



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Discovery Insure Limited v Masindi (534/2022) [2023] ZASCA 101 (14 June 2023)

Today, the Supreme Court of Appeal (SCA) upheld with costs an appeal against the judgment of the Gauteng Division of the High Court, Johannesburg (the high court).

The issue before the SCA was whether Discovery Limited (Discovery) was entitled to terminate the insurance policy with retrospective effect from the date of the occurrence of the incident giving rise to the claim, and reclaim the monies paid to Mr Masindi pursuant to a partially fraudulent claim.

Mr Masindi took insurance with Discovery during May 2016 in terms of which he insured, amongst others, his residential property located in Pretoria and household contents. The policy covered repairs to the insured residence and made provision for alternate emergency accommodation in the event the insured property was damaged and, as a result became uninhabitable. The material terms of the policy were that if any claim or part thereof was fraudulent Discovery would have the absolute right to cancel the policy retrospectively from the date of the reporting of the incident or the actual date of the incident, in which event the insured would forfeit all the benefits under the policy from the date of cancellation.

On 11 November 2016, an incident occurred which caused damage to the insured property and rendered the residence uninhabitable as also loss of household contents. Mr Masindi claimed for the repairs to his insured residence, compensation for damages to the household contents and reimbursement for the emergency accommodation expenses. Unbeknown that part of the claim was fraudulent, Discovery paid the claim in full. Subsequently, it was discovered that part of the claim relating to emergency accommodation was fraudulent. Consequently, Discovery cancelled the policy retrospectively from 11 November 2016 and reclaimed the full amount it had paid out by way of compensation to Mr Masindi. The high court held that Discovery was only entitled to the portion of the claim that was not tainted by fraud. It deemed the fraud clause in the policy to be akin to a penalty clause which the high court found to be disproportionate to the prejudice suffered by Discovery as a result of the fraud, and consequently declined to enforce it.

Concerning the merits of the appeal, the SCA considered three issues, namely: (i) the correct interpretation of the fraud clause; (ii) the application of the doctrine of accrued rights; and (iii) the characterisation by the high court of the fraud clause as a penalty under the Conventional Penalties Act and the consequent refusal to enforce it. The SCA accepted, as trite, that insurance companies have the right to incorporate comprehensive forfeiture clauses in their policies and where such clauses are included and are similar to the one upon which Discovery relied, then the insurer would be entitled to

reclaim the full amount paid in settlement of the claim that subsequently turned out to be partly genuine and partly fraudulent.

On the facts of the case, the SCA held that the doctrine of accrued rights found no application since there could be no rights accrued, as the forfeiture clause applied with retrospective effect from the date of the incident giving rise to the claim. Regarding the Conventional Penalties Act, it was held that this was not the issue before the high court as it had not been raised by the parties. The SCA also reiterated, with reference to judicial authority, that courts were not permitted to stray outside the issues raised by the litigants themselves. Hence, the appeal was upheld and the order of the high court set aside.

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