IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO. CACGB-258-20
(High Court Civil Case No. UAHGB-003198-19)

In the matter between:

MAJWE MINING JOINT VENTURE (PTY) LTD **APPELLANT**

AND

OLD MUTUAL SHORT-TERM INSURANCE (BOTSWANA) LIMITED **RESPONDENT**

Attorney Mr T J Motsumi for the Appellant
Attorney Mr M M Maswabi for the Respondent

JUDGMENT

CORAM: KIRBY P
WALIA JA
GAREKWE JA

KIRBY P:

1. This appeal is against a judgment of Khan AJ delivered on 17th December 2020, in which he upheld the Respondent's special plea that an insurance claim lodged by the Appellant for a combined sum in excess of P20 million had been time-barred in terms of the contract between the parties.

2. The Appellant is a contractor, utilising heavy duty mining machinery, which was engaged in a major contract at the Jwaneng Diamond Mine. The Respondent is an insurance company. It is common cause that the parties entered into a contract, valid for the period 1st July 2016 to 31st December 2016 in terms of which the Respondent agreed to insure the Appellant's plant and machinery against various eventualities.

3. On 22nd September 2016 the Appellant's Track Dozer TD004 sustained fire damage while being used on the contract. The Appellant timeously lodged its claim. The response was a letter dated 2nd February 2017, which was not marked as being WITHOUT PREJUDICE, and could thus be relied upon in any future litigation. That notwithstanding, it contained a final paragraph which commenced with the words "notwithstanding the above and purely without prejudice to the rights of Old Mutual..." This letter lies at the heart of the appeal, and is relied upon by both parties, so I will reproduce it verbatim. This is what it said:

"Dear Sirs

CLAIM - TRACK DOZER TD004

(1) We refer to the claim submitted by Majwe Mining Joint Venture (Pty) Ltd for damage to the said Track Dozer TD004 following damage to the said Track Dozer by fire on 22nd September 2016.

(2) In addition we draw the attention of Majwe Mining Joint Venture (Pty) Ltd to the provisions of General Condition 3 in the policy.

(3) General Condition 3 requires:

> "the Insured shall exercise reasonable care to prevent liability, loss or damage against which the Insurer indemnifies the Insured."

(4) We have ascertained that the cause of the fire which resulted in the damage to the Track Dozer was that:

4.1 The battery posts on the rear battery made contact with the earthed lid of the battery box causing a prolonged short-circuit in the twenty four (24) volt DC Circuit.

4.2 The main battery cable to the starter motor was unsupported and had rubbed through the insulation causing direct contact with the frame of the machine.

4.3 these prolonged short-circuits caused one of the battery cables to overheat due to current drain in excess of the cable ratings which then ignited oil residue on or adjacent to the cable.

4.4 The hold-down clamps that secure the batteries were removed allowing the batteries to move freely within the battery box.

(5) We have also ascertained that a two thousand (2000) hour electrical inspection was undertaken and completed on 20th September 2016.

(6) The two thousand (2000) hour electrical inspection completed on 20th September 2016 failed to identify the missing hold-down clamps, the missing terminal insulation covers and chafed wiring.

(7) Had the two thousand (2000) hour electrical inspection been performed properly, then and in that event, the defects referred to above would have been noticed and would have been remedied.

(8) In the event that the two thousand (2000) hour electrical inspection had been done properly and had the defects been remedied, the loss would not have occurred.

(9) The Insured (Majwe Mining Joint Venture (Pty) Ltd), as a result failed to exercise reasonable care to prevent liability, loss or damage as contemplated by General Condition 3 of the policy.

(10) Notwithstanding the above and purely without prejudice to the rights of Old Mutual, and solely in order to settle the matter, Old Mutual offers Majwe Mining Joint Venture (Pty) Ltd an amount equivalent to fifty percent (50%) of the proved loss.

(11) The above offer is in full and final settlement.

Yours faithfully

(Managing Director)" (*my emphasis*)

4. Following that letter, the factual contents of which were disputed, a professional firm, Crawford's Global Technical Services, was engaged

by the parties at the expense of Old Mutual "to report on the causation and quantum" of the claim. Crawford's rendered its report on 16th August 2018. It concluded that ignition from the battery box seemed 'less likely' and that a rupture of the Hydraulic Tank Feed Hose, or of the Return Hose, was a more probable basic cause of the fire. It recommended that Old Mutual hold a reserve of US$745,635 against the claim.

5. On Monday 12th November 2018 the Respondent despatched a letter to the Appellant per e-mail, which read as follows:

> "Dear Gerald,
>
> We have now had the opportunity to review the report submitted by the Loss Adjusters, Messrs "Crawford" to yourselves and subsequently forwarded to us in respect of this claim.
>
> Having reviewed the report and the circumstances that led to the fire event and consequent damage to the dozer, it is abundantly evident that the Insured failed to take adequate and reasonable precautions steps and actions to prevent the loss and damage to the insured dozer as required by General Condition 3 (Prevention of Loss) contained in the policy.
>
> Our considered view therefore, is that the claim does not fall within the terms stated in the policy and is therefore repudiated.
>
> We trust you will find this in order.

Regards

(Managing Director)" *(again my emphasis)*

6. It was a term of the Insurance Policy (that is, of the contract between the parties) that:

> "General Condition 3: The Insured shall exercise reasonable care to prevent liability loss or damage against which the Insurer indemnifies the Insured."

7. It was a further term that:

> "General Condition 7: if the Insurers shall in writing disclaim liability for any claim for indemnity by the Insured and the Insured does not institute proceedings for an action or suit at law within twelve months of the date of receipt of such written disclaimer, the insurers shall be entitled to assume that such claim has been abandoned and shall not thereafter be liable to make any payment whatever in connection therewith."

8. Summons was issued by the Appellant on 8th October 2019, claiming for the damage to its Track Dozer, which it averred was covered by the Insurance Policy. The Respondent countered with a special plea, stating that the claim was time-barred, and also with a plea over, dealing with the merits of the claim. The Special Plea was refuted

and it was averred in the alternative, that the Respondent had waived its right to rely on the time-bar clause by engaging the loss adjusters to determine liability and quantum.

9. The sole issue before Khan AJ when he heard argument on the Special Plea alone was whether, on the facts and correspondence recorded above, the Appellant's claim was time-barred in terms of the Insurance Policy, and so fell to be dismissed. A secondary issue was as to whether the right to rely on General Condition 3 had been waived by the Respondent.

10. Khan AJ sought to contrast the wording used in General Clause 7, namely "if the Insurer shall in writing disclaim liability" with the more generally used expression, namely "repudiates liability". He then proceeded to compare the definitions in the Oxford Dictionary of "rejection" and "repudiation" and concluded that:

> "It is clear that the two words for all practical purposes have the same meaning."

11. It is not stated on what basis he considered the word 'rejection', as no detailed analysis of the letter of 2nd February 2017 was made. His conclusion was that the claim had been repudiated on 2nd February 2017, that the defence of waiver could not avail the Appellant, and that accordingly summons had been issued too late. He upheld the Special Plea, and dismissed the action with costs, on the basis that the claim was time-barred.

12. The Appellant appeals on the grounds that the Special Plea was improperly upheld because:

    (i) The Judge erred in holding that the letter of 2nd February 2017 constituted a repudiation of the claim; and

    (ii) In concluding that there was no waiver of the right to rely on the time-bar.

The appeal is opposed.

13. On the view I take of this matter, it is not necessary to address the issue of waiver. The dispute is a narrow one, and revolves around the proper interpretation to be given to the letters of the 2nd February 2017 and 12th November 2018, in the light of the conduct of the parties in the intervening period.

14. Both parties agree that on all the authorities, time-bar clauses in insurance policies are lawful and enforceable, and that the repudiation of a claim (from which time limits generally start to run) is constituted by a party making it clear by word or conduct that he no longer intends to be bound by the contract, and so declines to honour the claim. See, for example, **Khutso Investments (Pty) Ltd v Ezra and Another [2009] 2 BLR 327 at 335; Power Contracting (Pty) Ltd v Botswana Meat Commission [2000] 2 BLR 349**. The accepted test as to whether conduct amounts to repudiation is whether fairly interpreted, it exhibits a deliberate and unequivocal intention no longer to be bound.

15. I turn now to the contractual clause, and the two letters. In my view the words "disclaim liability" and "repudiate a claim" have the same meaning and effect. Those are no doubt the two expressions which Khan AJ intended to equate, although he did not express himself well. It is noteworthy too that the Respondent, in its second letter of 12th November 2018, chose to use the word 'repudiate' rather than to use the words "disclaim liability" as contained in General Condition 3. It is as well to note that in order to be effective a repudiation must be clearly communicated and unequivocal. Where as in this case, the repudiation or disclaimer has to be in writing, then the time-bar clause only comes into operation when the insurer has actually communicated to the insured a notice of rejection of his or her claim. The rejection of the claim must be "clear, unequivocal and total". See **Hurwitz's Trustee v Salamander Fire Insurance Co 1917 TPD 216 at 220**.

16. Looking first at the letter of 2nd February 2017, can it be said that this letter clearly, unequivocally and totally conveyed to the Appellant the rejection of its claim? I think not. While it undoubtedly expresses, in

its first nine paragraphs, its view, or at least its *prima facie* conclusion, that the Appellant's loss was due in part or in whole to the negligence of the Insured's own employees or subcontractors, it forbears from actually rejecting the claim, or from disavowing liability unequivocally, as is required for a repudiation to be effective. It deliberately refrains from using the words reject, disclaim liability or repudiate at all. On the contrary it proceeds to offer, without prejudice it is true, to pay half of the assessed claim in full settlement. Certainly that is not conduct consonant with conveying an unequivocal and total rejection of the claim. I note that there was no application from the Respondent to strike out or to redact the final two paragraphs of the letter of the 2nd February 2017, which was relied upon by the Respondent in its plea.

17. Its subsequent conduct is even more indicative of not rejecting the claim outright. Instead of proceeding to repudiate, it not only made an offer (albeit without prejudice) to settle, but it also collaborated with the Appellant to commission a loss adjuster to provide professional advice both as to causation/liability and as to quantum,

and it footed the bill for that commission. That commission was subsequent to, and independent of the offer to settle. I do not for a moment believe that a reputable insurance company would try to "lay an ambush" for its client, by expressing a *prima facie* negative view on causation, then waiting, while the loss adjuster was at work, for the time limit to go by, before repudiating. Indeed, the Respondent did not do so. After one year went by after 2nd February 2017, it did not inform the Appellant that the claim was time barred, that it assumed the claim was abandoned, and that it was closing its file. Instead it waited for the report, which only came in many months later.

18. On receipt of the report, which seems, at least in part, to negative the Respondent's initial conclusion, and perhaps to validate the claim to some extent, although only a full trial will determine this, it is then that the Respondent acted. It despatched its letter of 12th November 2018 – and this time the repudiation was unequivocal. Not only that, it conveyed that this decision flowed from the Crawford's Report.

The exact wording of the relevant portion is that:

> "We have now had the opportunity to review the report submitted by the loss adjusters.
>
> ...it is abundantly evident that the insured failed to take adequate...precautions...to prevent the loss...Our considered view is that the claim does not fall within the terms stated in the policy and is therefore repudiated." *(my emphasis)*

19. In my view the chosen wording of that letter, including the use of the definitive term 'repudiate' for the first time, shows conclusively that it is this letter, and not the earlier one, which conveyed the Respondent's final decision on the claim. There is also no suggestion that the Respondent assumed that the Appellant had abandoned its claim, which was clearly not the case.

20. If 12th November 2018 was the actual date of repudiation, then it follows that the issue of summons on 8th October 2019 was within the twelve month period allowed for the commencement of legal proceedings, and the special plea had to fail.

21. Accordingly:

(1) The appeal succeeds.

(2) The Order in the Court below is replaced by an Order that the Special Plea is dismissed with costs.

(3) The case is returned to the Court below for continuation before another Judge in terms of the Rules.

(4) The Respondent is to pay the Appellant's costs of appeal.

DELIVERED IN OPEN COURT AT GABORONE ON THIS 5TH DAY OF NOVEMBER 2021.

I S KIRBY
PRESIDENT OF THE COURT OF APPEAL

L S WALIA
JUSTICE OF APPEAL

M T GAREKWE
JUSTICE OF APPEAL