CIV/T
/115/2005

IN THE HIGH COURT OF LESOTHO

(Commercial Division)

In the matter between:-

EVER UNISON GARMENTS LESOTHO (PTY) LTD **PLAINTIFF**

And

LESOTHO NATIONAL GENERAL INSURANCE CO. **DEFENDANT**

Date of Hearing : **5th March 2010**

Date of Judgment : **9th March 2010**

CORAM: **Lyons J. (agt)**

Counsel:

Mr. Daffeu (inst. by Mr. Snyman) **For the plaintiff**

Mr. Laubsher (inst. By Mr. Molyneux) **For the defendant**

JUDGMENT

LYONS J. (AGT)

Trial on a Special Plea.

Special plea -- onus -- insurance policy -- notification of event -- particulars of claim -- contract -- question of fact.

The plaintiff's, a garment manufacturer, held an insurance policy with the defendant. On or about 17 September 2003 there was labour unrest at the plaintiff's factory which resulted in damage to the plaintiff's business.

The plaintiff made a claim on the policy. The defendant rejected the claim on the grounds of late notification of the event, which it said constituted a breach of policy and, thus, relieved the defendant of any obligations under the policy.

On 1 March 2005 the plaintiff issued a summons for M 1,969,000.90 and further consequential relief.

On 14 July 2005 the defendant entered its plea in defence. That plea included a special plea.

This special plea reads: --

> *1.1 According to the particulars of claim, the labour unrest which allegedly caused the damages suffered by the plaintiff, took place on **17 September 2003**.*
>
> *1.2 In terms of the General Conditions to the insurance policy in question, the Plaintiff is required to give notice to the*

> *Defendant of the occurrence of the specific event as soon as reasonably possible and to submit to the Defendant full particulars of the claim in writing as soon as practicable after the event.*
>
> *1.3 The Plaintiff only notified the Defendant of the occurrence of the event on **2 September 2004**, that is almost 12 months after the event, thereby causing the Defendant prejudice.*
>
> *1.4 The plaintiff failed and/or neglected to submit full details of the claim in writing to the Defendant, thereby causing the Defendant prejudice.*
>
> *1.5 As a consequence, the Plaintiff is in breach of contract in so far as it failed to notify the Defendant within a reasonable period of time of the occurrence of the event, and in so far as it failed to submit full details of the claim in writing as soon as practicable after the event.*
>
> *1.6 In the premises, the Defendant is not liable for payment under the policy in question, and it is prayed that the Plaintiff's claim be dismissed with costs on this basis alone.*

The minutes of the pre-trial conference on 16 March 2006 note a request by the parties that the Court, in terms of section 32 (7) of the Rules of Court, order the special plea to be heard separately and that the other issues stand over for a later date.

As it turned out, due to other circumstances, this question became largely academic. At hearing the court made the order and the hearing of the special plea proceeded. The fate of the other issues between the plaintiff and defendant stood in abeyance pending the outcome of this hearing.

It was common ground that the onus of proof on a special plea rests with the party entering a plea (the defendant).

(See: **Resisto Dairy v Protection Insurance Co. 1963 (1) SA 632**).

The evidence placed before the court on the hearing of the special plea consisted of the oral evidence of Mr. S Letsie and the documentary evidence placed before the court by consent as to its admissibility. It was left to the Court in the exercise of discretion to determine the weight to be put on this evidence.

Mr. Letsie was the claims officer in the employ of the defendant at the relevant time. He has since moved on to other employment within the insurance industry. As claims officer, Mr. Letsie said he was the officer who handled the plaintiff's claim. It was he who, on behalf the defendant, notified the plaintiff's agent of the repudiation of the contract of insurance due to what was considered 'late notification of the event'. In his oral evidence he was adamant that the first and only notice of the event received from the plaintiff by the defendant regarding the incident on 17 September 2003, was a letter from the plaintiff's agent (Thoebe Insurance Brokers -- 'Thoebe' -- per Mr. D. Maling) dated 31 August 2004 and received by the defendant on about 2 September 2004. He strongly rejected any suggestion of an earlier notification of the event. Mr. Letsie also gave oral evidence that there were many 'ad hoc' conferences between plaintiff's representative and the defendants employees concerning the plaintiff's insurance business (which included this and at least one other event relating to a transformer). He offered no evidence that any notes or other contemporaneous record was kept relating to

content of these 'ad hoc' conferences. Certainly none were put before the court.

The plaintiff was unable to present any oral evidence on its behalf. The plaintiff's agent was Mr. D Maling who was with the insurance brokerage firm, Thoebe. It was not disputed that Mr. Maling has since passed away.

I turn now to the documentary evidence.

The insurance policy document was a standard document used by the defendant in its business. The original policy was entered into on 19 April 2002 to run for one year and expire on 30 June 2003. The policy was subsequently reviewed on 1 July 2003 and was current at the time of the event.

As is relevant, it reads: --

6. ***Claims***

> *(a) On the happening of any event which may result in a claim under this policy the insured shall, at their own expense*
>
> *(i). give notice thereof to the company as soon as reasonably possible and provide particulars of any other insurance covering such events as are hereby insured ……..*
>
> *(iii). as soon as practicable after the event submit to the company full details in writing of any claim.*

In terms of the special plea, therefore, the defendant has placed upon

it the onus to prove, on the balance of probabilities, that it first received notice of the event from the plaintiff on about 2 September 2003, and that there was no prior earlier notice. (For the purposes of clarity, the plaintiff pleads that it gave notice pursuant to sec. 6 (i) on about 19 September 2003).

Turning to the other documentary evidence (again, as is relevant), the plaintiff's agent (Mr. Maling), wrote to the defendant a memo dated 31 August 2004.

It reads: --

> *"To:* *Lesotho National General Insurance Co.*
> *Attention:* *Mr. S. Letsie*
> *From:* *D.T. Maling*
> *Date:* *August 31, 2004*
> *Subject:* ***Ever Unison Garments Lesotho (Pty) Ltd Riot and Malicious Damage claim and Business Interruption labour unrest 17 September 2003.***
>
> *Further to our original notification that there had been a labour disturbance at the insured's premises in Maputsoe we have at last been able to put together documentation to enable you to process the claim.*
>
> *The position was complicated by the alleged damage to the transformer which caused a further interruption to production and it was really only after this incident was cleared up that we could see to prepare final figures.*
>
> *To re-cap the unrest started as a result of the discharging of a Mosotho employee following an argument with an expatriate supervisor. The staff took over and caused damage to goods in production and looted goods as well.*
>
> *In the interest of safety the staff were all paid off and the factory was closed for a week to ten days. Some old staff was re-engaged as well as new who needed training.*

The factory resumed production on 26th September and apart from other transformer interruption has operated successfully since their return to work."

The balance of this memo sets out the particulars of the damage claimed.

On 8 September 2004, M. Letsie replied on behalf of the defendant. It reads (as is relevant): --

"*Re: Ever Unison Garments -- riot, strike and malicious damage.*

Yours of 31 August instant is under response.

*As you are aware, this claim was never advised to us, because if it had been, you would have as usual received a letter of acknowledgement of claim without claim number as well. As this claim has not been advised for a period of almost twelve (12) months, this constitute (*sic*) a serious breach of the Policy Conditions resulting in prejudice."*

On 29 October 2005, Mr. Maling replied (as is relevant): --

"We refer to your memorandum of 8th September and at the outset wish to state that your repudiation of these claims is based on a totally false premise for the following reasons: --

1. The writer personally advised you of the claim after visiting the premises the day after the incident took place. We advised that we expected the material damage to be minimal from the evidence we say, but that the timing of the Business Interruption claim could be a problem as it was not known what effect the interruption would have on turnover."

Mr. Letsie replied on 3 November 2004 stating: --

*"You know very well why notification of claims **MUST** be done in writing. As far as I am concerned this claim was never reported to me, and as such we cannot entertain an allegation that this claim was verbally notified to me. Why would this particular claim be notified verbally when a claim that occurred two months after this*

one from the same client was notified in writing and appropriate claim form filled?".

Mr, Maling replied on 22 November 2004: --

"We refer to your memorandum of 3 November 2004 and wish to repeat our earlier advices that you would given immediate notification of this loss immediately after my visit to the Insured's premises the day after the incident."

…. It continues in paragraph six:-

"It will not have escaped your notice that reference is made to this claim on the form to which you refer relative to the transformer. If as you aver you knew nothing of this loss we find it hard to understand why you did not raise a query then."

The claim form relating to the transformer referred to above, came to light during the hearing. The form was from Thoebe and was directed to the Claims Department of defendant. It was not referred to Mr. Letsie, but to a Mr. Rantseli. It was dated 8 January 2004. It referred to the date of loss of the transformer as 17 November 2003.

Part 12 reads: --

Have you or any member of your family ever suffered loss or damage by fire, burglary or any other cause? If so, please give full details together with the name of any insurance company who dealt with the loss.

The answer to part 12 reads: --

"Not by fire but as a result of strikers".

I turn now to consider the evidence. In doing so I bear in mind what are termed 'the vagaries of the human mind'. Courts are regularly presented with examples of this very human trait. We all have recollections, but we recall and remember things differently. It is not

unusual (in fact it could be argued to be the opposite) that, in the experience of the Courts, a number of persons, each being equally adamant that they are correct, can see the same incident but have different recollections of it. This does not necessarily impute dishonesty. It is just that we are human and we recall; we forget; we remember – but in so doing, we sometimes remember things differently. These differences can sometimes be minor. Or sometimes they can be major differences.

As I have said, in this case there were 'ad hoc' conferences. No evidence was put before the court of contemporaneous notes being taken of these conferences. The documentary evidence (excluding the claim form for the transformer) dates from nearly one year after the event. This gives plenty of time for the development of these 'the vagaries of the human mind'.

Looking at the evidence overall, (and notwithstanding that he was adamant in his oral evidence), I am struck by an unusual feature of Mr. Letsie's replies to Mr. Maling's correspondence. His assertion that, had notification been given it would have received the usual letter of acknowledgement and claim number, and, his later assertion that the notification of claims must be in writing, (the policy plainly does not require this), are put forward in support of his position. They may offer support for his recollection. It is not necessarily true that, because what should have happened if the notification was made did not happen, that therefore the notification must not have been made. Such incomplete logic ignores the possibility that the notification was

made earlier than 2 September 2004 but, given that it can be made orally, the recording of that notification was not made by an employee of the defendant.

On the other side of the ledger, however, these attempts at justification of his position are capable of carrying the reasonable inference that he was unsure about the precision of his recollection and is bringing forward these tangential justifications to bolster what he says is his recollection – not only to convince Mr. Maling, but, perhaps, himself.

Further that he, (Mr. Letsie), was adamant in the witness box does not, in my judgement, erase this reasonable inference of uncertainty. It is not unusual at all that, in the 5 years plus between the writing of the correspondence and the hearing, with the mind concentrated on one version (the need to justify and support forgotten), that the mind has excluded the uncertainties that were then present and now only holds a definite and ‘adamant’ version of events.

By contrast, Mr. Maling is quite definite in his assertion that notice of the event was given in September 2003. He is definite from the start and even when Mr. Letsie denies it (with his supporting justification), Mr. Maling offers no counter justification or supporting reasoning. He remains quite definite in his further correspondences and never moves from this position nor tries to put forward a ‘supporting theory’. This, to my mind, offers strength to his (Mr. Maling’s) position

Instead of trading justifications or reasons in support, he drives home his point by giving reference to the mention of the event here in the claim form relative to the transformer. (And it can reasonably be said that the reference to "as a result of strikers" is a reference to the event in these proceedings).

Counsel for the defendant submitted that the failure to put forward *full* details in the answer to part 12 (of the transformer claim) suggests that Mr. Maling was uncertain or was mistaken about the earlier notification. Equally, though, this can be said to be a reasonable explanation that the claim (which, though directed to another claims officer -- and it may not be under the hand of Mr. Maling), in its failure to provide *full* details, did so because such *full* details were not required by reason that the insurer, being the same insurer for the plaintiff, had already received the details by way of the earlier notification given by Mr. Maling. Councel's submission this regard does not take the matter any further. At very best for the defendant it balances the scales by raising equally acceptable explanations.

I might add though, that if the plaintiff's agent (Thoebe) held some uncertainty about the earlier notification, the opportunity to make such notification then and there certainly presented itself. This was January 2004 and it was conceivably within a reasonable period after the event. That it did not do so is capable of carrying an inference that arguably supports Mr. Maling's definite position - that the earlier notification was given. Were it to be otherwise, and that later in November 2004 Mr. Maling seized on this brief reference to the

event, depicts not only a special power to predict a future repudiation, but a level of incompetence by Mr. Maling not otherwise suggested in the evidence. Or it depicts the workings of a particularly devious mind. Mr. Maling, however, presents as very straightforward and definite in his dealings, which also, I might add, show objectivity, balance and frankness. This runs counter to any suggestion of deviousness or deliberate dishonesty. The detail and presentation of the particulars of claim evidence not only balance, but also a meticulous methodology not often found in persons prone to being mistaken.

Looking at the evidence overall, I am not satisfied that defendant has made out its special plea to the degree required. I'm not able to find, on the balance of probabilities, that the first notification of the event by the plaintiff to the defendant was by the memo of 31 August 2004 as received by the defendant on about 2 September 2004. As fine as the balance may be, in my judgement, the defendant has failed to tip it in its favour.

That being the case, I turn now to be provisions of section 6 (iii) of the contract.

This can be dealt with expeditiously.

Without rehearsing the documentation in full, the plaintiff asserts (through its agent, Mr. Maling) that any delay in presenting the statement of claim damages arose from difficulties arising from the

breakdown of the transformer and the effect of this on the production line. This, in turn, necessitated a careful consideration of what delays (and consequential damage) were to be attributed to the strike action to the breakdown of the transformer - or, as is suggested, general production delays that occurred in any event. Mr. Maling points this out with particular reference to the airfreight claims.

On my reading of the materials, the plaintiff's explanations are quite reasonable. The business interruption claims by their very nature, take time to, firstly, identify and, secondly, accurately compute. In my judgement, not only was the delay by the plaintiff reasonable in the circumstances, but also, the insurer cannot claim to have suffered any prejudice. It falls for the insurer to go through the details of the claim and either agree or disagree with the materials provided by the plaintiff. Again, the nature of business interruption claims is that the information all must first come from the insured before being assessed by the insurer. They are not in the nature of claims that lend themselves to an independent assessment of damage/liability and its causes such as fire or burglary claim.

As Mr. Maling sums it up in the final paragraph of part 1 of his memorandum of 29 October 2004: --

> *"All of the above problems, we can see, were not advised to you for which we apologise but this does not detract from the fact that notification of the loss was given to you verbally and on time".*

For completeness I will comment, as *obiter*, on the remaining

submissions made by Counsel for the plaintiff: --

1. As previously foreshadowed, I did not read the contract as requiring notification of the event (if given orally -- which is quite permissible) to be confirmed in writing. The contract creates no such requirement. As Counsel for the plaintiff submits in his written Heads of Argument, were that interpretation of the contract it would impose a new term by unilateral action of the insurer. That is impermissible. Furthermore, as he properly argues, the contract, having been written by the defendant (insurer) it must be interpreted with the *contra preferentem* rule in mind. Application of this rule would not favour the defendant To be fair, this argument was presented by Mr. Letsie in the giving of his oral evidence. Quite sensibly Counsel for the defendant did not take up his witnesses point.

2. I reject Counsel for the plaintiff's argument that the notification clause [clause 6 (i)] is not a condition precedent. In my judgement it clearly is. Were it to be otherwise it would defeat the very purpose of the clause -- to give the insurer the opportunity to make such enquiries and do such things as would protect its interest.

3. Finally, had it been that I had decided that the defendant had made out its special plea, I would not have been minded to hold that the time delay of nearly one year between the event and 2 September 2004 was reasonable. Plainly it would not have been.

In my judgement, and for the given reasons, the defendant's special plea is dismissed with costs to be taxed if not agreed.

I will hear Counsel on the date on which the remaining issues can be heard.

J.D. LYONS

JUDGE (AGT)