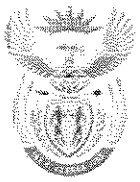
REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A5052/2010

In the matter between:

THE HOLLARD INSURANCE COMPANY LIMITED	Appellant
and	
UNITRANS FUEL AND CHEMICAL (PTY) LIMITED	First Respondent
KLIPSTONE TRANSPORT (PTY) LIMITED	Second Respondent

Summary

Several issues are dealt with in this appeal. A third party may proceed against the insurer of an insolvent entity who has incurred liability. The sole benefit enacted by s156 of the Insolvency Act No. 24 of 1936 is to give a third party a direct right of action against the insurer. That is where the benefit ceases. The third party must still comply with any procedural requirements as set out in the policy of insurance. A further issue raised was res judicata in the form of issue estoppel being a more expansive form of the exceptio res judicata. The parties agreed on the question of vicarious liability of their respective drivers. Vicarious liability was thus not a triable issue. A party cannot raise issue estoppel on the question of vicarious liability which was not a justiciable issue in a subsequent trial on indemnification. A further issue raised was the contradiction between a denial in the plea and a subsequent admission on the same aspect in a reply to further particulars for trial. The parties are to determine the contradiction prior to the commencement of the trial by way of exception during the trial or during cross examination. A party cannot claim prejudice at the appeal stage when it had ample opportunity to deal with the matter before or during the trial.

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A5052/2010

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

8/5/2012
DATE

SIGNATURE

In the matter between:

THE HOLLARD INSURANCE COMPANY LIMITED Appellant

and

UNITRANS FUEL AND CHEMICAL (PTY) LIMITED First Respondent

KLIPSTONE TRANSPORT (PTY) LIMITED Second Respondent

J U D G M E N T

VICTOR J

[1] The appellant is the insurer of a Mercedes Benz truck tractor with registration number HJB 422 GP, "the truck tractor". A collision occurred between the truck tractor and the first respondent's vehicle.

[2] The matter first came before Gildenhuys J in May 2006. The parties in those proceedings were Snyman Vervoer (represented in that trial by the liquidator) and Unitrans Fuel and Chemicals Pty Ltd, the first respondent in these proceedings. The only issue for determination was the question of negligence.

[3] On 18 May 2006 the respondents were successful in asserting that Snyman Vervoer's driver was negligent. The appellant was not a party to those proceedings. Of importance is the agreement noted by Gildenhuys J in his judgement that the parties agreed the vicarious liability of their respective drivers and only the question of negligence had to be determined. In the result, the question of vicarious liability was not a justiciable issue in that trial.

[4] Based on that victory the respondents instituted an action against the appellant on the basis that the appellant was the insurer of the truck tractor and was therefore obliged to indemnify them as third parties arising out of the negligence of the entity in liquidation being Snymans Vervoer. The trial came before the court a quo. The respondents' assertion that the appellant was liable to indemnify it as a third party arising out of Snyman Vervoer's insolvency was successful. It was common cause that Omnipact SA Investments 91 Pty Ltd "Omnipact" was the insured in respect of the truck tractor

[5] The appellant appeals that decision. The issues raised in the appeal can be crystallized into four issues: firstly whether the truck tractor was being

driven by the driver of Snyman Vervoer **on the order of** Omnipact as required by the contract of insurance and secondly whether the contractual provisions of the insurance agreement had been complied with. Thirdly whether the appellant's liability had been determined in the trial before Gildenhuys J and thus the appellant was estopped on the question of negligence and vicarious liability by virtue of res judicata in the form of Issue Estoppel as distinct from the exceptio res judicata. Fourthly whether the provisions of Section 156 of the Insolvency Act No. 24 of 1936 ("*the Act*") apply.

[6] On behalf of the appellant it was submitted that the evidence unequivocally demonstrated that the vehicle was not being driven on the order of Omnipact and that there had not been compliance with the terms of the insurance contract.

INDEMNIFICATION BY INSURER IN CIRCUMSTANCES WHERE THE INSURED IS SEQUESTARTED

[7] It is trite law that an insurer can be held liable to a third party if the insured has been liquidated or sequestrated as the case may be. S 156 of the Insolvency Act provides that:

> *Whenever any person is obliged to indemnify another person in respect of any liability incurred by the insured towards a third party, the latter shall on the sequestration of the estate of the insured, be entitled to recover from the insured the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured.'*

[8] As stated in Unitrans Freight (Pty) Ltd v Santam Ltd 2004 (6) SA 21 (SCA) at para 7

> *"[7] The section does not add to the contractual liability of an insurer. It merely allows a person who is not a party to the policy of insurance to recover directly from the insurer in particular circumstances. It entitles a person who has a claim against someone who is indemnified against such liability by an insurer to pursue the claim directly against the insurer if the estate of the indemnified person is sequestrated."*

[9] Upon a proper application of s 156 of the Insolvency Act it is still necessary to show that there is a good claim in law against the insolvent and that the insurer is obliged in law to indemnify the insolvent person against the claim. See *Le Roux v Standard General Versekeringsmaatskappy BPK* 2000 (4) SA 1035 (SCA) at para [7]. The sole benefit enacted by s156 of the Insolvency Act is to give a third party a direct right of action against the insurer. That is where the benefit ceases.

[10] In *Coetzee v Attorney's Insurance Indemnity Fund* 2003 (1) SA 1 (SCA) para [20]), it was clearly held that the claimant would have to prove that the insured would have succeeded against the insurer in his claim for an indemnity.

[11] Heher JA in Coetzee *supra* referred to the well established principles by Schutz JA in Woodley v Guardian Assurance Co of SA Ltd 1976 (1) SA 758 (W) at 759E - H and Van Schalkwyk J in Canadian Superior Oil Ltd v Concord Insurance Co Ltd (formerly INA Insurance Co Ltd) 1992 (4) SA 263 (W) at 273H - 274B :

> *'What the third party can recover, however, and whether the third party's claim is of such a kind as is covered by the indemnity*

conferred upon the insured, are matters which have to be determined by reference to the contract of insurance. If the liability is not of the kind covered by the indemnity provided by the insurer, then, it stands to reason, there will be no liability upon the insurer to the third party. So also, if the liability is of a kind for which the contract of insurance makes provision subject to a condition, the insurer will only be obliged to pay if the condition has been fulfilled.'

[12] The court a quo found that the truck tractor was being driven for and on behalf of an entity known as Snyman Vervoer CC (in liquidation) on the order of or with the permission of another entity known as Omnipact. This finding was largely based on an acceptance of the judgement of Gildenhuys J where the question of vicarious liability was not traversed as a justiciable issue.

[13] On a close analysis of the evidence in the court a quo I find that the evidence led in the trial in the court a quo was contrary to the finding that the insured vehicle was driven on the order of Omnipact. The evidence in this regard was neither vague nor unclear.

[14] Having stated the legal principles above one of the dispositive issues in this appeal is whether the lack of compliance with the provisions of the Contract of Insurance brings the Appellant's liability within the provisions of S156 of the Insolvency Act.

COMPLIANCE WITH THE POLICY OF INSURANCE

The Application of Section II Clause 2 of the Policy

[15] The relevant clause of the policy of insurance is to be found in clause 2 under section II and provides for payment for certain defined events as follows:

> *'Liability to Third Parties*
>
> *Defined events*
>
> *Any accident caused by or through or in connection with any vehicle described in the Schedule … shall become legally liable to pay in respect of*
>
> …
>
> *(ii) damage to property other than property belonging to the Insured or held in trust by or in the custody or control of the Insured …*
>
> *The Insurer will also*
>
> …
>
> *2 Indemnify (in terms of and subject to the limitations of and for the purposes of this section) any person who is driving or using such vehicle on the Insured's order or with the Insured's permission provided that*
>
> *(a) such person shall as though he were the Insured observe fulfil and be subject to the terms exceptions and conditions of this insurance insofar as they can apply.*
>
> *(b) such person driving such vehicle has not been refused any motor insurance or continuance thereof by any insurer.*
>
> *(c) indemnity shall not apply in respect of claims made by any member of the same household as such person.*
>
> *(d) such person is not entitled to indemnity under any other policy except in respect of any amount not recoverable thereunder.'*

The application of clause 13 of the Insurance Policy

[16] Of importance is the import of Clause 13 of the policy which provides:

> ***'No rights to other persons***
>
> *Unless otherwise provided, nothing in this policy shall give rights to any person other than the insured. Any extension providing indemnity to any other person other than the Insured shall not give any rights of claim to such person, the intention being that the Insured shall claim on behalf of such person. The receipt of the Insured shall in every case be a full discharge to the Insurer.'*

[17] In this case Omnipact was the insured and it is common cause that Omnipact did not lodge a claim on behalf of the respondents. The court a quo did not find that the omission of Omnipact to institute the claim to be fatal to the claim by the first respondent. It found that because Snyman Vervoer CC was placed under a winding-up order on 18 January 2001, that is, before the date of the collision of 28 May 2003 and in view of the judgment obtained on 18 May 2006 by the first and second respondents against the liquidator of Snyman Vervoer CC the appellant in terms of section 156 of the Act was liable to indemnify the respondents in respect of the judgment and costs awarded in their favour.

[18] It is however clear from the evidence led in the court a quo that the truck tractor was not driven for and on behalf of Omnipact or its order. The respondents bore the onus to prove their case. It was unnecessary for the appellant to call any more witnesses than it did. Mr Pierre Cronje who was the transport manager of Omnipact testified. He stated that at all times he was the transport manager of Omnipact. As at the time of the collision the truck tractor was being rented by Omnipact who was insured by the appellant. At no time did Snyman Vervoer CC in liquidation drive the vehicle on the order of or with

the permission of Omnipact. The appellant was criticised for not calling the owner of Omnipact. There was nothing preventing the respondents from calling the owner. Cronje the transport manager's evidence was not undermined in any way.

[19] Snyman Vervoer had been in liquidation some two years before the accident occurred. The vehicle was used for the delivery of bricks and to his knowledge none of the employees of Omnipact worked for Snyman Vervoer CC (in liquidation). He was in charge of the truck tractor whilst employed as transport manager at Omnipact and had not been called to testify in the previous trial before Gildenhuys J. He denied that Mr Nqiba was employed by Snyman Vervoer CC at the time of the collision.

[20] In the particulars of claim the respondents did not allege that Snyman Vervoer CC or any person driving or using the truck tractor at the time of the collision observed and fulfilled the terms, exceptions and conditions of the policy or that such person driving the vehicle in the truck tractor had not been refused any motor insurance or continuance thereof by any insurer or that such a person is not entitled to indemnity under any other policy. It is correct that the appellant admitted the terms of the contract and did not raise the non compliance with clause 2 of section 11 or non compliance with clause 13 of the contract. Upon a proper construction of the plea it was not necessary for the appellant to raise the respondent's lack of procedure. The respondents had not asserted that they had complied with clause 2. The agreement is but a segment of the first respondent's cause of action. Admitting the agreement

did not absolve the respondents from having to prove compliance with the provisions of the contract. See *Le Roux and Coetzee supra.*

ISSUE ESTOPPEL

[21] The respondents closed their case without leading any evidence in support of the allegations contained in their particulars of claim and relied instead on the judgment in the action between H J R Barnard as liquidator of Snyman Vervoer CC in order to prove that Snyman Vervoer CC was negligent and following from the agreement in the first trial that the driver was vicariously liable.

[22] The respondents relied on the argument that vicarious liability was established before Gildenhuys J and therefore the question of liability could not be raised again. The issue had been determined and the appellant was estopped on the basis of issue Estoppel. Reliance for this proposition on Janse Van Resnburg NNO v Steenkamp 2010(1) SA 649 SCA is misplaced. The application of the principles of res judicata in the form of issue estoppel was discussed by Botha JA in Kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A) ([1995] 1 All SA 517) at 666D - 670C as having its genesis in Boshoff v Union Government 1932 TPD 345 by Greenberg J held that in order to uphold a defence of res judicata the cause of action need not be precisely the same in both actions).

[23] Issue estoppel was also traversed in National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 (SCA). Olivier JA formulated the question as follows:

> *'[3] The fundamental question in the appeal is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the Court been finally disposed of in the first action?*

[24] The issue in the trial before Gildenhuys J was limited to negligence and in the second trial the issue of indemnity by the appellant arising out of the liquidation of Snyman's Vervoer. These two issues do not arise out of the same cause of action. In fact the issue of indemnity arises out of the terms of s 156 of the Insolvency Act and is completely disparate from the issue of negligence and vicarious liability. Heher JA in Janse Van Resnburg NNO was clear to outline line the basic requirements of issue estoppel:

> *'logic and equity will justify its application in appropriate cases'. While that may be so, I think that any such application must depend on an understanding of its true foundations."*

[25] The foundational facts relied upon by the respondents to support the very different causes of action on the basis of issue estoppel in these circumstances must fail.

CONTRADICTION BETWEEN THE PLEA AND REQUEST FOR FURTHER PARTICULARS

[26] In the appellant's plea it was denied that Snyman Vervoer CC was driving or using the vehicle on the order of Omnipact. The respondents did not file a replication. A confounding factor is the denial in the plea and the contradictory assertion in the appellant's reply to a request for further particulars for trial where the driving of the Mercedes truck tractor on the order of Omnipact is admitted. This obviously contradictory stance should have alerted the parties to a problem. The problem could have been argued by way of special plea prior to the commencement of the trial but the parties were clearly of the view that the trial could proceed and this would be cleared up later. The respondents are not justified in claiming prejudice in circumstances where they had an opportunity to consider their position. It was never cleared up and the appellants case in evidence was consistent with its plea namely that the truck tractor was not driven on the order of Omnipact.

CONCLUSION

[27] It is clear therefore that in order for the respondents to fall within the ambit of clause 2 of Section II of the policy Snyman Vervoer CC would have had to comply with the terms of the conditions of the policy and prove that the vehicle was driven on the order or with the consent of Omnipact. In addition it had to prove the other aspects of not having been refused motor insurance or continuance thereof and that Snyman Vervoer CC was not entitled to indemnity in terms of any other policy.

[28] In my view the respondents have failed to prove compliance with the terms of the policy.

[29] There was no evidence to demonstrate that the Mercedes truck tractor was being driven with the permission of Omnipact that the appellant was therefore liable to indemnify the respondents in respect of the judgment granted against Snyman Vervoer CC. The respondents could not overcome the undisputed evidence that Mr Nqiba was working and driving the vehicle for Omnipact and for no one else.

[30] The respondents failed to plead and prove that the vehicle was being driven by '*any person who is driving or using such vehicle on the Insured's order or with the Insured's permission*'.

[31] Omnipact did not institute the action of indemnification against the appellant. In *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 (SCA) held that s 156 of the Act is clear that there did not have to be a contractual nexus between the third party and the insurer. The policy in Unitrans *supra* had a clause in exactly the same terms as Clause 11 and reads as follows:

> *'Unless otherwise provided, nothing in this policy shall give any rights to any person other than the insured. Any extension providing indemnity to any person other than the insured shall not give any rights of claim to such person, the intention being that the insured shall claim on behalf of such person. The receipt of the insured shall in every case be a full discharge to the company.'*

[32] The Supreme Court of Appeal accepted the reasoning of the author of an article by A Chaskalson (later Chief Justice of South Africa) in the 1963 Annual Survey 382 in relation to a similar clause in a contract of insurance:

'There seems to be no reason in principle to prevent parties to a contract from prescribing a specific procedure to be adopted in regard to the form of action.
Nor, if the clause can be construed in this way, is there any reason for a court to decline to enforce the indemnity simply because it has been sued for in accordance with the prescribed procedure, which is different from the procedure normally adopted.'

[33] Nugent JA IN Unitrans *supra* accepted that the clause could be interpreted in accordance with the express wording of the contract.

'But it does not follow from the fact that De Kroon acquired no rights that it could enforce against Santam that Santam was not 'obliged to indemnify' De Kroon as that expression is used in s 156. For clause 11 also makes it clear that Santam intended the indemnity contained in the extension clause to be capable of being enforced: its reservation was only that it should not be enforced by anyone but the insured'.

[34] It is necessary for the court to determine whether the claim might yet be defeated for want of compliance by the insured with the conditions of the policy.

In Le Roux *supra*:

'Daar is egter niks in die artikel om aan te dui dat daardie aanspreeklikheid slegs tydens die toestaan van die sekwestrasiebevel moet bestaan of dat die versekeraar nie daarna op sy kontraktuele regte kragtens die polis staat kan maak nie. Indien die appellant se vertolking van die artikel korrek is, sou dit beteken dat 'n eiser onder die artikel 'n beter reg teen die versekeraar verkry as wat die versekerde self geniet het. Dit sou ook beteken dat die versekeraar verhoed word om op sy kontraktuele regte te steun indien dit blyk dat die versekerde kontrakbreuk gepleeg het. So 'n vertolking is onhoudbaar en kon nooit die bedoeling van die Wetgewer gewees het nie.'

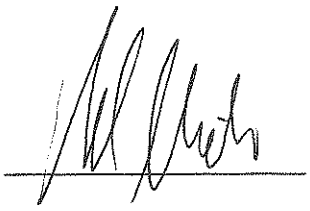
[35] Based on the proper interpretation of s 156 of the Insolvency Act read together with the proper application of clauses 2 and 13 of the policy of insurance the appeal must succeed.

[36] The respondents have raised the question of the costs of the trial before Gildenhuys J. A letter emanating from the appellants attorneys tendered the costs of that trial. Those costs have now been taxed. It was submitted on behalf of the appellant that the tender was for settlement purposes only. The matter was clearly not settled. I agree with this interpretation. In the light of the result of this appeal there is no need to deal with those costs separately. The appellant was not a party to those proceedings and has succeeded in this appeal. I find that the appellants are not liable to pay those costs.

The order I would make is:

The appeal is upheld with costs. The order of the Court a quo is set aside and the following is substituted:

"The action is dismissed with costs."



M VICTOR
JUDGE OF THE SOUTH GAUTENG HIGH COURT

I concur

CJ CLAASSEN
JUDGE OF THE SOUTH GAUTENG HIGH COURT

H SALDULKER
JUDGE OF THE SOUTH GAUTENG HIGH COURT.

Appearances

For Appellant
Advocate E Wessels
Botha Sutherland Attorneys

For Respondents

Adv A Crutchfield
Du Randt Du Toit Pelser Attorneys