

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-CON-2018/02486

In the matter between:

**NEW CREATIONS PRINTING AND DESIGN CC**

**PLAINTIFF**

and

**QUANTA INSURANCE LIMITED**

**DEFENDANT**

**Neutral citation:** *New Creations Printing and Design CC v Quanta Insurance Limited*  
(HC-MD-CIV-ACT-CON-2018/02486) [2020] NAHCMD 27 (05 February 2021)

**Coram:** UEITELE J

**Heard:** 30 November 2020; 08 December 2020

**Delivered:** 05 February 2021

**Flynote:** Special Plea — Insurance Contracts — Agent — Knowledge of an agent acquired while acting within the scope of employment imputed to his principle

**Summary:** The plaintiff issued summons in terms of which it claims for damages in the amount of N\$9 000 000 in respect of alleged damage to the plaintiff's printer for which plaintiff was insured by the defendant and N\$ 9 000 000 in respect of loss of income as a result of the damaged printer, for which the plaintiff was also insured by the defendant.

Defendant defended the action and filed a special plea raising prescription based on a time-bar clause contained in the insurance contract under General Exceptions, Conditions and Provisions. The time-bar clause states that no claim shall be payable unless the insured (plaintiff) claims payment by serving legal process on the company (defendant) within 12 months of the rejection of the claim in writing and pursues such proceedings to finality. Plaintiff objected to the special plea on the basis that the time-bar clause contained in the 'General Exceptions, Conditions and Provisions' part of the insurance contract, was never brought to the attention of the plaintiff by the plaintiff's agent.

The issue for determination was whether the time-bar clause formed part of the contract entered into between the parties, and if so, whether the defendant was thereby released from liability to compensate the plaintiff.

*Held*, that the principles of agency law provide that the knowledge of an agent acquired while acting within the scope of employment, is imputed to his principle.

*Held further*, that the knowledge can be imputed to the plaintiff and therefore clause 6(c) of the General Exceptions, Conditions and Provisions forms part of the contract concluded between the parties. The plaintiff's claim has thus prescribed and the special plea is upheld.

---

**ORDER**

---

1. The defendants' special plea is upheld.
2. The plaintiff must pay the defendant's costs of suit, such costs to include the costs of instructing and one instructed counsel.
3. The matter is removed from the roll and regarded as finalised.

---

**JUDGMENT**

---

**UEITELE J**Introduction

[1] The plaintiff in this matter is New Creations Printing and Design CC, a Close Corporation duly incorporated in terms of the Close Corporations Laws of the Republic of Namibia which was carrying on business as a printing and graphic design business enterprise in Windhoek.

[2] The defendant is Quanta Insurance Limited, a Company incorporated in terms of the applicable Company Laws of the Republic of Namibia and a duly registered and existing insurer, which carries on short-term insurance business in Namibia as contemplated in the Short Term Insurance Act, 1998<sup>1</sup>.

[3] On 28 June 2018 the plaintiff caused summons to be issued out of this Court in terms of which the plaintiff claims for damages in the amount of N\$9 000 000 in respect

---

<sup>1</sup> Short-term Insurance Act, 1998 (Act No. 4 of 1998)

of alleged damage to the plaintiff's printer for which plaintiff was insured by the defendant and N\$ 9 000 000 in respect of loss of income as a result of the damaged printer, for which the plaintiff was also insured by the defendant. The defendant entered notice to defend the plaintiff's action.

### Factual Background

[4] On 18 May 2016 the plaintiff entered into a short-term contract of insurance with the defendant. In terms of that contract, the plaintiff was insured against, among other risks, loss resulting from damage to its Xerox Igen 3 Digital Press printer (I will in this judgment and for ease of reference refer to the Xerox Igen 3 Digital Press printer as the 'printer') as well as losses to the plaintiff's printing and graphic design business as a result of business interruptions.

[5] On the evening of 22 July 2016, a power (electricity) failure occurred at the plaintiff's business premises and the printer went off. The next morning on 23 July 2016, the plaintiff notified the defendant that the printer was failing to switch on and also called a technician. The technician's findings were that the printer had been damaged beyond economic repair. The defendant disagreed that the printer was damaged beyond economic repair. On 29 August 2016 the plaintiff filed a written claim with the defendant by filling out the prescribed form.

[6] The defendant, denying that the printer was damaged beyond repair, attempted to fix the printer by bringing in local as well as expert technicians in an attempt to repair the printer. On 17 February 2017, while the expert technician was working on the printer, something blew inside of the printer, causing a burning smell.

[7] Some eight months later, the defendant, by letter dated 14 March 2017, repudiated the plaintiff's claim by delivering to the plaintiff a letter of repudiation. The defendant alleged that the damage to the printer was not covered in terms of Quanta's (the defendant) Trade Policy Wording. After dealing with the reasons why the claim was

repudiated, which are not relevant for purposes of this judgement, the repudiation letter continues as follows:

'We further advise that should you want to pursue this matter further the following policy condition has to be noted.

**"6. Claims**

- a) No claim shall be payable unless the insured claims payment by serving legal process on the company within 12 months of the rejection of the claim in writing and pursues such proceedings to finality."

We trust you find the above in order and confirm having closed our file.'

[8] Three days (that is, on 17 March 2017) after receiving the letter of repudiation the plaintiff responded to the defendant in the following terms (I quote verbatim from the letter dated 17 March 2017):

'1. I confirm receipt of your letter dated 14 March, instant. Eight (8) months after I lodge my claim you have finally reached the conclusion which is to repudiate my claim. ...

...

3. You may be pleased also to know, and as you would realize, should the matter go to court, which route I shall immediately consider ...

...

7. I have indeed as per your advice consulted a Legal Practitioner to institute legal action against your company should we not reach an amicable solution. ...'

[9] Despite the threat to institute legal action against the defendant, the defendant only instituted action against the defendant fifteen months later, that is on 28 June 2018, claiming the sum of N\$ 9 000 000 in respect of the damages to the printer as well as N\$ 9 000 000 in respect of loss of business together with interest on these amounts.

[10] The summons was met with a special plea, alleging that the defendant had been released from liability because the plaintiff had failed to serve summons within 12 months of being notified of the repudiation of its claim. The special plea was based on clause 6 of the contract which I quoted earlier<sup>2</sup>.

[11] In its replication, the plaintiff conceded that it lodged its claim on the 29<sup>th</sup> of August 2016 and that its claim was repudiated on the 14<sup>th</sup> day of March 2017 and that it only instituted summons against the defendant fifteen months later, but denies the validity of clause 6 which prescribes a time bar with regards to the institution of legal proceedings against the defendant. In amplification of its denial, the plaintiff pleaded that clause 6 was not incorporated in the contract signed on its behalf by FNB insurance brokers who worked with the plaintiff nor was clause 6 explained to the plaintiff's representative at the time of the conclusion of the contract.

[12] The replication did not evoke any further pleading from the defendant. After some other interlocutory proceedings and delays the matter ultimately came before me to hear the special plea raised by the defendant.

### Issue

[13] The issue to determine in this matter is whether clause 6, that I quoted earlier in this judgment, forms part of the contract entered into between the parties, and if so, whether the defendant is thereby released from liability to compensate the plaintiff.

[14] In dealing with the identified issues, I find it appropriate to commence with the evidence that was presented at the hearing of this matter.

### The evidence

---

<sup>2</sup> Para 7 above

[15] The defendant called three witnesses. Mr Johan Barnard, Mr Peter Kawanab and the plaintiff's insurance broker, Mr Alex Gaugorob. Mr Gaugorob was subpoenaed to testify. The plaintiff did not call any witnesses. For the purposes of this judgment I will in summary only discuss the evidence of Mr Johan Barnard and Mr Alex Gaugorob as their evidence is relevant to the dispute between the parties.

*Mr Johan Barnard:*

[16] Mr Barnard testified that he is the Chief Executive Officer of the defendant and that at the time of the conclusion of the short-term insurance contract between the parties, the defendant was represented by a certain Mr De Waal who is no longer in the employment of the defendant and the plaintiff was represented by Mr. Alex Gaugorob.

[17] He further testified that on 16 May 2016 the broker FNBIB (represented by Mr Gaugorob) requested a quote from the defendant (Quanta Insurance Limited) for a new business called New Creations Printing and Design CC. His testimony was further that on 19 May 2016 the defendant received closing instructions from the broker to issue a policy effective from 18 May 2016. On 26 May 2016 the policy was issued and the schedules with the witnesses' (Mr Barnard's) system generated signature and the General Exceptions, Conditions and Provisions was submitted to the broker for onward forwarding to the plaintiff.

[18] He testified that the schedule which was forwarded to the broker provides that: "This schedule forms part of and should be read in conjunction with the Quanta Insurance limited Policy Contract signed on behalf of the Company on 27/05/2016." He further testified that the disputed clause 6(c) forms part of the General Exceptions, Conditions and Provisions of the contract.

*Mr Alex Gaugorob:*

[19] Mr Gaugorob testified that he is a sales broker employed by FNB Insurance Brokers (Namibia) (Pty) Ltd (FNBIB) and that shortly before 16 May 2016 Mr Hamukoto, requested that he broker an insurance on behalf of New Creations Printing and Design CC. He continued and testified that on 16 May 2016 he requested a quote from Quanta on behalf of New Creations Printing and Design CC. He further stated that after he received the quote from defendant he discussed the quote with Mr Hamukoto who instructed him to arrange the insurance with Quanta. On 19 May 2016 he gave closing instructions to the defendant for the defendant to issue the policy.

[20] Mr Gaugorob continued to testify that on 26 May 2016 he received the policy schedule which was emailed to him. He testified that he immediately instructed his secretary to forward it to the plaintiff. It was Mr Gaugorob's testimony that the schedule clearly provides that: "This schedule forms part of and should be read in conjunction with the Quanta Insurance Limited Policy contract". On the same day (that is, on 26 May 2016) his secretary emailed the policy schedule to Mr Hamukoto. In the email she stated:

'Good Day Sir, Kindly see the attached schedule reflecting the New Business of the policy. Kindly please peruse and ensure that you agree with information as set out. Please do not hesitate to contact us should you require any additional information.'

[21] Mr Gaugorob in response to a question as to whether 'at the time when he acted as broker for the plaintiff he was aware of the terms and conditions that formed part of the contract' answered in the affirmative. The record of proceedings reflects the following exchange between Mr Heathcote (counsel for the defendant) and Mr Gaugorob the witness:

'At the time when you were the broker of the Defendant, ag, of the Plaintiff, I apologise, were you aware of these terms and conditions? --- Yes, I was aware.

Did you discuss it with him? --- Yes, it would have been discussed with the client, yes.'



[22] Mr Gaugorob continued to testify that shortly after his secretary had emailed the Policy Schedule to Mr Hamukoto, of the plaintiff represented by Mr Hamukoto instructed him to submit a claim for damage to a motor vehicle, which he did. Mr Gaugorob continued and stated that on 14 July 2016 and via email he received a copy of a letter from Mr Peter Kawanab sent to New Creations Printing & Design CC. In that letter the claim of New Creations Printing & Design CC in respect the damage to its motor vehicle was rejected. The letter relating to the rejection of the claim in respect of the motor vehicle stated the following:

‘6 Claims (c): No claim shall be payable unless the insured claims payment by serving legal process on the company within 12 months of the rejection of the claim in writing and pursues such proceedings to finality.’

[23] It is against the backdrop of the evidence that I have summarised in the preceding paragraphs that I proceed to consider whether clause 6(c) of the General Exceptions, Conditions and Provisions, forms part of the contract concluded between the plaintiff and the defendant.

## Discussion

### *Submissions on behalf of the parties*

[24] Mr Heathcote who appeared for the defendant argued that Mr Gaugorob testified that he was the appointed broker for the plaintiff, and that he was instructed to broker the insurance contract, of which clause 6(c) is being disputed by the plaintiff. Mr Heathcote further argued that Mr Gaugorob testified that, from previous transactions, the standard terms and conditions of the defendant were known to him at the time of contracting. Those standard terms and conditions, which include the time-bar clause in issue in the special plea, are therefore binding on the plaintiff, as principal. In support of this submission Mr Heathcote relied on Professor AJ Kerr<sup>3</sup>, who opined that:

---

<sup>3</sup> AJ Kerr, *Law of Agency 4<sup>th</sup> ed* (2006), LexisNexis: Butterworth at p 228

'The principal is bound by the transaction entered into by an empowered agent; and the agent's knowledge at the time, his conscious knowledge, is relevant to the question: to what terms did he agree? Thus, if from previous transactions on behalf of himself, or of the same principal, or another principal, an agent has learnt of the third person's standard form or special conditions, and if he has the relevant provisions in mind when he contracts, the principal is bound by the provisions. In such circumstances the rule in §276 of the second edition of the *Restatement on Agency* appears to be in accord with the principles of South African law. It reads:

"Except for the knowledge acquired confidentially, the time, place or manner in which knowledge is acquired by a servant or other agent is immaterial in determining the liability of his principal because of it. In the above category of cases the agent's knowledge is not imputed to the principal – it remains his own but the contract he enters into is the principal's. There are, of course, cases in which the knowledge of both the principal and of the agent has to be considered.'

[25] Mr Heathcote continued and argued that the evidence show that the policy schedule was received by the plaintiff's Mr Hamukoto and that notwithstanding that it refers to the policy contract, a copy of such policy contract was never requested. It was also not requested after it was referred to and quoted in the repudiation letter related to the motor vehicle claim. That was also the case with the repudiation letter related to the claim in issue. It was never challenged by the plaintiff until after the special plea was raised.

[26] Mr Appolus who appeared on behalf of the plaintiff argued that the written short-term insurance contract that was concluded between the parties, which contract was drafted by the defendant, is clearly vague and ambiguous, in so far as it relates to the question whether or not the time-bar clause was an agreed term of the said insurance contract. He based that contention on the argument that Mr Barnard, the defendant's CEO, allegedly conceded during his testimony that there is no specific document titled the 'Quanta Insurance Limited Policy Contract' and that it does not exist.

[27] Mr Appolus thus argued that based on the evidence presented to Court, by the defendant's own witnesses, the majority of whom confirmed that the General Exceptions, Conditions and Provisions, which contains the time-bar clause, were never discussed between the parties at the time of conclusion of the contract, neither was it sent to Mr Gaugorob by the defendant. He thus submitted that the defendant has failed to prove on a balance of probabilities, that the time-bar clause was indeed an agreed term of the contract.

[28] As regards the imputation of the knowledge of the agent on his principle Mr Appolus concedes that general knowledge acquired by an agent and not communicated to his or her principal may be imputed to the principal merely by reason of the fact that the agent has acquired such knowledge. Mr Appolus however, contends that there are four legal requirements which must be satisfied before such knowledge could be imputed to the principal namely that:

- (a) the agent must have actual knowledge;
- (b) the agent must have a duty to communicate the knowledge to his principal;
- (c) the agent must have had an opportunity to communicate the information to the principal, and
- (d) the agent's knowledge must be knowledge of a matter falling within the scope of his authority.

[29] Mr Appolus further argued that Mr Gaugorob testified that the General Exceptions, Conditions and Provisions, which contain the time-bar clause, were not sent to him by the defendant together with the Trade Schedule on the 26<sup>th</sup> of May 2016. He proceeded to argue that Mr Gaugorob's testimony on this point was corroborated by the emails which were attached as Annexures "A" and "B", to his witness statement and admitted into evidence as exhibits which annexures clearly shows that only the Trade Schedule was emailed to him by Ms Tuakondja Mberirua of the Defendant on the 26<sup>th</sup> of May 2016 at 1:14pm.

[30] Mr Appolus furthermore argued that it was Mr Gaugorob's testimony that he was aware of the time-bar clause, which in essence suggests that he had indeed acquired knowledge regarding the said time-bar clause, however, the only logical inference which the Court must and ought to draw from Mr Gaugorob's testimony to the effect that he was aware of the time-bar clause, is that he must have acquired the knowledge regarding the time-bar clause by virtue of his previous dealings or engagements with the defendant or both previous dealings and engagements with other clients who may have also taken-out insurance policies with defendant, whom he had also brokered for in the past.

[31] It is therefore so, argued Mr Appolus, that the knowledge acquired by Mr Gaugorob clearly falls outside the scope of his authority as an agent of the plaintiff, and as such the fourth requirement was not, in the circumstances of this case, satisfied and the knowledge that Mr Gaugorob had could therefore not be imputed to the plaintiff.

#### Application of the Legal Principles

[32] Like many other legal concepts, there is no definition to end all definitions of Agency. Nonetheless, there are several definitions of agency. For instance, the Blacks' Law Dictionary defines Agency as 'a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.'<sup>4</sup> By this definition, the agency relationship creates duties as between the parties, one of which is that the agent do something or say something on behalf of his principal and in so doing or saying, bind him.

[33] Kerr<sup>5</sup> indicates that the purpose of appointing an agent is for the performance of a service for the principal. Thus an empowered agent is one who is entitled, on behalf of his principal, to enter into, vary, or terminate a specified contractual obligation, or specific contract as a whole.

---

<sup>4</sup> B A Garner (ed), *Blacks' Law Dictionary* (7<sup>th</sup> ed, West Group St. Paul, 1999) 62

<sup>5</sup> A. R Kerr, *The Law of Agency* 4<sup>th</sup> ed vol 4 at page 227

[34] Ivamy<sup>6</sup> sets out the legal position regarding express authority an agent is armed with as against a principal as follows:

'All acts falling within the express authority of the agent bind the principle. There is express authority wherever the agent's authority in terms applies to the act in question. Thus where a proposed assured, or an underwriter is authorized to sign policies on behalf of a syndicate, the principals are, in both cases bound by any policy which is in accordance with the agent's instructions.'

[35] It is common cause that in this matter Mr Gaugorob acted as the agent of the plaintiff and entered into the insurance contract with the defendant on behalf of the plaintiff. There is no dispute that Gaugorob had express authority from the plaintiff to conclude an agreement of insurance with the defendant. It is further common cause that the contract which Gaugorob concluded on behalf of the plaintiff contained General Exceptions, Conditions and Provisions, which in turn contained the disputed time-bar clause.

[36] The plaintiff's bone of contention is that the General Exceptions, Conditions and Provisions, which in turn contained the disputed time-bar clause, were not sent to Mr Gaugorob nor were they discussed with Mr Hamukoto of the plaintiff.

[37] Bedrock principles of agency law provide that the knowledge of an agent acquired while acting within the scope of employment, is imputed to his principle<sup>7</sup>. Notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to his principal<sup>8</sup>. The liability of a principal is affected by the knowledge of an agent concerning a matter as to which the acts within his power to bind the principal or upon which it is the duty to give the

---

6

E R Hardy Ivamy, "*General principles of insurance law*" 6<sup>th</sup> Ed pages 553-4

<sup>7</sup> Restatement of the Law', American Law Institute, 2 ed, 1958

<sup>8</sup> Restatement (Third ) of Agency para 5.03

principal information<sup>9</sup>. In *Wellman v Hollard Insurance Company of Namibia Limited*<sup>10</sup> this Court approved the *dictum* in *Standard Bank of South Africa Ltd v Prinsloo & Another (Prinsloo & Another Intervening)*<sup>11</sup> where it was held that:

'The general knowledge acquired by an agent and not communicated to his principal is imputed to the latter merely by reason of the fact that the agent has acquired such knowledge, proved that the knowledge is acquired in the course of the agent's employment and further that there was a duty upon the agent to communicate the information obtained. Whether there is a duty depends upon the scope of the authority and the importance or materiality of such knowledge to the principal. The test of materiality is whether the knowledge of the agent is considered to be of such a kind that, in the ordinary course of business, a reasonable person would be expected to impart this knowledge to the person who has delegated to such agent the conduct and control of his or her affairs.'

[38] In view of the legal principles that I have set out in the preceding paragraphs it becomes immaterial as to whether or not the General Exceptions, Conditions and Provisions were sent to or discussed with Hamukoto of the plaintiff, if it is established that Mr Gaugorob who acted as agent for the plaintiff had knowledge of the time-bar clause.

[39] Mr Barnard testified that the agents who transact with the defendant, were trained with respect to the Insurance contracts that are issued by the defendant. He continued and testified that the defendant as a general practice issues the Trade Schedule and the brokers/agents must then explain the policy wording or General Exceptions, Conditions and Provisions to the insured.

[40] Mr Gaugorob, upon a question from the Court, confirmed that the normal practice is that once an insurer sends out a policy schedule, a policy wording will be provided to the broker/agent and uploaded on the system and the policy is active, and the insured is

---

<sup>9</sup> Restatement (Second ) of Agency § 272

<sup>10</sup> *Wellman v Hollard Insurance Company of Namibia Limited* (I 858/2010) [2012] NAHC 232 (15 August 2012) at para 82 – 85

<sup>11</sup> *Standard Bank of South Africa Ltd v Prinsloo & Another (Prinsloo & Another Intervening)* 200 (3) SA 576 (C)

insured on the terms and conditions of the insurer. Part of the exchange between Mr Gaugorob and the Court went as follows:

'Mr Gaugorob -- The company did not provide the policy wording to me... Normal practice is that once you send out a policy schedule, a policy wording on the inception state of the policy would have been attached .... it means that the, once it is sent out saying, if the closing is sent to the insurance ... Once you go into agreement with the client and the client agrees to the terms and conditions of the insurance... The insurance company then provides the policy schedule and the policy wording... to us as the broker. That means that the policy is now kept on record on their system. So that means that it is loaded onto their system. The, whatever information of the client is now onto their system and that confirms that there is a policy wording now sent, ag, policy schedule sent out to the broker house. So which means that the policy is now active. You are now an insured person ...

Court - On the terms, on their terms and conditions?

Mr Gaugorob -- On their terms and conditions, yes.

Court - How, who has to convey those terms and conditions to the insured?

Mr Gaugorob -- The broker. ...That is, and based on that, we as the broker would say 'if anything is not clear to you please contact us directly as I am broker in order to explain whatever needs to be, which is not clear...'

[41] Mr Gaugorob admitted that he was aware and had knowledge of the terms and conditions (including the time-bar clause) of the insurance contract that was signed between the plaintiff and the defendant. Mr Appolus in cross-examination suggested to Mr Gaugorob that it was not within his authority to accept the time-bar clause. Mr Gaugorob replied that whatever authority he had was mandated to him by Mr Hamukoto for the insured I was given was mandated by him as the insured. He said:

"I was given all mandate to negotiate the insurance terms and conditions on behalf of him and the insurance company."

## Findings

[42] I therefore have no doubt in my mind that the knowledge, with respect to the time-bar clause, which Mr Gaugorob had, he had acquired while acting within his scope of employment as an agent for the plaintiff. I am of the further view that the knowledge relating to the time-bar clause which Mr Gaugorob had was material to his duties to the plaintiff.

[43] I am thus satisfied that that knowledge can be imputed to the plaintiff and I therefore find that clause 6(c) of the General Exceptions, Conditions and Provisions forms part of the contract concluded between the plaintiff and the defendant. The plaintiff's claim has thus prescribed and I uphold the defendant's special plea.

[44] The general rule is that costs follow the event and that costs are in the discretion of the Court. No reasons have been advanced why the general rule must not apply.

[45] I therefore make the following orders:

[45.1] The defendants' special plea is upheld.

[45.2] The plaintiff must pay the defendant's costs of suit, such costs to include the costs of instructing and one instructed counsel.

[45.3] The matter is removed from the roll and regarded as finalised.

---

S UEITELE  
Judge





APPEARANCES

PLAINTIFF:

GT Appolus  
Of Thomas Appolus Incorporated

DEFENDANTS:

Jacobs

R Heathcote (SC) et SJ  
Of Van der Merwe-Greef Andima Inc.