REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 26150/2020
REPORTABLE: No
OF INTEREST TO OTHER JUDGES: Yes
16 May 2022

In the matter between**: -**

BLACKSPEAR HOLDINGS (PTY) LIMITED	**PLAINTIFF**
And	
BRYTE INSURANCE COMPANY LIMITED	**FIRST DEFENDANT**
SASRIA SOC LIMITED	**SECOND DEFENDANT**

JUDGMENT

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Headnote

Insurance claim – the principal issue was the determination of the factual and legal cause of mining equipment submerged and destroyed in a flooded mine - one of two insurers liable- either the primary insurer in terms of all all risks policy or Sasria if the losses were caused by labour unrest – on the facts the cause of the losses was established as the conduct of striking workers who occupied the shaft, inhibited anyone

attending to the pumps to operate them and cut the electrical cables linking a generator on the surface required to power the pumps.

Held: Sasria was liable

Costs: a costs order was made that Sasria pay the costs of both Blackspear and Bryte as it was the unsuccessful defendant – Rule 10(4) (b) ii of the Uniform Rules of Court.

Other factors taken into account included the failure of Sasria, who conceded at the conclusion of the trial that its liability was proven on the facts, not to have done so before the trial of 4 days commenced. The trial was conducted under the rules of the Gauteng Commercial Court which required every party, prior to the hearing, to furnish full witness statements which stood as the evidence in chief. The body of evidence revealed there had n not been challenged.

Also, Bryte had pleaded prescription of the claim. Because of the finding on liability, that defence became superfluous. However, the defence was held to be good. Because that aspect of the case took up a negligible portion of the hearing and it was impracticable to sever it from the other aspects of the case for the purpose of apportioning costs, it was appropriate to ignore it in the costs order.

Per Sutherland DJP:

Introduction

[1] This case is about an insurance claim. The Plaintiff, Blackspear, is the owner of earthmoving equipment used in underground mining. It leased the equipment to a mining company, Thutsi Mining (Pty) Ltd. Thutsi mined a colliery in which Blackspear's equipment was situated. The mine was flooded from an ingress of underground water. This rendered the equipment unsalvageable.

[2] Blackspear claims that one or other of the defendants, Bryte or Sasria, both insurers, is liable to pay compensation for the loss of the equipment. Bryte is the primary insurer with whom Blackspear had a contract of insurance covering the equipment. Sasria is a public state-owned insurer of special risks; in this case, in respect of losses sustained as a result of labour unrest. The Bryte policy excludes the perils covered by Sasria and vice versa, an arrangement articulated in the Bryte policy

by an exception from the scope of its cover of a labour unrest peril, and by the Sasria policy or “coupon”, covering such a peril, which coupon is supplementary to the policy issued by Bryte to Blackspear.

[3] The critical issue is whether Sasria is liable on the basis that the loss of the equipment was owing to labour unrest or Bryte is liable on the basis that the loss of the equipment was not the result of labour unrest, its policy being cover for all risks. A secondary issue that is relevant only to a claim against Bryte is that were Bryte to be held liable on its policy for the loss, whether or not Blackspear’s claim has prescribed.

[4] The parties agreed to a separation of the issues. These proceedings address only the issues so defined. The minute of the agreement reads thus:

> “**Special plea of prescription:**
> 2.1. The first defendant’s special plea of prescription enunciated at paragraphs 1 to 15 of its special plea, read together with paragraphs 1 to 4 of the plaintiff’s amended replication.
>
> **Separation of the remaining merits:**
> 2.2. The separated issue is that of causation.
> 2.3. The central issue is the determination of the proximate cause of the damage or loss suffered by the plaintiff.
> 2.4. The issue of causation requires a determination of whether the proximate cause of the loss or damages suffered by the plaintiff was either civil commotion, labour disturbances, riot, strikes, lockout or public disorder or any act or activity which is calculated or directed to bring about any of the aforementioned.
> 2.5. If the proximate cause of the damage or loss suffered by the plaintiff was related to or caused by any of the events or activities referred to in paragraph 2.4 above, then the second defendant is liable to indemnify the plaintiff for its proven damages or loss, except where it is found that the plaintiff had omitted to take

reasonable steps that would have prevented and/or restricted any damage to the mine and/or mining equipment.

2.6. If the proximate cause of the loss suffered by the plaintiff were activities or events not related to any conduct referred to in paragraph 2.4 above, and the loss was not caused by the removal of the main generator by the plaintiff, then the first defendant is liable to indemnify the plaintiff for its damages or loss."

A narrative of relevant events

[5] It is common cause that the assets of Blackspear were lost because they were drowned in the mine.

[6] Several years ago, the colliery began its life as an open cast pit. In its second phase, a horizontal shaft was excavated into the wall of the pit to continue the operation as an underground operation. The tunnels extend to well in excess of a kilometre. The inner terrain is roughly undulating but does vary slightly up or down, presumably, as it tracks the coal seam and encounters various rock formations.

[7] The mine experiences ingress of water from the surrounding landmass, a commonplace phenomenon in mining underground. It is essential that the water that seeps into the shaft be extracted. This is achieved by pumps which are supposed to be in operation 24 hours a day every day. A similar requirement for safe mining in a colliery is the appropriate ventilation of the shaft. A colliery is susceptible to a build-up of methane gasses which presents a danger of spontaneous ignition with deadly consequences. Thus, continuous ventilation by means of fans and other measures is supposed to be in place at all times.

[8] The mine operated on a 5-day week three-shift basis with two production shifts of 10 hours each and one maintenance shift of 4 hours. On Saturdays there was one production shift. On Sundays there was one maintenance shift.

[9] The pumps were operated by a designated attendant on each production shift. These attendants were skilled in the relevant know- how to maintain the pumps whilst in use. The pumps did not operate in the absence of an attendant. The pumps were powered by electricity. The electricity was supplied by a diesel generator situated on the surface near the shaft entrance. The generator was axiomatically situated at a great distance from the pumps. The generator and the pumps were connected by cables laid out through the shafts. The point of significance is that the requirement to keep the water ingress under control, a *sine qua non* for the mining activities to be undertaken, in turn, required skilled personnel to man the pumps and the pumps to be supplied with electrical power. The system could only work if both power and personnel were operational.

[10] The flooding of the mine shafts and the opencast pit is common cause, as it the loss of the assets as a result of that flooding. The key factual question is to assign legal responsibility for the failure to sustain the pumping out of the water.

[11] The mine was fully operational until 25 June 2016. The significance of that date is that the workforce who were due their wages on 25 June were not paid because the mine had no funds to do so. The workers refused to continue to work. On 30 June the management switched off the generator. It is said that operations ceased on that day, although no formal communication of the cessation of operations was made to the Department of Minerals and Energy, as required by law. The evidence is that the management contemplated that the cessation would be temporary and of short duration. The most probable reason to swich off the generator is that there was no point in burning fuel to generate electricity if no attendant was at the site of the pumps to operate them. Unfortunately, the mine manager Piet Botha and his superior, the general manager of Thutsi, Malcolm Ford, did not testify. Botha had died.[1] Ford was listed to testify but was not called after all. Therefore, useful detail has been denied to the enquiry,

[1] An application to admit hearsay evidence emanating from Botha was unopposed and granted. Nevertheless, such material evidence from this source was in any event corroborated by Julien Cassinga.

[12] On 15 July, the generator was removed from the site by its owner who had leased it to the mine and had not been paid. The mine had another back-up generator, the property of Blackspear, which could have been used. It was not put into operation, presumably for the same reasons that the principal generator had been switched off.

[13] The work stoppage continued for a considerable time. The management were, during this period, scrambling to secure funding to meet the workers' wages and pay other creditors. By 30 July 2016, no wages had yet been paid. It must be inferred that this incensed the workers. Members of the union, AMCU, which represented some, but not all of the workers, on that day, entered the mine shaft and commenced a sit-in. Management was denied access to the underground areas. There are no witnesses to testify exactly what the workers did whilst there. What took place, whilst they were in occupation, was later revealed.

[14] The behaviour of the workers was violent. All administrative staff were warned off and remained away from the mine throughput this period. Annemarie Weir, the financial manager and her assistant, on 25 August 2016, made an exceptional trip to their office to retrieve UIF documentation to enable a payment to be made to the workers. They were besieged in their office and assaulted. The Police were summoned to rescue them. They were extracted and taken away to safety under escort. An interdict was granted by the Labour Court on 31 August which addressed the objective of getting the workers out of the mine, *inter alia* for their own safety and to try to secure the assets underground from harm.

[15] The sit-in endured until 20 September 2016 with a short interruption in early August when a payment to the workers was made on 2 August. Julien Cassinga, the mine geologist and site manager, and Botha, seized the opportunity during what Cassinga described as a "quiet moment" to enter the mine to inspect conditions What they observed was widespread vandalization of various pieces of equipment and, most importantly, of electrical cabling. The destruction of the electrical reticulation

infrastructure meant that it was impossible to supply power to the pumps. Photos of the wanton destruction were exhibited to the court. They showed the cut cables and the stripping of copper wiring from transformers and battery chargers and the like. The only reasonable inference to draw is that the workers perpetrated these acts of vandalism and theft.

[16] At that time, the pumps had been inoperative for approximately six weeks. During this inspection, the ingress of water was noted by Cassinga. The working face was inaccessible. Razor wire was thereafter fitted to the shaft entrance to try to secure the area, but the workers returned to resume their sit-in and broke through the barrier to gain access. By the time a deal was eventually reached with the workers on 20 September 2016, to pay their wages in instalments, the mine had been lost to flooding and was not capable of economic rehabilitation. With the loss of the mine, axiomatically went the loss of the insured equipment.

[17] The expert evidence of Gerard Scherman, a consulting mining engineer, was presented. He addressed the prospects of re-opening the mine for production and traversed the practical and bureaucratic requirements. The rehabilitation would probably cost about R22,084,820 plus VAT and such a project would take about six months to complete. This is expenditure which would produce no revenue; it would simply open the prospects of fresh operations requiring yet further capital.

[18] The management of the mine and that of Blackspear were plainly powerless to resist the force exerted by the workers. In this regard the evidence is that the police were loath to engage the workers physically. No criticism can be advanced that there were reasonable steps by Blackspear that could have been taken and which were neglected.

What is the legal cause of the damages suffered by Blackspear?

[19] The test to be applied is that set forth in *Guardrisk Insurance Co Ltd v Café Cameleon Cc 2021 (2) SA 323 (SCA) at paras 37 -41:*

“[37] The general approach to causation also applies to insurance law. Factual causation is the first enquiry. The diagnostic tool is the 'but for' test, which involves a 'hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant'. The test is usually applied in the law of delict. In the insurance context, the analysis is aimed at establishing what would have happened, but for the insured peril.

[38] The courts have recognised that a rigid application of the test may sometimes yield unpalatable and unfair results, and have thus cautioned against applying 'rigid deductive logic'. In what is now an oft-quoted passage from this court, in *Minister of Safety and Security v Van Duivenboden*17 Nugent JA said:

'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was a probable cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the course of ordinary human affairs rather than an exercise in metaphysics.'

[39] The common-law test is thus applied flexibly, recognising that 'common sense may have to prevail over strict logic'. In the contractual context it has long been accepted that causation rules should be applied 'with good sense to give effect to, and not to defeat the intention of the contracting parties'. For insurance contracts the question always is, 'Has the event, on which I put my premium, actually occurred?'

[40] Of relevance in the instant case is that there may be more than one cause or multiple causes giving rise to a claim. In that case 'the proximate or actual or effective cause (it matters not what term is used) must be ascertained . . .'. Even if a loss is 'not felt as the immediate result of the peril insured against, but occurs after a succession of other causes, the peril remains the proximate cause of the loss, as long as there is no break in the chain of causation'. A proximate cause should be identified as a matter of 'reality, predominance [and] efficiency'. Put differently, the real or dominant cause is ascertained by applying good business sense.

> [41] The enquiry into legal causation usually follows factual causation. It asks whether there is a sufficiently close relationship between the factual cause and the consequent loss to give rise to legal liability. Put differently, the question is whether the loss is too remote for the factual cause to also be the legal cause. If not, no legal liability may arise."

[20] Both Blackspear and Bryte allege the cause of the loss suffered was the workers conduct which was a peril covered by Sasria. Sasria's case is that the cause of the losses is the removal of the main generator.

[21] On the facts described, it is plain that the idea of the removal of the generator as a cause of the loss is unsustainable. Indeed, as is amply demonstrated the presence or absence of the generator is irrelevant. The key to the controversy is to ask who is responsible for the failure to maintain the pumps in operation. The answer is plain:

21.1. the withdrawal of labour, including the labour of the pump attendants,
21.2. and the prevention of anyone else manning the pumps by denying access,
21.3. and moreover, the cutting of the cables,
21.4. all with the clear intention of hurting the mining operation.

[22] Some evidence was adduced from the claims-handlers of both insurers. None of it was useful for the purpose of determining liability. Bryte had commissioned an assessor to advise it and furnished a report which alleged the labour action was the cause. This was the basis for Bryte answering the claim by denying there weas cover for the peril in question. Sasria commissioned an assessor to give it a report. That assessor did not testify. Sasria's case as pleaded was that the removal of the generator was the cause of the losses. This has been proven to be incorrect. In short, the vandalism of the workers rendered the pumping operations impossible which in the chain of causation resulted in the mine being lost to flooding.

[23] This case is not one where there can be argued that, plausibly, there was more than one cause. The chain of events are unequivocally linked between the worker seizure of the shaft, their vandalism and violence, and the subsequent flooding. [2]

[24] During argument, Counsel for Sasria, quite properly conceded that the body of evidence adduced proved that the cause of the losses suffered by Blackspear was the labour unrest which was a peril for which Sasria was liable to Blackspear.

The Prescription issue

[25] As a result of the finding made on causation it follows that Bryte is not liable. The consequence is that the prescription defence has turned out to be superfluous. It is potentially relevant only to costs.

[26] The case pleaded by Bryte alleges that action was instituted after three years had elapsed from the date of the loss having been sustained. The date relied upon is 20 September 2016 when the management had unfettered access to the mine to assess the ultimate scale of the disaster, o,r at very latest, November 2016 when a claim was lodged. The action was indeed commenced more than three years later than these dates.

[27] Blackspear replicated that the Prescription Act 68 of 1969 did not apply because Bryte was confined to clause 8(b) of its policy which provided for a period of prescription from the date of a rejection of the claim and, as no rejection was ever issued, the clause could not be invoked. This proposition is unsound in law. It is contradicted by the decision in *Muller v Sanlam Life Assurance Ltd 2016 JDR 1813(SCA)* at paras 17-19.

> "[14] There are several strings to Muller's bow on prescription. First, he contends that until a claim has been repudiated by an insurer, the debt does not become due. But there is no authority for that proposition. Section 12(1) of the

[2] *See; Incorporated General Insurance Ltd v Shooter 1987(1) SA 842 (A) at 862C*.

Prescription Act 68 of 1969 provides that 'prescription shall commence to run as soon as the debt is due; s 12(3) states that a 'debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'.

[15] In *Danielz NO v De Wet & another* 2009 (6) SA 42 (C) (paras 48, and 50 to 54) the court stated that the Act applies to insurance contracts as to all other contracts. Traverso DJP stated that in terms of the insurance contract in issue, the debt became due when the insured died. That was the date on which prescription commenced to run.

[16] Muller knew of the death of his former wife and the existence of the policies on that date – 13 September 2006. Thus, the debt would have prescribed on 12 September 2009, three years later. That Muller was aware of the debt immediately is confirmed by the fact that he consulted his broker, G Botha, very soon after the death and claims were lodged on his behalf. And he had taken out the policies not long before his former wife's death so he was fully aware of their existence and their terms. Yet no proceedings were instituted until 10 May 2011, more than four years after the debt became due.

[17] Sanlam accepted that it bore the onus of proving that the debt had prescribed. It argued that the contention of Muller that prescription would only begin to run on the date when it rejected his claim was unsustainable. As Nugent JA said in *Duet & Magnum Financial Services CC v Koster* [2010] ZASCA 34; [2010] 4 All SA 154 (SCA) para 24: 'At times the exercise of a right calls for no action on the part of the "debtor", but only for the "debtor" to submit himself or herself to the exercise of the right.'

[18] It was thus not incumbent on Sanlam to accept or reject Muller's claims on the policies. Only when process was served on it in terms of the Act would it be obliged to defend the claim. Thus the numerous queries directed by the broker, G Botha, who represented Muller in dealing with Sanlam, did not require an answer from it, whether accepting the claim or rejecting it.

[19] Although the court considered cases that have dealt with the time at which a debt becomes due, I do not think it is necessary to repeat the established principles again. Muller had all the knowledge of the facts underlying his cause of action on the date of his former wife's death. In *Minister of Finance & others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA) this court said (para 17) that 'time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case "comfortably"' (footnotes omitted)."

[28] There was no doubt about the identity of the insurer to whom a claim could be made nor any uncertainty about the relevant necessary facts of which knowledge was a precondition to articulating a claim. Indeed, Blackspear demonstrated exactly that in its claim.

[29] Accordingly, the prescription plea is good.

The Costs of suit

[30] The strategic decision by Blackspear to sue both insurers cannot be criticised on any forensic grounds. Although it has succeeded in obtaining an order declaring Sasria liable, the action *ex abundante cautela* against Bryte ensured that were it to have failed in such a case against Sasria, the axiomatic result would have been to establish liability of Bryte. It might even be thought that Bryte had a material interest in the *lis* between Blackspear and Sasria; indeed, in the hearing Bryte and Blackspear were *de facto* on the same side.

[31] It was argued that an onus rested on Bryte to prove its exception as regards cover for labour unrest applied in this case. This is correct.[3] Although the exception in the Bryte policy is not articulated in the identical terms in the Sasria coupon, for all

[3] *See: Griesel v SA Myn & Algemene Assuransie (Edms) Bpk , supra, at 477*.

practical purposes, proof of a “Sasria peril” on Sasria’s terms would be clear proof of the applicability of the exception. Bryte, too, has been prudent by not putting up a single defence, and to cater for the risk of a court finding Sasria is not liable, added the prescription defence.

[32] The question thus arises, in this context, as to who should bear the costs. Blackspear’s argument is that Sasria should pay the costs of both other parties. This was premised on the notion that there is a *lis* between the two defendants. Strictly speaking that is not correct. But that nicety is unimportant to this analysis. A practical evaluation of this case is that it has been *de facto* a contest between the two defendants to show the other is liable rather than itself. Both Blackspear and Bryte have succeeded in the face of resistance from Sasria.

[33] Blackspear contends that there is a further reason why Sasria should bear the costs of both other parties. Sasria conceded liability, at argument stage, but it much earlier, had available to it, through the medium of the witness statements, all the evidence, none of which was uncontested by Sasria in the four-day hearing. This is a valid point.

[34] This case has been prepared and conducted in accordance with the rules of the Gauteng Division Commercial Court.[4] This involved a judge case-managing the matter from early on, and of particular significance, the provision, prior to the hearing, of witness statements to stand as evidence in the trial during which cross examination alone took place. It is contended that Sasria was fully acquainted with the evidence to establish its liability and could have capitulated before the costs of the hearing were incurred. In my view, among the several advantages of the commercial court model is precisely that opportunity to take a rational decision about the likely outcome of the case at an earlier time, and potentially save costs. A failure to do so ought to attract accountability.

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[4]These Rules are accessible in Erasmus et al, *Superior Court Practice, 2nd Ed (Juta), vol 3*, in section H.

[35] Lastly, it was contended that this failure by Sasria was egregious and should attract a punitive costs order. In answer it was argued whatever the evidence in the witness statements might reveal it was not improper to see what came out in the trial before reassessing one's case. That argument would have enjoyed some force if any part of the body of evidence had at least been challenged, even if not rebutted. In this case, the evidence as laid out in the witness statements was barely amplified in cross examination. Nothing novel was extracted because nothing novel was asked of the witnesses. It is thus fair to contend that a four-trial could have been avoided.

[36] Does it however warrant a punitive costs order? In my view it does not. A punitive costs order is appropriate where mala fide practises are evident. These circumstances do not reflect that to be so and to rebuke Sasria or its legal representatives on these facts would be inappropriate. Nonetheless, in my view, the appropriate costs order is that Sasria bear the costs of both Blackspear and of Bryte on the party and party scale.

[37] What then of the segment of the case concerned with Prescription? It consumed a negligible portion of the time taken up in the hearing. Were it practical to sever it from the whole, I would do so, but it seems to me to be an exercise that would constitute a disproportionate effort to achieve such end.

[38] Accordingly, having regard to the scope of the discretion provided in Rule 10 (4)(b)ii of the Uniform Rules of Court, in my view it is appropriate that Sasria shall bear the costs of Blackspear and of Bryte, Sasria being the unsuccessful defendant.

[39] On behalf of Blackspear, the costs of two counsel were sought. It was contended on behalf of Saria that this was not appropriate. I disagree. This matter is of enormous importance to Blackspear and its shareholders. The loss of the mining equipment is, in effect, the loss of the substratum of the business of Blackspear. The quantum sought is supposedly R18.629m, and although that has yet to be proven, it cannot be said that a litigant is being extravagant in briefing two counsel to present its case.

The Order

(1) It is declared that the second defendant is liable to the plaintiff in the sum of its proven damages.

(2) The second defendant shall bear the costs of the plaintiff and of the first defendant, including the costs of two counsel where so employed.

ROLAND SUTHERLAND DEPUTY JUDGE PRESIDENT
GAUTENG DIVISION, JOHANNESBURG

Heard: 9 -12 May 2022
Judgment: 16 May 2022

For the Plaintiff:
Adv R Shepstone,
Adv K Pule
Instructed by A Nondwana of Fairbridges Wertheim Becker.

For the First Defendant:
Adv L Choate
Instructed by C Theodosiou of Webber Wentzel.

For the Second Defendant:
Adv P J Coetsee
instructed by J Smith of Stegmanns.