THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

NOT REPORTABLE
Case No: 383/2013

In the matter between:

VAN DE WETERING ENGINEERING (PTY) LTD **APPELLANT**

and

REGENT INSURANCE COMPANY **RESPONDENT**

Neutral citation: *Van de Wetering Engineering v Regent Insurance* (383/2013) [2014] ZASCA 18 (26 March 2014)

Coram: Mthiyane DP, Leach, Petse JJA, Van Zyl and Legodi AJJA

Heard: **25 February 2014**
Delivered: **26 March 2014**

Summary: Claim for indemnity in terms of a Prize Indemnity Insurance Policy ─ repudiated by insurer ─ Claim by insured company dismissed by high court ─ risk insured against found not to have occurred ─ appeal dismissed.

ORDER

On appeal from: North Gauteng High Court, Pretoria (AA Louw J sitting as court of first instance):

1. The appeal is dismissed with costs.

2. The order of the court a quo in respect of the reserved costs on 28 July 2011 is set aside.

3. The parties are granted leave to approach the court below, if so advised, to present argument and for a ruling on the question of costs referred to in paragraph 2 of this order.

JUDGMENT

Mthiyane DP (Leach, Petse JJA, Van Zyl and Legodi AJJA concurring)

[1] The question to be considered in this appeal arises from a repudiation by the respondent of the appellant's claim for indemnification under a policy of insurance. The appellant concluded a Prize Indemnity Insurance contract with the respondent. The appellant, as insured, submitted a claim for indemnity under that policy but this was rejected by the defendant as the insurer, for reasons which will emerge later in the judgment. A subsequent action by the appellant in the high court, to enforce its rights under the policy, failed ─ hence this appeal. The appeal with the leave of the high court is against the judgment and order issued by AA

Louw J in the North Gauteng High Court, dismissing the appellant's claim with costs, including the wasted costs reserved on 28 July 2011.

[2] It is convenient to refer to the appellant as the plaintiff and the respondent as the defendant. The plaintiff, Van de Wetering Engineering (Pty) Ltd is a company which manufactures Afrit trailers. On 9 October 2008 it held a golf day for its clients and potential clients at Zebula Country Estate. As part of a marketing strategy to liven up proceedings, the plaintiff also sponsored a competition analogous to a 'hole-in-one'. In a golf game a 'hole in one' occurs when a player hits the ball directly from the tee into the hole with one shot. It is however not necessary that the ball should go directly into the hole. It may hit other objects or the ground on its way.

[3] The plaintiff called its competition a 'trailer-in-one'. This was because the competition required a player to land the ball inside a trailer. A player who hit the ball from the tee into the trailer with one shot would win a trailer worth R456 000. If more than one player managed to get the ball into the trailer, the winner would be the one whose ball ended up closest to the pin, which would be placed inside the trailer.

[4] The plaintiff wished to be insured against the costs it would incur in the event of one of the competitors succeeding in getting the ball into the trailer or hitting it close to the pin located in the trailer. And so prior to the competition the plaintiff, on 15 September 2008, took out a policy of insurance to cover itself against liability to pay the prize in the event of anyone of the participating players achieving a 'trailer in one' or hitting the ball nearest to the pin. This type of cover is common in golf competitions. As I have already indicated it is known as prize

indemnity insurance or hole in one insurance. Prize indemnity insurance offers a policy that would pay the winning golfer if he or she achieves a hole in one. The main benefit of prize indemnity insurance is that the company sponsoring the competition gets the benefits of marketing a high profile event or its products without being required to cover the cost, if the high valued prize is won. All that it loses in that event is the premium paid the insurer.

[5] It is fair to assume that the plaintiff would have taken the above factors into account when it took out a prize indemnity insurance policy with the defendant. The terms and conditions of the policy are set out in the policy and the schedule annexed to the policy. In terms of the policy the defendant:

'Indemnified the insured in respect of a liability to award a prize to the value of R456 000 (four hundred and fifty six thousand rands only) to the first golfer who attempts to hit the ball inside the trailer. Only if the ball lands inside the trailer and does not bounce out, will it be deemed a win whilst, participating in the insured Event.'

[6] The policy stipulated further that the defendant 'shall indemnify the insured for the expenses incurred by the insured [the plaintiff] in presenting the Prize stated . . . to a contestant golfer' for making a 'trailer in one'. The limit of the plaintiff's liability was, as I have indicated, stated in the schedule to the policy as R456 00, being the sum assured. The premium paid by the plaintiff in exchange for the cover was the sum of R45 600. In the schedule it is stated that the number of players were not to exceed 80 amateurs and the attempts to hit a 'trailer in one' was also limited to 80. Other details set out in the schedule included the distance from where the players were to tee off, which was 160 metres from the trailer, and the size of the trailer, the particulars of which are not relevant to the question to be determined in this appeal.

[7] The policy also stipulated that the defendant's liability thereunder was to be subject to a number of conditions, one of which was the following:

'2 The tournament shall be conducted in accordance with rules, regulations and guidelines established by the International Professional Golfers Association (IPGA) or the International Amateur Golfers Association (IAGA)'.

[8] The 'trailer in one' competition was to commence soon after the completion of the round of golf, which the invitees of the plaintiff had played. Only some of those persons who had partaken in the golf day took part in the 'trailer in one' competition.

[9] Before the competition started, the plaintiff's managing director, Mr Andre Van de Wetering, explained the rules of the competition to the participants. In response to a question, he announced that the plaintiff's employees could participate in the competition for fun but could not win. In his evidence at the trial he admitted that he made this announcement

[10] On the day and time of the competition the defendant had an assessor, Mr Sareshen Reddy, in attendance to ensure that all of the conditions laid down by the defendant were complied with. The announcement that the plaintiff's employees were not eligible to win the prize should they succeed in obtaining the 'trailer in one' was made in the presence of approximately 160 people. Van de Wetering stated in his evidence that when he made the announcement he was not sure of the terms of the policy and wished to avoid the embarrassment which could follow should an employee win and it turn out that the terms of the insurance contract prohibited an employee from winning the prize.

[11] The competition began. Mr Van de Wetering was the first to hit a ball and, amazingly, it bounced and landed inside the trailer. No other competitor succeeded to hit a ball into the trailer, despite the fact all the 80 players and some 200 others attempted to do so.

[12] After the competition the assessor, Mr Reddy, submitted a report to the defendant's underwriters KEU Underwriting Managers who had underwritten the policy contract, on the defendant's behalf. In a letter addressed to Ms Denise Hattingh of the underwriters, he reported as follows:

'I was told by Mr Andre van de Wetering, before the trailer competition could start that no one that is employed by Afrit is allowed to win the trailer, but they are going to have a shot for fun.
Mr Andre Van de Wetering had started the competition by hitting the first ball for the trailer, which had bounced and went in.
No one else that had participated in the competition had managed to get their balls in the trailer.
Furthermore to end the series of shots taken to win the trailer, Mr Andre van de Wetering had taken another shot to close off the competition and he missed.'

[13] The assessor did not consider Mr Van de Wetering to have won for two reasons. The first was that he was not eligible to participate in the competition as he was an employee of the plaintiff. The second was that his ball had to enter the trailer directly and not bounce. Mr Van de Wetering's ball had bounced before entering the trailer.

[14] Another significant factor is the following. In terms of the rules of the competition the winner was to be announced at the prize giving ceremony at the end of the round of golf later that evening. No winner was announced and no prize was awarded to Mr Van de Wetering at the prize giving ceremony. No claim was made to the defendant's assessor, present at the competition for the purpose of

establishing who, if anybody had won. Mr Van de Wetering himself made no claim. As already indicated, after the competition the assessor informed the defendant that there was no winner and thus no claim.

[15] The competition was on a Thursday and, on the Monday after the competition, Mr Van de Wetering said he perused the contents of the insurance policy between the parties and could find no exclusion pertaining to the employees of the plaintiff. The board and management of the plaintiff thereupon decided to award the prize to Mr Van de Wetering. Mr Van de Wetering consequently contacted the broker who proceeded to submit a claim for indemnity to the defendant on the plaintiff's behalf, to cover the cost of the prize of the trailer in the sum of R456 000.

[16] As indicated the defendant repudiated liability on the two grounds referred to in the assessor's report, the most important of which was, in my view, that Mr Van de Wetering was not eligible to partake in the trailer in one competition as he was an employee of the plaintiff. The second reason, relating to the bouncing of the ball before landing in the trailer, is groundless and I did not understand counsel for defendant to place any reliance on it. It flounders in the face of the condition stipulated in the schedule to the policy where it is stated that, an attempt to hit the ball inside the trailer will be deemed a win 'only if the ball lands inside the trailer and not bounce out'. There is no mention of the ball bouncing before it lands inside the trailer. Under the circumstances that ground cannot be upheld as an excuse for the defendant's refusal to pay the claim in terms of the policy of insurance.

[17] In the pre-trial minute dated 14 July 2011 it is recorded that the plaintiff 'accepts that it bears the onus and duty to begin to prove that the occurrence

against which the insurance policy applied, occurred' (that is, to bring the plaintiff's claim within the four corners of the policy). What is also minuted is the plaintiff's contention that the defendant bears the onus of justifying any repudiation once the plaintiff has proved the aforegoing.

[18] In terms of the basic principles of indemnity insurance an insured is entitled to recover the actual commercial value of what it has lost through the happening of an event insured against. The ordinary rule is that an insured must prove that its claim falls within the primary risk insured against, whilst the onus is on the insurer seeking to avoid liability to prove the application of an exception.[1]

[19] In the present matter the peril insured against was the possibility of one of the golfers partaking in the competition getting the ball into the trailer and thus rendering the plaintiff liable to award the prize of the trailer to the winner. There was however another twist to the tail. The winning golfer had to be eligible to partake in the competition. Based on the announcement made by Mr Van de Wetering before the commencement of the 'trailer in one' competition, the defendant contends that Mr Van de Wetering was disqualified because he was an employee of the plaintiff.

[20] On the contrary the plaintiff contends that there is nothing in the policy which suggests that employees of the plaintiff were not eligible to participate. Mr Van de Wetering avers that his announcement that employees could not win but were entitled to play just for fun was a mistake, based on the fact that he had not seen the conditions of the policy.

---

[1] *Walker v Santam Ltd* 2009 (6) SA 224 (SCA) para 16.

[21] It is true that the policy does not say who may or may not participate in the competition. But the policy cannot be interpreted and applied or considered in isolation from the rules relating to participation in the competition. Those rules applied in tandem with the policy. In general an assurance policy should be construed in accordance with sound commercial and good business sense, so that the provisions receive a fair and sensible application.[2] This court cautioned against interpreting a provision in a policy of insurance in a way that would conflict with a business like interpretation.[3] In my view what this means is that an insurance policy the purpose of which is to cover perils in a business setting cannot be considered in isolation from commercial and business practices. By parity of reasoning a policy of insurance in a golf competition, the prize indemnity insurance policy so called, cannot be considered in isolation from the rules of the competition to which it is intended to apply. It is the rules of the competition which determine who should play, how the game should be played, by whom, the ranking of the particular player, to mention just a few important factors. Those rules were that in order for it set by the appellant who was sponsoring the golf day, albeit to seek to recover under the prior insurance its rules had at least to encompass the conditions of liability prescribed by the insurance contract.

[22] The announcement made by Mr Van de Wetering that employees could not win a trailer was part and parcel of the rules of the competition, laid down by the appellant. Those rules excluded an employee of the appellant from winning the prize. Although it was previously argued that it had not been shown that he was such an employee, as managing director, he clearly was, as counsel for the plaintiff correctly conceded before this court, was the case. Therefore the policy of

---

[2] *Grand Central Airport (Pty) Ltd v AIG South Africa Ltd* 2004 (5) SA 284 (WLD) para 9.
[3] *Van Zyl NO v KLN Non-Marine Syndicate NO 510 of Lloyds of London* 2003 (2) SA 440 (SCA) at 457 para 44.

insurance in issue in the present matter must be construed and applied with due regard to the rules of the competition. There is some indication of this symbiosis between the rules of the competition and the conditions of the policy. The policy conditions are applicable in the present matter and it is stated that the company's liability under the policy shall be subject to certain conditions. The policy then goes on to provide that the tournament, meaning the golf competition, shall be conducted in accordance with the rules, regulations and guidelines established by the IPGA or the IAGA. It is not however suggested that the IPGA and IAGA rules apply here but the plaintiff's case must stand or fall by the terms and conditions of the policy and the rules of the 'trailer in one' competition as laid down by the plaintiff. Clearly therefore the policy does not exist and cannot be construed and applied in isolation from the rules of the competition as they applied to the golf day event.

[23] It then remains to consider whether Mr Van de Wetering was eligible to win the prize in the 'trailer in one' competition. If he was, the risk insured against occurred and the plaintiff became entitled to recover the cost of the prize to be awarded in the sum of R456 000 and the defendant was consequently liable to pay. For the plaintiff to sustain a claim under the policy it must have become legally liable to pay the prize of a trailer one. It is only then that the right to claim an indemnity would have arisen.[4] As the plaintiff failed to bring itself within the terms and conditions of the policy considered together with the rules of the trailer in one competition, Mr Van de Wetering was not eligible to win the prize in the competition and the risk insured against, which was essential to render the plaintiff liable, did not arise. In the circumstances the high court was justified in dismissing the claim with costs. In that event the appeal must therefore fail.

[4] *Truck and General Insurance Co Ltd v Verulam Fuel Distributors CC & another* 2007 (2) SA 26 (SCA) para 16.

[24] The order pertaining to the reserved costs on 28 July 2011 was made in error and falls to be set aside. The parties may approach the court below, if so advised, to present argument and ask for a ruling once more on those costs.[5]

[25] In the result:

1. The appeal is dismissed with costs.
2. The order of the court a quo in respect of the reserved costs on 28 July 2011 is set aside.
3. The parties are granted leave to approach the court below, if so advised, to present argument and for a ruling on the question of costs referred to in paragraph 2 of this order.

K K Mthiyane
Deputy President

[5] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 307G-H.

Appearances

For the Appellant:	T A L L Potgieter Instructed by: Savage Jooste & Adams, Pretoria Webbers Attorneys, Bloemfontein
For the Respondent:	J E Ferreira Instructed by: Norton Rose c/o Jacques van der Merwe Attorneys, Pretoria E G Cooper Majiedt, Bloemfontein