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SWAZILAND HIGH COURT

S V M S Investments (Pty)Ltd
Plaintiff

v

Swaziland Royal Insurance Corporation
Defendant

Case No 2592/99

Judgment

23/06/00

Coram	Sapire, CJ
For Plaintiff	Mr. N. Kades, S.C.
For Defendant	Mr. D. Smith, S.C.

Judgment

23/06/00

The Plaintiff, a company engaged in the taxi business, insured its vehicles used in the conduct of its business with the Defendant. The Defendant is an insurance company conducting its business in Swaziland, where it enjoys a privileged position, with exclusive rights to conduct such business in the Kingdom.

One of plaintiff's vehicles, an ubiquitous Comb, was stolen while in the Republic of South Africa. The Plaintiff had covered itself against such loss by taking out a policy with the defendant, through a firm of insurance brokers. The Defendant had unbeknown to the plaintiff cancelled the authority of that broker to do business on its behalf but had omitted to publicise the fact of such cancellation.

The Plaintiff, which had received no more than a cover note from the broker claimed the indemnity to which it was entitled in terms of the policy, but was met by a denial from the Defendant that any insurance had been effected in respect of loss to the vehicle. Defendant based its repudiation of the claim, on the termination of the broker's authority, and the failure of the broker both to inform the Defendant that the risk had been underwritten, and to account for the premium paid to it.

The dispute became the subject matter of an action in this court. The plaintiff claimed payment of the amount of the indemnity together with interest a *tempore morae* and costs. The trial commenced and concluding some two years after the cause of action arose.

Matsebula J after hearing the cases presented by the contending parties found that the Plaintiff was estopped from denying the authority of its erstwhile agent, and liable to pay to the plaintiff the sum claimed together with interest a *tempore morae* and costs.

Relying on the outcome of the case, and attaching a copy of the judgement to its particulars of claim the plaintiff pursues a further claim against the Defendant. The claim is for an amount said to be the income or profit by which the plaintiff would have benefited, had the defendant not delayed in making payment of the indemnity. Plaintiff's claim is therefor in damages allegedly suffered by reason of and consequent upon the breach by the defendant of the terms of the policy in making payment only after the order in the first action. The parties have agreed that I determine the question of liability first.

Although the Defendant has not specifically pleaded *res judicata*, the undisputed facts on the pleadings reveal the present to be a further claim for damages arising from the same cause of action. The Plaintiff relies on the judgement and has attached to its particulars of claim, the whole of the judgement of Matsebula J determining the first action. The judgement, which stands, and has been satisfied, is a complete bar to the present claim. It is a final judgement between the same persons arising from the same cause of action.

The effect of a final judgement on a claim is to render the claimant's cause of action *res iudicata.*[1]

If therefore a party with a single cause of action giving rise to a single claim obtains a final judgement on part of his claim, the judgement puts an end to his whole cause of action. The result is that a subsequent claim for the balance of what his cause of action entitled him to claim in the first instance can be met with a plea of *res iudicata.*

When a cause of action gives rise to more than one remedy, a plaintiff who pursues one of those remedies and obtains a judgment thereon can be met with a plea of *res iudicata* if he should subsequently seek to pursue one of the other remedies. The reason being that a final judgement on part of one's cause of action puts an end to the whole of such cause of action.

Although *res judicata* has not, *per se* been pleaded by the defendant, the plaintiff's own allegations in its particulars of claim, establish that it has already exhausted its remedies for redress by reason of the Defendant having failed to make timeous payment in terms of the policy.

It is significant that the first claim on which the plaintiff obtained judgement included a prayer for interest *a tempore morae.* The plaintiff succeeded in this claim and received the interest in terms of the judgement. It follows that not only could the Plaintiff have made claim for its loss occasioned by the late payment, but it did so, and received compensation in accordance with its claim.

The plaintiff's allegations in the particulars of claim are destructive of plaintiff's cause of action. Notwithstanding Defendant's surprising omission to plead res *judicata, this* court cannot in accordance with the authorities which I have quoted earlier, again for a second time award damages arising out of the same breach of the same contract.

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[1] *Van Zyl v Niemann 1954 (4) SA 661 (A) 669–670A; Custom Credit Corp (Pty) Ltd v Shembe 1972 (3) SA 462 (A) 472A–B.*

The Plaintiff cannot succeed in its action for a second reason. The Defendant's obligation in terms of the standard contract of indemnification for loss arising from the theft of the insured vehicle is to make payment of its value. The payment will normally be made in an amount sounding in money. This indeed was the nature of Plaintiff's claim in the first action. The loss suffered by the creditor for non payment of an amount sounding in money is compensated for by the interest a tempore morae which is claimed and usually awarded in addition to the capital amount. The following extract from the judgement in Bellairs v Hodnett summarises the exposition as

"It may be accepted that the award of interest to a creditor, where his debtor is in mora in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date (Becker v Stusser, 1910 CPD 289 at p. 294). This loss is assessed on the basis of allowing interest on the capital sum owing over the period of mora (see Koch v Panovka, 1943 NPD 776). Admittedly, it is pointed out by Steyn, Mora Debitoris, p. 86, that there were differences of opinion among the writers on Roman-Dutch law on the question as to whether mora interest was lucrative, punitive or compensatory; and that, since interest is payable without the creditor having to prove that he has suffered loss and even where the debtor can show that the creditor would not have used the capital sum owing, this question has not lost its significance. Nevertheless, as emphasized by CENTLIVRES, C.J., in Linton v Corser, 1952 (3) SA 685 (AD) at p. 695, interest is today the "lifeblood of finance" and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of mora interest seeks to compensate the creditor.".[2]

The damages now claimed by the plaintiff are not such as normally follow from a failure to make timeous payment of a debt sounding in money. The losses in respect of which plaintiff now claims rise not only because the indemnity was not paid on time but because of the particular financial position of the plaintiff. Such damages fall within the category labelled "special"

The terms "general" and "special" damages are derived from English law and our law does not draw the same hard and fast distinction between "general" and "special" damages.[3] Since the terms are closely connected with certain features of English law which are foreign to Roman-Dutch law, they should be used with circumspection in South African practice. The terms are used in a variety of different meanings, but in South African practice the word "special" as applied to damages is generally used to indicate that they are connected with some special circumstance in the particular case.

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[2] *Bellairs v Hodnett And Another 1978 (1) SA 1109 (A)*
[3] *Bothe v Pretoria Printing Works Ltd 1906 TS 710 713; Buchanan 1965 SALJ 457 458.*

In contract the two terms are convenient labels to differentiate, broadly and without any pretence at precision, between (1) damage that flows naturally and generally from the kind of breach of contract in question and which the law presumes that the parties contemplated would result from such a breach, and (2) damage that, although caused by the breach of contract, is ordinarily regarded in law as being too remote for damages to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or constructively contemplated that they would probably result from its breach.

In formulating the test for special damages, the courts have failed to distinguish clearly between reasonable foresight and convention as bases of special damages. According to Curlewis JA in Lavery & Co Ltd v Jungheinrich the test for special damages is the actual or presumptive contemplation of the parties. The requisite contemplation (foresight) may be inferred from (a) the subject matter and terms of the contract itself, or (b) the special circumstances known to both parties when they contracted. However, in considering the allegations necessary in a pleading to found a claim for special damages, the judge states that the plaintiff should not only allege "common knowledge", but also that the contract was entered into "on the basis" of such knowledge. This seems to suggest that the test is not merely the contemplation of the parties, but the convention of the parties. In his concurring judgment Wessels JA expressly states that the basis of the defendant's liability is conventional.

The position was reconsidered by the appellate division in Shatz Investments (Pty) Ltd v Kalovymas and the conclusion was reached that, in an appropriate case, the correctness of the principles as stated in the earlier cases should be reconsidered. It seems clear that upon eventual reconsideration of the principles the appellate division may make foresight alone the basis of liability for special damages. In the meantime, the convention principle as expounded in Lavery & Co Ltd v Jungheinrich must still be regarded as governing.

Special damages must be specially alleged and claimed, and full particulars thereof must be given. Where special damages are claimed for breach of contract, the necessary allegations are (a) that such damages were within the contemplation of the parties, and (b) that the contract was entered into on the basis of the special

circumstances on which the plaintiff relies for his claim. A claim for damages other than the normal or legal measure constitutes a claim for special damages. The plaintiff must allege and prove that such damages were within the contemplation of the parties at the time the contract was made. Failure to make the necessary allegations in a summons in support of a claim for special damages may render the summons excipiable, or the claim may be struck out.[4]

The plaintiff has not made the necessary allegations upon which to base the claim for special damages. Plaintiffs counsel has argued that from the mere fact that the Defendant insured the vehicle used by a person engaged in public transport it followed that it was in the contemplation of the parties that the plaintiff would suffer loss should the indemnity not be paid on time, and that they contracted on that basis The policy however did not provide cover for loss of profits, and the consideration advanced by the Plaintiff was neither pleaded or proved.

The defendant's obligation at all times was to pay an amount of money required to replace the stolen vehicle. The contract of insurance limited the defendant's liability, to the figure stated. This obligation was eventually discharged albeit long after due date. In so far as, lateness of payment constituted a breach of contract no claim for special damages flowed therefrom. The plaintiff neither pleaded nor proved that when contracting the parties envisaged that because of the particular circumstances of the plaintiff's financial position, non-payment or late payment of the indemnity would occasion losses other than interest.

I therefor rule that there is no liability on Defendant in respect of the present claim. The claim is dismissed with costs.

Sapire CJ

[4] see *Lavery & Co Ltd v Jungheinrich 1931 AD 156 162; Bower v Sparks, Young and Farmers' Meat Industries Ltd 1936 NPD 1 13; Whitfield v Phillips 1957 3 SA 318 (A) 329; Garavelli and Figli v Gollach and Gomperts (Pty) Ltd 1959 1 SA 816 (W) 819; North & Son (Pty) Ltd v Albertyn 1962 2 SA 212 (A) 215;*