REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1362/2013

In the matter between:

JOHANNES MUSHINDI **PLAINTIFF**

And

HOLLARD INSURANCE COMPANY OF NAMIBIA **DEFENDANT**

Neutral citation: *Mushindi v Hollard Insurance Company of Namibia* (I 1362/2013) [2014] NAHCMD 229 (31 July 2014)

Coram: PARKER AJ
Heard: **30 June 2014; 1 – 4 July 2014**
Delivered: **31 July 2014**

Flynote: Insurance – Contract of insurance – Time limits for insured to make a claim, to challenge insurer's rejection of claim, to institute legal action by serving summons on insured – Court found that in terms of the contract of insurance where the time limit for serving summons has expired the claim became prescribed and the insurer was not liable for the claim.

Summary: Insurance – Contract of insurance – Time limits for insured to make a claim, to challenge insurer's rejection of claim, to institute legal action by serving summons on insured – Court found that in terms of the contract of insurance where the time limit for serving summons has expired the claim became prescribed and the insurer was not liable for the claim – Plaintiff (insured) served summons outside the

90 days' time limit within which to serve summons on the defendant (insurer) – In an application for absolution from the instance court found that on the basis that the claim had become prescribed the defendant was not liable for the claim – Consequently, court reasoned that it is in the interest of justice to make an order granting absolution from the instant – Court, accordingly, ordered absolution from the instance with costs.

ORDER

That the absolution from the instance is granted with costs, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] This matter arises from an indemnification claim made by the plaintiff (insured) against the defendant (insurer) under an insurance contract entered into between the plaintiff and the defendant. The issue to determine at the threshold is set out in para 1(d) and paras 2(a) and (b) of the Pre-trial Conference Order made on 20 February 2014. The issue of fact to be resolved during the trial under para 1(d) is this: Whether the plaintiff complied with the provisions of clause 13.2 of the insurance contract entered into between the plaintiff and the defendant? The issues of law to be resolved during the trial under paras 2(a) and (b) are these: (a) Whether the plaintiff was barred in terms of clause 13.2 of the contract between the parties from taking legal action against the defendant? (b) Whether the plaintiff's claim, when it was instituted, had become prescribed by virtue of the provisions of clause 13.2 of the insurance contract entered into between the parties?

[2] Clause 13 of the contract of insurance is entitled ‘Prescription/Time Bar’, and clause 13(2) provides:

> ‘If we (ie the defendant) reject a claim or cancel Your Policy You have 90 (ninety) days from that date to challenge Our decision. Thereafter You have another 90 (ninety) days to take legal action against Us by serving summons (on) against Us. If this is not done, your claim will prescribe and We will no longer be liable for the claim.’

[3] At the close of the plaintiff’s case, Mr Van Zyl, counsel for the defendant, applied for an order granting absolution from the instance. Mr Phatela, counsel for the plaintiff opposed the application. Mr Van Zyl raised several grounds in support of the application, including the *in limine* ground that in terms of para 13.2 of the insurance contract (quoted above) the plaintiff was barred from taking legal action against defendant because the legal action that the plaintiff instituted had become prescribed in virtue of the said clause 13.2 of the contract of insurance.

[4] Summons was served by the assistant deputy sheriff on the defendant on 26 June 2013. In terms of clause 13.2 (of the ‘prescription/ time bar’ clause) summons should be served on the defendant within 90 days after the defendant has communicated to the plaintiff its decision to reject the plaintiff’s challenge to the defendant’s decision repudiating the plaintiff’s claim.

[5] The evidence that I accept is as follows. The letter, dated 19 February 2013 and written by the plaintiff’s legal practitioners, was the challenge to the defendant’s repudiation of the plaintiff’s claim; and that was in compliance with the first part of clause 13.2 of the insurance contract. In that regard, thereafter, the redress open to the plaintiff in terms of clause 13.2 of the insurance contract was for the plaintiff to take legal action against the defendant ‘by serving summons against Us’ within 90 days after the plaintiff has received the defendant’s decision to reject the plaintiff’s challenge. The evidence establishes that the plaintiff received that decision on 26 February 2013 when the defendant’s legal practitioners communicated the decision to the plaintiff’s legal practitioners. It follows that the plaintiff was entitled to institute action and serve summons on the defendant within 90 days after 26 February 2013.

[6] Mr Phatela agrees that the 90 days' time limit should run form 26 February 2013. Mr Phatela's only argument in the opposite direction is this. The insurance contract does not define the word 'day'; and so, for Mr Phatela, 'the reasonable conclusion is that it (ie the word 'day') relates to working day'. Mr Phatela is, with respect, palpably wrong. Counsel's argument disregards s 4 of the Interpretation of Law Proclamation 37 of 1920 which provides:

'When particular number of days is prescribed for the doing of any act or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day shall happen to fall on a Sunday or on any other day appointed by or under the authority of a law as a public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.'

[7] It follows that the plaintiff had up to 27 May 2013 to serve summons on the defendant; but, as I have found previously, summons was served on the defendant on 26 June 2013. The irrefragable fact is, according to clause 13.2 of the insurance contract, that the claim has become prescribed, and the defendant is no longer liable for the claim.

[8] In *Erasmus v Wiechmann* (I 1084/2011) [2013] NAHCMD 214 (24 July 2013) I stated as follows about the test for absolution from the instance:

'The test for absolution from the instance has been settled by the authorities in a line of cases. I refer particularly to the approach laid down by Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (A) at 92E-F; and it is this:

'[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

> "… (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not

should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T))" '

'And Harms JA adds, "This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff." Thus, the test to apply is not whether the evidence established what would finally be required to be established but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff. (HJ Erasmus, et al, *Superior Court Practice* (1994): p B1-292, and the cases there cited)'

[9] In the instant case the plaintiff's claim had become prescribed when summons was served on the defendant, and the defendant was for that reason not liable for the claim. Applying the principles set out in the previous paragraph to the facts of the instant case, I should say this. There is 'the principled judicial counsel that a court ought to be chary in granting absolution from the instance at the close of the plaintiff case unless the occasion arises. In that event the court should order it in the interest of justice'. (*Erasmus v Wiechmann*, para 20) I have applied the test for absolution from the instance to the facts of the instant case, particularly the fact that the plaintiff's claim has prescribed and, therefore, the defendant is not liable to the plaintiff for the claim. Having done that, I conclude that in the present case the occasion has arisen to make an order granting absolution from the instance in the interest of justice of this case; whereupon, I make an order granting absolution from the instance with costs, including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF : T C Phatela
Instructed by Murorua & Associates, Windhoek

DEFENDANT: C Van Zyl
Instructed by Francois Erasmus & Partners, Windhoek