

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 2622/2015

In the matter between:

CCN BOERDERY BK

Plaintiff

and

ABSA VERSEKERINGSMAATSKAPPY BPK

Defendant

Coram: Lever J

JUDGMENT

Lever J:

1. The plaintiff in this matter ran a business where it bought up lucerne from other farmers and resold such lucerne. The plaintiff entered into a contract which was alleged to be partly written and partly oral to insure such lucerne with the defendant. The said insurance agreement was negotiated through a broker appointed by the plaintiff. This brokerage firm bears a similar name to the defendant, but the evidence is that it operates independently of

the defendant and even sells products from at least one competing insurer. One of the risks plaintiff sought to insure the said lucerne against was spontaneous combustion under what was termed a 'crop and stack' extension to the relevant insurance agreement.

2. There were three incidents which gave rise to claims against the said insurance agreement. The present matter involved only the third such claim. The incident that gave rise to the said third claim took place on the 29 December 2012. The defendant repudiated this third claim in writing on the 1 March 2013. Thereafter, the plaintiff left his original brokers and appointed a new broker. The new broker referred to as 'Libra Brokers' wrote to the insurance ombud on behalf of the plaintiff on the 9 December 2013. Thereafter a complaint was lodged with the insurance ombud on the 11 December 2013.
3. Correspondence between the insurance ombud and the defendant then ensued. The insurance ombud was unable to resolve the matter as the quantum of the plaintiff's claim fell outside his jurisdiction.
4. The plaintiff then issued and served summons in this matter on the 18 December 2015. The defendant defended the action and *inter alia* filed a special plea. The said special plea relied upon a contractual time bar contained in the agreement between the parties. The relevant written portion of the agreement is contained in clause C1(f) and reads as follows:

“(f) Prescription

- (i) The company will not be liable for any loss or damage after the expiry of 24 (twenty four) months after the occurrence of such loss or damage, unless the claim is the subject of a pending lawsuit or arbitration, or unless the claim in respect of the insured's legal liability is against a third party.

This limitation shall not apply to claims under any of the following Sections:

- a. Business interruption

- b. Probity Guarantee
- c. Stated Benefits
- d. Group Personal Accidents
- e. Personal Accidents (Assault) Extension under the Money Section if and when applicable.

(ii) If the Company denies any claim and a Summons is not served within 6 (six) months after such denial or in the case of arbitration in terms of General Condition 13 (Arbitration) of this Policy within 6 (six) months after the arbitrator or arbitrators or final decision-maker has given his or her verdict, all benefits in terms of this Policy will be forfeited in terms of such claim.”

5. It was common cause between the parties that the exceptions and the provisions relating to arbitration in the above quoted clause did not apply to the present case.
6. The special plea proceeded that the incident giving rise to the claim took place on the 29 December 2012 and the repudiation having taken place on the 1 March 2013, that the summons was served on the 18 December 2015. Accordingly, the relevant action was not initiated within six months of the repudiation, and it was also not initiated within twenty-four months of the incident that gave rise to the claim.
7. The plaintiff replicated to the said special plea. Such replication was to the effect that plaintiff denied the contention that the relevant clause relating to the time bar formed a part of the insurance agreement between the parties. Plaintiff also raised two other alternatives in the said replication, but these were not pursued when the matter was argued.
8. It is only this special plea that is before this court for adjudication. The defendant accepted the duty to begin and led the evidence of three witnesses. The defendant also accepted the onus to establish the contract.

9. The first witness called by the defendant was Mr Seabelo Nkomozulu. Mr Nkomozulu was an employee of the defendant at different times. He was not employed by the defendant at the time that is material to the present claim, but the records and correspondence relating to the present claim falls under his custody and control. Mr Nkomozulu recovered the email which was sent to the plaintiff's broker with the various policy components attached to such email from the defendant's old archive system. He could not open such attachments. Mr Nkomozulu also identified the various components that make up the defendant's insurance policy agreement. Mr Nkomozulu also pointed out from the documents that plaintiff claimed to be the written terms of the said insurance agreement that the general terms and conditions, which contain the time bar clause, were incorporated by reference.
10. The next witness called by the defendant was Mr Jonathan Tuohy. He is a technical manager with the defendant. He was furnished with the email that appears on page 1 of the defendant's bundle, which is dated the 3 August 2012. Mr Tuohy was able to open the attachments to that email and furnished same to the defendant's attorney. The plaintiff's then broker Mr Barnie Du Plessis is known to him although he (Mr Tuohy) did not deal with the policy at the material time. Mr Tuohy identified the attachments to the aforesaid email which he opened. This included *inter alia* the general terms and conditions which included the 'time bar clause' quoted above. Mr Tuohy denied the contention that the policy schedule attached to the plaintiff's Particulars of Claim at pages 7 to 25 of pleadings bundle 1 formed the full policy issued by the defendant.
11. Mr Tuohy also explained what is meant by the terms inception date, endorsement date and review date. Mr Tuohy also testified that once the policy is issued the documents would be sent to the plaintiff's broker, who would forward such documents to the plaintiff.

12. The next witness called by the defendant was Mr Barend (Barnie) Frederik Du Plessis. His evidence was that he was the plaintiff's broker and acted as the plaintiff's agent in arranging insurance coverage for the plaintiff. The people Mr Du Plessis had contact with in his dealings with the plaintiff were Mr Charles De Villiers and his daughter. Mr Du Plessis' evidence was that he had contact with the plaintiff's representative at least once a month, at times he would have had weekly contact with the plaintiff's representatives and at other times he might have had such contact every second week.
13. With reference to the email dated 3 August 2012, which appears at page 1 of the defendant's trial bundle, Mr Du Plessis testified that such email was sent by Ms Minnie Grobler, who was an administrative officer employed by the defendant. The email was copied to Mr Du Plessis as the plaintiff's broker. Mr Du Plessis was asked if he had an independent recollection of receiving this email to which he replied that he could not independently recollect receiving it but acknowledged that it was copied to his email address.
14. Mr Du Plessis was asked what he did with the electronic version of the relevant insurance contract which was attached to the said email in several parts. To which he replied that he was obliged by legislation to either print a hard copy or forward the contract in electronic form to the client within 30 days of him receiving it. Mr Du Plessis was asked if he could remember doing so in this case. He replied that he could not now recall doing so, but testified that in the ordinary course he would visit his clients at least once a month that he would normally print that contract and take it to the client when he visited them.
15. Mr Du Plessis was referred to a trailing email to the one already referred to dated 9 October 2012 which appeared at page 2 of the defendant's trial bundle and a further trailing email dated the 20 December 2012 in which at the instance of the plaintiff certain amendments and additions to the relevant policy were sought.

16. These emails tend to support the evidence of Mr Du Plessis that he had regular contact with the representatives of the plaintiff.
17. It was clear from the evidence of Mr Du Plessis that he forwarded the relevant repudiation letter to Mr De Villiers' daughter.
18. Mr Du Plessis also testified that as the broker he was aware of the defendant's time bar clause.
19. It is also clear from the evidence of Mr Du Plessis that in forwarding the repudiation letter to the representative of the plaintiff he drew attention to the part of the letter that dealt with the various options of how the matter could be pursued if the plaintiff did not accept the repudiation of its claim by the defendant and this included a reference to the limit of time within which legal steps had to be initiated.
20. The defendant then closed its case on the special plea and the plaintiff then called Mr Charles Tielman De Villiers to testify on behalf of the plaintiff.
21. Mr De Villiers testified that he was not a member of the plaintiff, but he described himself as the controlling mind behind the plaintiff. Mr De Villiers testified that his wife and a trust established for her benefit were the members of the plaintiff. Mr De Villiers also testified that his daughter did all of the administrative work on behalf of the plaintiff, and this included the filing of the relevant insurance policy.
22. Mr De Villiers testified that the only written policy document the plaintiff received from the defendant was the schedule attached to the Particulars of Claim as annexure "A", which appears at pages 7 to 17 of Pleadings Bundle 1. The said document is in the Afrikaans

language and contains the following term: “Hierdie polisskedule moet saamgelees word met die polisbewording, wat deel vorm van die versekeringssooreenkoms wat hierby aangeheg is, of op versoek verkry kan word.” Loosely translated this means that: This policy schedule must be read together with general terms and conditions that form part of this insurance agreement, such general terms and conditions are annexed hereto or can be obtained on request.

23. Mr De Villiers did not testify on what he understood by this clause that was clearly set out in the document which the plaintiff asserted as the written portion of the relevant insurance agreement. Unfortunately, Mr De Villiers was also not cross-examined on this aspect. However, from this clause alone it must have been abundantly clear to Mr De Villiers that there was more to this insurance agreement that would affect the rights of the plaintiff under the contract of insurance.
24. Significantly, under cross-examination Mr De Villiers conceded that the broker and Brokerage were acting as the plaintiff’s agent in entering into the relevant contract of insurance between the plaintiff and the defendant.
25. Also of significance is the fact that despite testifying that his daughter did the administration on behalf of the plaintiff, which would have included receiving and filing the relevant contract of insurance, the plaintiff did not call Mr De Villier’s daughter to give evidence in this matter. This is important in the context that the evidence was that such daughter was the administrative officer of the plaintiff. Mr Du Plessis’ evidence that his dealings were mainly with the daughter of Mr De Villiers. The fact that the plaintiff replicated to the special plea that the time bar clause did not form part of the relevant contract of insurance between the plaintiff and the defendant.

26. This was the evidence placed before this court. Mr Jankowitz who appeared for the plaintiff argued that the time bar clause was of such a nature that the defendant bore the onus of establishing not only that it was part of the agreement but that it had come to the attention of Mr De Villiers and that he had accepted the time bar clause as a term of the insurance contract on behalf of the plaintiff.
27. Mr D T v R Du Plessis SC, who appeared for the defendant, argued that this was not the case pleaded by the plaintiff in its replication. That, accordingly, it was not the case that the defendant had to meet on the pleadings. Mr Du Plessis argued that Mr De Villiers conceded that the broker also a Mr Du Plessis was acting as the plaintiff's agent in entering into the relevant insurance agreement. That the said broker was furnished with the full agreement and was aware that the relevant insurance contract contained the disputed time bar clause.
28. The defendant's counsel Mr Du Plessis is undoubtedly correct when he states the argument put forward by Mr Jankowitz on behalf of the plaintiff was not the case that defendant had to meet on the pleadings. In these circumstances, such case cannot fairly be considered in argument.
29. Mr De Villiers in his evidence on behalf of the plaintiff contended that he was not aware of the defendant's time bar clause in the relevant agreement of insurance and on this basis, Mr Jankowitz argued that plaintiff did not agree to the time bar clause. Apart from the legal consequences of the broker being the plaintiff's agent, there are two other considerations that cast doubt on the evidence given by Mr De Villiers. Firstly, in a letter by the plaintiff's new brokers, being Libra Brokers, dated 9 December 2013, it is clear that such new brokers were on that date aware of the defendant's time bar clause and that at the date of the letter that the plaintiff's claim had already lapsed in terms of the time bar clause in the agreement with the defendant. Mr De Villiers was unable to explain how Libra Brokers had knowledge


of the time bar clause if he was ignorant of that fact as he claimed to be. The second aspect that is a cause for concern in regard to the case put forward by the plaintiff is that it was clear from the evidence put before this court that the daughter of Mr De Villiers was the person who did the plaintiff's administrative work. That she was the person who filed the policy documents relevant to this matter. Yet she was not called to give evidence on the plaintiff's behalf.

30. The defendant's Counsel, Mr Du Plessis argued that I should draw a negative inference from the plaintiff's failure to call the daughter of Mr De Villiers. I don't think it is necessary for this court to go that far to reach a conclusion in this matter.
31. The evidence before this court clearly established that the time bar clause was a part of the relevant insurance agreement between the plaintiff and the defendant in this matter.
32. The legal consequences that flow from the broker Mr Du Plessis being the plaintiff's agent in negotiating the insurance cover with the defendant bind the plaintiff to such agreement including the time bar clause.
33. In these circumstances the defendant's special plea must succeed, and the plaintiff's claim must be dismissed on the basis that it has become time barred.
34. The only outstanding issue that remains is the issue of costs. Mr Du Plessis, who appeared for the defendant argued that costs should follow the result and that I should award costs of two counsel. He argued for costs of two counsel not on the basis of the complexity of the matter but on the basis that the matter was of great importance to both the plaintiff and the defendant.

35. In my view costs should follow the event, but this is not a matter that justifies the employment of two counsel. In considering the scale on which costs should be awarded I consider scale B to be the appropriate scale.

In the circumstances, the following order is made:

1. The defendant's special plea is upheld.
2. The plaintiff's claim is dismissed.
3. The plaintiff is ordered to pay the defendant's costs on scale B.


L G Lever
Judge
Northern Cape Division, Kimberley

APPEARANCES:

For The Plaintiff: Adv D C Jankowitz oio Haarhoffs Inc

For The Defendant: Adv D T v R Du Plessis SC with Adv W A De Beer oio Van De Wall Inc.

Date of Hearing: 14 February 2023

Date of Judgment: 04 October 2024