THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 775/2018

In the matter between:

MAGIC EYE TRADING 77 CC t/a TITANIC TRUCKING	**FIRST APPELLANT**
PERUMAL CHETTY	**SECOND APPELLANT**

and

SANTAM LIMITED	**FIRST RESPONDENT**
IMPERIAL CARGO (PTY) LTD	**SECOND RESPONDENT**

Neutral citation: *Magic Eye Trading 77 CC v Santam Limited* (775/2018) [2019] ZASCA 188 (10 December 2019)

Coram: Cachalia, Zondi and Nicholls JJA and Gorven and Hughes AJJA

Heard: 4 November 2019

Delivered: 10 December 2019

Summary: Whether a contingent right to claim an indemnity had prescribed – when prescription in respect of such claim starts to run – indemnity can only be against actual loss – a claim to be indemnified becomes due only when the insured is under a legal liability to pay a fixed, determinate amount.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Magona AJ sitting as court of first instance):

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

2 The order of the court a quo is set aside and substituted with the following:

'(a) The special plea of the third party is dismissed;

(b) The third party is to pay the costs of the special plea including the costs of two counsel, where so employed.'

JUDGMENT

Nicholls JA (Cachalia and Zondi JJA and Gorven and Hughes AJJA concurring):

[1] The issue in this appeal is whether an insured's contingent right to claim indemnification under an insurance policy is capable of becoming prescribed in terms of s 12(1) of the Prescription Act 68 of 1969 (the Act)[1] before the liability of the insured, and its extent, is determined.

[2] The appeal arises out of a delictual claim by Imperial Cargo Pty Ltd (Imperial) claiming damages to its truck, when it was allegedly forced off the road on 21 March 2009 by another truck. Imperial alleged that Mr Perumal Chetty, the driver of the other truck was acting within the course and scope of his employment with Magic Eye Trading 77 CC t/a Titanic Trucking (Magic Eye), and was solely responsible for the incident. In March or

[1] Section 12(1) provides that–
'Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.'

April 2011 Imperial issued summons for R449 461.71 for damage to its truck against Magic Eye as first defendant and Mr Chetty as second defendant.

[3] The two defendants denied all liability in their plea. After close of pleadings they applied to join Santam Limited (Santam), the respondent in this matter, as a third party. The third party notice was premised on an insurance policy issued by Santam in favour of Magic Eye and which included indemnity insurance against loss suffered by Magic Eye by way of liability to third parties as a benefit under the policy. On 11 October 2016, and by consent between the parties, the court made an order joining Santam and separating the issues between the two defendants and Santam from the main action, in terms of Rule 33(4) of the Uniform Rules of Court.

[4] In the third party notice, the defendants claimed that, by virtue of certain clauses in Sub-section B of the policy, Magic Eye had a contractual right to claim indemnity from Santam against any liability to the injured party attributed to them. They sought a declaratory order to the effect that in the event of Imperial succeeding against the defendants, Santam would be liable to indemnify them in such amount as they may be ordered to pay Imperial, together with legal costs and expenses on an attorney and own client scale. This would occur upon the granting of a judgment in favour of Imperial. In response thereto Santam filed a special plea that any such claim had prescribed. The Western Cape Division of the High Court (Magona AJ) upheld the special plea but granted the defendants, to whom I shall henceforth refer to as the appellants, leave to appeal to this court.

[5] Santam's special plea of prescription alleged that upon the occurrence of the defined event, alternatively when the appellants became aware of the event, their right to a claim for indemnification against any liability to Imperial became vested in the appellants. Because the appellants, so continued the special plea, failed to serve the notice of joinder on Santam within three years of that date, any third party claim they may have had against Santam had prescribed.

[6] Santam conceded that the incident took place within the protected period under the insurance policy, and that it constituted a defined event under Sub-section B of the 'Motor section' of the policy, which provides:

'Any accident caused by or through or in connection with any vehicle described in the schedule or in connection with the loading and/or unloading of such a vehicle in respect of which the insured and/or any passenger becomes legally liable to pay all sums including claimants costs and expenses in respect of

(i) death or bodily injury to any person, but excluding death or bodily injury to any person in the employ of the insured arising from and in the course and scope of such employment or being a member of the same household as the insured;

(ii) damage to property other than the property belonging to the insured or held in trust by or in the custody or control of the insured or being conveyed by, loaded onto or unloaded from such a vehicle.'

[7] Three possible dates were pleaded as being the date when the claim fell due and consequently the date upon which the period of prescription commenced. Santam pleaded that it was immaterial which of the dates one chose because all of them fell outside the three year period laid down in s 11 of the Act. The dates were:

(i) 21 March 2009, the date when the incident took place, being the defined event in terms of the policy document Sub-section B, Liability to Third Parties;

(ii) 21 April 2011, when Magic Eye gave written notice to Santam, in accordance with clause 6 of the General Exceptions, Conditions and Provisions of the insurance policy, of the particulars of the defined event and Imperial's claim as set out in the summons;

(iii) 12 January 2012, the date when Santam repudiated the claim on the basis that Magic Eye did not adhere to policy conditions regarding the submission of documents and requests for information within the specified time to Santam.

[8] In their replication to the special plea the appellants averred that prescription commences to run only after they have paid the claim against them or are at least liable to do so in a determined amount. The word 'claim' in the policy, they added, refers to a claim for indemnification made by the insured and not to a claim made by a third party in

respect of which an insured is entitled to claim against the insurer for indemnification under the policy. The latter kind of claim, they continued, must be for a fixed amount and cannot exist until such liability, and the extent thereof, has been determined by agreement or legal process.

[9] The court a quo upheld the special plea, albeit reluctantly. Relying on this Court's judgment in *Truck and General Insurance Co Ltd v Verulam Fuel Distributors CC*,[2] it held that liability of the insurer to the insured arises as soon as the insured suffers the loss. The insured's cause of action arose when all the events had occurred, which gave rise to the liability towards the third party, even if the amount had not been quantified. The court a quo found that when Santam repudiated the claim for indemnification, on 12 January 2012, this gave rise to a right to approach the court for a declaratory order. As the appellants only did so in September 2016, more than three years later, their claim had already prescribed.

[10] In determining when the appellants' claim for indemnification prescribes, one is faced with what, at first blush, appear to be two diametrically opposed decisions emanating from this court. These are *Truck and General* on which the respondent relies and *Pereira v Marine and Trade Insurance Co Ltd*,[3] on which the appellants rely. Essentially the question to be asked and answered in this appeal is whether *Truck and General* overrules the long-standing legal principles enunciated in *Pereira.*

[11] The appellants, relying on *Pereira*, contend that their right to approach the court for a declaratory order could not prescribe prior to their liability to Imperial, as well as the quantum thereof, being finally determined either by agreement or by a court order. It is only at that point that Magic Eye has a claim against Santam to indemnify it against the loss suffered by way of its liability to Imperial. Until then the potential claim is not 'a debt' within the meaning of the Act and therefore prescription cannot have commenced to run

[2] *Truck and General Insurance Co Ltd v Verulam Fuel Distributors CC* [2006] ZASCA 85; 2007 (2) SA 26 (SCA).
[3] *Pereira v Marine and Trade Insurance Co Ltd* 1975 (4) SA 745 (A).

against a claim for indemnification, still less an action for a declaration concerning the right to be indemnified.

[12] *Pereira* has an impressive pedigree. As early as 1930, Watermeyer J, in *Le Voy v New Zealand Insurance Co Ltd*,[4] found that the phrase 'to pay all sums which the insured shall be legally liable to pay' in the context of a claim for indemnification meant that the amount of damages had to have been established. An indemnity claim as contemplated by the insurance policy was one 'which could be sued for at once, and not a claim in respect of which action cannot be taken.' Until then there was no 'claim' in existence. This decision was made before courts were given the discretion to grant a declaratory order. *Le Voy* was followed by *Boshoff v South British Insurance Co. Ltd*[5] by which time the discretionary grant of a declaratory order was competent. Clayden J found that an insured is only entitled to indemnity against loss or damage for which he becomes legally liable. An insured can only become legally liable to pay once a sum is fixed against him by a court or by agreement. Until then no claim for indemnification can arise.

[13] In *Pereira*, an insurance company repudiated liability in a claim for indemnification in terms of a motor vehicle insurance policy on several grounds, including that the insured had not issued summons within three months of the repudiation, as was required in terms of the policy. The insured maintained that there could be no repudiation unless there had been a demand for indemnity in a fixed amount and no claim for indemnity until the liability to the third party had been determined in a fixed amount. The court upheld the insured's contention. From past cases, Corbett JA, in *Pereira*, distilled three propositions:

'(1) The words "any claim", appearing in the opening portion of the condition reading "In the event of the company disclaiming liability in respect of any of the claim… ", refer to a claim for indemnification by the *insured* in terms of the policy and do not include claims by third parties upon the insured in respect of which the insured is entitled to claim indemnification under the policy.

(2) That such claim for indemnification must be for a fixed or specific amount and that, therefore, where the claim arises from the insurer's undertaking to indemnify the insured against liability

[4] *Le Voy v New Zealand Insurance Co Ltd* 1930 CPD 427 at 431.
[5] *Boshoff v South British Insurance Co Ltd* 1951 (3) SA 481 (T) at 487.

incurred to a third party . . . no claim can exist until such liability has been determined, either by agreement or legal process.

(3) That the disclaimer by the insurer, from which the period of three months allowed for the institution of action commences to run, must follow on a claim by the insured of the character described in (1) and (2) above. The condition does not admit of a general disclaimer of future claims at a stage when a precise claim in a fixed amount has not, and cannot, be made by the insured.'[6]

[14] This approach was followed in a number of subsequent cases. In *Shraga v Chalk*,[7] Didcott J, drawing support from *Pereira* and *Boshoff*, held that the cause of action in respect of a contractual indemnity was not complete until the plaintiff had made payment, 'or at least until he committed himself firmly to doing so'[8], and claimed reimbursement. In that matter the plaintiff was sued by a bank for an overdraft on an account for which he had stood surety. The defendant had undertaken to indemnify him against any such claim. The court found that it was only when the plaintiff paid the bank, or at least committed himself to doing so, that his cause of action against the defendant became complete. Describing it as a situation analogous to a policy of insurance indemnifying the insured person against liability incurred towards a third party, Didcott J found that a claim for indemnification did not fall due until the amount was judicially determined or fixed by agreement. Therefore, he held, the plaintiff's claim had not been extinguished by prescription which commenced running only when payment was made to the bank. So, too, in *Cape Town Municipality v Allianz Insurance Co Ltd*,[9] where Howie J confirmed that in respect of liability insurance, the insurer's debt is due when the extent of his loss is known. He becomes liable to pay only once the amount has been judicially determined or fixed by agreement. This court, more recently, in *Metcash Trading Ltd v Credit Guarantee Ins Corp of Africa Ltd*,[10] citing *Pereira* with approval, held that 'any claim' referred to a claim for indemnification by the insured in terms of the policy, and that such claim must be for a fixed or specific amount.

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[6] *Pereira* at 757H-758C. His emphasis.
[7] *Shraga v Chalk* 1994 (3) SA 145 (N).
[8] *Shraga* at 155 C-D.
[9] *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) at 321.
[10] *Metcash Trading Ltd v Credit Guarantee Ins Corp of Africa Ltd* 2004 (5) SA 520 (SCA) para 16.

[15] The principle emerging from this line of cases is clear. A claim to be indemnified against liability to a third party only arises once liability, in a fixed amount, has been established. The corollary, which applies to the present matter, is found in the third proposition set out in *Pereira*:

'That the disclaimer by the insurer, from which the period of three months allowed for the institution of action commences to run, must follow on a claim by the insured of the character described in (1) and (2) above. The condition does not admit of a general disclaimer of future claims at a stage when a precise claim in a fixed amount has not, and cannot, be made by the insured.'[11]

This line of authority is firmly established.

[16] *Truck and General* had an unusual set of facts. The respondent was a distributor and transporter of fuel. Trucks belonging to the respondent caused a fuel spillage on two separate occasions. It was part of the respondent's pleaded case that it had an obligation under the National Environmental Management Act 107 of 1998 (the Environmental Act) to clean up any spillage and minimise the effects of the incident as soon as was 'reasonably practicable'. In both instances, the respondent undertook clean-up measures and then claimed the sums that it was legally liable to pay in respect thereof, from its insurer, the appellant. The high court granted a separation of the question of liability from quantum in terms of Rule 33(4). By oversight of the trial court, judgment had been granted in the specified amounts. It was agreed on appeal that this should be amended even if the appeal failed.

[17] The question for determination by the court was whether the appellant was legally liable to make payment under the policy. The appellant argued that for liability to be established, an organ of state must first have given directions to the respondent to act, or have itself taken the measures and have submitted an account in terms of the Environmental Act. The court held that, to suggest that an insured in the plaintiff's position should not act in terms of his or her statutory obligations in terms of the Environmental Act and itself contain or minimise the damage to state property, would lead to absurdity.

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[11] *Pereira* at 758A-C.

[18] In reaching this conclusion, Mpati DP was not referred to the above line of cases. Neither did he refer to them. He was referred instead to the UK case of *Post Office v Norwich Union Fire Insurance Society Ltd*.[12] In that matter, a Post Office cable had been damaged by an insured entity. That entity became insolvent but held public liability insurance. The Post Office sued the insurance company directly. Lord Denning MR, dealing initially with when the insured would acquire a right to be indemnified by the insurance company, stated that:

'[T]he insured only acquires a right to sue for money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement. Until that is done, the right to indemnity does not exist.'[13]

Dealing with the claim of the Post Office against the insurance company, he said:

'The correct procedure is for the injured person to sue the wrongdoer, and having got judgment against the wrongdoer, then make his claim against the insurance company. This attempt to sue the insurance company direct (before liability is established) is not correct'.[14]

[19] Mpati DP, in criticising what has been referred to as the narrow approach of the Post Office rule, said that its strict application to the facts of that case would result in an absurdity.[15] It should be borne in mind that there a fixed sum had been sued for and the issues separated. All that was before the court at that point was the liability of the appellant to indemnify the respondent for its loss arising from its admitted liability under the Environmental Act to clean up and contain the spills. It may not have been strictly necessary to decide whether the Post Office rule was too narrow. However, Mpati DP made it clear that the finding in that matter was fact specific.[16] This court dismissed the appeal and amended the order of the high court to one declaring the appellant liable to

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[12] *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363; [1967] 1 All ER 577 (CA).
[13] Id at 373-4.
[14] Id at 375.
[15] For a detailed discussion on the narrow approach v the wider approach espoused in *Truck and General* see *Lawsa* 2 ed vol 12(2) and JP van Niekerk *Annual Survey of South African Law* (2007) Issue 1 at 578-588.
[16] *Truck and General* para 20.

compensate the respondent for such loss as it was able to prove it had suffered as a result of damage to property from the spills.

[20] The facts in the present matter are entirely distinguishable from those of *Truck and General*. Not only has the amount of damages not been fixed, but the incident itself is disputed, as is the extent of the appellants' liability, if any. Prescription was not an issue in *Truck and General* and it was accordingly unnecessary to decide when the claim arose. As indicated, no mention whatsoever was made of *Pereira* in *Truck and General.* It certainly did not purport to explicitly overrule *Pereira.* Nor had it impliedly done so. It seems unlikely that this was an oversight. It is more probable that the court deliberately omitted reference to it because it was simply not applicable to the particular facts of that case. The claim we are dealing with in the instant matter is for a declaration of rights in respect of a contingent claim. Liability is dependent on the outcome of an uncertain future event, namely a finding by a court holding the appellants liable to Imperial in a specified amount. It is no more than a contingent claim at this stage.

[21] It must be borne in mind that there is a fundamental distinction between a claim and a contingent claim. This was recognised by Wessels JA in *Reinecke v Incorporated General Insurance*.[17] In that case, as in the present one, after repudiation of liability by the insurer, Reinecke sought a declaratory order that the insurer would be liable to indemnify him for all amounts which he may be legally liable to pay in respect of a motor vehicle collision. This was before any liability of the insured to the claimants had been established. A special plea was raised by the insurer that the application was premature as there was still uncertainty whether Reinecke would require indemnification. The court said that at the time proceedings were instituted by him 'his interest did not relate to any ultimate right to claim, but to the existence of a contingent right to claim under the policy upon the future occurrence of certain specified events, namely a legal liability to compensate his passengers in a quantified amount.'[18] This court held that the insurance policy gave rise to a contractual obligation between the parties, contingent upon the

[17] *Reinecke v Incorporated General Insurance* 1974 (2) SA 84 (A).
[18] *Reinecke* at 99 G-H

happening of some future uncertain event. A distinction was drawn between ‘a claim’, a ‘right to claim’ and a ‘contingent right to a claim’ which Wessels JA described as ‘distinct legal concepts’. The claim in that matter was a contingent one. It was held that the court had jurisdiction to grant a declaratory order to determine any existing, future or contingent right or obligation, even if the person seeking it cannot claim any relief consequential upon the declaration until the amount is determined. Importantly, no issue of prescription arose in *Reinecke*. It would simply make no sense for a right to approach a court for a declaration concerning a contingent claim to prescribe before a claim to be indemnified had been arisen.

[22] In addition the granting of a declarator is discretionary. This means that there is always a possibility that a court may, in its discretion, refuse to grant a declaration of rights. This is particularly so in light of the uncertainty regarding the incident itself, as in the present matter. If the court refuses to grant a declarator in respect of a contingent right, namely the claim for indemnification, the logical consequence of Santam’s argument is that the claim would have prescribed following the effluxion of the prescription period. That is absurd. This is precisely because the claim for indemnity can only arise once there has been a fixed and quantifiable loss.

[23] To conclude, a claim for indemnification insurance under an insurance contract can only arise when liability to the third party in a certain amount has been established. The debt, for purposes of prescription, therefore, becomes due when the insured is under a legal liability to pay a fixed and determinate sum of money. Until then a ‘claim’ for indemnification under the policy does not exist, it is only a contingent claim. Magic Eye’s right to approach the court for a declaration concerning the obligation of Santam to indemnify it in the event of Imperial establishing liability has thus not prescribed, in fact prescription has not even begun to run. Santam’s special plea ought to have been dismissed. The appeal must accordingly succeed.

[24] In the result, I make the following order:

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

2 The order of the court a quo is set aside and substituted with the following:

‘(a) The special plea of the third party is dismissed;

(b) The third party is to pay the costs of the special plea, including the costs of two counsel, where so employed.’

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C Heaton Nicholls

Judge of Appeal

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