory words of the products liability extension specifically provide that: 'The following Extension . . . unless specifically varied herein shall be subject to the . . . exclusions . . . of this policy'. Exclusion 10.1 is not 'specifically varied' by exclusions (iii) or (iv) — they deal with different situations; and the fact that Eagle Ink escapes the provisions of exclusions (iii) and (iv) does not mean that exclusion 10.1 is rendered inapplicable.

[10] I therefore conclude that the court a quo should have dismissed Eagle Ink's claim as it arose out of liability directly or indirectly caused by contamination as envisaged in exclusion 10.1 of the policy.

[11] The following order is made:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the Cape High Court is set aside and the following order substituted:

'The plaintiff's claim is dismissed with costs, including the costs of the proceedings before Knoll J and the costs of two counsel at both stages of the proceedings.'

T D CLOETE
JUDGE OF APPEAL

Appearances:

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