OOS-RANDSE BANTOESAKE ADMINISTRASIERAAD v SANTAM VERSEKERINGSMAATSKAPPY BPK EN ANDERE (2)
[1978] 1 All SA 314 (W)

Division:	Witwatersrand Local Division
Judgment Date:	16 September 1977
Case No:	not recorded
Before:	Colman J
Parallel Citation:	1978 (1) SA 164 (W)

. Keywords . Cases referred to . Judgment .

Keywords

Insurance - Policy of - Exclusion clause - Breach - Onus of proof - Interpretation - Riot and civil commotion - "Volksopstand" - "Volksoproer"

Summary Judgment - Affidavits - Deponent - Authorisation by plaintiff's attorney

Summary Judgment - Liquidated amount in money - Insurance claim - Admission of correctness of amount by assessor

Cases referred to:

Bodemer v Hechter 1962 (4) SA 244 (T) - Referred to

Botha v Swanson and Co (Pty) Ltd 1968 (2) PH F85 (C) - Referred to

Breitenbach v Fiat SA (Edms) Beperk 1976 (2) SA 226 (T) - Applied

Kosak and Co (Pty) Ltd v Keller 1962 (1) SA 441 (W) - Applied

Leymac Distributors Ltd v Hoosen and Another 1974 (4) SA 524 (D) - Referred to

Sand and Co Ltd v Kollias 1962 (2) SA 162 (W) - Compared

South African Trade Union Assurance Society Ltd v Dermot Properties (Pty), Ltd and Others 1962 (3) SA 601 (W) - Applied

JudgmentCOLMAN, J.: This is an opposed application for summary judgment. The plaintiff is a statutory body corporate which owns property and carries on business and other activities in a portion of the Transvaal. The defendants are four insurance companies which, in terms of a lengthy and complicated contract of insurance, severally obliged themselves, in certain proportions, to indemnify the plaintiff against a variety of risks.

The plaintiff's case is that, during the currency of the contract of insurance, between 16 June and 21 July 1976, certain events took place in consequence whereof it suffered loss and damage for which the defendants are liable, under the contract of insurance, to indemnify it.

Eleven separate claims are put forward. The total amount sued for is in excess of R3 million, and the plaintiff claims from each of the four defendants its contractual percentage of that amount.

Notices of intention to defend the action were duly given by a firm of attorneys acting on behalf of the four defendants. In another application,* which has already been decided, the validity of one of the notices, in so far as it related to the first defendant, was under attack. But in the present proceedings there is no such issue; for the purposes of this application for summary judgment it is accepted by the applicant (the plaintiff) that the firm of attorneys to which I have referred is and was at all material times properly and effectively empowered and authorised to defend the action on behalf of the defendants, and to do whatever might be necessary or appropriate in that regard.

An application for summary judgment on ten of the eleven claims followed. It was supported by the affidavits of a number of people. That was an unobjectionable way of dealing with the matter - indeed an unavoidable one in a case where no single person would have been able to verify all the elements in the cause of action. All that I need add with regard to the affidavits supporting the application for summary judgment is this: that, in so far as any of them purports to amplify or add to what appear in the summons, instead of merely verifying it, the purported amplification or addition must be disregarded. That appears from *Kosak & Co.* (*Pty.*) *Ltd.* v. *Keller and Another*, 1962 (1) S.A. 441 (W), and from *South African Trade Union Assurance Society Ltd.* v. *Dermot Properties* (*Pty.*) *Ltd. and Others*, 1962 (3) S.A. 601 (W).

In response to the application for summary judgment the attorneys for the defendants filed an affidavit by one Markotter, the assistant claims manager of the first defendant, with certain supporting affidavits and other

documents attached thereto and referred to therein.

In that affidavit, read with the supporting documents, a number of defences to the plaintiff's claims were raised, and Markotter prayed that the application for summary judgment be dismissed with costs. Markotter, in making that affidavit and putting forward that prayer, purported to be acting on behalf of all the defendants. And his affidavit, with the supporting

documents, was filed by the attorneys of record for the defendants under a covering sheet, signed by them as such, wherein they described it as the answering affidavit of the first, second, third and fourth defendants.

The main contention, put forward in this application by Mr. *Wulfsohn*, on behalf of the plaintiff, was that Markotter's affidavit, with the supporting affidavits and other documents annexed thereto, should be struck out, and that summary judgment should thereupon be granted, as prayed, under Rule 32 (5). The affidavit should be struck out, said Mr. *Wulfsohn*, because there was no acceptable evidence on oath to prove that Markotter had been authorised by the defendants to file his affidavit and to raise defences in their behalf, and (so the argument went) the absence of such evidence was fatal to the defendants.

Markotter did say, in his affidavit, that he was duly authorised to make it for filing on behalf of all the defendants. It was argued, however, that, if one reads that averment with what precedes and follows it, it is at least doubtful whether Markotter's statement that he was authorised was based on anything more than an inference on his part from facts which were inadequate to support that inference. These is substance in that argument, as counsel for the defendants were constrained to concede.

But is there substance in the contention that an affidavit disclosing a defence to an action cannot be received by the Court, in reply to an application for summary judgment, unless that affidavit, or an affidavit filed with it, contains an acceptable averment that the deponent has been authorised by the defendant to make and file it ? I think not. Mr. *Wulfsohn*, in support of his contention, lays great stress upon the wording of Rule of Court 32 (3) (*b*). He draws attention to the fact that it is the defendant, and no other person, who is authorised to lay an affidavit before the Court (although it need not necessarily be his own affidavit). And he stresses the word "he" in the requirement that the affidavit must be one whereby the defendant satisfies the Court -

> "that *he* has a *bona fide* defence to the action".

It is the word "he" in the sub-Rule (so counsel for the plaintiff contended), which imports into the affidavit tendered in resistance to an application for summary judgment a requirement which does not attach to an affidavit filed on behalf of a respondent to an ordinary application. The mischief to be prevented, Mr. *Wulfsohn* argued, is the possibility that an affidavit might be made, by some person having knowledge of the facts, in which the deponent raises a defence which the defendant does not wish to have raised on his behalf.

I have had great difficulty in following these contentions, and I find myself unable to accept them. I see nothing in the use of the word "he" in the sub-Rule which supports the proposition under examination. The phrase "that *he* has a *bonafide* defence" seems to me, in the context, to be synonymous with "that there is a *bonafide* defence"; if there is a defence to an action, it is the defendant's defence; and in neither phrase can I see any implication that there must be proof of authority on oath. The earlier part of the sub-Rule does, indeed, require that it be the defendant, and not some officious stranger to the action, who may resist the application for summary judgment by filing the appropriate affidavit. But, in my view, that requirement is satisfied if the affidavit is filed by the attorney authorised

to act for the defendant in the action. What that attorney does, in the name of the defendant, within the wide ambit of his mandate, is, in law, the act of the defendant. (Cf. the remarks of TROLLIP, J. (as he then was), in *Sand & Co. Ltd.* v. *Kollias*, 1962 (2) S.A. 162 (W.) at pp. 164H-165A.)

Therein, it seems to me, lies the answer to the somewhat far-fetched apprehension, voiced by counsel, that an unauthorised defence might be raised. If a defence is raised in an affidavit filed by a defendant's attorney that defence is validly raised on the defendant's behalf. It is not uncommon, in our Courts, that a litigant is saddled with a disability flowing from something that his legal adviser has, without express instruction, but within the ambit of his authority, done on his behalf. Here, curiously enough, counsel's argument raises the converse case. Does a defendant get the benefit of a helpful affidavit filed on his behalf, but without his express instruction or consent, by his attorney acting within the ambit of his authority? The answer, as I see the matter, is "Yes".

In the case before me it is clear that Markotter's affidavit, with its supporting documents, was filed on behalf of all the defendants by a firm of attorneys authorised to act for those defendants in resisting the plaintiff's action. That suffices. The affidavit is properly before the Court and, if it discloses a *bona fide* defence to all the claims, summary judgment must be refused.

I would add this: If I had been persuaded that it was necessary to have proof, on oath, of Markotter's authority to depose to and file his affidavit, I would not have granted summary judgment merely because Markotter's averments in that regard fall short of what was necessary. If asked to do so (as I undoubtedly would have been) I would, in the exercise of my discretion under Rule 32, have given the defendants an opportunity of supplementing Markotter's affidavit on the question of authority.

Counsel for the plaintiff informed the Court that, if he was unsuccessful (as he has been) on his main argument, he would ask for summary judgment on claims 1, 6 and 7 only. I turn, therefore, to an examination of those claims.

The first question to be considered, in relation to each of those claims, is whether it is a claim for "a liquidated amount in money" within the meaning of Rule 32 (1) (*b*). If it is not, summary judgment cannot be granted on it, as it clearly does not fall within the scope of Rule 32 (1) (*a*), (*c*) or (*d*).

A money claim is liquidated if the amount thereof has been fixed by agreement or by the judgment of a Court. To those two cases one can perhaps add a third one (as suggested in *Botha* v. *Swanson & Co.* (*Pty.*) *Ltd.*, 1968 (2) P.H. F83, and in *Leymac Distributors Ltd.* v. *Hoosen and Another*, 1974 (4) S.A. 524 (D)), namely, if the ascertainment of the amount is a mere matter of calculation. In the last-mentioned case, however, the *data* upon which the calculation is to be based would themselves have to be amounts about which there was no room for uncertainty, estimation or debate. When, in order to prove his claim, the plaintiff will have to show that it, or some element in it, or some *datum* involved in its computation, was fair or reasonable, the claim is not liquidated.

Bearing those considerations in mind, I turn to the plaintiff's claims 1, 6 and 7. Claim 6 is a claim for loss of gross profit consequent upon an interruption of the plaintiff's trading activities. In its particulars of claim the plaintiff avers that the amount of that claim falls to be determined by the application of an elaborate formula which is set out in a document at pp. 102 and 103 of the papers. I need not recite or explain that formula in full. It will suffice if I say that it involves the adjustment of the figure provisionally reached, by allowances for such things as business fluctuations and special circumstances which affected the business, or would have affected it if the interruption had not taken place. The allowances, it is provided, are to be made in such manner that, as far as is reasonably practicable, the resulting figure represents the result which, but for the interruption, would have been achieved in the business. In my judgment no claim which has to be arrived at in that way can be characterised as a claim for a liquidated amount in money.

Claim 7 is for the loss suffered by the plaintiff in consequence of the disappearance of a projector. The value of the projector at the material time will have to be proved, and the claim is, therefore, not for a liquidated amount.

Claim 1 is for the relatively trifling sum of R120,34 which, so it is alleged, was paid by the plaintiff for fire-fighting services provided by the Springs Municipality, in connection with the disturbances covered by the policy; and the expenditure, it is said, is covered by the policy. The wording of the relevant provision in the insurance contract, and of the particulars of claim based thereon, is vague, and difficult to interpret. I incline to the view that it will be necessary, at the trial (if there is one), for the plaintiff to prove that the charge made by the Springs Municipality was a reasonable one for the specific services rendered. If that is so, the claim is not liquidated. But, if I am wrong in my assumption, it is because of the vague manner in which the claim is formulated; and that, in itself, would be a ground for refusing summary judgment.

What I have said does not, however, exhaust the question whether claims 1, 6 and 7 are for liquidated sums in money. I must refer now to the averments in the plaintiff's particulars of claim relating to a firm of assessors which, the plaintiff alleges, was appointed by the defendants to investigate the relevant occurrences, damages, losses and expenses on their behalf, and to represent and act for the defendants in accordance with insurance usage. The firm of assessors, it is said, did the things which it was appointed to do, and in so doing sought and obtained information and documents relating to the claims. And (the plaintiff goes on to allege) the assessors agreed with the reasonableness and fairness of the amounts claimed by the plaintiff.

That, it is argued, puts claims 1, 6 and 7 into the category of liquidated claims. I have, however, two difficulties with that submission. The first is that it is not alleged that the assessors were authorised to agree, with binding effect upon the defendants, upon the *quantum* of compensation for which the defendants would be liable if the plaintiff proved successful on the merits of the action. That, in itself, would be destructive of the contention under discussion. But I would go further and say that it is not unambiguously alleged that the assessors did so agree. The mere expression

of an agent's opinion that the amount of a claim is fair and reasonable is something different from his undertaking that his principal will accept that amount as established for the purposes of pending litigation. And, on the wording of the summons, what was said by the assessors may just as well fall into the one category as into the other.

In the affidavits filed on behalf of the defendants, I might add, it is denied that the assessors were authorised to agree upon the *quantum* of the plaintiff's claims, or that they ever did so. I mention that fact in order to make it clear that liquidity has not been conceded by the defendants. What I have said must not be interpreted as a suggestion that a claim, *prima facie* liquid as put forward in a summons, can be rendered illiquid, for the purposes of an application for summary judgment, by something which appears in an affidavit filed on behalf of the defendant.

For the reasons which I have given, I am of the view that, *ex facie* the plaintiff's documents, liquidity has not been shown in respect of its claims 1, 6 and 7, or any of those claims. Consequently summary judgment must be refused.

That, if I am right, disposes of the matter. But there were two other issues upon which I heard argument at length and, in case I have erred on liquidity, I propose to add some brief discussion on those.

One of them arises out of a condition in the insurance policy to the effect that the policy does not cover loss, destruction, damage or liability which, directly or indirectly, arises from, or is the result of, or is caused or contributed to by "volksopstand" or "volksoproer". That must be read with a provision, elsewhere in the policy, to the effect that the insured is covered against "oproer" and "burgerlike beroering". The defendants contend that the plaintiff's claims fall within the exclusionary provision, and the plaintiff disputes that. To resolve the dispute in a trial it will be necessary, firstly, to decide upon the precise meaning and ambit of each of the four expressions which I have mentioned.

It must be assumed that the two expressions which I have quoted from the exclusionary clause bear narrower meanings than the ones which I have quoted from the covering provision. What has to be determined is the nature and extent of the limitation introduced by the prefix "volks-". That, as I see it, is a matter of some difficulty, partly (though not entirely) because the word "volk" is not unambiguous. One of its meanings, of course, is "nation" and, if that is what it means in the exclusionary provision, the event not covered by the indemnity is a *national* revolt, insurrection, rising, commotion, or riot. But here one is faced with the question which has been asked dramatically in another context: "What is a nation?". In the *Handwoordeboek van die Afrikaanse Taal by* Schoonees, Swanepoel, Du Toit en Booysen the term is given a cultural denotation, and is said to refer to a group of people who, by reason of their common language and historical development, possess a clear consciousness of solidarity. On that footing, the next question (which might arise for determination at the trial) is whether there is a South Africa nation, or whether there are many nations living in this country. And further questions might be these: How many members of the nation or a nation have to be involved in a commotion, rising or like disturbance to bring it into the category of "volksopstand" or "volksoproer"? Are their

motives relevant and, if so, what must they be?

The word "volk" has, moreover, other meanings. One of them is "people". And if that is the relevant meaning, a *popular* uprising, revolt or the like would come within the exclusionary clause. The people involved, on that footing, would not all have to belong to the same nation. There would have to be a considerable number of them, although, clearly, it would not be necessary that the occurrence be country-wide, or even that it involve all or nearly all of the people in a particular area. The necessary size of the area, number of people involved, and their motives might be problems which would require resolution.

Yet another meaning of "volk" is "workpeople". A farmer, referring to the Black labourers on his farm, and their families, will often speak of his volk. The usage is recognised (though perhaps not fully) by *Schoonees* and his co-authors in the dictionary from which I have already quoted. They give, as a meaning of "volk": "nie-blanke arbeiders". And in the *Verklarende Afrikaanse Woordeboek* by Kritzinger and others the same word is given (among other meanings) the meaning "inboorlingarbeiders". It would seem, therefore, that a rising of or commotion caused by a sufficient number of people in that category could fall within the exclusionary clause. Whether "volk", in this sense, relates only to the labourers themselves, or whether it bears a meaning wide enough to cover members of their families is a question which might arise for determination.

I have raised these questions, not because I intend to answer them, but in order to indicate the various categories of evidence which (depending on the interpretation given to the vital words) would have to be laid before the Court in order to disclose a defence based on the exclusionary clause.

In the present application, it seems to me, I need not attempt to define the ambit of "volksopstand" or "volksoproer". I say that because, whatever the answer may be to the questions which I have raised, the defendants have not placed such material before the Court as would justify the grant of leave to defend on the basis of the exclusionary provision to which I have referred. It is true that, in terms of the policy, upon the mere invocation, by the insurers, of the exclusionary clause an *onus* devolves upon the insured to prove that the clause does not apply. But that does not relieve the present defendants of the obligation, under the relevant Rule of Court, to show by affidavit that they have a *bona fide* defence, in the manner, and to the degree, indicated in the Full Bench case of *Breitenbach* v. *Fiat S.A.* (*Edms.*) *Bpk.*, 1976 (2) S.A. 226 (T).

In that case the obligations of a defendant under Rule of Court 52 (3) (*b*) were construed with liberality towards that defendant. What is required of him is not a great deal. But he must lay enough before the Court to persuade it that he has the genuine desire and intention of adducing, at the trial, evidence of facts which, if proved, would constitute a valid defence. In order to achieve that degree of persuasiveness the defendant must do more than assert his intention to establish his defence by evidence at the trial. He must place on affidavit enough of his evidence to convince the Court that the necessary testimony is available to him, and that, if it is accepted, it will constitute a defence. That applies even if the *onus* of negativing the defence will ultimately rest upon the plaintiff as, for example, in a case where the plaintiff is claiming enforcement of a contract, and the

defence is a denial that such a contract was concluded.

I turn to the manner in which the present defendants have sought to raise the defence under discussion. They have filed the affidavit of Markotter, who says that the applicant's loss or damage arose, directly or indirectly, from or was caused by, "volksoproer", "volksopstand" and "opstand teen gesag". But that is a conclusion which has to be drawn from facts, and Markotter does not set out any facts to support it. He contents himself, in that regard,

with a reference to the affidavit of one Mullins.

Mullins, an assurance assessor, does give some facts about the disturbances from which the applicant's loss and damage flowed. But the information he puts forward is very meagre; and I have two major difficulties with it. The first is that what Mullins tells the Court is, admittedly, based in part upon observation and in part upon hearsay. But he does not say which of his facts fall into one category and which into the other; I, therefore, do not know what part of his evidence about the nature of the disturbances is admissible. If I am to accept at its face value his assertion that he made his investigating only in and after June 1977, it is probable that most of what he says is hearsay.

The second difficulty is that Mullins does not say who caused the disturbances, or with what purpose, and without that information it is not possible to categorise them as "volksoproer" or "volksopstand".

In the circumstances I would not have been entitled, had the claims been liquidated, to grant leave to defend on the basis of the exclusionary clause.

There is, however, another defence raised by Markotter. Liability under the policy of insurance is conditional, *inter alia*, upon compliance by the insured with its obligation to furnish the insurers with certain written particulars, proofs, information and statements. And Markotter avers that the applicant failed to comply with the conditions of the policy in that regard. He does not, in his affidavit, give particulars of the default, but he incorporates, by reference, the assertions previously made by him, in that regard, in two letters, which he annexes to his affidavits marked "D" and "E".

Counsel for the applicant have pointed to ambiguities in the letter marked "D" which make it an unreliable foundation for the defence under discussion. It is my view, however, that, on a careful reading of the letter marked "E", together with the portion of Markotter's affidavit relating thereto, one finds that the defendants have made out a *bonafide* defence to the claim. If, therefore, I had found the applicant's claims 1, 6 and 7, or any of them, to be liquidated, I would not have granted summary judgment, but would have granted leave to defend, based on the last-mentioned defence. And, by reason of the fact that the applicant had knowledge of that defence, before it applied for summary judgment, I would, following such cases as *Bodemer* v. *Hechter*, 1962 (4) S.A. 244 (T), have ordered it to pay the costs of the application.

In view of my finding on liquidity the proper course for me to follow is to dismiss the application with costs and that is what I propose to do. Regard being had to the magnitude of the claim, it was plainly a matter of great importance to the defendants that summary judgment be not granted, and I am of the view that the employment by them of two counsel was reasonable.

The application for summary judgment is dismissed with costs, which are to be taxed on the footing that the employment of two counsel on behalf of the defendants was justified.

Appearances

RJ Goldstone, SC with JH Conradie - Advocate/s for the Defendant/s

PM Wulfsohn, SC with EM du Toit - Advocate/s for the Plaintiff/s

Hofmeyr, Van der Merwe and Botha - Attorney/s for the Defendant/s

De Villiers, Scholtz and Van der Walt - Attorney/s for the Plaintiff/s

Footnotes
*See p. 160, ante.-Eds.