IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

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

2.7.2007
DATE

SIGNATURE

Case no: 04/16161

In the matter between:

AFRICAN PRODUCTS (PTY) LTD Plaintiff

and

AIG SOUTH AFRICA LIMITED Defendant

J U D G M E N T

JOFFE J:

[1] The plaintiff seeks indemnification from the defendant in terms of an insurance contract concluded between them. The claim arises in essence as a result of the failure of electrical cables at the plaintiff's Kliprivier mill.

[2] At the commencement of the trial, and by agreement between the parties, an order was made separating the issue of merits from the issue of quantum. The trial proceeded on the issue of merits. This judgment deals with that issue.

[3] In terms of the contract of insurance, the defendant undertook to indemnify or compensate ***"the Insured by payment or, at the option of the Insurers, by replacement, reinstatement or repair, in respect of the Insured Events occurring during the period of insurance up to the Sums Insured, Indemnity Limits, compensation and other amounts specified."*** The insured is the Tongaat – Hulett Group Ltd. It is common cause that the plaintiff is a subsidiary company of the Tongaat – Hulett Group Ltd.

[4] The plaintiff's case is based on the provisions of ***"Section 3: Business Interruption"*** of the written contract of insurance. In terms thereof the defined event which would result in indemnification is ***"Loss following interruption of or interference with the business in consequence of damage occurring during the period of insurance in respect of which payment has been made or liability admitted under... Section***

2: *Engineering".* The business interruption section aforementioned further provides that ***"liability shall be deemed to have been admitted if such payment is precluded because the Insured is required to bear the deductible as stated in the schedule."*** The relevant defined event in terms of ***"Section 2: Engineering"*** is ***"Unforeseen and sudden physical damage to the machinery described in the schedule from any cause***

1.1 whilst it is at work or at rest

1.2 ..."

Machinery is defined in section 2 as ***"all plant and machinery and/or electronic equipment being an integral part of controlling machinery, but excluding..."***

[5] The contract of insurance contained various specific exceptions. The fourth specific exception provided that the defendant shall not be liable to indemnify the plaintiff, irrespective of the original cause in respect of ***" wastage of material or the like or wearing away or wearing out of any part of the machinery caused by or naturally resulting from the ordinary usage or working or other gradual deterioration."***

[6] The main disputes that fall to be resolved in this judgment is whether that which occurred to the plaintiffs machinery was ***"unforeseen and sudden physical damage"*** and whether specific exception four is applicable.

[7] It is necessary to set out the factual matrix to which the insurance contract must be applied. At the trial, the plaintiff adduced the evidence of four witnesses. The defendant closed its case without adducing any evidence. The plaintiff adduced the evidence of Dr P Carstensen, Mr J Grobler, Mr J K Marais and Mr M D Claasen. Carstensen and Claasen were qualified as experts. Grobler is a registered engineer and an employee of the plaintiff. He s the head of the plaintiff's technical support group. Marais, in 2002, was the plaintiff's maintenance manager. Issues of credibility in respect of all four witnesses do not arise, nor is the expertise of the plaintiff's expert witnesses doubted.

[8] Carstensen testified that electrical cables are designed to either convey electrical energy (these cables are called power cables) or electrical signals (these cabled are called control cables) from one point to another. The power cables relevant to the present matter consist of four copper or aluminium conductors.

Each aforesaid conductor is covered by an intact sheaf of plasticized polyvinylchloride ("PVC") which serves to insulate the one conductor from the other. The four conductors are twisted together to make a core and are kept together with a polyester tape. A PVC bedding is extruded over the tape. The bedding is in turn covered by galvanised steel wire armour. The steel wire armour is utilised for mechanical purposes. It, in turn, is covered by a PVC outer sheath. According to Carstensen, the electrical properties and the thickness of the insulation layer determines the voltage which can be imposed on the cable. The cross – section of the conductor determines the resistance of a conductor and hence the maximum allowable current that can be carried by the cable. Control cables also comprise insulated conductors. The current that is passed through the control cables is minimal.

[9] If the conductors conveying the electricity in the cable come into contact with each other, or earth, the cable will fail. They will come into contact with each other if the PVC insulation fails. If the cables are installed in the ground and subjected to higher temperatures than permitted and subjected to mechanical stress, the high temperatures will soften the PVC material and the mechanical stresses will force the insulation to flow. By this

process the insulation will over time become progressively thinner. The progressive decrease in insulation thickness will not reveal itself during use and because the cables are buried in the ground, will not be detected. When all the insulation material has moved away, the conductors will come into contact with each other, resulting in a short circuit and the failure of the cable.

[10] From the evidence of the witnesses referred to in para 7 it emerged that the plaintiff commissioned Flour SA (Pty) Ltd to design and construct the mill for it. This included the design and installation of electricity sub – stations and the design of cables. The mill is known as the Kliprivier Mill. It was commissioned during 1997 and came into production during 1998. It appears that the loss which the plaintiff sustained and in respect of which it seeks indemnification occurred when the mill achieved its highest level of production since its commission.

[11] The mill was constructed for the production of various products derived from the wet milling of maize. The equipment used in the manufacture relied upon electricity. The electricity entered the mill via some 650 cables which were connected from a sub – station, known as sub – station 2. The cables ran into a vault

in sub – station 2 and then ran underground into the mill. In this process the cables were bent at approximately 90 degrees. This occurred in the ground under sub – station 2. In this process the cables had to pass through ducting in the concrete foundations of sub – station 2. The surface under which the cables ran from entering the ground in sub – station 2 until emerging in the mill was covered with a concrete slab.

[12] As to the events which occurred from 11 September 2002 liberal reference is made to the plaintiff's counsels' heads of argument.

[13] At 4h50 on the morning of 11 September 2002, the plaintiff suffered a cable failure which was detected because the switch relating to the cooling tower pump at the mill had tripped. Shortly thereafter, a further switch tripped indicating a further cable failure. The cable failures were reported by the millwright on duty to Marais, when he arrived at work. During the course of that day, several further cables, including power cables, failed. As already indicated control cables as opposed to power cables carry minimal electric current. The failure of control cables signified a major problem.

[14] Marais, realising that a major and serious problem had occurred, instructed his electrical technicians to physically trace the cables in the area where they were exposed outside (as opposed to laid beneath the concrete slab) in order to try to detect if there was any mechanical failure. No mechanical problem was detected and it was realised that there was an electrical failure of the cables, in that they were no longer conveying electricity through their copper conductors.

[15] Grobler was contracted and he despatched an engineer to the Kliprivier Mill who was in contact with him through the day. Grobler himself then went to the mill and by this time the realisation had dawned that there was a major catastrophe.

[16] Inspection of those portions of the cables which were not beneath the concrete slab did not reveal any mechanical defect. Consequently, Grobler thereafter contacted and employed the services of outside contractors. The process of examining the cables beneath the concrete slab commenced. During this inspection process, several further cables failed, including power cables.

[17] In order to deal with the cables which had failed and to ensure that the mill continued operating, temporary cables were connected to bypass the area beneath the concrete slab. This, according to Grobler, led to intermittent shut – downs but the mill still continued operating.

[18] On the day after the first cable failures (i.e. on 12 September 2002) the concrete slab in the area outside the sub – station 2 (the concrete slab depicted to the left of sub – station 2 in Exhibit "E4") was broken and the cables in that area were inspected. Both Marais and Grobler testified that there were no problems detected with the cables in that area. However, steam was seen to be coming out of the ducts beneath sub – station 2.

[19] The concrete slab inside sub – station 2 was then broken. The problem area was thus exposed to be in what was colloquially referred to as the "lobster pot". This was an area of confined space inside sub – station 2 beneath the concrete slab, at the point where the 650 cables were laid at an approximately 90° angle. There was a great deal of steam above the sand which was covered by the concrete slab, and the sand was also very hot.

[20] The process of excavating the sand around the cables in this area then commenced. This was an extremely difficult and hazardous task which took approximately three days.

[21] During this period, in addition to further cable failures, the plaintiff's staff (according to Marais and Grobler), had commenced with what was referred to as an "insulation test". The purpose of this test was to ascertain the level of insulation in the cables and Marais testified that if the reading was below the SABS approved level, the cable was considered to have failed even though the electrical conductors had not yet come into contact. The plaintiff could not safely continue to use those cables. This was confirmed by Claasen to have been the only responsible decision that could have been taken by the plaintiff.

[22] The cables which had actually failed, were condemned because the conductors had come into contact with each other. Those were no longer fit for their intended purpose, namely to convey electrical power.

[23] The "lobster pot" area was incredibly hot. Heat was generated as a result of the electrical current which had passed through the hundreds of cables laid in that confined area. Having regard to the closeness of the cables and the level of electricity (i.e. the voltage) which passed through those cables, the heat generated did not dissipate sufficiently. Consequently, the PVC insulation around the copper conductors had softened. What followed was the coming into contact of the copper conductors which resulted in the cable failing, in respect of those cables which had failed. In addition, through the insulation test, it became clear to the plaintiff that there were also a number of cables which had "failed" because their copper conductors (having regard to the wearing out of the insulation as a result of excessive heat) were dangerously close to each other and would imminently come into contact and fail electrically.

[24] Throughout this period, the plaintiff took steps to try to avoid a shut – down of the plant through the laying of temporary cables. However, by 19 September 2002, it became clear to the plaintiff, according to Grobler, that they could not continue operating in that manner since it had become unsafe to do so.

[25] Consequently, the plaintiff took steps to find a temporary solution (pending the re – design of the electrical cables from sub – station 2 to the mill) and the plaintiff took the decision to shut down the Kliprivier mill operation. Claassen eventually re – designed the cabling installation so that the 650 cables would be routed above ground (in the air) in protected racks.

[26] As a result of all of the aforegoing, the plaintiff shut down the Kliprivier mill on 19 September 2002 and re – opened it on 15 October 2002. The loss of production sustained by the plaintiff in monetary terms, is the loss in respect of which the plaintiff seeks indemnification in this action.

[27] It is common cause that the design of the Kliprivier mill by Flour SA (Pty) Ltd was deficient. In the ordinary course the cables should have had a life expectancy of at least 40 years. The cables in the area around the lobster pot were subjected to excessive heat. This resulted in the softening of the PVC insulation. In the area where there was mechanical stress (that is where the cables were laid at an angle), the PVC insulation began to flow, resulting in its thinning, until ultimately the conductors came into contact with each other, resulting in the failure of the cables.

[28] The plaintiff contends that it was only when the conductors came into contact with each other that the damage occurred to the cables. Emphasis was placed in this regard on the evidence of Claassen who drew a distinction between the mechanical properties of a cable and the electrical properties thereof. The PVC protective covering constituted part of the mechanical function. It did not convey any electricity and its softening would not have resulted in cable failure. It was according to Claassen only when the conductors came into contact with each other, or earth, that the cable would fail. The defendant contends that the only damage which can be said to have been occasioned to the cables is the physical degradation of the PVC insulation, which manifested itself when the cables failed.

[29] Against this background a meaning must be ascribed to the expression ***"unforeseen and sudden physical damage to the machinery".***

[30] The approach to be followed in interpreting an insurance contract has been set in many judgments. From these judgments it is clear that the ordinary rules relating to the interpretation of

contracts must be applied. Thus in Fedgen Insurance Ltd v Leyds 1995 (3) SA 33 A at 38B – E it was held that *"The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Limited 1934 AD 458 at 464 – 5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (Auto Protection Insurance Co Ltd v Hammer – Strudwick 1964 (1) SA 349 (A) at 354C – D); for it is the insurer's duty to make clear what particular risk it wishes to exclude (French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd 1931 AD 60 at 65; Auto Protection Insurance Co Ltd v Hammer – Strudwick supra at 354D – E). A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the*

event of a real ambiguity the contra proferentem rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy (Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd 1961 (1) SA 103 (A) at 108C. See also Metcash Trading Ltd v Credit Guarantee Insurance Corporation of Africa Ltd 2004 (5) SA 520 SCA at 526B.

[31] Furthermore, ***"If the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the court may modify the words just so much as to avoid the absurdity or inconsistency but no more."*** See Metcash Trading Ltd v Credit Guarantee Insurance Corporation v Africa Ltd, supra at 526 C – D.

[32] As was held in Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934 AD 458 at 464 ***"Naturally, we must look to the object of the contract of insurance we are dealing with in order to ascertain what both parties to the contract intended by the language used. Where, for instance, the object of the contract is to insure against accidental***

deaths and injuries, we must not construe the contract so as to defeat that object nor so as to render it practically illusory..."

[33] As was held in Wellworths Bazaars Ltd v Chandler's Ltd and Another 1947 (2) SA 37 A at 43 a court should be slow to come to the conclusion that words are tautologous or superfluous. See also van der Westhuizen v Arnold 2002 (6) SA 453 (SCA) at 458 J to 459 B. Furthermore, in interpreting the contract, different words or expressions in the same contract are presumed to indicate different meanings. See Cradock v Estate Cradock 1949 (3) SA 1120 at 1123 to 1124.

[34] Reverting to the words ***"unforeseen and sudden"*** the new shorter Oxford English Dictionary (1993) defines "unforeseen" as being ***"that has not been foreseen".*** To "foresee" is defined as ***"to be aware of beforehand to predict".*** The primary meaning ascribed to "sudden" is ***"happening or coming without warning or premonition; taking place or appearing all at once".*** Sudden also means, in relation to physical objects, to be ***"appearing or discovered unexpectedly"*** and also ***"performed or taking place***

without delay; speedy; prompt; immediate" and also ***"made, provided or forwarded in a short time."***

[35] It is contended on behalf of the defendant that if the primary meaning of aforementioned is ascribed to the word "sudden", there is no difference in meaning between unforeseen and sudden. In these circumstances the use of the word "sudden" would be tautologous. If however, the secondary meaning aforementioned is given to the word "sudden" namely ***"performed or taking place without delay; speedy; prompt; immediate"*** then the words sudden and unforeseen are not tautologous. Accordingly it is submitted on behalf of the defendant, relying on the authorities already referred to, that the word "sudden" must carry its secondary meaning in the context of interpreting the phrase "unforeseen and sudden physical damage" as it appears in the contract of insurance. The plaintiff submits that the word sudden should bear its primary meaning. It is submitted on behalf of the plaintiff, that to interpret in any other way would be to deprive the policy of the "sound commercial principles and good business sense" described by Boruchowitz J in Grand Central Airport (Pty) Ltd v AIG South Africa Ltd 2004 (5) SA 284 (W). In that judgment it was held in para 9 that ***"An insurance policy should be***

construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application. The literal meaning of words must not be permitted to prevail where it would produce an unrealistic and generally unanticipated result, as, for example, where it would absolve the insurer from liability on the chief risks sought to be covered by the policy..."

[36] The expression ***"unforeseen and sudden physical damage"*** has not received judicial attention in South Africa. The plaintiff referred to a judgment of the United States Supreme Court of Rhode Island in the matter of Textron Inc v Aetna Casualty & Surety Co, et al (Rhode Island Supreme Court No. 98/357). In that matter the relevant insurance policy excluded liability for personal injury or bodily injury or loss of or damage to or loss of the use of property directly or indirectly caused by seepage, pollution or contamination. The policy provided that the exclusion would however not apply ***"to liability for personal injury or bodily injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damaged or destroyed where such seepage, pollution or contamination is caused by a sudden and unexpected happening during the***

period of insurance" The court held at 10 of the judgment *"giving the word "sudden" its "plain everyday meaning" is no easy task. Both sides muster dictionary support of their respective positions, half of which accord a temporal meaning to the word and the other half of which give it the meaning of unexpected".* At 12 the court went on to hold *"When used in the context of an insurance policy's pollution – exclusion clause, the word "sudden", we hold, bars coverage for the intentional or reckless polluter but provides coverage to the insured that makes a good – faith effort to contain and to neutralize toxic waste but, nonetheless, still experiences unexpected and unintended releases of toxic chemicals that cause damage. Thus, coverage will be provided when the contamination was unexpected from the insured's standpoint: that is, when the insured reasonably believed that the waste – disposal methods in question were safe. The insured must show that it had no reason to expect the unintended damage and that it undertook reasonable efforts to contain the waste safely. In other words, a manufacturer that uses state – of – the – art technology, adheres to state and federal environmental regulations, and regularly inspects, evaluates, and upgrades its waste – containment system in accordance with advances*

in available technology should reap the benefits of coverage under our construction of this type of pollution – exclusion clause. But one that knowingly or recklessly disposes of waste without the necessary and advisable precautions will forfeit coverage under this clause."

[37] The defendant relied on a decision of the Supreme Court of the Australian Capital Territory in the matter of Vee H Aviation (Pty) Ltd v Australian Aviation Underwriting Pool Propriety Limited [1996] ACTSC 123. In that matter, the insurer was indemnified against losses consequent upon "Breakdown" which was defined as meaning "sudden and unforeseen damage". Although the Court accepted in that case that the damage was undoubtedly foreseen, it was unable to find in any meaningful sense of the word that it could be called **"sudden" (paragraph 25.) "Sudden to my mind, is to be contrasted with "gradual". Synonyms are "abrupt" and "quick". It is often a connotation of the word that the event it describes should be "unforeseen" or "unexpected", or "without warning" but those words, alone or in conjunction do not express its denotation". (paragraph 31). "In the ordinary, every day meaning of the word, "sudden" is not the same as "unforeseen and unexpected". The definition of**

Breakdown used in this particular policy required that the damage, as distinct from the cause of it, should be both sudden and unforeseen. That requirement is not tautologous. The words have different meanings, and the requirements that they express are cumulative." (paragraph 32 to 33).

[38] The approach adopted by the Australian court commends itself. There is no good reason not to give a meaning to the word "sudden" so as not to render it tautologous. If it is given a meaning of temporarily abrupt the contract of insurance is certainly not rendered nugatory. An indication against such an interpretation may be found in section 1 of the contract of insurance where the expression "sudden and accidental..." is used. In that context the word "sudden" may be interpreted as "unforeseen". But this interpretation is a consequence of the impact on the meaning of "sudden" by "unforeseen" just as the impact of the word "unforeseen" has as set out above. Regard being had to all of the aforegoing it is held that the word "sudden", in the expression "sudden and unforeseen" is to be interpreted as meaning temporally abrupt.

[39] Reverting to the facts it is common cause that the degradation of the PVC insulation took place over a long period. When it degraded to such an extent that the conductors touched, the cable failed. To look at that point in time in isolation would not be correct. The failure of the cable is the result of a lengthy degradation process. It accordingly cannot be regarded as "unforeseen and sudden physical damage".

[40] In the light of this finding it is not necessary to consider any of the other arguments raised by the defendant's counsel.

[41] Accordingly the plaintiff's claim does not fall within the provisions of the contract of insurance.

[42] Both parties were represented by two counsel. Both parties sought the costs of two counsel in the event of them being successful. The employment of two counsel was reasonable and necessary.

[43] In the result the following order is made:

The plaintiff's claim is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.