INSURANCE

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CO-INSURERS: THE IMPORTANCE OF SELECTING THE RIGHT CAUSE OF ACTION

Selecting the correct cause of action can in general be a tricky business. It is even more so where one co-insurer wants to claim from another.

The following facts presented in *Samancor Ltd vs Mutual & Federal Insurance Co Ltd and Others* 2005 (4) SA 40 (SCA):

- Samancor insured certain equipment under two policies, termed an 'assets policy' and a 'works policy'.
- Mutual & Federal was the insurer in respect of the 'works policy' and Westchester was the insurer under the 'assets policy'.
- After an equipment failure, Westchester fully indemnified the insured, Samancor.
- Westchester instituted a subrogation action (in the name of Samancor) against the co-insurer, Mutual & Federal.
- Mutual & Federal (Respondent) raised a special plea to that action, pleading that since Samancor (Appellant) was fully indemnified against the loss, the Appellant could not seek indemnity from them for the same loss.

The legal issue was whether a subrogation action could succeed in these circumstances. The general principle is that a person who has more than one claim to indemnity is not entitled to be paid more than once. In *Caledonia North Sea Ltd v British Telecommunications Plc (Scotland) and Others* [2002], ALL ER (Com) 321, this principle was highlighted. Two possible approaches were delineated. One is that the insurer who has paid is entitled by way of subrogation to exercise the rights of the insured against the other liable party. The other is that one payment discharges the liability. The law ordinarily adopts the first approach when the liability of the person who paid is secondary to that of the other liable party. It adopts the second approach when the liability of the party who paid was 'primary or the liabilities are equal and co-ordinate'.

Following the *Caledonia* case, the Supreme Court of Appeal (SCA) held that:

- an insurer may be in a position to reclaim what it has paid as a typical secondary debtor;
- where it can and does exercise a right of subrogation, it must do so in the name of the insured;
- a right of subrogation can be exercised against a wrongdoer or a contractual defaulter;
- a right of subrogation cannot be exercised by one secondary debtor against another as payment by one discharges the other; and
- a subrogated claim against a co-insurer can only be competent if such co-insurer assumed primary responsibility for a debt.

The SCA scrutinised the wording of the policies in order to determine whether any of the insurers assumed primary liability. The finding was that, on interpretation of the policy contracts, the two insurers had equal and co-ordinate liability. The one could therefore not institute a subrogated action against the other. Claiming a contribution was held to have been the equitable remedy. Instead of instituting a subrogated claim in the name of the Appellant, Westchester should have claimed a contribution from the Respondent in its own name. Although the remedy of a contribution is not founded on a contractual relationship between co-insurers, the SCA found that it may consult the insurance agreements to determine how much an insurer who has paid should be allowed to recover from its co-insurer.

It is submitted that in instances of multiple insurance, the insurers should ensure that the distinction between secondary and primary liability, and the details of contributions claimable are clearly spelt out.

Roy Barendse

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IT'S ALL ABOUT THE EVIDENCE

Having the law of evidence on your side – and adhering to its precepts – is crucial if insurers hope to uphold a repudiation based on an insured's non-disclosure of material facts.

Section 59(1) of the Long Term Insurance Act, No 52 of 1998 and s53 of the Short Term Insurance Act, No 53 of 1998 permit insurers to escape liability under an insurance contract on the basis of misrepresentation, provided such misrepresentation would have likely materially affected the relevant policy's risk assessment upon issue.

The Supreme Court of Appeal's Willis JA recently clarified the legal position when insurers repudiate a claim upon discovering a material non-disclosure by an insured in his concurring but separate judgment in *Visser v 1Life Direct Insurance Ltd 2015* (3) SA 69 (SCA) (28 November 2014)

1Life Direct Insurance Ltd (1Life) repudiated a life insurance policy claim after investigations revealed that the deceased insured had misrepresented and failed to disclose details of a pre-existing medical condition which would have materially affected the policy's risk assessment.

The High Court ruled in favour of 1Life. On appeal, the Supreme Court of Appeal held that 1Life did not discharge the onus of proving the truth and accuracy of the contents of the hospital records on which it relied to prove the deceased's pre-existing medical condition. 1Life failed to lead the necessary evidence and accordingly had to pay the R3,3 million claim out and foot the legal bill for its lack of attention to the evidence.

In his separate judgement, Willis JA discussed the requirements for insurers to secure a repudiation based on non-disclosure of material facts. These are that:

- insurers bear the onus of proving all the elements to justify this type of repudiation;
- the onus on insurers to defend a repudiation of this nature is extensive
- insurers must prove that:
  - a representation was made;
  - the representation was untrue;
  - the true facts were known to the insured when the insured responded to the insurer's questions; and
  - the misrepresentation was likely to have materially affected the policy's risk assessment at the time of issue.

Assessing an insured's state of mind at the time of responding to their insurer's enquiries involves both objective and subjective elements to be inferred from the evidence available to the court. Subjective elements include what the insured thought and understood when making the disclosures, while an objective assessment is necessary to establish whether the insured could reasonably have been expected to know that their misrepresentation would materially affect the insurer's risk assessment.

Willis JA remarked that the materiality of a non-disclosure is a question of law and emphasised the importance of distinguishing questions of law from questions of fact in similar cases of repudiation.

The relevance and reliability of evidence as well as the Constitutional right to a fair trial must also be considered before disputed evidence may be admitted into evidence and relied upon by a court.

In future, insurers should not take shortcuts when asking a court to uphold a repudiation based on material non-disclosures and must ensure that they meet the high evidential bar of these types of actions.

Philene Spargo

TAPPING INTO THE AFRICAN INSURANCE MARKET

The world's insurance industry is dominated by insurance companies of developed countries. In 2014, KPMG reported that G7 countries (Canada, France, Germany, Italy, Japan, United Kingdom and the United States of America) account for approximately 65% of the world's insurance premiums, yet cover just over 10% of the world's population. In comparison - according to CNBC Africa - the insurance market in Africa is underdeveloped with only 3.5% of the African market being insured. This status quo – with many first world countries being inundated with insurance firms and African countries being underrepresented – has led many insurance firms to identify Africa as an opportunity for growth.

Ahead of the surge, South Africa's leading insurance companies have started to make inroads into this predominantly untapped market by expanding their scope into African countries. In December 2013, Santam and Sanlam Emerging Markets entered into an emerging markets partnership, with an aim to expand both parties' reach into, among other geographical areas, Africa. In February 2014 Sanlam announced its entry into the Nigerian insurance market through its associate company, FNB Life Assurance, which acquired a controlling interest of 71.2% in Nigeria-listed short-term insurer, Oasis Insurance. Similarly, Africa's biggest insurance company, Old Mutual has set aside R5 billion for the next three to five years in order to increase its reach into Africa.

Although expanding into the African insurance market is potentially very lucrative, the decision and resources such a move requires is not without risks. Prior to entering the African market, insurance firms need to thoroughly assess the plausibility of the market, and consider the restrictions, controls and uncertainties inherent in insurance regulation in African countries. These considerations include the:

- level of know-how, local market data and knowledge needed to adequately assess the risks. There is currently an absence of or lack of information on the insurance market in Africa which may make insurance firms reluctant to tap into the continent's potentially lucrative market (Source: Final Report of the Commission Expert Group on European Insurance Contract Law and CNBC Africa);
- additional resources and capital output required for managing claims in countries across the African continent (Source: Insurance Europe);
- level of demand for insurance in African countries. Some of the reasons for the low rate of penetration in African countries include multinationals being reluctant to enter the African market due to the high rate of poverty, lack of private sector development, and the lack of regulation and supervision. Conversely, this low penetration rate can be viewed as an incentive for insurance firms to enter a potentially profitable market (Source: Insurance Europe and KPMG);
- level of experience and familiarity with the legal, regulatory and taxation systems in African countries as well as the potential risks faced by insurance firms that enter African countries. Based on these factors the insurer may need to adapt its insurance contract to the conditions and requirements imposed by another country in order to comply with that country's legal and regulatory requirements for insurance firms (Source: Insurance Europe);
- insurer's capacity to cover potential claims in African countries while still satisfying its solvency requirements and its financial obligations to its investors. Factors such as poor risk management and actual incurred claims exceeding expected claims can lead to the non-viability of an insurer providing insurance in foreign countries (Source: Insurance Europe and International Association of Insurance Supervisors); and
- feasibility of maintaining a continuous relationship with policyholders domiciled in another country (Source: Insurance Europe).

Africa's insurance industry has scope for further growth and if properly assessed can offer profitable opportunities for insurance firms. The ultimate aim in entering the African insurance market is ensure profitability, sustainability and longevity of the insurance firm's business. In turn, insurance firms entering the African market can provide the impetus needed to develop Africa's insurance industry.

Commercial considerations such as the insurer's ability to insure risks in foreign jurisdictions, the repercussions of foreign law on the insurance contract and the impact of other legal and regulatory requirements will influence an insurance firm's decision to enter the African insurance market.

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