IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

[redacted]

SIGNATURE DATE: 11 March 2025

Case No. 2020/12145

DRAKENSTEIN MUNICIPALITY Plaintiff

and

GUARDRISK ALLIED PRODUCTS AND SERVICES (PTY) LTD First Defendant

AON SOUTH AFRICA (PTY) LTD Second Defendant

JUDGMENT

WILSON J:

1 On 10 March 2025, I granted the plaintiff, Drakenstein, leave to amend its replication in this trial action. By agreement between the parties, I directed Drakenstein to pay the costs of the application for leave to amend, with counsel's costs to be taxed on scale "C", and I postponed the trial action *sine die*. I said at the time I gave my order that my reasons would follow in due course. These are my reasons.

2 Drakenstein sues the first defendant, Guardrisk, on Guardrisk's repudiation of two claims under an insurance policy taken out on Drakenstein's behalf by the second defendant, AON. The second of the two claims was for fire damage to a switchgear room and a substation at the Parys electricity substation. Guardrisk repudiated much of the Parys fire claim, on the basis that the switchgear had been underinsured, and the substation had not been covered by the policy at all. In an unsigned "agreement of loss" issued to Drakenstein on 27 March 2019, Guardisk tendered to indemnify Drakenstein for a fraction of the sum claimed on the policy.

3 In due course, Drakenstein sued for the full amount it said was due to it in respect of the Parys fire. Guardrisk defended the action. One of Guardrisk's pleaded defences was that the summons commencing Drakenstein's action had been issued more than twelve months from the date on which its claim had been "rejected", in the sense given to that word under clause 7 of the insurance Policy Wording. This meant that the claim was time-barred.

4 In its replication, Drakenstein sought to escape the time-bar clause by pleading five contentions, each in the alternative to the other. It was first pleaded that Guardrisk had, contrary to Rule 17.6.3 (e) of the Policy Holder Protection Rules, 2017, made under the Short Term Insurance Act 53 of 1998, failed timeously to inform Drakenstein of the time-bar clause. Drakenstien says that failure means there is good cause to condone Drakenstein's non-compliance with the time-bar clause under Rule 17.6.9 of the Rules. Second, Drakenstein alleged that, by drawing Drakenstein's attention only to the provisions of the Prescription Act 68 of 1969 in its post-claim correspondence,

Guardrisk had impliedly waived the right to rely on the time-bar clause. Third, it was said that Guardrisk is estopped from relying on the time-bar clause because the reference to the Prescription Act alone was itself a representation that Guardrisk did not intend to rely on the time-bar clause, and because Drakenstein relied on that representation reasonably and to its detriment. Fourth, it was contended that to hold Drakenstein to the time-bar clause would be contrary to public policy. Fifth, Drakenstein pleaded that its attention had not been drawn to the time-bar clause, that it never intended to be bound by it, and that it is, as a result, not so bound.

5 Drakenstein later sought leave to amend its replication to add a sixth contention. The contention was that, because Guardrisk offered to pay some of Drakenstein's claim, the claim was not in fact "rejected" within the meaning of Clause 7, and that the time-bar clause does not apply for that additional reason.

6 Guardrisk objected to the amendment on the basis that by offering to settle Drakenstein's claim for less than the amount Drakentstein sought, Guardrisk had in fact "rejected" the balance of the claim. There was no difference, in substance, between the rejection of a claim under clause 7 of the Policy Wording, and a repudiation of part of a claim. Guardrisk must simply be taken to have rejected that part of the Parys fire claim it repudiated. Guardrisk argued that to allow Drakenstein to plead that the Parys fire claim had not been "rejected" would permit Drakenstein to contradict its earlier averment that Guardrisk had repudiated the bulk of the Parys fire claim. The contradiction arises, Guardrisk says, because "rejected" and "repudiated" mean the same

thing. To allow Drakentsein to contradict itself in this way would render its replication either excipiable or vague and embarrassing.

7 The question, then, is really whether the word “rejected” in clause 7 of the Policy Wording means only to refer to a claim “rejected outright” or whether it can also refer to a claim that was partially repudiated. Mr. Fagan, who appeared for Drakenstein, relied upon a decision of this court in *Hurwitz’s Trustee v Salamander Fire Insurance Company* 1917 TPD 216 (“*Salamander*”). In that matter, at page 220, Bristowe J held that a “rejection” in the context of a time-bar clause in an insurance agreement means a “total and not partial rejection”. Its meaning cannot extend to cover the payment of part of a claim and the rejection of the rest.

8 Mr. Stockwell, who appeared for Guardrisk, pointed out that Bristowe J had not meant his conclusion to extend to a situation in which an insurer rejects the claim as a whole but offers a token payment in settlement of any dispute that might arise from that rejection. That, Mr. Stockwell contended, is what happened in this case. The agreement of loss was really a tender to compromise. The claim was rejected, but a token amount was tendered to settle the claim. Drakenstein does not accept that construction of the agreement of loss. It says that, at least in respect of the switchgear room, its claim was not rejected but reduced on the basis that the switchgear had been underinsured.

9 At this stage, I need not take a view on that controversy. It seems to me to be enough that there is a colourable difference of opinion about the meaning of the agreement of loss, on which evidence will have to be heard. Once I accept

that Drakenstein's construction of the agreement of loss may be sustained on the evidence, I must also accept in principle that Drakenstein may consistently plead that the Parys claim was partially repudiated, but not "rejected" for the purposes of clause 7 of the Policy Wording. Whether Drakenstein is right will depend on the meaning to be attributed to the agreement of loss, and to clause 7 of the Policy Wording, in the context of the evidence as a whole. It follows that Drakenstein's amendment will render its replication neither excipiable nor vague and embarrassing.

10 I accept the possibility that, even if Drakenstein's construction of the agreement of loss is correct, the Policy Wording might mean that any repudiation of any portion of a claim on the policy is *per se* a rejection of that portion of the claim. This would be inconsistent with what is said in *Salamander*, but the question of whether there really is a difference between the rejection and a partial repudiation of Drakenstein's claims does not turn exclusively on that precedent. The question can in truth be resolved only by interpreting the Policy Wording itself – that is, by attributing meaning to the word "rejection" in clause 7 of the Policy Wording in the context of the insurance agreement as a whole and the circumstances surrounding the conclusion of that agreement. The decision in *Salamander* is of course material to that exercise. But the exercise cannot sensibly be completed until evidence has been led. Until then, Drakenstein is perfectly entitled to contend that the "rejection" of its claim was not synonymous with its partial repudiation. The contention may not survive contact with the proven facts, but that possibility should not deprive Drakenstein of the right to advance the contention at trial.

11 It was for these reasons that I granted the application for leave to amend. The parties had already agreed that, leave to amend being an indulgence, Drakenstein should pay the costs of the application, with counsel's costs to be taxed on scale "C". It was also agreed that, in the event that the application succeeded, the trial action would have to be postponed, with the costs of the postponement being reserved.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 11 March 2025.

HEARD ON:	10 March 2025
DECIDED ON:	11 March 2025
For the Plaintiff:	E Fagan SC A Price Instructed by the Van der Spuy & Partners
For the First Defendant:	R Stockwell SC Instructed by Clyde and Co Attorneys