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CASE NO: 93/91

C M PENDERIS AND SOLOMON GUTMAN NNO ..... APPELLANTS

and

THE LIQUIDATORS SHORT-TERM BUSINESS,
AA MUTUAL INS ASS LTD ..... RESPONDENTS

HARMS, AJA:

Case No. 93/91
J VD M

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

C M PENDERIS AND SOLOMON GUTMAN NNO Appellants

and

THE LIQUIDATORS SHORT-TERM BUSINESS,
AA MUTUAL INSURANCE ASSOCIATION LTD Respondents

CORAM: BOTHA, GOLDSTONE, VAN DEN HEEVER, JJA et VAN COLLER, HARMS, AJJA

HEARD: 10 SEPTEMBER 1992

DELIVERED: 28 SEPTEMBER 1992

J U D G M E N T

HARMS, AJA:

During August 1985 Nightingale Lingerie Manufacturers (Pty) Ltd ("the insured") concluded a

written contract of insurance ("the policy") with AA Mutual Insurance Association Ltd ("the insurer"). The policy was for short-term cover against, inter alia, destruction or damage caused by fire to the insured's property. The premium was payable monthly by debit order and, provided clause 13 of the policy,

> "(i)f any bank debit order be dishonoured for lack of funds all cover under this Policy shall cease with effect from 16h00 on the last day of the last period for which premium has actually been paid." [Emphasis added]

On 2 October 1985, the insurer duly presented for payment the debit order for the month of October 1985 to the insured's bank, First National Bank of South Africa Ltd ("the Bank"). It was done through the system of the Automated Clearing Bureau (Pty) Ltd. In short, that system has the effect that the amount of the debit order was automatically entered against the insured's banking account and simultaneously credited to the insurer's banking account. In the meantime during the

afternoon of 1 October, a fire occurred at the insured's premises and destroyed its plant and equipment. The Bank's manager, Mr Pitt, on learning of the fire, panicked. The cause of his concern was that the insured had extensive overdraft facilities; its account was actually overdrawn in a sum in excess of R343000; and the machinery destroyed by the fire was hypothecated in terms of a notarial general covering bond to the Bank as security for the overdraft. He gave immediate instructions for the freezing of the overdraft facilities and, as a result thereof, the debit was reversed by first debiting the insurer's bank on 2 October by means of a debit note sent to it and, secondly, crediting the insured's account with the amount of the premium on the same day.

The insurer rejected the insured's claim, contending that the insurance cover had ceased on 30 September because the debit order had been "dishonoured

for lack of funds" within the meaning of clause 13 of the policy. The insured subsequently issued summons during December 1985 against the insurer for an order declaring that the policy was of full force and effect at the time of the fire and that the insurer was liable to indemnify it in accordance with the terms of the policy. In the alternative, it claimed an indemnity or damages from the Bank (who was cited as the second defendant) on the ground that it had breached a tripartite agreement between the insured, the insurer and the Bank in terms of which the latter, allegedly, had undertaken to honour the debit order. By the time the matter came to trial both the insured and the insurer's short-term business had been liquidated and their respective liquidators substituted for them. The claims against both defendants were dismissed and the judgment of Berman J in the Court a quo was reported sub nom Penderis & Gutman NNO v Liquidators of the Short-

Term Business, AA Mutual Insurance Association Ltd, and Another 1991 (3) SA 342 (C). The references to that judgment will be to it as reported.

An application for leave to appeal was dismissed by the learned trial Judge but leave was granted, pursuant to a petition addressed to the Chief Justice, in respect of the insurance claim; as far as the claim against the Bank is concerned, leave was refused. The present appeal lies thus between the insured's liquidators (as appellants) and the insurer's (as respondents).

Before considering the issues as they appear from the reported judgment, it is necessary to note that, although the policy was only concluded on 22 August 1985, its effective date was 1 July 1985 and even though the premiums for the months July, August and September were paid only on 6 September the insured had had insurance cover from 1 July. This was so because,

even though the policy provided that the indemnification thereby given was "(i)n return for the premium", payment of the premium was not a condition precedent for cover. That much is clear from clause 13. See in this regard S A Eagle Versekeringsmaatskappy Bpk v Steyn 1991 (4) SA 841 (A) at 846 A - G. It follows that the party who alleges a cessation of cover in terms of clause 13, must prove it. Cf. Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (A) 645 A - B. (It may be noted in passing that the October premium was tendered to the insurer on 18 October but that the tender was rejected.) The onus involves, in the present case, proof of dishonour (non-payment) of the debit order as well as that it occurred for lack of funds. The Court a quo found, as far as the first issue is concerned, that the debit order was not met (at p 345 B - E). The correctness of this finding was not challenged. It is tantamount to a finding that a

debit order is in the nature of an electronic cheque; that the book entries were provisional; and that the Bank's timeous reversal of the entries resulted in non-payment. See also Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank) en 'n Ander 1991 (3) SA 605 (A) 612 E - 613 A.

That brings me to the crucial question whether the dishonour occurred for lack of funds. In answering that question in the affirmative the learned trial Judge held in effect that once the Bank decided to freeze the account on 2 October, any resultant failure to honour the debit order had to be for lack of funds (at p 346 B - C); it did not matter what the Bank's motive was (at p 345 I - J); it was the duty of the insured to keep its account in funds (at p 346 G - H); and that it was impractical to burden an insurer with the obligation to establish the reason for every dishonour (at p 346 E).

I am in respectful disagreement with these findings

since they entail that the words "for lack of funds" perform no function in clause 13 and are thus meaningless. In the ordinary course of events the dishonour of a debit order would be the result of a lack of funds but that is not necessarily the case. It may be the result of a malfunctioning of the electronic system or because of some negligence on the part of the Bank. There is no reason to believe that the insurer (who was the scribe of the contract) did not intend to bear such risks, especially since it was the party who insisted upon payment of the premium by means of a debit order. Berman J seemingly placed some reliance on the wording of a "warning" at the foot of the authorisation given by the insured to the insurer to submit debit orders to its banker and to the Bank to honour them (at p 346 H - I). The warning was to the effect that if a debit order is not met, "all cover under the Policy will cease from 16h00 on the last day

of the period for which premium has been paid"; in other words, the qualification contained in clause 13 that the dishonour had to be for lack of funds was not part of the warning. This approach cannot be justified: it was never part of the respondents' case that the warning was a term of the insurance contract; nor that it amended clause 13. I also fail to see on what basis it could be used to interpret clause 13. In conclusion on this aspect of the case, there is no reason why the words "lack of funds" in the context of clause 13 should not bear their ordinary everyday meaning namely an absence of funds in the designated bank account. See Concise Oxford Dictionary (1990) s v lack: "for lack of owing to the absence of (went hungry for lack of money)."

The insured did not have its own funds in the designated account. It had, however, an overdraft facility. The history of this facility is not clear

because the appellants led no evidence thereanent and because the bank manager was a confused and unreliable witness. It appears from the Bank's documents that, at least since 26 January 1984, the insured had some overdraft facilities. The Bank was not satisfied with the security provided and insisted upon the provision of "firm supporting security" in order to cover in full the overdraft debt. During March 1984 it was agreed that, subject to the registration of a notarial general covering bond ("the bond") for R150000 hypothecating all the insured's machinery at its factory, an overdraft facility of R260000 would be granted for a period of 12 months. The bond was registered during April 1984. The overdraft was extended and we find that on 12 September 1985 (i e two weeks before the fateful fire) a facility of up to R350000 was granted until the close of business in December. A request by the insured for the release of some other security held by the Bank was

turned down.

When the debit order was presented on 2 October the facility had not been fully utilised. It was withdrawn, at least temporarily, when it was frozen on 2 October. The question then is whether the Bank was entitled to suspend it. This question is of vital importance because if the Bank was not so entitled the dishonour was not by reason of lack of funds but because of an unjustified act by the Bank who, as lender, was obliged to provide the necessary funds and to discharge the insured's indebtedness to the insurer from the funds so furnished.

The respondents' contention (as stated at the pre-trial conference) was, and remained, that the Bank was entitled to suspend the overdraft once the subject-matter of the bond had been destroyed by the fire; and since the overdraft was no longer in force, no funds were available to satisfy the debit order;

consequently, there was a dishonour according to clause 13 and the insurance cover ceased as from 30 September. Having regard to what has been said above in respect of the onus it was incumbent upon the respondents to prove the Bank's entitlement to suspend the overdraft.

The Court a quo considered this question in the context of the appellants' case against the Bank and held that, as a matter of law, if an overdraft facility is granted on the strength of certain security, and the security is extinguished, a bank can without notice terminate the facility forthwith (at p 349 D - E; p 350 A). Reliance was placed upon Volkskas Bpk v Van Aswegen 1961 (1) SA 493 (A) for this proposition. That is not what that case held. The learned Chief Justice (Steyn CJ) was at pains to point out that he was considering the provisions of the overdraft agreement in issue (see especially at p 495 G - H; p 496 A - B; p 496 E - F; p 496 H; p 497 D) and that he was

accordingly not formulating rules of general application. The statement in the judgment (at p 496 F) that the right to a notification of the termination of the overdraft was dependent upon a contractual term to that effect must also be seen in the context of the facts of that case. The Court was there concerned with a term of the agreement which was in the nature of a resolutive condition and in such a case the resolution of the contract normally takes place automatically. The rule, as formulated in Swart v Vosloo 1965 (1) SA 100 (A) 115 D - G is, however, that, since the termination of a contract has important consequences, the party who is entitled to terminate can only do so (in the absence of a contrary provision) by communication his election to the other party. See also Miller & Miller v Dickenson 1971 (3) SA 581 (A) 587 H -588 A. (In parenthesis it may appear strange that I criticize a ruling or finding made by the trial court in

the course of the case against the Bank since leave to appeal against that part of the judgment was refused. It must be borne in mind that those findings are not res judicata as between the present parties because the respondents were not privy to that part of the litigation. Also, as counsel for the appellants readily conceded, any appeal against that part of the case was in any event doomed, for reasons which are irrelevant for present purposes.)

It is therefore necessary to determine the terms of the agreement relating to termination or suspension of the overdraft. The respondents did not plead any such terms; their contention as formulated above does not refer thereto; they did not, either through cross-examination or evidence, attempt to prove any relevant terms. They merely relied upon the evidence presented on behalf of the appellants and the Bank.

The appellants' witness, Mr Frith, was asked under

cross-examination about the agreement of March 1984 relating to the registration of the bond and he confirmed that it was a condition for the grant of the R260000 facility. No other questions relevant to the present issue were asked of him. In particular, it was never put to him that the facility could have been terminated (provisionally or permanently) with (or without) notice upon the destruction of the machinery. Mr Pitt was called on behalf of the Bank. He alleged that the facility was extended on the condition stated. The Bank's right to terminate or suspend the facility, he said, arose from a banking practice or ruling. As to the question whether the Bank was obliged, before exercising this right, to notify the insured, he gave contradictory evidence with the result that the learned trial Judge was not prepared to hold that his evidence could assist the appellants in discharging their onus vis-à-vis the Bank (see p 349 H - J read with p 348 B -

G). And, save for the finding that the facility was extended on condition of the provision of the bond (which was common cause), the trial court made no findings relating to the terms of the agreement.

The fact that the respondents failed in duty to plead the agreement (including its terms, express or tacit) on which they relied, makes it virtually impossible to draw a fair conclusion from contradictary and unreliable evidence. Can it be said that the respondents established that the Bank could suspend the facility without notice where the only witness who dealt with the issue gave conflicting answers to the question? I believe not. If Mr Pitt's evidence was not good enough to discharge the appellants' burden of proof, the selfsame evidence could not suffice to discharge the respondents'. That is especially so where those parts of Mr Pitt's evidence on which the respondents have to rely do not even purport to deal with

contractual rights. But that is not the end of the matter. The supposed term of the agreement upon which the respondents' case depends, is not consistent with the terms of the bond. The bond itself spells out in great detail the circumstances under which the Bank was entitled to act against the insured without notice - and destruction of the goods is not one of them. Clause 1 of the bond accords that right in the event of any default by the insured in the observance or performance of any of the conditions of the bond, or its failure to discharge any obligation or liability to the Bank. Clause 16 grants a similar right, inter alia, if the Bank has reason to believe that its interests are in any way imperilled by any act or omission on the part of the insured. Loss of the goods hypothecated is not mentioned, the probable reason being the provisions of clause 5. They obligate the debtor to insure "such of the machinery ... as the Bank may decide" against inter

alia fire, in which event the policy of insurance must be ceded to the Bank to be held as collateral security. The Bank, arguably, could have believed that with insurance and a cession in place, the destruction of the hypothecated goods would not in itself be a reason to withdraw without notice the overdraft facility. But, even if that were not the reason for the omission, expressum facit cessare tacitum - see Barnabas Plein & Co v Sol Jacobson & Son 1928 AD 25 at 30 in fin. It follows that the respondents did not establish that the Bank was entitled to act as it did on 2 October and that the appellants are consequently entitled to the declaratory orders sought.

As far as costs are concerned, a few issues have to be dealt with. First, the appellants applied for condonation for the late filing of part of the record. The respondents consented thereto and an order was made at the outset of the hearing granting the condonation

and ordering the appellants to bear the costs of the application. Second, the registrar informed the appellants, prior to the hearing, that certain relevant documents were not included in the record. In reaction six new volumes were filed whereas the practical way would have been to insert the few missing papers into the existing record. The appellant's Cape Town attorney, very properly, readily agreed himself to bear the costs wasted by this unnecessary duplication. Third, it was submitted on behalf of the respondents that the costs of two counsel could not be justified. I disagree. The case was of sufficient complexity to merit the decision to employ two counsel. Lastly, the costs of the application for leave to appeal to the Chief Justice as well as to the Court a quo were reserved for the Court hearing the appeal. In the light of the outcome of the appeal, it follows that the respondents must bear these costs.

The order, consequently, is as follows:

1. The appeal is upheld.

2. Paragraph (a) of the order of the court a quo is amended to read:

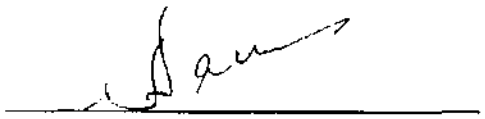
"(i) It is declared that the insurance policy, annexure "A" to the particulars of claim, was of full force and effect on 1 October 1985 when the fire occurred and that the first defendant is liable to indemnify the plaintiffs in accordance with the provisions of the policy.

(ii) The first defendant is ordered to pay the plaintiffs' costs in respect of the claim against them."

3. Paragraph (d) thereof is amended by substituting for "first defendant" the word "plaintiffs".

4. The appellants' attorneys are to bear, in terms of their undertaking, the costs of the second record.

5. Subject to paragraph 4 and subject to the order relating to the condonation application, the respondents are to pay the costs of the appeal, including the costs relating to the applications for leave to appeal, and on the basis that the employment of two counsel was justified.



L T C HARMS
ACTING JUDGE OF APPEAL

BOTHA, JA)
GOLDSTONE, JA) CONCUR
VAN DEN HEEVER, JA)
VAN COLLER, AJA)