

(Insurance) fraud unravels all: The SCA confirms that fraud can lead to the forfeiture of a partly valid and partly fraudulent claim when a policy says so

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In *Discovery Insure Limited v Masindi* the SCA considered whether the entirety of an insurance claim should be forfeited in circumstances where only part of the claim was fraudulent and the other part was valid in relation to the same facts. The insurance policy in question included a forfeiture clause which provided for retrospective cancellation in the event of a fraudulent claim. The case dealt with an insurer who was claiming repayment of all amounts paid to the insured in terms of an insurance claim – both in relation to the fraudulent and valid portions of the claim. This article discusses this recent case and its importance for policyholders and insurers alike.

Mr Tshamunwe Masindi (“**Mr Masindi**” or the “**insured**”) had an insurance policy in place with Discovery Insure Limited (“**Discovery**” or the “**insurer**”), entitled “*Discovery Insure Plan*” (the “**policy**”). The policy insured against losses arising in relation to property and household contents. It also covered reimbursement for “*emergency accommodation*” in the event that Mr Masindi’s house was unoccupiable due to an insurable event. Mr Masindi’s house was struck by a storm and flooding on 10 November 2016, and on the following day, 11 November 2016, he lodged a claim in two parts in response to the catastrophe: a claim for losses relating to property and household contents (the “**property claim**”) and a claim for the recoupment of emergency accommodation (the “**accommodation claim**”).

Discovery paid Mr Masindi out for both the property claim and the accommodation claim (together, the “**total claim**”), but following investigation Discovery uncovered that the accommodation claim was based on fraudulent invoices. The insurer proceeded to cancel the policy (with retrospective effect) and instituted a claim against the insured for the total claim, even though only the accommodation claim was tainted by fraud. Discovery’s conduct was based on a forfeiture clause in the policy which provided that –

- all benefits in terms of the policy in respect of any claim will be lost if any claim “or part thereof” was in any way fraudulent; and
- in that case, the insurer would be entitled to cancel the policy with retrospective effect, from the date the incident occurred or was reported, whichever was earlier.

The insurer’s case was that the forfeiture clause permitted it to cancel the policy with retrospective effect from 10 November 2016, being the date of the incident, and to reclaim all amounts paid subsequent to the retrospective date of cancellation. Mr Masindi disputed Discovery’s claim on the basis that there is no express provision in the policy – and that the forfeiture clause in question was not wide enough – to require the insured to repay all amounts paid in terms of the policy, even those that were genuine and not fraudulent.

The High Court decided in favour of Mr Masindi by only ordering him to repay the sum received for the property claim, being the genuine claim. The High Court’s decision was based on, firstly the doctrine of “accrued rights”; and secondly the fact that the forfeiture clause in question was a penalty clause which was unenforceable for causing disproportionate prejudice to the insured. Discovery, unsatisfied with the decision of the High Court, took the matter on appeal to the Supreme Court of Appeal (“**SCA**”).

Discussion

The SCA in its judgment makes it clear that despite the High Court’s focus on other issues, what was in question in this case was an issue of interpretation, namely did the forfeiture clause result in the forfeiture of the total claim and not just the accommodation claim, and ancillary to this, if answered in the affirmative, was Discovery entitled to repayment of the total claim by the insured?

The SCA’s consideration of the issues was premised on the basis that forfeiture clauses are a common feature in insurance contracts and are generally viewed as valid and enforceable. The underlying purpose of such clauses was to prevent fraudulent claims and their

lodgement.

The SCA referred to our courts' approach to interpretation and held that an insurance policy, like any other document, had to be interpreted by having regard to its language, context and purpose.[1] Furthermore, a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

The court held that the clause in question was "*clear and unambiguous*" and accordingly had to be given effect to. Because the forfeiture clause permitted the insurer to cancel the policy with retrospective effect from the date of the incident in the event of a fraudulent claim, Discovery was permitted to do so and acted within the bounds and in accordance with the policy in cancelling it retrospectively from 10 November 2016. The court also emphasised the importance of the context of such forfeiture clauses, namely, to prevent fraud.

The SCA accordingly held that the High Court had erred in considering the doctrine of accrued rights to be applicable. When Masindi purported to submit his claim on 11 November 2016, there was no longer an extant insurance policy because it had already been terminated with retrospective effect from 10 November 2016. Accordingly, no rights accrued to him and the doctrine was not applicable in the present instance.

In relation to the High Court's reliance on the forfeiture clause being a penalty clause, the court held that this was not an issue which could be considered by the court because it had not been raised by the parties in their pleadings and the court was not permitted to raise it for them. Given the court's pronouncements regarding the permissibility of forfeiture clauses, it seems even an alternative argument that the clause was unenforceable based on public policy would have failed.

In the premises, the SCA ordered Mr Masindi to repay all the monies he had received in relation to the total claim, with costs and interest. The SCA held that giving the forfeiture clause the meaning contended by Mr Masindi would undermine the well-established tenets of interpretation of documents and render the clause entirely nugatory.

Conclusion

Neither insurance fraud nor the legal imperative to control it is new. The use of forfeiture clauses by insurers is common. The *Masindi* case confirms that such clauses have a clear purpose and are not on the face of it unenforceable. The court will give effect to the meaning of such clauses and policyholders are well minded to ensure that they understand what the enforcement of such clauses will mean for any claims. The result of the *Masindi* case will surely be welcomed by insurers; policyholders should be wary that the submission of a partly genuine and partly fraudulent claim may result in the forfeiture of their entire insurance claim.

Footnotes

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] JOL 28621 (SCA) at paragraph 17.



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