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DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

INTERPRETING A REINSTATEMENT CLAUSE IN AN INSURANCE CONTRACT: INSURERS SHOULD ACT QUICKLY AND WISELY, OR PAY THE PRICE

An insurance company recently suffered the consequences of its wrongful repudiation of a claim in terms of the reinstatement provisions of an insurance policy, in the Western Cape High Court case of *Watson and another v Renasa Insurance Company Limited* [2019] 2 All SA 280.

BE CAREFUL RETAILERS, YOU MAY RUN OUT OF FUEL: SECTION 12B OF THE PETROLEUM PRODUCTS ACT MAY NOT BE YOUR SAVING GRACE

In terms of s12B of the Petroleum Products Act 120 of 1977 (Act), the Controller of Petroleum Products (Controller) may on request by a licensed retailer alleging an unfair or unreasonable contractual practice by a licensed wholesaler, or vice versa, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration.

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Interpreting a Reinstatement Clause in an insurance contract: Insurers should act quickly and wisely, or pay the price

Should the insurer elect to reinstate the property, it will be bound by that decision regardless of the consequences, and will further be liable for the consequences of a failure to reinstate timeously and adequately.

An insurance company recently suffered the consequences of its wrongful repudiation of a claim in terms of the reinstatement provisions of an insurance policy, in the Western Cape High Court case of *Watson and another v Renasa Insurance Company Limited* [2019] 2 All SA 280. After a fire at the plaintiff's place of business destroyed machinery insured by the defendant insurance company, the defendant repudiated the insurance claim, based on its assertion that the plaintiff's arson had caused the fire. Both the High Court and the Supreme Court of Appeal sided with the plaintiff, finding that the insurer was obliged to indemnify the insured property. The matter then came before the High Court in respect of the quantum of the plaintiff's claim.

The court confirmed that a contract of insurance is an indemnity contract aimed at procuring indemnity for any losses that the insured may sustain against certain unforeseen risks. The event giving rise to the claim is accordingly viewed as a fictional breach of the insurance contract, while compensation is seen as damages for this fictional breach.

In addition, the court reiterated that the *contra proferentem* rule applies when interpreting insurance contracts. This means that, in cases of ambiguity, the contract will be interpreted against the insurer, who drafted the agreement, and in favour of the insured.

Reinstatement vs replacement value

Insurance policies frequently allow the insurer to elect to "reinstate" the insured property either by paying a sum of money, or by reinstating the property itself. The latter may be cheaper, and may also protect insurers against excessive demands and fraudulent claims.

However, should the insurer elect to reinstate (that is, replace, rebuild, reinstate or repair, as appropriate) the property, it will be bound by that decision regardless of the consequences, and will further be liable for the consequences of a failure to reinstate timeously and adequately.

Another manner in which the term "reinstatement" is encountered in indemnity policies is in the context of the basis upon which a claim is to be valued. The court in *Watson* considered that the usual basis

Interpreting a Reinstatement Clause in an insurance contract: Insurers should act quickly and wisely, or pay the price...*continued*

The plaintiff's inability to commence reinstating the property himself did not preclude him from relying on the reinstatement clause.

for indemnity would be the actual *loss or diminution of value* of the property as at the date of the unforeseen event.

However, a policy offering to pay "replacement value" will require the insurer to pay the actual costs to replace the lost property with equivalent new property available on the market, or to repair the property fully, subject to a specified maximum cost.

Inability to reinstate

The court in *Watson* further interpreted a clause in the insurance policy requiring the insured to "intimate" his intention to replace or reinstate the property, and to be able and willing to replace or reinstate the property. While the defendant argued that this clause required the insured itself to commence replacing or reinstating the property, and subsequently be reimbursed by the insurer, the court held that such a clause would give rise to potential abuse by an insurer acting in bad faith, and places a relatively impecunious claimant at a severe disadvantage.

Very few insured parties have the means to commence and effect replacing or reinstating costly property without the cooperation and assistance of the insurer, and without any certainty that the insurer will ultimately approve its claim. Such a requirement in a policy would, in fact, undermine the purpose of the indemnity contract; that is, to avoid the risk of itself having to fund the replacement or reinstatement.

The court accordingly acknowledged that the plaintiff had taken sufficient steps to intimate his intention to replace or reinstate the insured machinery, as required. For example, he had obtained various quotations for replacement machinery, incurred significant expenditure trying to repair the factory and other machinery, and continued to try to generate income through the factory. This genuine desire and intention to recommence the business was held to be adequate to fulfil the requirement set out in the abovementioned clause in the policy, and the plaintiff's inability to commence reinstating the property himself did not preclude him from relying on the reinstatement clause.

The court thus suggested that where such a clause exists in a policy, insurers should make payment of the indemnity value; if the insured fails to expend it on reinstatement within any period contemplated in the policy, then the insurer would be absolved from making any further payment. Such an approach is aligned with the legal convictions of the community.

Interest on the reinstatement value

Since the date of valuation was found to be that of the date of the incident, which occurred in 2011, the court was obliged to consider the principles surrounding interest on an unliquidated claim where there has been a significant delay in settling a claim. Ordinarily, in terms of s2A(2)(a) of the Prescribed Rate of Interest

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The court ordered the insurer to pay interest on the reinstatement value from the date of issuing of summons in September 2011, notwithstanding the fact that interest consequently exceeded the amount claimed.

Act No 55 of 1975, interest runs from the date of demand or summons. In addition, the *in duplum* rule is generally applicable, causing interest to stop running once unpaid interest equals the capital.

However, the court relied on *Drake Flemmer & Orsmond Incorporated and another v Gajjar 2018* (3) SA 353 (SCA) in finding that s2A(5) of the Act allows a court to consider the facts, and make any order in respect of interest that it considers to be just. The practical effect of this is that, if it is considered just, the court may order interest to be paid which exceeds the amount of the unliquidated debt. In light of the fact that the numerous costly delays had been caused by the insurer's unreasonable conduct, the court ordered the insurer to pay interest on the reinstatement value from the date of issuing of summons in September 2011, notwithstanding the fact that interest consequently exceeded the amount claimed.

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The Court showed a willingness to exercise its discretion in awarding interest that exceeds the actual amount claimed, as a result of the insurer's unreasonable delays.

Finally, the court held that interest is also to be paid on the VAT component of the reinstatement value, since the VAT percentage will at present be applied to a higher invoice cost and will accordingly result in a larger VAT payment for the plaintiff.

Conclusion

The High Court in *Watson* has emphasised the importance of an insurer considering all facts in making a decision that is fair to the insured, and making that decision as soon as possible. An insurer facing the election between reinstating insured property and paying the reinstatement value is advised to bear in mind that the choice made is final, and that the insurer will be bound to that decision regardless of the cost of reinstatement or any other consequent liability. The Court further recommended that insurers pay the indemnity value without requiring the insured to commence reinstating the property itself, as such a requirement would offend public policy. Finally, and significantly, the Court showed a willingness to exercise its discretion in awarding interest that exceeds the actual amount claimed, as a result of the insurer's unreasonable delays.

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Be careful retailers, you may run out of fuel: Section 12B of the Petroleum Products Act may not be your saving grace

The referrals in terms of s12B are often abused by licensed retailers in an effort to delay and/or frustrate litigation proceedings or to extend their contractual relationships until the finalisation of the s12B arbitration.

In terms of s12B of the Petroleum Products Act 120 of 1977 (Act), the Controller of Petroleum Products (Controller) may on request by a licensed retailer alleging an unfair or unreasonable contractual practice by a licensed wholesaler, or vice versa, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration.

In *The Business Zone CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others* [2017] ZACC *it was held that "the low discretionary threshold"* contained in s12B(1) is that *"the only jurisdictional requirement for the Controller to make a referral under section 12B(1) is an allegation by a licensed retailer that a licenced wholesaler, or vice versa, has committed an unfair or an unreasonable contractual practice. It does not require the 'proving', 'demonstrating', or 'showing' of an unfair or unreasonable contractual practice and the Controller need only satisfy himself of the existence of such an allegation and must accordingly limit his interrogation of the merits of the dispute to the extent required to establish the allegation's existence. The Controller should then refer the matter to arbitration".*

Having regard to the limited discretion of the Controller, the Controller is obliged to accept most, if not all, referrals in terms of s12B. Upon acceptance of the referral by the Controller, the parties are required to agree on the appointment of an arbitrator and the applicable rules. If the parties fail to reach an agreement regarding the arbitrator, or the applicable rules, within 14 days of receipt of the notice, the Controller must upon notification of such failure, appoint a suitable person to act as arbitrator.

Section 12B fails to set out the time periods within which the arbitration should be finalised and the rules applicable to the arbitration proceedings are within the parties' absolute discretion provided that the parties agree thereto. Consequently, the referrals in terms of s12B are often abused by licensed retailers in an effort to delay and/or frustrate litigation proceedings or to extend their contractual relationships until the finalisation of the s12B arbitration.

The court in *Bright Ideas Projects 66 (Pty) Ltd T/A All Fuels V Former Way Trade and Invest (Pty) Lts T/A Premier Service Station* [2018] JOL 40129 (KZP) was tasked with determining whether the referral of a dispute to arbitration under s12B justified the stay of the litigation proceedings in the High Court. In *Bright Ideas* the applicant sought an order evicting the respondent from its site in Pietermaritzburg. Having proven the grounds for an eviction order, the applicant's claim could only be undermined by the court finding that (i) the parties concluded an agreement renewing the respondent's right to occupy the premises; or (ii) arbitration under the Act or arbitration clause 20 of the franchise agreement suspended the litigation. The respondent failed to prove that a valid renewal agreement, containing an arbitration clause, was concluded and therefore it was left to the court to determine whether s12B required a stay of the litigation proceedings.

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Be careful retailers, you may run out of fuel: Section 12B of the Petroleum Products Act may not be your saving grace...*continued*

The Court held that a mere referral to arbitration in terms of s12B does not automatically suspend litigation whereas an agreement to arbitrate entitles a party to apply to the court for a stay of litigation proceedings.

The court recognised the importance of the principles outlined by the Constitutional Court in *The Business Zone* case for interpreting s12B. These principles include:

- that the legislature had no intention of encouraging forum-shopping when designing the dispute resolution process for the petroleum industry;
- the self-regulatory aspect of s12B allowed the parties to include or exclude certain matters in the terms of reference for the arbitrator's determination and if the parties could not agree, the arbitrator's powers would be restricted to the provisions set out in s12B(4); and
- the concepts of unfairness and unreasonableness could be informed by the jurisprudence interpreting the Labour Relations Act 66 of 1995 which led to the Constitutional Court concluding that *"the fairness required in our labour law jurisprudence is the same as the fairness in Section 12B"*.

The Court, however, stated that the facts in *Bright Ideas* were distinguishable from those in The Business Zone, as that case did not deal with ejectment nor the consideration of a declarator creating a renewal agreement.

The Court held that a mere referral to arbitration in terms of s12B does not automatically suspend litigation whereas an agreement to arbitrate entitles a party to apply to the court for a stay of litigation proceedings. The arbitration referrals in terms of s12B are not arbitrations arising from an arbitration agreement governed by the Arbitration Act 42 of 1965 which prescribes the procedure for a stay of litigation. The Court may, however, stay litigation proceedings pending the outcome of a s12B arbitration, subject to such terms and conditions as may be considered just in the general exercise of its powers.

The crux of the decision to grant the order for eviction and not stay the litigation in the *Bright Ideas* case turned on the content of the respondent's referral to arbitration, which meant that the court was not called upon to decide issues placed before the arbitrator.

License retailers should thus be cautioned against referring disputes to the Controller in terms of s12B in an effort to delay litigation proceedings or extend their contractual relationships. The arbitration proceedings envisaged in terms of s12B is not an opportunity for a party to have two bites at the cherry and the arbitrator's power to impose punitive cost awards against parties making frivolous or capricious referrals should discourage such abuse of the s12B referrals.

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