

CASE NO. SA

1/98 IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SANTAM NAMIBIA LTD

APPELLANT

and

BANK WINDHOEK LIMITED

RESPONDENT

CORAM: STRYDOM, C.J. et HANNAH, A.J.A, et SILUNGWE,

A.J.A.

Heard on: 1999-04-16

Delivered on: 1999-05-10

JUDGMENT:

HANNAH, A.J.A: This is an appeal from a judgment of Teek J awarding the respondent NS350 009,86 with interest and costs. The appeal has been brought directly to this Court by agreement between the parties.

The respondent's claim in the Court *a quo* arose out of an insurance policy issued by the appellant and although

various facts were put in issue by the pleadings the case
was

ultimately put before the Court *a quo* by way of a statement of agreed facts pursuant to Rule 33 (6) of the High Court Rules. I will set out those facts contained in the statement which are material to this appeal:

"3. In terms of a written contract of insurance entered into between the parties the defendant undertook to indemnify the plaintiff, *inter alia*, for the loss of foreign currency notes *in transito* between the Republic of Namibia and the Republic of South Africa to a maximum of NS75,000-00 per freight, subject to contribution by the plaintiff of 20% of the claim of a minimum of NS 10,000-00."

Paragraph 3.1, 3.2 and 3.3 then annexed a copy of the general conditions of insurance, a copy of the general conditions relating to money and a copy of a further endorsement relating to money styled "Memo 1" in the original Afrikaans language with a sworn translation thereof. Paragraph 2 of Memo 1, according to the sworn translation, reads as follows:

"2. Foreign currency notes transported to the RSA shall comply with the following conditions:

a. This shall be restricted to NS75 000-00 per consignment.

- b. It shall be sent by registered speed mail or insured mail with the contents declared as documents.

- c. The contribution amounts to 20% of the claim with a minimum of NS10 000,00."

Paragraphs 4 and 5 read as follows:

"4. Plaintiff as a commercial bank on various occasions prior to the 7th of April 1995 forwarded foreign currency notes to Rennies Travel (Pty) Ltd, Johannesburg, South Africa.

5. On 7 April 1995 the plaintiff forwarded foreign currency notes to the value of NS555,504-65 from Windhoek to Rennies Travel (Pty) Ltd, Johannesburg, Republic of South Africa by insured mail. The said foreign currency notes were contained in eight different parcels (envelopes), each containing notes to the following value, expressed in Namibian currency."

The value of the notes contained in each of the eight envelopes is then set out. In the case of one envelope the value is given as NS75 S32,93 and in the case of another

NS75 000,00. In the case of the others the value is less than NS75 000,00.

Paragraph 6 reads as follows:

"6. The envelopes were handed in at the Post Office simultaneously on the 7th of April 1995 as per list of Nampost annexed hereto as Annexure "D'V

This list is a list of insured parcels handed in at the Post Office and each parcel (envelope) is listed separately and numbered one to eight respectively. The name and address of the addressee is written opposite each number.

Paragraphs 7,S,9 and 11 read as follows:

"7. The envelopes were delivered by the Post Office to be dispatched by air to Johannesburg.

S. The said foreign currency notes were lost or stolen in transit and were never delivered to the said Rennies Travel. The bag containing the envelopes was eventually found at the airport in Gaborone but the envelopes were violated.

9. After the recovery of the bag containing the envelopes aforesaid, foreign

notes to the value of NS143,844,96 were retrieved by the plaintiff.

11. The only issue the court is required to determine is whether on a proper

interpretation of the insurance contract, the defendant is liable to pay the plaintiff NS60,000,00 or NS350,009,56. This question in turn depends on whether the amount of NS75,000,00 per consignment relates to each envelope separately or to the value of the contents of all the envelopes concerned."

The Court *a quo* found that the limitation of cover to NS75 000,00 per consignment related to each envelope separately and accordingly gave judgment for the higher amount.

One difficulty which immediately arises and which must be resolved is the inconsistency between paragraph 3 of the agreed statement of facts and the sworn translation of Memo 1. The former refers to "NS75,000,00 per freight" whereas the latter refers to "NS75 000,00 per consignment." The matter can, in my view, be resolved by having regard to paragraph 11 of the agreed statement of facts. That paragraph sets out the issue which the Court has to determine and when setting out that issue the parties used the expression "per consignment." That, in my judgment, is the expression we should have regard to when determining this appeal. I would add that whatever

the position may be in the Afrikaans language the word "consignment" sits more comfortably on the tongue than the word "freight" when reading paragraph 2.a of Memo I in English.

I *do* not consider it necessary to set out the grounds of appeal. The appeal turns on the

construction of the words "per consignment" in the context of Memo 1 and, more particularly, how those words should be applied to the situation which arose on 7th April, 1995 when the eight envelopes were simultaneously handed in at the Post Office.

The parties are agreed on the approach to be adopted when construing Memo 1 and I can do no better than set out the following words of Wessels C.J in *Scottish Union & National Insurance Co., Ltd v Native Recruiting Corporation. Ltd* 1934 AD 45S at 465:

"We must gather the intention of the parties from the language of the contract itself, and if that language is clear/we must give effect to what the parties themselves have said; and we must presume that they knew the meaning of the words they used. It has been repeatedly decided in our Courts that in construing every kind of written contract the Court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties their plain, ordinary and popular meaning, unless it appears clearly from the context that both the parties intended them to bear a different meaning."

The word "consignment" has a variety of meanings depending on the context in which it is used. For example, in *Acme Transport v Betts* [1951] Lloyd's Rep. 131 it was held that "consignment" as used in clause 10(2) of the Road Haulage Association's Conditions of Carriage 1967 can cover an empty container. So the starting point is to look at the context in which the word is used in Memo 1. Memo 1 is concerned with money in transit. It

begins by stating:

"It is hereby declared and agreed that all money in transit shall be subject to the following conditions."

Paragraph 1 then deals with money etc. transported within Namibia and paragraph 2 deals with foreign currency notes transported to the Republic of South Africa. "Consignment" is therefore used in the context of transporting foreign currency notes from Namibia to South Africa and when this is borne in mind it is not too difficult to establish, at least in general terms, what the parties intended when using the word in question.

A consignment is the act or process of consigning and I therefore turn to the verb "to consign". This is defined in the Concise Oxford Dictionary 9th ed. As:

"1 handover; deliver to a person's possession or trust. 2 assign; commit decisively or permanently (consigned to the dustbin; consigned to years of misery) 3 transmit or send (goods) usually by a public carrier."

The Collins Concise Dictionary 2nd ed. gives the following:

- "1. to give into the care or charge of; entrust
2. To commit irrevocably: he consigned the papers to the flames.
3. to commit: to consign someone to

jail. 4. To address or deliver (goods): it was consigned to his London address."

And the Shorter Oxford English Dictionary on historical principles 3^rJ ed. states:

"4. To deliver or transmit (goods) for sale or custody: usually implying their transit by ship, railway, etc."

I have deliberately set out just this one definition.

When the context is considered it is plain to me that "consignment" as used in paragraph 2 a. of Memo 1 is used in the sense of goods i.e. foreign currency notes, transmitted or sent and that much can be concluded with relative ease. But that, of course, is by no means an end to the matter. As was said by Miller J A in *Lehnibecker's Earth Moving and Excavators (Ply) Ltd v Incorporated General Insurances Ltd* 1954 (3) SA 513 (A) at 520 I:

"But it not infrequently happens that the parties use simple words, in themselves unambiguous, but which cannot readily or reasonably be applied in their literal sense to all the situations to which their agreement was directed. In such cases an element of

ambiguity arises from the fact that an absolutely literal interpretation may be wholly or substantially impracticable, or productive of startling results which could hardly have been intended."

There is, in my view, no difficulty in applying the expression "per consignment" to the situation where the insured consigns, sends or transmits by post one package or envelope containing foreign currency notes from Namibia to South Africa. That is obviously one single consignment and by virtue of paragraph 2 a. of Memo 1 the cover provided by the policy is restricted to NS75 000,00. The difficulty in the present case arises from the situation that eight envelopes, each containing foreign currency notes, were handed in at the Post Office simultaneously. Did that represent one consignment or eight separate and distinct consignments? In my view, the answer to this question must depend on whether the envelopes were sent collectively or individually. If on the agreed facts it can properly be concluded that they were consigned or sent as a whole then there was one consignment. If on the agreed facts it can properly be concluded that each envelope had a distinct character it can properly be concluded that they were consigned or sent individually in which case there were eight consignments. If each envelope had a distinct character then to my mind it matters not whether they were handed in at different Post Offices or at the same Post Office at the same time. In each of these situations there is a separate consignment and the limitation or restriction on cover applies to each. That, in my view, is a fair and sensible

application of the words used by the parties in their agreement and represents the intention of the parties.

One argument advanced by Mr Jordaan, who appeared for the appellant, concerned the general purpose of the cover restriction. Counsel submitted that one consignment is more at risk of loss or theft than several and therefore if, as a matter of fact, all envelopes are

transported together the risk is enhanced. It must, so counsel submitted, have been the intention of the parties that when envelopes containing money are transported together in one container, as was ultimately the situation in the instant case, there should be one cover restriction of NS75 000,00.

Superficially, this argument has its attractions but at the end of the day the Court has to have regard to the intention of the parties as expressed in the words which they used. Let us say that the insured consignor sends foreign currency notes to South Africa in a number of different envelopes each posted on a different day of the week in order to minimise the risk of loss or theft. Seen from the point of view of the insured consignor, and I should also have thought from that of the insurer, he is sending a number of different consignments of currency notes each of which is subject to the cover restriction of NS75 000,00. It then happens that the Post Office, for whatever reason, places these different consignments in one container for onward transit to South Africa. Seen now from the point of view of the Post Office there is only one consignment being sent to South Africa. Does this affect the position as between insured or insurer in any way?

The answer must be no. In my view, the parties never had in mind, nor did they intend, when they agreed that "[cover] shall be restricted to NS75 000,00 per consignment" that, if by chance, parcels or envelopes consigned by the respondent separately were, unbeknown and without pre-arrangement, but simply by chance, transported together in one container by the Post Office, the designated carrier, then, for the purposes of paragraph 2a. of Memo 1

they should be treated as one. That would have been considered far too random a situation. Put shortly, several consignments do not become one simply because the Post Office decides to collect them together into one body. To find otherwise would, in my opinion, produce an unrealistic and generally unanticipated result and this must not be permitted: MacGillivray and Parkington on Insurance Law 7th ed. at para 1037.

Nor do I see any merit in Mr Jordaan's submission that to construe and apply paragraph 2a. of Memo 1 in the manner contended for by the respondent opens the door to the respondent to take unfair advantage and do what it did in the present case and avoid the cover restriction. I see nothing unfair in the respondent's actions. It could, with ease, have sent the envelopes from different Post Offices or on different days in which case there could be no real argument that each envelope represented a separate consignment. No unfair advantage could be claimed in these circumstances and I see no element of unfairness arising from sending the envelopes from the same Post Office at the same time.

Turning now to the agreed facts what is, in my opinion, of great significance is the fact that when posting the

envelopes the respondent insured each one separately. That is the only reasonable inference to be drawn from the "list of insured parcels" attached to the statement of agreed facts. A serial number is given to each one of the envelopes (they are described as "parcels") handed in together with the name and address of the addressee although, as it happens, the name and address of each addressee was the same. There must have been eight different contracts of insurance entered into with the Post Office and that is sufficient

to give each envelope and its contents a distinct character. It can, in my view, properly be concluded that the envelopes were consigned or sent individually and that there were, therefore, eight consignments.

For the foregoing reasons I am of the opinion that judgment for NS350 009,86 was rightly given in the respondent's favour.

The appeal is dismissed with costs.

HANNAH, A.J.A:

I agree.

STRYDOM, C.J.

I agree.

SILUNGWE, A.J.A.

ON BEHALF OF THE APPLICANT

(SC)

Instructed by:

Adv C \V JORDAAN

(With ADV R HEATHCOTE)

Conradie & Damaseb

ON BEHALF OF THE RESPONDENT

Instructed by:

ADV G S COETZEE

Lorenz & Bone