REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2008/27712

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

4/04/2014
DATE

SIGNATURE

In the matter between:

SCREENING AND EARTHWORKS (PROPRIETARY) LIMITED Plaintiff

and

HOLLARD INSURANCE COMPANY LIMITED Defendant

JUDGMENT

KATHREE-SETILOANE, J:

[1] The plaintiff, Screening and Earthworks (Pty) Ltd which specialises in the field of supplying screening and crushing services to various entities including mines and organs of state, claims indemnification from the defendant, Hollard Insurance Company Limited, in terms of a Machinery Breakdown and Loss of Profit Policy ("the Policy"). The Policy as well as the

terms and conditions contained therein are common cause between the parties.

[2] The plaintiff seeks indemnification under the Policy as a result of the sudden and unforeseen physical damage which occurred to the main bearing of its insured machine – a 2002 Pegsan Cone Crusher S/N QMO 18003 ("the cone crusher"). It alleges that this damage occurred on 23 October 2007 and resulted in a complete failure of the bearing. The plaintiff seeks indemnification under the Policy arising from the failure of the bearing in the amount of R589 503.22 being the costs it expended in repairing the cone crusher and main bearing. The defendant has refused to indemnify the plaintiff, and after various investigations rejected the plaintiff's claim on the basis that the damage was caused from wear and tear; but also reserved its right to raise any such other grounds that may become apparent. Pursuant hereto, the defendant raised various other exceptions and defences in various alternatives in its plea to the plaintiff's particulars of claim. Not unexpectedly, during the course of the trial various issues narrowed and defences raised fell away – including the wear and tear defence. The remaining defences are:

(a) the plaintiff's failure to preserve the damaged parts and make them available for inspection to a representative of the defendant, and

(b) the plaintiff was under-insured and thus an average is to be applied to its claim.

These so called special defences are founded on exceptions contained in the Policy. The court held at the onset of the trial that the onus to prove these defences is on the defendant.

Condition Precedent

[3] I deal first with the defence that the plaintiff failed to preserve the damaged parts and/or make them available for inspection by a representative of the defendant[1]. In this regard, the general conditions of the Policy provide:

> "The due observance and fulfilment of the terms of this Policy ... shall insofar as they relate to anything to be done or complied with by the insured be a condition precedent to any liability of the company to make any payment under this Policy."

This general condition and term of due observance is qualified in the following manner:

> "5. Claims
>
> a) On the happening of any event which may result in a claim under this Policy the insured shall as soon as possible and at its own expense ...
>
> *iii)* preserve any damaged parts and make them available for inspection by a representative or surveyor of the company."

[4] Clause 5(a)(iii) of the Policy stipulates that on the happening of any event which may result in a claim, the insurer must preserve any damaged parts and make them available for inspection by a representative or surveyor of the company. The Concise Oxford Dictionary defines the word "*preserve*" to

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[1] The defendant pleaded this defence at paragraph 4.2.3 read with sub-paragraph 4.2.4.3, paragraph 6.1 read with sub-paragraph 6.1.1, sub-paragraph 6.1.1.3 and sub-paragraph 6.1.2 of its plea.

mean "*keep safe*" (from harm etc.). The noun "*preservation*" is defined as "*preserving, being preserved, from injury or destruction*". Similarly, the Collins Dictionary of the English Language defines the verb *"preserve" "to keep safe from change or extinction"* and "*to protect from decay and damage*".

[] The argument advanced on behalf of the defendant is that the term in clause 5(a)(iii) of the Policy is a "condition precedent" to a successful claim, and having regard to the nature of the Policy, which is a "machinery breakdown and loss of profit" policy, the inclusion of a preservation clause such as clause 5(a)(iii) is essential, without which the insurer would be left to the mercy of the insured's unilateral decision-making, leaving the insurer with no checks or balances to verify the claims process. Clause 5(a)(iii) of the Policy is, as contended for by the defendant, a condition precedent which the plaintiff is required to comply with, failing which the defendant is allowed to deny liability to make any payment under the Policy. A strict observance of the Policy's terms is thus a condition precedent to the incidence of the defendant's liability.

[6] The plaintiff led the evidence of four experts on the operation, maintenance, repair, and costing of cone crushers. They are Mr Ross Trevelyan, Mr Sydney Rees, and Mr Gerhardus Jansen van Rensburg ("Van Rensburg"), the plaintiff's owner and general manager since 1998 to date. Their qualifications and expertise are not in dispute. All three experts testified that the damage to the cone crusher was occasioned by sudden and unforeseen physical damage to it, and not as a result of wear and tear,

cavitation, corrosion, erosion etcetera. In brief, their evidence was that a piece of the bearing cage became dislodged from the bearing cage causing it not to hold together. The piece of the bearing cage that had dislodged caused the bearing to jam. Consequently, one or two of the rollers adjacent to the dislodged piece of the bearing cage became lodged between the bearing and the outer bearing cup, alternatively between the inner race and the bearing cage, as a result of which the crusher head lifted from its seating area. By way of analogy to a chocolate fountain, Rees and van Rensburg, in particular, testified that the damage to the bearing at issue was within a closed system wherein oil had been continually re-circulated throughout the eccentric of the mobile crusher and that this became entirely contaminated and damaged as a consequence of the sudden and unforeseen damage.

[7] Van Rensburg, the plaintiff's owner testified that he, together with Micheal Frederick Botha ("Botha") were the first persons to be notified and to attend to the failure of the plaintiff's cone crusher on 23 October 2007, and to inspect, diagnose and give instructions to dismantle it. Van Rensburg conceded under cross-examination that at a very early stage, between 23 October 2007 and 26 October 2007, after having taken preliminary steps to strip the cone crusher down, he was able to establish, by peering down through the chamber (described by him as a port-hole type opening) that serious damage had occurred to the upper lip of the inner race of the bearing. In fact, Van Rensburg's evidence was that when he saw the divots through the port-hole, he knew that the machine was not going to start.

[8] It is apparent from Van Rensburg's evidence that at this early stage the plaintiff (Mr Van Rensburg and other personnel) were already aware not only of an "*event which may result in a claim*" but also of the "serious" nature of the event. Therefore, at this stage already, it would have been more than apparent to the plaintiff that an insurable event had occurred and there was an obligation to preserve and make the component part (the bearing) available for an *in situ* inspection by a representative of the defendant.

[9] This was, however, not the course that the plaintiff chose to take. Instead the plaintiff chose to continue the stripping process. This process, which in my view further comprised the preservation of the damaged parts, entailed a further strip-down of the various component parts making up the cone crusher, a separation of various of these parts, certain of which were left *in situ* at Brits and others of which, the bearing as a component part, were then road-freighted to the plaintiff's Rustenburg factory/workshop. Van Rensburg conceded under cross-examination that this freight trip in itself could have further compromised the condition of the bearing as a component part, which was freighted.

[10] On arrival at the plaintiff's Rustenburg factory/workshop those portions of the cone crusher were further undressed to allow for a more complete inspection of the bearing. Although at this stage the damage to the roller cage was evident, Van Rensburg instructed his artisan/boilermaker to torch cut the cage. The cage was torch cut on two opposite sides of the cage. It would seem to me that these two cuts to the cage, position aside, are again in

and of themselves a direct failure to preserve the damaged parts. The situation, in my view, was exacerbated by Van Rensburg's direct instruction to cut at the compromised point of the cage – directly where the damage was said to have occured. It is apparent from van Rensburg's testimony that other than for purposes of convenience, "driven by expediency", no good reason was given as to why this instruction was given.

[11] Van Rensburg, Rees and Trevelyan were *ad idem* that when cutting the main bearing from the eccentric, which could not be attained by any other means, this would be done as a matter of course at the easiest point, namely the point where the bearing cage had the finger displaced. However, Rees in cross-examination conceded that the latter may have caused the "*killing of*" evidence, but said that he did not know whether there was an intention to have so killed (destroyed) evidence.

[12] In cross-examination and when presented with portions of Rees and Trevelyan's evidence, Van Rensburg conceded that his instructions as carried out had compromised ("*killed evidence*") at the site of the alleged failure. While Van Rensburg conceded that his instructions and the actions taken compromised evidence, he qualified this by stating that he had not intended to obscure or destroy any evidence – this decision he said was a purely practical one driven by considerations of convenience and expediency.

[13] Whilst this may have been so; I am of the view that this does not assist the plaintiff or Van Rensburg as the contractual obligation in clause 5(a)(iii) of

the Policy is absolute – on the happening of any event that may result in a claim, the damaged parts must be preserved and made available for inspection by a company representative or surveyor . The test is not whether the failure to preserve was intentional or negligent, as the insurer has no way of testing this. The test is simply was it preserved or not?

[14] The evidence makes it clear that in addition to the destruction of the cage, the inner ring and the outer ring were also torch-cut, each roughly in half. These actions again amount to a failure of the plaintiff's obligation to preserve. This fact was for the plaintiff, exacerbated by Van Rensburg's evidence-in-chief, and under cross-examination, that the cutting process in and of itself was not only destructive to the portions being cut, but also to surrounding areas. In this regard, Van Rensburg ascribed certain of the pitting, heat discolouration and bluing to the cutting process, and conceded that a five centimetre portion on each side was compromised from the cutting process. I am, in the circumstances inclined to agree with the defendant's contention that in these respects the plaintiff and Van Rensburg's failure to preserve the damaged parts is patent, and fatal to the plaintiff's claim.

[15] Mr Lazar, the defendant's appointed Loss Adjustor was appointed by way of a letter dated 31 October 2007 under the hand of the plaintiff's broker, Newman & Associates. It is not evident exactly when this advice was communicated but it would seem to have occurred between 1 and 9 November 2007, as it is common cause that Mr Lazar attended at the Brits site for an inspection on 12 November 2007. Mr Lazar's letter, dated 3

March 2008, addressed to Van Rensburg of the plaintiff was read into the record by the defendant's counsel and through evidence-in-chief it was, insofar as it related to the plaintiff and Mr Van Rensburg, accepted as a true recordal of the events that ensued – an *aid memoire* or memorandum of sorts.

[16] While Van Rensburg was originally on site at the time of Mr Lazar's attendance at Brits, and had travelled in the same vehicle that repatriated certain of the component parts from Rustenburg back to Brits, the conduct of the meeting itself was delegated by Van Rensburg to one Mr Christo Smit of the plaintiff. Annexed to the 3 March 2008 Lazar letter, are also a sequence of photographs taken by Mr Lazar at this time, which depict those portions of the composite bearing which were made available for inspection, as also certain other *in situ* portions of the cone crusher.

[17] Van Rensburg conceded that these photos were taken by Mr Lazar at the relevant time and are proper representations of what was made available for his inspection. In short, from the bearing as a composite part and the root of the breakdown, only the halved cage, the broken finger and two out of an agreed total of some 28 rollers were made available for inspection by Lazar at the Brits site. Mr Lazar was also able to inspect and photograph the lowest bearing, the sump and the main shaft.

[18] What is absolutely certain at this time, is a complete and utter failure to preserve inter alia the damaged parts in the form of the component bearing. The bearing had for all intents and purposes been completely "destructed" by

this stage in complete disregard of the plaintiff's contractual and absolute obligations to preserve. Van Rensburg's mind-set which is apparent from his conduct is summed up in what he repeats as the instruction that came from the plaintiff's broker, Newman & Associates (Fred Newman), to continue with the fixing of the bearing:

"Mr Fred Newman always had a saying, carry on, do what you must do as if you were uninsured, and I loved that. The way I understood it is do not waste time, do not wait, carry on because your income is standing, we will do whatever to get you going."

[19] This attitude is also borne out in the repair of the cone crusher, its re-assembly and the re-commissioning of the machine. Sixteen days of downtime were claimed in terms of the loss of profit portion of the Policy, which meant that the machine had been re-commissioned by 14 November 2007. As a fact we know that the machine was re-commissioned shortly after Mr Lazar's visit to Brits. However, by this time the preservation clause had been offended against, and any further inspections were of little or no use.

[20] By the time Trevelyan and the other experts become involved, not only the fact of the failure to preserve, but also the consequences resultant from such failure became manifest. Trevelyan in his expert notice and his report dated 20 March 2008 opines that he is only in the position to give "*the possible cause of failure having only inspected the inner ring, cage and two rollers*". Trevelyan had grave misgivings about the fact that the cage "*has been gas cut in half, unfortunately at the point that appears to be a fractured cage finger*", which is the point where the damage occurred. He was of the

opinion that because the finger had been gas cut at one end, this made it "*impossible to determine if there was a fracture, crack or distortion*".

[21] His report and indeed his *viva voce* evidence is littered with similar qualifications and observations, none more so than his observation that the "*cage has strangely, been gas cut at the location of the said failure*". He thereafter struggles to his conclusion that on the sparse evidence available to him, that the fracture of the cage pocket would usually be sudden and the result of severe vibration or shock loading. He does not exclude and cannot exclude other possibilities.

[22] Mr Rees, also an expert, gives evidence "*that he* [the plaintiff] *is killing evidence*". The common theme throughout the various experts canvassed, is the ability to study the bearing as a full component part as the only reliable mechanism for establishing the cause of the fault with absolute certainty.
Van Rensburg stated that he had gone to Mr Edward Booyens of ELB Equipment Limited for the purposes of garnering an expert and expert advice. Van Rensburg was taken to a letter, written by Edward Booyen's of ELB Equipment Limited and addressed to the plaintiff, dated 11 March 2008, both in evidence in chief and cross-examination. Mr Booyens required of the plaintiff that they make the bearing as a component part available, and that certain testing be conducted on this component part. He concludes his request by stating that conclusive evidence regarding the root cause of the failure can only be garnered by having access to the bearing as a complete component part and conducting the tests as suggested.

[23] Under cross-examination, Trevelyan states that he would have liked to inspect "*the entire bearing*" because "*the other parts of the bearing may have told other parts of the story*". It is to be noted that he did not deem it necessary to make the request for the full component part bearing, as Mr Eric Glasfit (one of the experts) had asked, at the meeting of experts of ELB, that it be made available for the experts – but it never was.

[24] The plaintiff contends that there is no merit in the submissions of the defendant that it failed to preserve the damaged parts, as no further components from the broken bearing had been called for in order to evaluate the damage and assess the cause of the breakdown. The plaintiff, therefore, argued that the extensive debate with the plaintiff's experts in this regard, and in particular as to whether they would have wanted to see more of the bearing, was nothing but a red herring as there is no evidence of a call for more components. In this regard, the plaintiff points out that what remains unscathed is Van Rensburg's evidence that Lazar at all material times knew that the remaining parts were at the plaintiff's premises at Rustenburg, where the eccentric had been repaired, but that nobody for the defendant ever demanded to see them, because Lazar throughout insisted that the roundings on all four points of the bearing cage were visible (at a distance) evidence of "*wear and tear*". The plaintiff accordingly contends that there is no direct evidence from the defendant (*viva voce* or otherwise) that it had ever required more components to be made available in order to consider the cause of the

damage - which at all times was considered by the defendant as being nothing more than "*wear and tear*".

[25] The plaintiff also contends that the evidence that the bearing failure was caused by sudden and unforeseen damage and not wear and tear remained unchallenged, and hence the plaintiff's version must stand. In response, the defendant argues that it would have been futile to challenge the evidence of the plaintiff on this score, as the defendant was in no position to challenge the evidence as it had no way of knowing what the cause of the failure of the bearing was, because at the point of inspection the damaged parts were not preserved. I am persuaded to agree with this submission for the following principal reason. In the absence of inspecting the damaged parts in their preserved condition, the insurer has no way of knowing what the cause of the damage or failure is, and is therefore in no position to challenge any evidence led by the insured as to the cause of the failure of, or damage to, a particular part. Hence the need for a preservation clause such as clause 5(a)(iii) of the Policy, which places a positive obligation on the insured to preserve the damaged parts and make them available for inspection by a representative or surveyor of the insurer.

[26] It is furthermore not for the insurer to demand to see the damaged parts in their preserved form, but it is for the insurer to preserve the damaged parts and make them available to the insurer's representative for inspection. As to the plaintiff's contention that there is no direct evidence from the defendant that it had ever required more component parts to be made

available in order to consider the cause of damage, I consider it futile for the defendant to have requested to see more component parts, because by this stage the damaged parts had already been "destructed" – the preservation clause having already been offended against – making any further inspections of little or no use.

[27] The experts all speak with a common voice when it comes to the failed bearing: the need to inspect the whole bearing. As contended for by the defendant, this common thread in the evidence highlights in practical terms the necessity of preservation clauses as conditions precedent, which place an absolute obligation on the insured. Preservation clauses, and other similar clauses are therefore not merely inserted so that the insurer can collect premiums and thereafter avoid liability on vague and unreasonable technicalities, but are essential to reserve the insurer's rights to properly assess the situation.

[28] Clause 5(a)(iii) of the Policy places a positive obligation on the insured, on the happening of any event which may result in a claim, to preserve any damaged parts and make them available for inspection by a representative or surveyor of the company. A failure in respect of any part or parts of the condition precedent will allow the insurer to avoid liability. Obligatory terms that place duties on a party (to preserve) are designed to minimize the incidence of the risk or to ensure the correct determination of the extent of a

loss.[2] Similar clauses that have found application in our law are the so-called timeous notice claims, which in *Norris v Legal and General Assurance Society Limited*[3] was found to be a condition precedent. The Court in *Norris* stated thus:

> "There can be no doubt that condition No. 4 was imposed for the benefit of the Company. The Company would obviously want to know immediately of the happening of a fire so that it could investigate the cause and effect thereof under the most favourable circumstances, and it would likewise want to know within a certain time whether or not a claim was being preferred against it by the insured, and if so, the details thereof. Delay in notifying the Company of a fire or in preferring the claim against it might well result in serious prejudice to the Company."

[29] In *Russel,N.O and Loveday, N.O. v Collins Submarine Pipelines Africa (Pty) Ltd*[4] the concept of positive obligations on, in this case, the insured was examined. The concept was recognised as were the possible far-reaching consequences. In this event, a positive obligation in the form of assistance and co-operation was deemed to be suspensive upon an election by the insurers "*to exercise their right to associate*"[5] As they had not made such an election to associate, the obligation had not been triggered. However, had such an election been made it would have triggered an investigation as to whether the breach was fatal.

[30] In the present matter, clause 5(a)(iii) of the Policy places a positive contractual obligation on the insured, on the happening of any event which may result in a claim, to preserve any damaged parts and make them

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[2] *Resisto Dairy (Pty) Limited v Auto Protection Insurance Company Limited* 1963 (1) SA 632 (AD), p 643G-H to 644A-H
[3] 1962 (4) CPD at 745C-E
[4] 1975 (1) SA110 (A)
[55] at 152C-H and 153A-G

available for inspection by a representative or surveyor of the insurer. The uncontroverted evidence led on behalf of the plaintiff through the testimony of Trevelyan, Rees and Van Rensburg makes is quite clear – and it is in fact admitted by the plaintiff through Mr Van Rensburg – that there has been a breach of the obligation to preserve. In law, such breach of the express terms of the contract allows the defendant to avoid liability and to reject the plaintiff's claim, which it has done. In these circumstances, I find that the defendant has discharged its onus to prove on a balance of probabilities that the plaintiff has failed to comply with all of its obligations arising from the Policy. The defendant was accordingly entitled to reject the plaintiff's claim and deny liability. Accordingly, the plaintiff's claim falls to be dismissed.

[31] In view of the conclusion which I have arrived at, there is no need to deal with the defendant's further defence that the plaintiff was under-insured and therefore an average must be applied.

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

(1) The defendant is granted absolution from the instance.

(2) The plaintiff is ordered to pay the defendant's costs.

F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG

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