THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 574/03

In the matter between :

SOUTH AFRICAN EAGLE INSURANCE COMPANY LIMITED Appellant

and

KRS INVESTMENTS CC Respondent

Before:	**NUGENT, VAN HEERDEN JJA & ERASMUS AJA**
Heard:	**16 NOVEMBER 2004**
Delivered:	**24 NOVEMBER 2004**
Summary:	**Insurance policy – fraudulent claim – whether insurer excused from liability for subsequent claims**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] Fraudulent insurance claims – regrettably – are not altogether rare. While an insurer is naturally not bound to meet a claim that in truth is not covered by the policy the question that arises in this appeal is whether it may also avoid liability for a valid claim that arises subsequent to the attempted fraud.

[2] The question arises in relation to a policy of insurance pursuant to which the appellant indemnified the respondent against a variety of risks for the period 1 September 1999 to 31 August 2000. One of the risks against which the respondent was indemnified was the risk of loss or damage to a specified Land Rover motor vehicle. Another was the risk of damage by fire to the respondent's restaurant and its contents.

[3] On 30 December 1999 the insured Land Rover overturned and was damaged while it was being driven, with the respondent's knowledge and consent, by a person who was not licensed to drive the vehicle. In terms of an exception in the policy the appellant was not liable in those circumstances to indemnify the respondent. The respondent sought to overcome that inconvenient hurdle by misrepresenting the identity of the driver of the vehicle when it submitted its claim to the appellant.

[4] On 6 February 2000 – after the motor vehicle claim had been submitted but before it was paid – the respondent's restaurant and its

contents were destroyed by fire and the respondent submitted a further claim for recovery of that loss.

[5] In the course of investigating the claims the appellant discovered that at the time the Land Rover was damaged it was being driven by an unlicensed driver – contrary to the respondent's representation – and on those grounds it declined to meet the claim. It also declined to meet the fire claim, on the grounds that the misrepresentation made by the respondent – which must have been fraudulent – entitled the appellant to avoid the policy from the date that the misrepresentation was made and it purported to do so.

[6] The respondent sued the appellant in the Johannesburg High Court for recovery of both claims. The matter came before Ponnan J who, by agreement between the parties, was called upon to determine only the question of liability in relation to each claim. The learned judge found that the Land Rover was being driven by an unlicensed driver when the damage occurred – contrary to what the respondent persisted in asserting – and on those grounds dismissed that claim. Leave to appeal against that order was refused by the court *a quo* and by this court and I need say no more about it. The learned judge also found that the appellant was obliged to meet the fire claim and he issued a declaratory order to that effect. The present appeal, which comes before us with the leave of the court *a quo*, is against that order.

[7] The appellant's contention, both in this court and in the court below, was that one of the *naturalia* of an insurance contract – a term of the contract that is implied *ex lege* – is that an insurer against whom a fraudulent claim is made has an election to terminate the contract, and moreover, to do so with effect from the date that the fraudulent claim was made.

[8] Perhaps an insured does have a duty – whether tacit or implied – to act in good faith towards the insurer for the duration of the contract. And perhaps the deliberate submission of a false claim is a breach of that duty entitling the insurer to terminate the policy. But if that is so then on ordinary principles of our law the insurer would be relieved of liability only from the time of termination, and the rights and obligations that had accrued before then would remain extant (see, for example, *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) 22D-I; *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) 515E-516A; 1988 (2) SA 546 (A) 563J-564D). What the appellant seeks, however, is the recognition of something more: it seeks the recognition of a right to terminate the policy with retrospective effect from the date of the attempted fraud, with the result that the insured would forfeit rights that had accrued before the termination.

[9] Counsel for the appellant could refer us to no authority from our traditional sources in support of such a right – and I am not aware of any –

but he invited us to import the principle from the English law of insurance, which was said to be to that effect.[1]

[10] A similar invitation to import principles of English law relating to the consequences of submitting a false claim was recently declined by this Court in *Schoeman v Constantia Insurance Co Ltd* 2003 (6) SA 313 (SCA). In that case an event occurred that was insured against under the policy but the insured deliberately inflated the amount of the loss when submitting her claim. The insurer submitted that in those circumstances it was relieved of liability for the whole of the claim. Rejecting the invitation to import penal principles of English law that would have that effect Marais JA pointed out that our common law is 'basically anti-penal' and went on (at para 21) to say that

'[t]here would therefore have to be either a clearly recognised doctrine of forfeiture in our law or a compelling present need for its adoption before this court would be justified in lending its *imprimatur* to such a fundamentally penal doctrine.'

[11] In my view the rule that is sought to be introduced in the present case would operate as punitively as the rule that was rejected in *Schoeman's* case, for it purports to dispossess the insured of a perfectly valid claim, untainted by the fraud, that accrued contractually before the policy was

[1] The English law recognises forfeiture remedies in the event of fraud. The precise scope of those remedies, and their foundation, seems to be not altogether settled, and it is also doubtful that they correspond with the remedy that is now sought - see ER Hardy Ivamy *General Principles of Insurance Law* 6th ed 434 ff; *Colinvaux's Law of Insurance* 6th ed by Robert Merkin para 9-34; *MacGillivray on Insurance Law* 10th ed by Nicholas Legh-Jones paras 19-54 - 19-61; *The Law of Insurance Contracts* 4th ed by Malcolm A Clarke para 27-2C; Peter MacDonald Eggers and Patrick Foss *Good Faith and Insurance Contracts* para 11.128-11.134; Malcolm A Clarke 'Good Faith and Bad Blood in Insurance Claims' (2002) 14 SA Merc LJ 64.

terminated, and for the reasons outlined in that case we should similarly decline to import such a rule. As pointed out in *Schoeman's* case our law has no recognised doctrine of forfeiture, and in this case too there is no compelling reason to import such a rule, bearing in mind the following observation by Marais JA at para 24:

> 'When there is added to that the fact that insurance companies are masters of their own policies in the sense that they are free to unilaterally devise them, the insured has no say in the process, and that it is a simple matter to include an appropriate clause to protect the insurer against fraudulent claims by providing for forfeiture, there does not appear to be any pressing need for the law to provide such protection.'

[12] The appeal is dismissed with costs.

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R W NUGENT
JUDGE OF APPEAL

VAN HEERDEN JA)
ERASMUS AJA) CONCUR