THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
CASE NO: 616/06

In the matter between:

ALLIANZ INSURANCE Ltd **Appellant**

And

RHI REFRACTORIES AFRICA (Pty)Ltd **Respondent**

CORAM: **HOWIE P, BRAND JA, LEWIS JA, COMBRINCK JA and KGOMO AJA**

Date of hearing: 12 November 2007

Date of delivery: 3 December 2007

Summary: Short-term insurance, ordinary rules of interpretation of contracts applicable. Special exclusion clause providing that the insurer will only indemnify the insured should 'unintended damage' result from a particular defect. Insurer held liable.

Neutral citation: This judgment may be referred to as ***Allianz Insurance Ltd v RHI Refractories Africa (Pty) Ltd*** **[2007] SCA 174 (RSA)**

KGOMO AJA

[1] The appellant, a company conducting business as a short-term insurer in terms of the Short Term Insurance Act 53 of 1998, approaches this court with the leave of the court *a quo* (Mathopo J of the Johannesburg High Court) against a determination of a point *in limine* made in favour of the respondent, as the insured, relating to the interpretation of an exclusion clause contained in a contract of insurance. Also before us is a conditional cross-appeal by the respondent against the court *a quo's* ruling that proposed evidence by Mr D J Chisholm, the respondent's expert, would constitute inadmissible evidence because it would be irrelevant in determining the meaning of the exclusion clause.

[2] The material facts are as follows. On 8 June 2001 the respondent, as contractor, entered into a written construction contract with Indian Ocean Fertilizer (Pty) Ltd. Broadly stated, the work undertaken by the respondent in terms of the construction contract was to effect an epoxy lining to various parts of Indian Ocean's acid plant in order to protect the underlying concrete from acid erosion. Pertinent for present purposes, is that the construction contract also provided that the respondent would remain liable for all physical damage to the construction works during the course of its completion.

[3] To safeguard itself against the last-mentioned risk, the respondent entered into the insurance contract with the appellant, which forms the subject matter of this appeal. According to the provisions of the policy, the appellant *inter alia* undertook to indemnify the respondent against 'physical loss or damage to the property insured', which essentially comprised the works under construction. In terms of the policy this indemnity is subject to certain exemptions. The one relied upon by the appellant in this case appears in what is referred to as exception clause 1 ('exclusion 1'). In the context of the introduction pertaining to all the exception clauses, it reads:

'The insurer will not indemnify the insured for:

1. The costs necessary to replace, repair or rectify any defect in design, plan or specification, materials or workmanship, but should **unintended damage result or ensue**

from such a defect, this Exclusion shall be limited to the additional costs of improvements to the original design, plan or specification.'

[4] The dispute between the parties turns on the interpretation of exclusion 1. It arose from the fact that the epoxy lining applied by the respondent had failed, or delaminated, resulting in physical damage that had to be repaired. The respondent's claim in the court *a quo* was for the expenses incurred to repair this damage which allegedly amounted to about R9m. The basis of the respondent's claim was, of course, that these expenses were covered by the policy. The appellant's contention, on the other hand, was that they were excluded by the provisions of exception 1.

[5] At the trial the respondent sought to introduce the expert evidence of an underwriting manager, Mr Chisholm, in support of its interpretation of exclusion 1. According to the expert summary relating to his evidence, Mr Chisholm would explain how, over time, clauses of like wording to the one under consideration, evolved in the short term insurance industry. Against this background, so the expert summary stated, Mr Chisholm would express the opinion that the respondent's claim is not excluded by exclusion 1. The appellant, however, objected to this evidence and its objection was upheld by the court *a quo*, on the basis that Mr Chisholm's evidence would be 'inadmissible and of no assistance to the interpretation of the contract since it was not argued by the plaintiff [the respondent] that the agreement is obscure, uncertain and ambiguous. (See *Dorman Long Swan Hunter (Pty) Ltd v Karibib Visserye Ltd* 1984 (2) SA 462 (C).)' After this ruling the parties, by agreement, proceeded in the court *a quo* to argue the interpretation of exclusion 1 as a point *in limine* on the basis of what was referred to as 'stated assumptions'. These assumptions were formulated as follows.

'Assumptions:

1. There was a defect in the design, specification *and/or* workmanship of, *and/or* pertaining to, the epoxy lining.
2. The epoxy lining delaminated and was damaged.
3. The delamination and damage to the epoxy lining was caused and brought about the defect(s) referred to in paragraph 1 above.'

[6] Thereafter the parties stated the issues to be determined by the court *a quo,* as follows:

'1. Does the expression "*unintended damage* " in Exclusion Clause 1 refer to (a) damage to the epoxy lining or (b) damage to the insured property other than damage to the epoxy lining?

2. Having regard then to the finding in respect of paragraph 1 above, is the risk of delamination of the epoxy lining expressly excluded in terms of Exclusion Clause 1 *or* is the exclusion limited to the additional costs of improvements to the original design, plan or specification?'

As to question 1, the case was argued on the basis that the defective lining constituted 'damage'. I revert to this.

[7] The approach to the interpretation of contracts of insurance, in general, and exemption clauses in particular, has by now become well settled. For the present it can be summarised by the statement of two basic principles. First, a contract 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 policy. Thus the terms are to be understood in their plain, ordinary sense unless it is evident from the context that the parties intended them to have a different meaning (see eg *Blackshaws Ltd v Constantia Insurance Ltd* 1983 (1) SA 120 (A) at 126H-127A, *Fedgen Insurance v Leyds* 1995 (3) SA 33 (A) at 38A-E). Second, whilst the ordinary rule is that the insured must prove itself to fall within the primary risk insured against by the policy, an exception clause is restrictively interpreted against the insurer, because it purports to limit what would otherwise be a clear obligation to indemnify (see eg *Van Zyl v Kiln Non-Marine Syndicate Number 510 of Lloyds of London* 2003 (2) SA 440 (SCA) at 446A-H).

[8] In order for the respondent to qualify under the policy, it had to establish that there had been physical damage to the insured property. From the stated assumption it is apparent, however, that the appellant has conceded this fact. What remains is the issue whether it was exempted from liability by exclusion 1. Moreover, it appears from the stated assumptions and the issues as formulated, that the dispute regarding the meaning of exclusion 1 has been narrowed down substantially. Fortunately we are therefore not

required to determine the general meaning of the clause. I say ‘fortunately’, because I find exclusion 1 very difficult to understand. Maybe this is the very type of situation where expert evidence as to the background of the clause, along the lines foreshadowed by Mr Chisholm’s expert summary, could be of considerable assistance. But, be that as it may: as I have said, the question to be determined in this case falls within a narrow ambit.

[9] Succinctly stated, the only question is whether the physical damage resulting from the failure of the epoxy lining constituted ‘unintended damage’ as contemplated by exclusion 1. Conversely stated, the question is not whether the expenses necessitated by the failure of the epoxy lining would in any event be excluded by the first part of the exception. If the failure of the epoxy lining – which the parties admit constituted damage – was ‘unintended’ the appellant is liable for the costs of repair. Moreover, the question is not whether the appellant’s liability would then be limited by the third part of the clause as constituting so-called ‘betterment costs’.

[10] It is clear that damage to the epoxy lining itself is not expressly excluded in exclusion 1. Yet, the appellant contended that it is so excluded because the adjective ‘unintended’ in the clause must be understood as something akin to ‘unforeseen’ or ‘unexpected’. Thus understood, its argument went, the failure of the epoxy lining, which was an inherent consequence of the respondent’s defective planning or workmanship, could not be regarded as unintended. On the contrary, the appellant argued, the delamination of the epoxy lining was a natural and foreseeable consequence of the respondent’s failure to comply with its obligations under the construction contract.

[11] The problem I have with the appellant’s whole line of argument lies in its point of departure. I do not think the plain meaning of ‘unintended’ indicates something akin to ‘unforeseen’ or ‘unexpected’. To my way of thinking, consequences can clearly be foreseen or expected and yet not intended. According to its plain, ordinary meaning ‘intended’, refers to consequences which were planned or intentionally brought about. But even accepting that

'intended' can have an extended meaning, it would require something in addition to foreseeability. While foreseeability suggests no more than contemplation of the possibility that a particular eventuality may occur, 'intended' must, in my view, at best for the appellant, entail something analogous to the concept of *dolus eventualis* in criminal law (see eg *S v Maritz* 1996 (1) SACR 405 (A) at 416e-g) which has in the past been extended to insurance law (see *Nicolaisen v Permanente Lewensversekeringsmaatskappy Bpk* 1976 (3) SA 705 (C) at 709E-H). This would require: (1) a realisation on the part of the performer of an act that the foreseen consequence of the act is more than a mere contingency: that it is therefore a real possibility; and (2) a reconciliation by the performer with the occurrence of the eventuality, in the sense of a deliberate decision to proceed with the act, with indifference to its appreciated consequences. 'Unintended would of course have the opposite meaning: the damage was not regarded as a real possibility, with the consequence that there would be no need to consider steps to avoid the damage or to contemplate an alternative design.

[12] The appellant's further argument appears to have been that if what I consider to be the natural meaning of 'unintended' is attributed to exception 1, it would render exception 1 nugatory, because no contractor would intentionally cause physical damage to the works. Again, I do not agree. Experience has shown that damage is sometimes intentionally caused to a perfectly working or undamaged part of the works so as to remedy the defective or damaged part. Such intentional damage to gain access was considered, for example, in *Standard General Insurance Co Ltd v Voest-Alpine Industrieanlangenbau GMBH* 1994 (3) SA 356 (A). But even if, at best for the appellant, 'unintended' could be interpreted to mean 'unforeseeable', it has failed to exclude the possibility that the adjective must be afforded what I consider to be its plain meaning, namely of consequences which are intended or planned. And because exclusion 1 must be restrictively construed against the appellant, this narrower meaning must be accepted.

[13] Reverting to the facts, it is not suggested that the delamination and damage to the epoxy lining was planned or intended by respondent – even in the extended sense discussed in para 11 – when it designed or performed the

construction work. On the contrary, the probabilities seem to indicate that these were consequences it would strive to avoid. Hence I agree with the decision of the court *a quo* that the point *in limine* should be decided in favour of the respondent. In consequence, the conditional across-appeal need not be considered.

[14] It is therefore ordered that the appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

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FD KGOMO
ACTING JUDGE OF APPEAL

CONCUR:

HOWIE P
BRAND JA
LEWIS JA
COMBRINCK JA