MANDERSON T/A HILLCREST ELECTRICAL v STANDARD GENERAL INSURANCE CO LTD 1996 (3) SA 434 (D)

Citation	1996 (3) SA 434 (D)
Case No	4898/92
Court	Durban and Coast Local Division
Judge	Mccall J
Heard	August 11, 1993
Judgment	September 2, 1993
Counsel	A Troskie for the plaintiff. G O van Niekerk for the defendant.
Annotations	Link to Case Annotations

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Flynote : Sleutelwoorde

Insurance - Generally - Applicable legal principles - Insurable interest - Generally accepted in South Africa that requirements of insurable interest based on c considerations of public policy, namely law's distaste for and refusal to recognise wagering, gaming or gambling agreements - Generally accepted that insurable interest has to exist at time when loss occurring - If no such interest existing at time of loss, no loss suffered and contract mere wager - *In casu* employer (plaintiff) insuring employee's (X's) car and tools with defendant on same policy as employer's D own cars - Defendant refusing to compensate plaintiff when X's car and tools stolen - Loss represented by market value of vehicle and tools stolen was loss suffered by X, not by plaintiff - Plaintiff's loss representing loss of profit or goodwill suffered by business as result of being unable to supply customers with service E performed by X - Loss insured against was loss of or damage to vehicles described in schedule, including vehicle owned by X, not loss caused to plaintiff as result of unavailability of X's vehicle or tools - If test of proof of loss or damage applied to ascertain whether plaintiff having insurable interest in motor vehicle and F tools at time of theft, plaintiff not having insurable interest to extent of value of vehicle and tools - Plaintiff's interest in vehicle being interest in ensuring that business not suffering as result of loss of or damage to vehicle - Plaintiff, however, seeking to recover not his interest but value of X's proprietary interest in motor vehicle, which was not permitted - Mere agreement between insured and third party G to insure interest of latter not imposing obligation on insurer to compensate for loss not to insured but to third party.

Headnote : Kopnota

The problem of identifying and defining insurable interest is a vexed one, and the difficulties confronting the law in this regard are perhaps best solved by legislation. It H appears to have been generally accepted in South Africa that the requirements of an insurable interest for contracts of insurance are based on considerations of public policy. The principle of public policy involved is said to be the law's distaste for and refusal to recognise wagering, gaming or gambling agreements. The approach which focuses the enquiry upon whether or not the contract amounted to a betting and wagering agreement is unhelpful in that it leaves unanswered the question of what it is, other than insurable interest, which determines whether or not a contract of insurance amounts to a wager. (At I 439F-440C.)

It seems generally accepted by the authorities that in the case of property insurance the insurable interest has to exist at the time when the loss occurred. Whether or not a

contract is a wagering contract has to be determined by the intention of the parties to the contract at the time of entering into the contract. Secondly, the concept of an insurable interest is inextricably interwoven with the question of loss. The loss must be a loss with a real value in trade or commerce. In the insurance context loss or damage is defined with J reference to insurable interest; insurable interest is

A employed as a yardstick for loss or damage, and an insurable interest exists whenever a particular event involved a person in damage in the ordinary sense of the word. (At 440H-I, 441A, 422C and 442C/D-E.)

The plaintiff and defendant had entered into a written agreement of insurance in terms whereof the defendant undertook to insure *inter alia* certain motor vehicles, plants, tools B and equipment against, amongst other risks, theft. The plaintiff's main business was the wiring of buildings such as blocks of flats, workshops and factories, but it had employed X to carry out repairs to domestic appliances for his customers. It had been agreed that X would supply his own vehicle, while the plaintiff would insure the vehicle. A policy had been taken out which covered the plaintiff's vehicles as well as X's vehicle. The insurance had been contracted through a broker who had at no time asked the plaintiff to specify whether he was the owner of the vehicle or not. The plaintiff had paid the premium in C monthly instalments, and X had paid the portion of the premium attributable to his vehicle to the plaintiff every month. When X's vehicle (with tools inside) was stolen, the defendant refused to compensate the plaintiff for the loss of the vehicle and tools through theft. The defendant denied that it was obliged to make any payments to the plaintiff as the plaintiff had no insurable interest in the vehicle. Counsel for the plaintiff submitted that the plaintiff had an insurable interest in the motor vehicle on two grounds, namely (1) that he D was bound by his agreement with X and that if he had not insured the vehicle he would be liable to X for damages in the event of the loss of the vehicle; and (2) that he would be prejudiced if the vehicle was lost because he stood to lose the goodwill of his business. Counsel for the defendant contended that the mere fact that it had been agreed between the plaintiff and X that the former would insure the vehicle did not give him an insurable interest in it, and, secondly, that the plaintiff had not proved on a balance of probabilities that at the time of the loss of the vehicle he stood to lose something of appreciable E commercial value.

Held, that the plaintiff's suggestion that, once an insurable interest was established the insured was entitled to recover the full value of the items insured, irrespective of the extent of his loss or the value of his interest, was a fallacy: the loss had to be a loss with a real value in trade or in commerce. (At 441G-H read with 442C.)

Held, further, applying these principles to the facts, that the plaintiff had not suffered any F loss capable of being valued as a result of the theft of the car and tools belonging to X. He had certainly not suffered a loss represented by the market value of the vehicle and the tools which were stolen; that loss had been suffered by X. What the plaintiff had in mind was that, if X's vehicle was stolen or damaged and could not be replaced, he would suffer a loss representing the loss of profit or loss of goodwill suffered by his business as a result of his being unable to supply his customers with the service performed by X. That may G well have been an insurable loss and a loss giving him an insurable interest in X's motor vehicle but that was not a loss insured under the policy. What had been insured against had been the loss of or damage to the vehicles described in the schedule, including that owned by X, not the loss caused to the plaintiff as a result of the unavailability of that vehicle or the tools which were contained in it when it was stolen. (At 442E-H.)

Held, therefore, that, if the test of proof of loss or damage were applied in order to H ascertain whether the plaintiff had an insurable interest in the motor vehicle and the tools at the time of their theft, then the plaintiff did not have an insurable interest to the extent of the value of the vehicle and tools: the plaintiff's interest in the vehicle was an interest in ensuring that his business did not suffer as a result of the loss or damage to the vehicle, but what he was seeking to recover was not his interest, but the value of X's proprietary interest in the motor vehicle, which was not permitted. (At 442H-I and 443D -D/E.)

Held, further, as to whether the mere fact that the plaintiff had agreed to insure the vehicle I was sufficient to give the plaintiff an insurable interest in the vehicle such as to

entitle him to recover from the defendant the value of the vehicle and the tools which were in it, that a mere agreement between an insured and a third party to insure the interest of the latter would not impose an obligation on the insurer to compensate for a loss not to the insured but to the third party. It might be possible for an insurer and an insured to agree that a policy of insurance would confer a benefit on a third party; however, the conferring of a J benefit on a third party clearly required a disclosure by

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A the insured to the insurer that it was the third party who was to benefit and an agreement between the insured and the insurer that such third party would benefit. That had not occurred in this case. (At 443E, 444A-B, 444D and 444E-F.)

Held, further, that, although the Court would always lean in favour of finding the existence of an insurable interest, having regard to the fact that the insured had paid the premiums B and that the objection might be a technical one, in the present case, whether the matter was approached strictly on the basis of an insurable interest, or on the basis of proof of loss, which could not be divorced from the concept of insurable interest, the plaintiff could not succeed. (At 444F/G and 444G-H.) Judgment for the defendant.

The following decided cases were cited in the judgment of the Court:

Littlejohn v Norwich Union Fire Insurance Society 1905 TH 374

*Phillips v General Accident Insurance Co (SA) Ltd*1983 (4) SA 652 (W)

C *Steyn v AA Onderlinge Assuransie Assosiasie Bpk*1985 (4) SA 7 (T)

Steyn v Malmesbury Board of Executors and Trust and Assurance Company 1921 CPD 96

*Van Achterberg v Walters*1950 (3) SA 734 (T).

Case Information

Civil trial in an action for damages. The facts appear from the reasons for judgment.

D *A Troskie* for the plaintiff.

G O van Niekerk for the defendant.

Cur adv vult.

E *Postea* (2 September 1993).

Judgment

McCall J: The plaintiff claims from the defendant an amount which he alleges is the value of a certain motor vehicle which, it is common cause, was stolen on 3 January 1992, and the value of certain tools and equipment which were in the vehicle when it was stolen.

F It is common cause that in about February 1990 the plaintiff and the defendant entered into a written agreement of insurance, policy no 103052, in terms of which the defendant undertook to insure, *inter alia*, certain motor vehicles, plant, tools and equipment against the risks mentioned in the contract, one of them being the risk of theft. It is, further, G common cause that the motor vehicle which was stolen was included amongst the vehicles referred to in the insurance policy, by an amendment to the agreement on 5 April 1991. The plaintiff contends that the defendant is obliged to make the payment claimed by him, pursuant to the said policy of insurance.

H The defendant in its plea denied that it was obliged to make any payments to the plaintiff. Initially it raised two defences to a claim under the policy, namely one of non-disclosure that the plaintiff did not own the motor vehicle in question and the other that the plaintiff had no insurable interest in the vehicle. When the matter came before me it had been agreed that the only issue to be decided by this Court is whether or not the I plaintiff had an insurable interest in the vehicle and tools which were stolen, and that the trial should proceed for the purpose of determining that issue.

I am not sure that it was a wise decision on the part of the defendant to have agreed to restrict the issues in this case. One of the results of that decision was that, initially, the actual policy document was not placed before me. However, it was later handed in by J consent but it seems that,

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A because of the agreement, I may only refer to or rely on it to the extent that it has a bearing on the question of an insurable interest. Furthermore, it may be that there are some instances in which the question of disclosure may have a bearing on the extent of an insurable interest. Finally it seems to me, as will appear from this judgment, that the real B issue may be not simply whether or not the insured had an insurable interest in the vehicle and the tools, as such, but whether his interest extended to the value of the vehicle and tools. Counsel for the plaintiff, in argument, was of the view that once the insured has shown an insurable interest of any kind in the items insured, that is sufficient to entitle him to recover the full value of the items lost. That does not seem to be either logical or legally C correct.

I was further informed at the commencement of the trial that, if I found in favour of the plaintiff on the issue of an insurable interest, it was agreed that the plaintiff would be entitled to judgment in the amount of R25 950 and to costs of suit. I shall, therefore, endeavour, to the best of my ability, to arrive at a decision within the limits imposed upon D me.

Most of the facts relevant to the issue relating to an insurable interest were either common cause or not in dispute. Most importantly, it was common cause that at all material times the motor vehicle which was stolen did not belong to the plaintiff. It belonged to one Erwin Sieg and was registered in his name.

E The plaintiff gave evidence in support of his claim and called the said Mr Sieg to give evidence. Although there were certain minor discrepancies between them as to the precise nature of the working relationship between the plaintiff and Mr Sieg, the material facts were not in dispute and were as follows hereinafter.

F The plaintiff acquired the business, trading under the name of Hillcrest Electrical, in February 1985. At that time Mr Sieg was employed by Hillcrest Electrical in terms of a standard type of employment contract. The main business of Hillcrest Electrical was the wiring of buildings, particularly buildings such as blocks of flats, workshops and factories. However, Hillcrest Electrical had calls from its customers, from time to time, to carry out G repairs to domestic appliances and, in order to provide a full service as an electrician, it employed Mr Sieg to carry out that work on a full-time basis.

About six months to a year after the plaintiff acquired Hillcrest Electrical it was agreed H between him and Mr Sieg that, thenceforth, Mr Sieg would be employed as a subcontractor. The basis of his employment would be that when Hillcrest Electrical received a call from a customer for the repair of an electrical appliance, it would send Mr Sieg out to do the work. After completing it, Mr Sieg would write out an invoice, on a I form with the name of Hillcrest Electrical stamped on it, for the amount due. He would usually receive payment there and then, either by way of a cheque or in cash. He would then take the payment to Hillcrest Electrical where it would be dealt with by a secretary employed by the firm. She would credit Mr Sieg, in the books, with the amount due in respect of the work done. From that amount would be deducted, in respect of each job, a R10 administration fee and the VAT charged to the customer. At the end of the month, J Mr Sieg would be given a cheque for

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A the total value of the work, less the deductions and less any outstanding work or, as I understand it, outstanding payments. Mr Sieg worked solely for Hillcrest Electrical.

From the time that Mr Sieg commenced operating as a sub-contractor it was agreed that he would supply his own vehicle and would also supply materials required for each job. B He would, in fact, purchase the materials in the name of Hillcrest Electrical and pay for them himself but Hillcrest Electrical would be responsible for claiming VAT refunds. The plaintiff agreed with Mr Sieg that he would insure Mr Sieg's vehicle. He took out a policy with the defendant which covered his own vehicles and the original vehicle belonging to

C Mr Sieg. Subsequently Mr Sieg sold that vehicle and purchased another one which was then substituted on the policy. The insurance was contracted through a broker who at no time asked the plaintiff to specify whether he was the owner of the vehicles insured, and the broker was, in fact, never told that one of the vehicles belonged to Mr Sieg. The D premium on the policy was paid by the plaintiff in monthly instalments. That portion of the premium attributable to Mr Sieg's vehicle was paid by Mr Sieg to the plaintiff each month.

The plaintiff said that he agreed to insure Mr Sieg's vehicle so that he would at all times be E protected in the event of the vehicle being stolen or damaged and that, in the event of the vehicle being off the road, his customers would continue to be serviced at all times. This was necessary because, if Hillcrest Electrical was unable to provide someone to repair faulty household appliances, the customer concerned would go to a competitor, and might then look to the competitor to provide other electrical services, to the detriment F of Hillcrest Electrical and resulting in a loss of money to it. He agreed to insure Mr Sieg's vehicle because Mr Sieg did not make a lot of money and his income depended on the demand for repairs. If Mr Sieg failed to make sufficient money to cover the insurance, the plaintiff's interests would be covered at all times by the fact that the plaintiff was paying for the insurance.

Under cross-examination the plaintiff conceded that he did not tell Mr Sieg how to do his G work and did not supervise him. He admitted that what he got out of the arrangement with Mr Sieg was the rendering of a service to his customers. If Mr Sieg took a holiday (which he apparently did only once, for two weeks, in a period of eight years) or was incapacitated through illness, and a customer wanted an appliance repaired, the customer H would either be asked to wait until Mr Sieg returned or another of Hillcrest Electrical's employees would try to repair the appliance. Or, if it was a matter of urgency, an arrangement would be made with another man in the area who had his own business of repairing appliances to carry out the work. It was suggested to the plaintiff, therefore, that I he would suffer no loss when Mr Sieg was not working. He disputed that, saying that he would be unable to service his customers. He derived a benefit from Mr Sieg working for him solely because, if the customers required any other work to be done of the type normally done by Hillcrest Electrical, Mr Sieg would refer them to Hillcrest Electrical. The administration fee paid by Mr Sieg also helped pay for the lady in the office. He J conceded, under re-examination, that

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A if he obtained judgment against the defendant, the whole of the amount recovered would be paid to Mr Sieg and would be used by him to pay his overdraft and help repay his costs.

Mr Sieg corroborated the plaintiff in most respects. He said that the plaintiff offered to B insure the vehicle for him. They agreed this would be the correct thing to do because if the vehicle was stolen or damaged the vehicle would be insured at all times and the plaintiff would be able to make sure that it was insured. This would be done to make sure that at all times he would be fully operational for the plaintiff. Under cross-examination he said C that the plaintiff felt that to insure the vehicle would be an advantage to both of them.

Counsel for the plaintiff submitted that the plaintiff had an insurable interest in the motor vehicle on two grounds, namely:

(1) that he was bound by his agreement with Mr Sieg and if he did not insure the vehicle he would be liable to Mr Sieg for damages in the event of the loss of the vehicle;

D (2) he would be prejudiced if the vehicle was lost because he stood to lose the goodwill of his business.

Counsel for the defendant, on the other hand, contended that the mere fact that it was agreed between the plaintiff and Mr Sieg that the former would insure the vehicle did not give him an insurable interest in it. Secondly, he contended, by reference to the cases

and particularly that of *Littlejohn v Norwich Union Fire Insurance Society* 1905 TH 374 E at 380, that the plaintiff had not proved, on a balance of probabilities, that at the time of the loss of the vehicle he stood, to use the words of Wessels J in that case, 'to lose something of appreciable commercial value'. Consequently, he submitted, the judgment of F the Court ought to be one of absolution from the instance.

The problem of identifying, and defining, an insurable interest is a vexed one. The author of Gordon and Getz *The South African Law of Insurance* 4th ed suggests, at 99, that:

> 'The difficulties which presently confront South African law in respect of G insurable interest are perhaps best solved by legislation. . . .'

Having wrestled with the problem in this case, I cannot but agree with that suggestion.

It appears to have been generally accepted in South Africa that the requirement of an insurable interest for contracts of insurance is based on considerations of public policy.

H The principle of public policy involved is said to be the law's distaste for, and refusal to recognise, wagering, gaming or gambling agreements. See *Gordon and Getz (op cit* at 92). This led De Villiers J, in two leading cases on insurable interest, to take the view that too much emphasis is placed on the concept of the insurable interest and that the inquiry ought to be whether the agreement 'amounts to a betting or wagering agreement'. In I *Phillips v General Accident Insurance Co (SA) Ltd*1983 (4) SA 652 (W) at 659F-G he said:

> 'I am of the view that the author places too much emphasis on the insurable interest, and loses sight of what the real inquiry is, namely whether the contract, having regard to all the surrounding circumstances and especially the intention of the parties, amounts to a betting or wagering agreement. If there is any doubt, J the benefit should in my view be given to the insured, having regard to fact (*sic*)

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> A that normally the company has throughout the period of insurance accepted the insurance premiums and that such a defence is really a technical one. I concede that one of the factors to be taken into consideration in deciding whether the agreement amounts to a wager or not is whether the husband has an insurable interest in the article insured.'

B See also *Steyn v AA Onderlinge Assuransie Assosiasie Bpk*1985 (4) SA 7 (T) at 10-12.

With respect to De Villiers J, I find this approach to be unhelpful. It leaves unanswered the question of what it is, other than an insurable interest, which determines whether or not C a contract of insurance amounts to a wager. Thus R H Christie *The Law of Contract in South Africa* 2nd ed at 448 says:

> 'Insurance contracts, which are basically wagers, are not hit by the general rule provided the insured has an insurable interest.'

In *Phillips'* case *supra* De Villiers J at 660D appears to define a betting or wagering D agreement as being one 'where the one party risks his money against the company on the result of a doubtful event'. It seems to me that all contracts of indemnity insurance would fall within that definition even if, as observed by De Villiers J, the premiums are actuarially computed by evaluating the risk. In *Steyn's* case *supra* at 12F-G De Villiers J E suggests that a test is whether the person concerned does or does not want the event to take place, ie an insured insures against the occurrence of the event, a gambler bets in the hope that the event will occur. That test certainly highlights what could be an important public policy consideration for not recognising an insurance contract in which the insured's F interest is in the occurrence, rather than the non-occurrence of the risk insured against. An insurance contract which is purely a gamble or a wager could encourage fraud or the deliberate bringing about, by the insured, of the occurrence of the risk insured against. If the test is as simple as that then, clearly, in this case, the contract was not a wagering contract because the plaintiff did not insure the vehicle, on behalf of Mr Sieg, in the hope G that the vehicle would be stolen or damaged but rather to protect Mr Sieg and, indirectly, himself if the vehicle was, unfortunately, stolen or damaged.

I do not think, however, that, certainly with regard to modern indemnity insurance, such a simple test can be applied in all cases. Firstly, it seems to be generally accepted by the authorities that, in the case of property insurance, the insurable interest must exist at the time when the loss occurs. See *Gordon and Getz (op cit* at 100).

Whether or not a contract is a wagering contract must surely be determined by the intention of the parties to the contract at the time of entering into the contract. Thus *MacGillivray and Parkington on Insurance Law* 8th ed at 4 para 7*a* distinguishes between a wager and an insurance contract as follows:

> 'Both insurance contracts and wagering contracts are aleatory. The risk of loss in a wager is, however, created by the making of the bet itself, whereas typically insurance is to indemnify the assured in respect of the risk of loss to an interest he already possesses.'

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Secondly, it seems to me that the concept of an insurable interest is inextricably interwoven with the question of loss. The author of *Colinvaux's Law of Insurance* 6th ed para 3-01 says that:

> 'The insurable interest requirement is in fact based upon a series of independent principles, which apply differently to the various classes of insurance contract.'

He then lists three sources of such interest, namely 'interest required by statute', 'interest required by the policy' and 'anti-wagering legislation'. Under the second heading he says:

> 'The policy will generally require the assured to have insurable interest, either directly, or indirectly, by providing that the assured must prove that he has suffered a loss. Policies of this nature are *indemnity* policies.'

In *Gordon and Getz (op cit* at 100) it is stated that:

> 'There is no doubt that an insurable interest must be shown to exist at the time of the loss, for, if there is no interest then, no loss has been suffered, and the insured is not entitled to an indemnity.'

In *Halsbury's Laws of England* 4th ed vol 25 para 632 it is stated that:

> 'A contract of fire insurance, like all other contracts of insurance, requires an insurable interest in the subject-matter of the insurance to support it; in the absence of an insurable interest, the assured can suffer no loss, and the contract becomes a mere wager.'

The inevitable association between an insurable interest and loss appears from the following extract from *MacGillivray and Parkington (op cit* at 4 para 9) dealing with the interest required by a policy of indemnity:

> 'If, upon a proper construction of the policy, the insurer has undertaken to indemnify the assured against pecuniary loss caused by or arising from particular risks, an interest is required by reason of the nature of the contract itself. If the assured has no interest at the time when the event insured against occurs, it is clear that he cannot recover anything on an indemnity policy, because he has suffered no loss against which he can be indemnified. Similarly, if he has an interest limited to something less than the full value of the subject-matter, he can suffer no greater loss than the total value of his actual interest at the time of loss, and his claim to an indemnity cannot exceed the value of his interest.'

This passage demonstrates the fallacy of the suggestion by counsel for the plaintiff that, once an insurable interest is established, the insured is entitled to recover under the policy the full value of the items insured, irrespective of the extent of his loss or the value of his interest.

Indeed, the association between an insurable interest and the loss suffered by the insured was identified in an early South African case on insurable interest, namely that of *Littlejohn v Norwich Union Fire Insurance Society (supra)*. In that case the plaintiff claimed payment under a policy for the insurance of certain goods in a store. He was married out of community of property to his wife and she was the owner of the goods in the store. The plaintiff had, however, the entire control of the business and was the sole manager of it. He and his wife lived on the profits of the business and whatever he did in the business was for the joint interest of himself and his wife. He also had possession of the goods. It was held that he had an insurable interest in the goods. After reviewing cases in England and America Wessels J said at 380:

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> 'The principle to be deduced from these cases appears to be this: If the insured can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a *jus in re* nor *a jus ad rem* to the thing insured his interest will be an insurable one.'

Wessels J then considered whether the plaintiff was in a worse position after his wife's property insured by him had been burnt and whether he had suffered a loss thereby. He concluded that it was to his interest that the property should be replaced exactly as it was before the fire and that he had an insurable interest in the goods. In the context in which the word was used by Wessels J 'appreciable' means, in my view, 'capable of being valued' or 'perceptible' (*The Shorter Oxford English Dictionary* vol I at 93) and 'commercial' means 'relating to commerce or trade' (*ibid* at 276). What Wessels J had in mind, therefore, in my view, was a loss with a real value in trade or commerce.

It follows from the aforegoing that I agree with the view taken by the authors of the title of 'Insurance' in Joubert (ed) *The Law of South Africa* vol 12 para 102 that:

> 'In the insurance context "loss or damage" is therefore defined with reference to insurable interest; insurable interest is employed as a yardstick for loss or damage.'

They add that:

> 'As matters now stand an insurable interest exists whenever a particular event involves a person in damage in the ordinary sense of the word.'

Applying these principles to the facts of the present case, I am of the view that the plaintiff has not suffered any loss capable of being valued as a result of the theft of the car and tools belonging to Mr Sieg. He certainly has not suffered a loss represented by the market value of the vehicle and the tools which were stolen. That is the loss which has been suffered by Mr Sieg. As appears from the evidence of the plaintiff and Mr Sieg which was not disputed, what the plaintiff had in mind was that if Mr Sieg's vehicle was stolen or damaged and could not be replaced the plaintiff would suffer a loss representing the loss of profit or loss of goodwill suffered by his business as a result of his being unable to supply his customers with the service performed by Mr Sieg. That may well have been an insurable loss and a loss giving him an insurable interest in Mr Sieg's motor vehicle, but that was not a loss insured under the policy. What was insured against was the loss of or damage to the vehicles described in the schedule, including that owned by Mr Sieg, not the loss caused to the plaintiff as a result of the unavailability of that vehicle or the tools which were contained in it when it was stolen. If one applies, therefore, the test of proof of loss or damage, in order to ascertain whether the plaintiff had an insurable interest in the motor vehicle and the tools at the time of the theft of them, I am of the opinion that the plaintiff did not have an insurable interest to the extent of the value of the vehicle and tools.

Of course, various people may have different insurable interests in the same property. An obvious example is the interests of the lessor and the lessee respectively, in the property let, dealt with by Millin J in the case of *Van Achterberg v Walters*1950 (3) SA 734 (T) at 740F-G where the following was said:

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> 'Clauses to compel the insurance of the subject-matter of the contract are quite common in leases. By virtue of the lease the lessee has an insurable interest in the property let to him, and although he cannot usually recover more than the value of his own interest, he is entitled to insure for the full value of the property. *Castelmain v Preston* 11 QBD 380 at 400. Where the lessee is under obligation, as here, to repair and replace all furniture and furnishings damaged or destroyed and at the end of the lease to restore possession of all furniture and fittings let, it is obvious that the lessor has a direct interest to compel him to insure, at any rate, against destruction or damage by fire.'

Again, in *Steyn v Malmesbury Board of Executors and Trust and Assurance Company* 1921 CPD 96 at 104 Watermeyer AJ said:

> 'It appears to me also that when the assured will derive some benefit from the preservation of the property insured, but has not a proprietary interest in the property itself, the more correct course, if he

is insuring his own interest only, is to insure his interest in the property *eo nomine* and not the *corpus* of the property itself.'

Here, the plaintiff's interest in the vehicle was, as I have said, an interest in ensuring that his D business did not suffer as a result of the loss of or damage to the vehicle but what he is seeking to recover in this case is not his interest, but the value of Mr Sieg's proprietary interest in the motor vehicle. That, in my view, is not permitted.

That brings me to the remaining question as to whether the mere fact that the plaintiff E agreed with Mr Sieg that he would insure the vehicle is sufficient to give the plaintiff an insurable interest in the vehicle such as to entitle him to recover from the defendant the value of the vehicle and the tools which were in it. In this regard I was referred to *Gordon and Getz (op cit* at 106) where the authors say:

'A person who undertakes an obligation to insure has an insurable interest, F "because if he fails to insure he will be liable for damages in the event of loss".'

The authority cited and quoted in support of the proposition is *Van Achterberg's* case *supra*. The quotation occurs in the following passage at 744D:

G 'He had an insurable interest as already shown; and even if he had not for any other reason it was enough that he had undertaken an obligation to insure these goods. This alone gives him an insurable interest, because if he fails to insure he would be liable for damages in the event of loss. (*Heckman v Isaac* (1862) 6 LT 383; *Halsbury (supra* vol 18 para 740 at 490). (In any event he was entitled to take out a policy in the name of the appellant, as owner. (*Halsbury (supra* vol 18 H para 745 at 492).)'

That statement was made in the context of a lessee who was under an obligation to repair and replace all furniture and furnishings damaged or destroyed and at the end of the lease to restore possession of all furniture and fittings let. That is quite different from the case under consideration. The plaintiff had no obligation regarding the maintenance or I replacement of the vehicle or the tools. He simply agreed to insure them with a view to enabling Mr Sieg to obtain compensation to enable him to repair or replace them. Had he not insured the motor vehicle and the tools, notwithstanding his agreement with Mr Sieg to do so, any liability to Mr Sieg which he may have incurred would have arisen not because J of the loss of or damage to the vehicle and tools, as such, but because of his

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A breach of contract with Mr Sieg to, as it were, insure the vehicle and tools on his behalf. I fail to see how a mere agreement between an insured and a third party to insure the interest of the latter would impose an obligation on the insurer to compensate for a loss, not to the insured, but to the third party.

B To the extent that I may be entitled to take into account the policy of insurance, it will be noted that under the motor section 6/6 it is provided under 'Specific exceptions' that:

'2. The company shall not be liable for any claim arising from contractual liability, unless such liability would have attached to the insured notwithstanding such contractual agreement.'

C It seems to me that, even if an insurable interest could have been created by agreement between the plaintiff and a third party, this specific exception would have excluded liability on the part of the defendant, based on such agreement.

D Of course, it may be possible for an insurer and an insured to agree that a policy of insurance will confer a benefit on a third party. That was the basis suggested by De Villiers J in *Steyn's* case *supra* at 11I-12A as being the basis upon which some cases can be resolved, for example, where parents conclude a policy of insurance for the benefit of E a child. As appears from *Gordon and Getz (op cit* at 98), it has been argued that *Phillips'* case *supra* could have been decided on this basis. Clearly, however, the conferring of a benefit on a third party requires a disclosure by the insured to the insurer that it is the third party who is to benefit, and an agreement between the insured and the insurer that such third party will benefit. That did not occur in this case which is why I F questioned, at the outset of this judgment, whether the defendant was wise to have abandoned the defence of non-disclosure.

The Court will always lean in favour of finding the existence of an insurable interest, having regard to the fact that the insured has paid premiums and that the objection may

be a technical one. See *Littlejohn's* case *supra* at 383; *Phillips'* case *supra* at 659F-G; G *Steyn's* case *supra* at 10E-H. In this case, however, whether one approaches the matter strictly on the basis of an insurable interest, as I have been enjoined to do, or on the basis of proof of loss which, in my opinion, cannot be divorced from the concept of insurable interest, I am of the opinion that the plaintiff cannot succeed. Although the H plaintiff had an interest in ensuring that Mr Sieg continued to have transport and tools to enable him to service the plaintiff's customers and may have suffered a loss if Mr Sieg was unable to service his customers, that is not the loss insured against. He cannot show that because of the loss of the vehicle and tools he stands to lose something of 'an appreciable I commercial value'. What in fact the plaintiff did was to endeavour to insure the vehicle and tools on behalf of, and for the benefit of, Mr Sieg but, because that was not the basis on which the policy was entered into, he did not succeed in doing so.

Although I was invited by the defendant's counsel to grant absolution from the instance, it J is clear that a finding of an absence of an insurable

1996 (3) SA p445

MCCALL J

A interest is a complete defence to the plaintiff's case. The appropriate judgment is, accordingly, one of judgment in favour of the defendant with costs.

I order that there will be judgment in favour of the defendant with costs.

B Plaintiff's Attorneys: *Pampallis & Randles*. Defendant's Attorneys: *Deneys Reitz*.

MUTUAL AND FEDERAL INSURANCE CO LTD v OUDTSHOORN MUNICIPALITY
[1985] 1 All SA 324 (A)

Division:	Appellate division
Judgment Date:	16 November 1984
Case No:	not recorded
Before:	Miller JA, Joubert JA, Cillié JA, Viljoen JA and Galgut AJA
Parallel Citation:	1985 (1) SA 419 (A)

• Keywords • Cases referred to • Judgment •

Keywords

Cases referred to:

Bodemer, NO v American Insurance Co 1961 (2) SA 662 (AD) - Referred to

Carter v Boehm (1766) 3 Burr 1905 (KB) - Referred to

Colonial Industries Ltd v Provincial Insurance Co Ltd 1922 AD 33 - Not followed

Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1984] 1 LI LR 476 (CA) - Approved

Elton v Larkins 5 Car & P 385 - Applied

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122 (HL) - Approved

Fine v The General Accident Fire and Life Assurance Corporation Ltd 1915 AD 213 - Applied

Fransba Vervoer (Edms) Bpk v Incorporated General Insurances Ltd 1976 (4) SA 970 (W) - Referred to

Iscor Pension Fund v Marine and Trade Insurance Co Ltd 1961 (1) SA 178 (T) - Approved

Joel v Law Union and Crown Insurance Company [1908] 2 KB 863 (KB) - Considered

John Dwyre Holdings Ltd v Phoenix Assurance Co Ltd 1974 (4) SA 231 (W) - Referred to

Lambert v Co-operative Insurance Society Ltd [1975] 2 LLR 485 - Considered

Noakes v Oudtshoorn Municipality 1980 (1) SA 626 (C) - Applied

Pearl Assurance Co Ltd v Union Government 1934 AD 560 - Referred to

Pereira v Marine and Trade Insurance Co Ltd 1975 (4) SA 745 (AD) - Not approved

Roome NO v Southern Life Association of Africa 1959 (3) SA 638 (D) - Approved

Tuckers Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (AD) - Referred to

Weber v Santam Versekeringsmaatskappy Bpk 1983 (1) SA 381 (AD) - Referred to

Woolfall and Rimmer Ltd v Moyle and Another [1941] 3 All ER 304 (CA) - Referred to

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Judgment

JOUBERT, JA: The contract of insurance was unknown to Roman law. That is probably the reason why Voet in his *Commentarius ad Pandectas* 22.2.3 contented himself, *inter alia*, with the following few observations concerning the contract of marine insurance:

> ". . . quo id agitur, ut merces & alia assecurata navigent periculo non domini, sed assecuratoris, pro periculo suscepto pretium recipientis.

> De hoc vero assecurationis contractu universa huc transcribere, quae circa modum assecurationis, personas assecurare valentes aut prohibitas, res assecurandas vel assecurationem respuentes, rerum assecurandarum aestimationem, conservationem, impensas, cessionem seu abdicationem, periculum, praemium assecu

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> rationis seu periculi pretium ac solutionem ejus, observanda veniant, consultum non censui.
>
> Videri ista possunt enarrata prolixe satis & accurate variarum regionum legibus superiori & hoc seculo conditis; ac in plerisque consensum, in pauds, iisque levioribus tantum, dissensum continentibus, praecipue, *edicto nautico Philippi Hisp. Regis anni 1563 cap. ult. & edicto peculiari de assecurationibus anni 1570, lege municipali Medioburgensium anni 1600, Roterodamensium anni 1604, Amstelodamensium anni 1612* quae omnia simul juncta *in vol. 1 placitor. Holl. à pag. 820 ad pag. 876* ac tandem novissime, pariterque plenissime, edicto Ludo vici XIV Galliarum Regis, anni 1681 in libello cui titulus, *ordonnance de Louis XIV touchant la marine, livr 3 tit 6.* Quibus addendus Petri de Santerna Lusitani Benevenuti Stracchae *de assecurationibus liber.*"

(*Horwood's* translation:

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> "The effect of this contract is that the merchandise and other articles insured (*assecurata*) travel by sea at the risk not of their owner but of the insurer (*assecurator*) who receives a price for the risk which he undertakes.
>
> I have decided not to deal with the incidents of this contract of insurance under which would fall to be discussed the formation of the contract, the persons who can or cannot insure, the property which is or is not insurable, its valuation and preservation, the expenses incurred upon it, the cession or abandonment of such property, the risk, the premium for the insurance (that is the price of the risk) and the payment of such premium.
>
> All these matters can be seen and are dealt with in sufficient detail and accuracy in the statutes of several countries passed in this and the last century: these laws for the most part coincide and differ only in few points and those unimportant ones. See the Maritime Edict of Philip, King of Spain, 1563, last chapter; the special Edict on Insurance of the year 1570; the Municipal Laws of Middelburg. 1600; of Rotterdam, 1604; and of Amsterdam, 1612 (Placita Hollandiae vol 1 pp. 820-876); and latest and most detailed of all the Edict of Louis XIV, King of France, of 1681, in the book called Ordonnance of Louis XIV *touchant la marine*, Book 3, title 6. See also the book *De Assecurationibus* of Petrus de Santerna Lusitanus and Benevenutus Straccha."

Voet's reference to the sources of the law of insurance in the Netherlands is by no means exhaustive. It is of great significance that he referred not only to the legislation of the Netherlands and France on marine insurance but also to the treaties of *Petrus de Santerna* and *Benevenutus Straccha* on the law of insurance as I shall presently demonstrate.

Marine insurance, the oldest form of insurance in its modern sense, traces its origin back to the medieval Law Merchant (*Lex Mercatoria*) as developed in the great trading centres and seaports of Italy and South Western Europe. Recent researches reveal that policies of marine insurance were in use in Italy towards the end of the 14th century, as appears from the instructive article "Die ontstaan van versekering gerig op winsbejag" by Schalk van der Merwe in 1977 *TSAR* at pp. 227-234. Two outstanding treatises on the law of insurance were published during the 16th century. The one is Petrus de Santerna's pioneering treatise *De Assecurationibus et Sponsionibus* (1554) which is also to be found in *Tractatus Universi Juris* (also known as *Tractatus Tractatuum*), 1584, *tomus* 6 *pars* 1 *folio* 348 to 357. The other one is Benevenutus Straccha's famous treatise *De Assecurationibus* which has been included in *Tractatus Universi Juris, tomus* 6 *pars* 1 *folio* 357 to 377. These two treatises soon acquired international fame and authority throughout Western Europe. It is therefore not surprising that *Voet* 22.2.3 referred to these two treatises as sources of the Roman-Dutch law of insurance. Fortunately the library of this Court has a complete set of *Tractatus Universi Juris*, 1584, 24 volumes.

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Mention should also be made of the work of the 17th century Italian jurist Roccus, *Tractatus de navibus et naulo item de Assecurationibus notabilia*, which was translated into Dutch with notes and annotations by Feitema in 1737 as *Merkwaardige Aanmerkingen vervat in twee Tractaten over Scheepen en Vrachtgoederen alsmede over Assurantie ofte Verzekeringen.* The library of this Court has a copy of this translation. During the 17th century the Italian and Spanish jurists adopted the principles of marine

insurance to insurance of transport by land (Holdsworth, *A History of English Law*, vol 8, 2nd ed., p. 276 footnote 7) and even to life insurance (*assecuratio vitae hominis*). See *Benevenutus Straccha, op. cit., folio* 360, *nr.* 46, Ludovicus Molina, *Disputationes de Contractibus* (1601) *disputatio* 507 *nr.* 7 and Sigmundus Scaccia, *Tractatus de Commerciis et Cambio*, (1669), § 1 *quaestio* 7 *pars* 2 *nr.* 19 *et* § 3 *Glossa* 3 *nr.* 52. According to the French jurist Antonius Faber (1557-1624), *Codex Fabrianus, lib. 5 tit. 7 def.* 3, a dowry (*dos*) could be insured. The jurists, however, experienced difficulty in finding for the contract of insurance an appropriate niche within the framework of the civil law's traditional classification of contracts as a *numerus clausus*. Attempts were made to regard it as *emptio et venditio, locatio et conductio, contractus innominatus* or *contractus fideiussionis*. See *Sigmundus Scaccia, op. cit.*, § 1 *quaestio* 1 *nr* 129. The generally accepted view was that it was a species of the contract of sale in terms of which the insurer was the seller, the insured the purchaser, the risk or event insured against the *merx* and the premium the *pretium*. According to Roman-Dutch law, however, the contract of insurance is a contract nominate. (Van der Keessel, *Theses Selectae* 711 and *Praelectiones ad Gr.* 3.24.1, 2.)

The reception of the Italian Law Merchant, including the law of insurance, occurred throughout Western Europe and England during the 16th century. (*Holdsworth, op. cit.*, vol 8, 2nd ed. p. 273-285). In the Netherlands this reception more or less coincided with the reception of Roman law. The effect of this reception was according to Wessels, *History of the Roman-Dutch Law*, 1908, at p. 228-229 as follows:

> "There was no uniform law of insurance, and each maritime nation or town made its own regulations. Spain, Portugal and Holland and the Hanseatic towns were the first to elaborate a system of marine insurance, and it seems to be universally acknowledged that Holland contributed the most important share in the development of that branch of law throughout Europe."

How was the Roman-Dutch law of insurance developed? In the last chapter of his *Ordonnantie, Statuyt ende Eeuwich Edict op 't faict van der Zeevaert*, dated 30 October 1563, King Phillip II enacted for general application in the Netherlands his *Ordonnantie op de Verseeckeringe oft Assurantie* (I G. P.B. 821-829). This was followed by his enactment on 20 January 1570 of his *Ordonnantie, Statuyt ende Policie op 't feyt van de Contracten van de Assurantien ende Verseeckeringen* (1 G.P.B. 828-838) for general application in the Netherlands.

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Both ordinances dealt with marine insurance. Art. 32 of the Ordinance of 20 January 1570 contained the important prohibition against life insurance. A similar prohibition against life insurance was contained in article 10 of Louis XIV 's Ordinance of 1681. In addition local laws (*keuren*) concerning marine insurance were made for Amsterdam, Rotterdam, Dordrecht and Middelburg. They are enumerated in Van der Keessel's *Praelectiones ad Gr.* 3.24. *Wessels, op. cit.*, p 229 comments on them as follows:

> "These laws were constantly amended and amplified during the seventeenth and eighteenth centuries, and if we examine them we find that they contain all the fundamental principles of maritime insurance that are in vogue to-day in all the great commercial countries of Europe."

An important innovation during the 17th century was the establishment of insurance tribunals (*Kamer van Assurantie*) in Amsterdam, Rotterdam, Dordrecht and Middelburg as courts of first instance with jurisdiction over matters concerning insurance. The members of these tribunals were experts in insurance matters. There was an appeal from their decisions to the Hof van Schout en Schepenen or directly to the Hof van Holland (or the Hof van Zeeland in the case of Middelburg). An appeal lay from the Hof van Holland, or the Hof van Zeeland, to the Hooge Raad. Decisions of the Hooge Raad on matters of insurance are to be found in *Observationes Tumultuariae* (4 volumes) and *Observationes Tumultuariae Novae* (3 volumes).

The opinions of the Dutch jurists on insurance matters are included in the *Hollandsche Consultatien* and in Van den Berg's *Nederlands Advysboek*. I quote the following comprehensive survey of the Roman-Dutch authorities in *The South African Maritime Law and Marine Insurance: Selected Topics*, (1983) by Dillon and Van Niekerk (at p. 108-109);

> "The Roman-Dutch authorities of the sixteenth, seventeenth and eighteenth centuries dealt extensively with insurance law. Indeed, at the end of the eighteenth century the insurance contract was, after contracts of sale and lease, the most prevalent type of contract. Because of the needs of their time, the Roman-Dutch jurists concerned themselves almost exclusively with marine insurance. The more well-known Dutch writers of this period, most of whom our Courts have in the past consulted on matters relating to marine insurance, were

> *Grotius, Van Leeuwen, Voet, Van Bynkershoek, Van der Keessel* and *Van der Linden*. Others which may be mentioned are *Verwer, Lybrechts, Schorer* and *Barels*. The legislative measures as well as the Dutch theses dating from this period may still prove to be of valuable assistance in the study of the Roman-Dutch law of marine insurance.
>
> It has been pointed out, furthermore, that our common law is not what is usually regarded, in the strict sense, as Roman-Dutch law (that is the law of the province of Holland or even of the Netherlands) as it had developed at the end of the eighteenth century, but rather a European *ius commune* of this period. This view, no doubt particularly true of the mercantile law in general, is confirmed by the fact that the Dutch jurists, when dealing with insurance law, made copious reference to the works of authors from other European countries.

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> There would in principle, therefore, not appear to be any obstacle in the way of consulting, as our Courts have done in the past, the works of jurists such as *Pothier, Emerigon, Straccha, Roccus, Santerna* and others on the law of marine insurance."

Mention should also be made of the three works by Kersteman (1728-1793) viz. *Academie der Jonge Practizyns, of Beredeneerde Consideratien over de Theorie ende Practycq in Zaaken van Rechtspleeging* (1765), 18de hoofdeel, *Hollandsch Rechtsgeleert Woordenboek, s.v.* Assurantie, and *Aanhangsel tot het Hollandsch Rechtsgeleerd Woordenboek*, vol. 1, *s.v.* Assurantie. According to U. Huber (1636-1694), *Praelectiones ad* D.1.3.14 and *H.R.* 3.21.76 the province of Friesland, owing to the small volume of its maritime trade, did not develop its own law of marine insurance but whenever it became necessary recourse was had to the law as applied in the province of Holland and West-Friesland although the law of the latter province was not *per se* binding on Friesland.

The Hooge Raad through its decisions and the Dutch jurists by means of their works collectively succeeded in moulding the principles of marine insurance as an integral part of Roman-Dutch law. By analogy with marine insurance, other forms of indemnity insurance were recognised by the Dutch jurists. Van der Keessel, *Theses Selectae* 716 (translated by *Lorenz*) describes the extension of the law of marine insurance to other forms of insurance thus:

> "Although originally insurances related chiefly to things exposed to the dangers of navigation and transport; yet they have since been extended to buildings also and other goods, which are liable to destruction by fire; and indeed to everything wherein anyone has an interest, provided it can be accurately defined in the contract."

See also his *Praelectiones ad Gr.* 3.24.4. The principles of the Roman-Dutch law of marine insurance are indeed capable of application, with adaptation if necessary, to other forms of insurance to meet the requirements of our modern society. It is a characteristic of Roman-Dutch law as

> "a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society".

(*dictum* from the Privy Council judgment in *Pearl Assurance Co.* v. *Union Government* reported in 1934 AD 560 at p 563).

The General Law Amendment Act 8 of 1879 (C) introduced the English law, (as it then existed) concerning fire, life and marine insurance into the Cape of Good Hope Colony. The General Law Amendment Ordinance 5 of 1902 (O) incorporated "the law administered by the Supreme Court of the Cape of Good Hope". This in effect introduced the English law (as it existed in 1879) concerning fire, life and marine insurance into the Orange Free State Colony. Both Act 8 of 1879 (C) and Ordinance 5 of 1902 (O) were repealed by section 1 of the Pre-Union Statute Revision Act 43 of 1977 with the result that the English law (as it existed in 1879) concerning fire, life and marine insurance is no longer binding authority in the Cape Province or in the Orange Free State Province.

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The Insurance Act 27 of 1943 is largely a regulatory measure containing a few substantive provisions which directly or indirectly affect the law of insurance. Hence, the South African law of insurance is governed mainly by Roman-Dutch law as our common law.

I have already stated that the reception of the Italian Law Merchant, including the law of marine

insurance, also occurred in England during the 16th century. At the end of the 16th century England was beginning to take her place among the great commercial countries of Europe.

The importance of marine insurance was increased by the growth of England's foreign trade in the latter part of the 16th century. A statute of 1601 (43 Elizabeth 1 c. 12) established in London a special Court for the hearing of actions upon marine policies. This special Court, however, suffered from two grave defects. In the first place its jurisdiction was confined to insurance policies registered in the London Office of Insurances and did not extend to insurances made in other seaport towns. Secondly, it did not have exclusive jurisdiction in insurance cases. It waged a losing jurisdictional battle against the common law courts. Moreover, the London Office of Insurances disappeared in the 17th century. During the 17th century the law of marine insurance was in a very state. Consult *Holdsworth, op. cit.*, vol. 8 (2nd ed.) p. 289-293.

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Nicolas Magens, a German merchant resident in London, wrote in German a work on marine insurance which was published in Hamburg in 1753. His own English translation thereof was published in London in 1755 under the title, *An Essay on Insurance, explaining the Nature of the various kinds of Insurances practised by the different Commercial States of Europe and showing their Consistency or Inconsistency with Equity and the Public Good.* In 1756 Lord Mansfield (1705-1793) was appointed Chief Justice of the Court of King's Bench and he continued in office until his resignation in 1788. His distinguished tenure of office was very important for the development of the common law. His permanent stamp upon Anglo-American law lies in commercial law. He adopted the principles of the Italian Law Merchant, including the law of marine insurance, into the common law and thus rendered the latter suitable for the great commercial expansion that was taking place. He succeeded in making the international law of marine insurance an integral part of the common law. He was well equipped for this task since he was learned in the civil law and in foreign systems of law. (Holdsworth, *Sources and Literature of English Law*, 1928, p 218). That explains why he could often in his judgments refer to European works on marine insurance (*Dillon and Van Niekerk, op. cit.*, p 109 footnote 45). It is obvious that both Roman-Dutch and English law of marine insurance stem from the same original sources. The reported decisions of the courts of law and equity became the main source of the English law of marine insurance.

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In 1774 the Life Assurance Act (14 Geo. 3 c. 48) was passed. For purposes of this judgment it is not necessary to consider its provisions. Suffice it to say that towards the end of the 18th century marine insurance was still by far the most important form of insurance while life and fire insurance were also in vogue. In 1787 James Allan Park published his work on insurance, entitled *A System of the Law of Marine Insurance with three chapters on Bottomry, on Insurances on Lives and on Insurances against Fire.* It was the first book written by an English lawyer on the law of insurance. The next important step was when the Marine Insurance Act 1906 (6 Edw. 7 c. 41) was passed. It codified the existing principles of marine insurance as developed by the courts of law. Despite the fact that the courts of law apply principles of marine insurance to non-marine insurance there still remain important differences between them as can be ascertained from Raoul Colinvaux, *The Law of Insurance*, 4th ed at p 13-14.

Section 17 of the English Marine Insurance Act 1906 provides:

> "A contract of marine insurance is a contract based upon the *utmost good faith*, and, if the *utmost good faith* be not observed by either party, the contract may be avoided by the other party."

(My underlining.)

The phrase "utmost good faith" is also known by its Latin equivalent as *uberrima fides.* According to section 17 a contract of marine insurance is a contract of utmost good faith or a contract *uberrimae fidei.* The origin of the phrase *uberrima fides* is doubtful but it would seem that it made its appearance in English case law in 1850. See A.N. Oelofse's unpublished doctoral thesis *Die Uberrima Fides - Leerstuk in die Versekeringsreg*, University of Stellenbosch (1983) at p 2 and the authorities cited in footnote 5.

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Without investigating our own law on this aspect our courts have under influence of English law attached

to a contract of insurance the label *uberrimae fidei* e.g. *Fine* v. *The General Accident Fire & Life Assurance Corporation Ltd.*, 1915 AD 213 at p 218, *Colonial Industries Ltd.* v. *Provincial Insurance Co. Ltd.*, 1922 AD 33 at p 40, *Bodemer N.O.* v. *American Insurance Co.*, 1961 (2) SA 662 (A) at p 668; *Pereira* v. *Marine and Trade Insurance Co. Ltd.*, 1975(4) SA 745 (A) at p 755 F. The Romans were familiar with *bona fides* and *mala fides* but they never knew *uberrima fides* as another category of good faith. I have been unable to find any Roman-Dutch authority in support of the proposition that a contract of marine insurance is a contract *uberrimae fidei.* On the contrary, it is indisputably a contract *bonae fidei.* Art 22 of the Ordinance of 20 January 1570 explicitly enacts:

> "Ende alsoo dese Contracten van verseeckeringen oft asseurantien, gehouden ende geestimeert worden, voor *Contracten van goeder trouwen*, daar inne geen fraude oft bedroch en behoorde te intervenieren oft geschieden ----------"

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(My underlining).

See also *Ludovicus Molina, op. cit., disputatio* 507 *nr.* 3, *Perezius* (1583-1672) *ad Cod.* 11.5.22, *Van der Schelling's* (1691-1751) note 2 on Van Zurck's *Codex Batavus s.v.* assurantie § 23, Van der Keessel (1738-1816) *Theses Selectae* 712 and *Praelectiones ad Gr.* 3.24.1 and 20, *Van der Linden* (1756-1835) 4.6.10. There is a duty on both insured and insurer to disclose to each other prior to conclusion of the contract of insurance every fact relative and material to the risk (*periculum* or *risicum*) or the assessment of the premium. This duty of disclosure relates to material facts of which the parties had actual knowledge or constructive knowledge prior to conclusion of the contract of insurance. Breach of this duty of disclosure amounts to *mala fides* or fraud, entitling the aggrieved party to avoid the contract of insurance. This duty of disclosure received very extensive treatment in the Roman-Dutch authorities. Consult *Benevenutus Straccha, op. cit., folio* 377, *Glossa* 26 nrs 2,4,5,6; *Sigmundus Scaccia, op. cit.*, § 1 *quaestio* 1 nrs. 132, 156 to 169, § 1 *quaestio* 7 *pars* 2 *ampl.* 10 nrs. 17, 19 to 22; *Roccus, op. cit.*, arts. 51, 78, 84; *Ludovicus Molina, op. cit., disputatio* 507 nrs. 3 to 6; Perezius *ad Cod.* 11.5.23; Art. 11 of the Ordinance of 20 January 1570; *Van Zurck, op. cit., nr* 9; *Schorer ad Gr.* 3.24.6 nr 15; Van der Keessel, *Theses Selectae* 722 to 724 and *Praelectiones ad Gr.* 3.24.5 and 20; *Van der Linden* 4.6.4 nr 3; 1 Hollandsche Consultatien *c.* 234; 2 Hollandsche Consultatien *c.* 322; 3 Hollandsche Consultatien *c.* 175; and numerous decisions of the Hooge Raad e.g. 2 *Observationes Tumultuariae* 1357, 1873; 3 *Observationes Tumultuariae* 2647, 4 *Observationes Tumultuariae* 3168, 3287 and 3 *Observationes Tumultuariae Novae* 1248. The duty of disclosure is the correlative of a right of disclosure which is a legal principle of the law of insurance. Wessels, *Law of Contract in S.A.*, 2nd ed., vol. 1 para. 1039 makes the following significant observation concerning the law of insurance:

> "At the same time it must be understood that this part of our law is based upon principles well known to the civil law. It was by extending the principles of the Aedilitian Edict and of the law of *dolus malus* that the European jurists and judges have elaborated the law of marine and other insurances. At the root of the aedilitian *actio redhibitoria* lies the principle that a contract of sale can be avoided if the subject matter contains a latent defect unknown to the

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> purchaser, which would have affected his judgment in buying it had he known of its existence."

The duty of disclosure is imposed *ex lege.* It is not based upon an implied term of the contract of insurance. Nor does it flow from the requirement of *bona fides.* Oelofse, *op. cit.*, at pp 286:

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> "Blykbaar moet die goele trougedagte bloot as 'n verskyningsvorm van die gewone beginsels met betrekking tot bedrog gesien word."

By our law all contracts are *bonae fidei* (*Ludovicus Molina, op. cit. disputatio* 259 nr 4: *namque bona fides in omnibus contractibus esse debet; Wessels, op. cit.*, paras. 1976, 1996; *Tuckers Land and Development Corporation (Pty) Ltd.* v. *Hovis*, 1980 (1) SA 645 (A) at p 652 A). Yet the duty of disclosure is not common to all types of contract. It is restricted to those contracts, such as contracts of insurance, where it is required *ex lege.* Moreover, there is no magic in the expression *uberrima fides.* There are no degrees of good faith. It is entirely inconceivable that there could be a little, more or most (utmost) good faith. The distinction is between good faith or bad faith. There is no room for *uberrima fides* as a third category of

faith in our law. *Oelofse, op. cit.*, at p 2:

> "Streng gesproke kan daar nie grade van goele of kwaaie trou wees nie. Iemand tree òf te goele trou òf te kwaaie trou op."

Compare Spiro, *Uberrima Fides*, in 1961 *T.V.H.R. – H.R. p* 196-202. *Uberrima fides* is not a juristic term with a precise connotation. It cannot be used as a yardstick with a precise legal meaning. ROBERTS A.J. correctly held in *Iscor Pension Fund* v. *Marine and Trade Insurance Co. Ltd.* 1961 (1) SA 178 (T) at p 184 that "the claim that *uberrima fides* is a necessary and inseparable concomitant of insurance is misleading". In my opinion *uberrima fides* is an alien, vague, useless expression without any particular meaning in law. As I have indicated, it cannot be used in our law for the purpose of explaining the juristic basis of the duty to disclose a material fact before the conclusion of a contract of insurance. Our law of insurance has no need for *uberrima fides* and the time has come to jettison it.

Section 18 of the English Marine Insurance Act 1906 provides:

"(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely

(*a*) Any circumstance which diminishes the risk;

(*b*) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

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(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term 'circumstance' includes any communication made to, or information received by, the assured."

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In order to determine the materiality of facts for purposes of disclosure section 18(2) of the English Marine Insurance Act 1906 adopted the prudent or reasonable insurer test which had been established in relation to marine insurance as long ago as 1832 (*Elton* v. *Larkins*, 5 Car. & P. 385). This test had become the dominant test of materiality in English case law by the end of the 19th century. See R.A. Hasson, *The Doctrine of Uberrima Fides in Insurance Law - A Critical Evaluation*, in vol. 32 (1969) *Modern Law Review* p. 615-637. According to this test the criterion is the objective judgment of an hypothetical prudent or reasonable insurer and not the subjective judgment of the insurer in a particular case. This test has been criticised as too harsh on an insured since it takes account only of facts material to the insurer. See the *Journal of Business Law*, March 1984, p 109.

It is not surprising therefore that the prudent or reasonable insured test made its appearance sporadically in the field of non-marine insurance. This test is more favourable to an insured since the standard of judgment is the objective judgment of a prudent or reasonable insured and not the subjective judgment of the insured in a particular case. In its report of 1957 the Law Reform Committee in England recommended that

> "for the purpose of any contract of insurance no fact should be deemed material unless it would be considered material by a reasonable insured".

The Law Commission in its report of 1980, according to Birds *Modern Insurance Law*, (1982) at p 102-103, urged

> "that while the test of materiality remains broadly the same, questions expressly asked being presumed to be material, the proposer should be bound to disclose only those material facts which he knows or ought to know which a reasonable man in his position would disclose, having regard to the nature and extent of the insurance cover which is sought and the circumstances in which it is sought".

See also *Oelofse, op. cit.*, p. 78-79). In *Lambert* v. *Co-operative Insurance Society Ltd.*, (1975) 2 LLR 485 (CA), a case concerning all risks insurance, i.e. non-marine insurance, the Court of Appeal held that the prudent or reasonable insurer test of materiality was applicable as a general rule of insurance law to all forms of insurance. In the light of the recommendations referred to above it is at this stage uncertain what the future holds for the prudent or reasonable insurer test of materiality in England.

Let us now turn to consider the test of materiality in our law. In *Fine* v. *The General Accident, Fire & Life Assurance Corporation Ltd.*, 1915 AD 213 an appeal from the W.L.D. on a fire insurance policy came before this Court. Neither Act 8 of 1879 (C) nor Ordinance 5 of 1902 (O) was applicable.

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As regards the test of materiality and its application, the approach by SOLOMON J.A. (at p 220-221) was as follows:

> "And in *Joel's* case FLETCHER MOULTON L.J., says: 'If a reasonable man would have recognised that it was material to disclose the knowledge in question, it is no excuse that you did not recognise it to be so.' And that after all appears to be the true test, would *a reasonable man* consider that the fact was one material to be known by the insurer, or a fact that in the words of Lord BLACKBURN 'might influence the underwriter's opinion as to the risk he is incurring'. And if that be the test, can there be any doubt that *a reasonable man* would consider the fact, that there had been a cancellation of a previous contract, material, unless at the same time a satisfactory explanation had been given of that fact."

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(My italicising).

Joel v. *Law Union & Crown Insurance Co.*, (1908) 2 K.B. 863 (CA) concerned a life insurance policy. It is significant that SOLOMON J.A. applied the *reasonable man test* without reference to the prudent or reasonable insurer. He did not purport to apply the prudent or reasonable insurer test of the English marine insurance law. In *Colonial Industries Ltd.* v. *Provincial Insurance Co. Ltd.*, 1922 AD 33 this Court heard an appeal from the C.P.D. on two policies of fire insurance. According to the provisions of Act 8 of 1879 (C) the English law (as it existed in 1879) concerning fire insurance was applicable. The approach to the question of materiality by DE VILLIERS J.A. (at p 42) was as follows:

> "The only question that remains is: were the facts material? To this there can be but one answer, if we bear in mind that every fact is material which would affect the minds of prudent and experienced insurers in deciding whether they will accept the contract, or when they accept it, in fixing the amount of premium to be charged. *Tate* v. *Hyslop*, (1885, 15 Q.B.D. at p 368)."

The latter case dealt with marine insurance. DE VILLIERS J.A. applied the prudent or reasonable insurer test of the English marine insurance law. In view of the repeal of Act 8 of 1879 by sec. 1 of Act 43 of 1977 the judgment of DE VILLIERS J.A. on the materiality test is no longer binding on this Court. In *Roome N.O.*v. *Southern Life Association of Africa*, 1959(3) SA 638 (D & CLD) JANSEN J. (at p 641 F) had occasion to apply the reasonable man test to determine materiality. In *Fransba Vervoer (Edms) Bpk.* v. *Incorporated General Insurances Ltd.*, 1976(4) SA 970 (W) MCEWAN J. (at p 978) in effect applied a double test which is a combination of the prudent or reasonable insurer test as well as the prudent or reasonable insured test.

What is the position in Roman-Dutch law? I am unable to find any support in the Roman-Dutch law for either the prudent or reasonable insurer test or the prudent or reasonable insured test.

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It is implicit in the Roman-Dutch authorities and also in accordance with the general principles of our law that the Court applies the *reasonable man test* by deciding upon a consideration of the relevant facts of the particular case whether or not the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums. If the answer is in the affirmative the undisclosed information or facts are material. The Court personifies the hypothetical *diligens paterfamilias* i.e. the reasonable man or the average prudent person. (*Weber* v. *Santam Versekeringsmaatskappy Bpk.*, 1983 (1) SA 381 (A) at p 410H to 411D). The court does not in applying this test judge the issue of materiality from the point of view of a reasonable insurer. Nor is it judged from the point of view of a reasonable insured. The court judges it

objectively from the point of view of the average prudent person or reasonable man. This reasonable man test is fair and just to both insurer and insured inasmuch as it does not give preference to one of them over the other. Both of them are treated on a par.

The facts of the present case are set out fully in the judgment of my Brother MILLER. By a strange quirk of fate the height of the pole with which the light aircraft of Mr Noakes collided on the night of 23 October 1971 was never measured prior to the conclusion of the contract

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of insurance. Nor was it measured prior to the collision. The several complaints in writing by Gillis on behalf of the Oudtshoorn Aero Club to Schultz, the Town Clerk of the respondent municipality, that the proximity of the high-tension overhead line to runway 21 of the Oudtshoorn Aerodrome constituted a hazard to flying aircraft evidently achieved no more than the placing of white markers on the pole for daytime flying. In 1969 the respondent municipality appointed Schultz manager of the Oudtshoorn Aerodrome. Until the end of 1969 the latter was normally used for daytime flying by aircraft. A new development took place when night flying was authorised during or about April 1970. In his letter, dated 14 April 1970, to the airport manager Gillis advised him to inform the Divisional Controller of Civil Aviation that a single electric flare path had been installed on runway 21 only and that "caution should be exercised on the approach for high tension wires". On 8 June 1970 Schultz in his capacity as airport manager duly conveyed by letter the recommendations of Gillis to the Divisional Controller of Civil Aviation. I am satisfied that when the respondent municipality negotiated the insurance policy with the appellant insurer during June 1970 the undisclosed information that the close proximity of the high tension overhead line to the Oudtshoorn Aerodrome constituted a hazard to night flying which necessitated the exercise of caution on approaching the flare path of runway 21 at night was reasonably relative to the risk or the assessment of the premiums.

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Such undisclosed information was therefore material. Our law requires an insured to have actual or constructive knowledge of the material information prior to the conclusion of the contract of insurance. (*de Groot* 3.24.5, *Van der Linden* 4.6.4 nr 3). Schultz in his capacity as chief executive and administrative officer (Town Clerk) of the respondent municipality at all relevant times prior to the conclusion of the contract of insurance had actual knowledge of the undisclosed information. It follows that the Court *a quo* should have upheld the appellant's defence of non-disclosure of material facts. The appeal succeeds. I agree with the orders proposed by my Brother MILLER.

CILLIÉ JA, VILJOEN JA and GALGUT AJA concurred.

MILLER, JA: This litigation stems from an accident which occurred at about 7.45 pm on 23 October 1971, when a Piper Cherokee Aircraft coming in to land on a runway at the aerodrome at Oudtshoorn, crashed to the ground as a result of colliding, while still in descent, with the top of a pole carrying electric power lines. The pilot was killed, certain passengers injured and the aircraft virtually reduced to a wreck. At that time the aerodrome was owned by the respondent ("the Municipality") and controlled by it under licence issued in terms of air navigation regulations made under authority of the Air Navigation Act, No 74 of 1962. The pole carrying the power lines had been erected by the Municipality in 1964, in a street immediately outside the boundary of the aerodrome. The owner of the aircraft, Mr D Noakes, sued the Municipality in the Cape Provincial Division of the Supreme Court for payment of damages suffered by reason of the

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destruction of the aircraft. The gist of the cause of action was that the Municipality, in breach of its duty to take proper care for the safety of aircraft coming in to land at the aerodrome at night, had negligently erected, and continued to retain, the relevant pole "foul of the approach surface" of the runway and had failed to provide such pole with adequate lighting. The Municipality unsuccessfully resisted the claim, the Court finding that causal negligence on the part of the Municipality was established. The plaintiff was awarded damages in the sum of R13 850. (See *Noakes* v *Oudtshoorn Municipality* 1980(1) SA 626 (C).)

At all relevant times the Municipality held a public liability insurance policy issued by a company known as

"Mutual Brand". It was common cause in the Court *a quo* and in this Court that the appellant, having taken over certain obligations of "Mutual Brand", was the company responsible for payment of any moneys that might be due to the Municipality in terms of the indemnity given by the policy. The Municipality accordingly sued the appellant in the Witwatersrand Local Division of the Supreme Court. It claimed not only payment of the sum of R13 850 which it was by law required to pay to Noakes, but also an order declaring that the policy was valid and in force on 23 October 1971 and that the appellant was obliged to indemnify the Municipality in terms of the policy in respect of all sums for which it, the Municipality, was legally liable as a result of the accident in question, up to a maximum total of R200 000.

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The declaratory order was no doubt sought in anticipation of claims against the Municipality by others who might have suffered loss as a result of the crash on 23 October. The matter came before MCEWAN, J, who, in a full, detailed judgment in which the several problems that arose were carefully discussed, granted the orders sought by the Municipality. The appeal is against the whole of the orders made.

It is not disputed that the terms of the policy of insurance, which was first issued in August 1970 and renewed in July 1971, are sufficiently wide to cover claims of the nature of those with which this case is concerned. Nor has the question of the Municipality's legal liability on the ground of its negligence to compensate those who suffered damage in consequence of the crash, been in issue in this case. The appellant's answer to the claims made against it was that it was entitled to, and did, repudiate liability to the insured because of the latter's failure to disclose to the insurer, prior to the issue of the policy or prior to renewal thereof, certain material facts. In the alternative, the appellant pleaded (I summarize) that condition 2 (*a*) of the policy expressly provided that the insured would at all times take reasonable precautions to prevent accidents and to ensure compliance with all statutory requirements and regulations. It was alleged that such condition was a condition precedent to liability under the policy, that the Municipality had not fulfilled the condition in that it had been negligent and had not exercised reasonable care to ensure compliance with all statutory requirements in respect of the aerodrome and, therefore, that it was not entitled to recover on the policy.

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This alternative defence was apparently argued in the Court *a quo*, which rejected it. MCEWAN, J, gave cogent reasons for such rejection, in the course of which he referred to and relied upon, *inter alia*, *Woodfall and Rimmer Ltd* v *Moyle and Another* (1941) 3 All E R 304 and *John Dwyer Holdings Ltd* v *Phoenix Assurance Co* 1974(4) SA 231 (W). In both of those cases there was discussed the proper approach of the Courts to a condition similar to condition 2(a), which appeared in a policy the specific object of which was to indemnify the insured in respect of the consequences of negligence on his part. (See, in particular, in *Woodfall's* case, the observations of Lord Greene, M R, at p 307 H – 308 A and at p 309 G – p 310 C; also *per* GODDARD, LJ, at p 311 C - E.) On appeal to this Court, Mr *Browde*, for the appellant, although he did not expressly abandon the defence founded upon condition 2(*a*), informed us that he would not advance any argument in support of it, and, indeed, he did not. I think that in the circumstances of this case his decision not to persevere in the alternative defence was correctly and wisely made.

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The sole issue before us, then, is whether the Court *a quo* ought to have found that the Municipality's claims failed because of fatal non-disclosure of material facts, as Mr *Browde* contended, or whether, as Mr *Burger* for the Municipality contended, the admitted non-disclosure related to matter which was not material and therefore did not serve to vitiate the claims on the policy. Unfortunately, the issue is very much more easily stated than resolved.

The defence founded upon alleged non-disclosure of material facts was formulated in the plea, as amended, in these terms:

> "10. When applying for the said policy of insurance, the Plaintiff was under a duty to disclose to the Defendant all facts material to the risk to be undertaken by the Defendant. 11.
>
> 11. (*a*) In breach of its aforesaid duty, the Plaintiff failed to disclose to the Defendant certain

facts, documents and their contents, which facts, documents and their contents were material to the risk to be undertaken by the Defendant.

(*b*) The facts which were material to the risk were:

(i) That the electric pole on the approach to runway 21 was of a height (having regard to its position in the approach area) which breached the Air Navigation Regulations:

(ii) That the said pole had no warning light as prescribed by the Air Navigation Regulations;

(iii) That the Plaintiff had from time to time received complaints about and was involved in a debate concerning the effect of the said pole on landing aircraft;

(iv) That the Plaintiff had from time to time been warned that the said pole constituted a danger to aircraft particularly at night and/or was of a height which in the circumstances breached the Air Navigation Regulations:

(v) That the said pole was a hazard to aircraft.

(*c*) The said complaints, debate and warnings were contained in one or more or all of the documents now contained in

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the bundle which has been agreed upon between the parties. In relation to such documents the Defendant contends that they and their contents should have been disclosed individually, alternatively in their entirety, and that the failure to disclose them either individually or in their entirety was material.

12. In the circumstances the Defendant is entitled to avoid the said policy as it hereby does."

It is necessary, I think, briefly to sketch the history of the aerodrome in order to provide some background to the correspondence and the allegations of non-disclosure. The Oudtshoorn aerodrome was for several years under the control of the military authorities and almost exclusively used for military purposes, more especially during World War II when it was the home of No 45 Air School. The Municipality took over its control in 1948 and it was thereafter, under proper licence, in use for both civil and military aviation. In the years following the Municipality's assumption of control a daily passenger service was operated from the aerodrome for which purpose several different types of aircraft were used.

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At one stage, South African Airways operated a service to and from the aerodrome in association with a concern known as Cape Air. It appears from the evidence of Mr Schultz, who entered the employ of the Municipality in 1948, became Town Clerk in 1956 and still occupied that position at the time of the trial, that these services were regularly operated almost throughout the 1950's and that no complaints were received by the Municipality regarding the condition of the aerodrome or its safety. Indeed, the Municipality was concerned to maintain a very high standard so that the aerodrome might be upgraded to the status of a regional airport. In that regard there was competition with the nearby Municipality of George, which apparently also aspired to regional status for its airport. In the end George won, but it is implicit in Mr Schultz's evidence that it was not for want of proper maintenance and improvement of the Oudtshoorn aerodrome that George was preferred by the authorities. It was also explained by Mr Schultz that throughout the years the Municipality enjoyed an excellent relationship with and gave full co-operation to the civil aviation authorities.

As I have mentioned, the pole carrying high tension electricity wires was erected in 1964. Its erection was preceded by correspondence with the Government's department of transport, which, by letter dated 24 April 1964, and signed by one Krige, approved the proposed work according to the plan which had been furnished by the Municipality. In terms of the relevant regulations and having regard to the gradient of the approach surface to the runway, the pole ought not to have exceeded 25 feet in height; in fact (and this was common cause) it was a fraction over 30 feet high and therefore was not in accordance with the

requirements. The evidence was to the effect that neither the Town Council nor the Town Clerk knew of this irregularity. Schultz said that he was at the relevant time aware of the restriction in respect of the height of the pole but was under the firm belief that it was in fact 25 feet high. I shall return to this aspect of the matter in due

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course. The pole was also the subject of complaints or warnings conveyed to the Municipality through the Town Clerk by one Gillis, who initially wrote on behalf of the "Flying Club" of Oudtshoorn and later on behalf of the "Oudtshoorn Aero Club" ("Aero Club"). On 29 April 1968 the Aero Club, through Gillis, requested the Town Clerk in writing to arrange a meeting for the purpose of discussion, *inter alia*, "the removal of the high tension wires on the approaches to the main runway". The responsible standing committee of the Town Council had previously met by request on 16 May 1967, to discuss what was described in the notice as

> "the extremely dangerous position of certain high tension overhead line poles situated in Park Road at the approach to the main runway of the local aerodrome".

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It was also said in the notice of such meeting that the poles constituted "a hazard" to pilots. In consequence of this, authority was granted for an investigation of "the most effective means" of marking the poles so that the "hazard" be clearly discernible to pilots. Approval was subsequently granted on 17 July 1967 for the purchase of 6 white markers which, it would appear, the Council considered would serve to remove the "hazard". White markers were duly installed.

On 22 May 1968 Gillis, again on behalf of the Aero Club, wrote to the Civil Division of the transport department in these terms:-

> "About two to three years ago you approved the erection of 30 feet high tension wires directly across the glide path of the Oudtshoorn Airport. As a matter of interest, I should very much like to know why you do not consider this a danger to aircraft. At the moment the Oudtshoorn Flying Club is trying to get the Council to remove these wires, but they maintain that once your department has approved of the erection, it must obviously be no hazard to aircraft.
>
> Furthermore, it would be appreciated if, without prejudice, you would advise us if an aircraft flew into these wires - they are not clearly visible from the air - who would be to blame."

No reply to the letter of 22 May was received by the Aero Club until 22 October 1968, when the Secretary for Transport informed the Aero Club that to the best of his department's knowledge,

> "no complaints regarding the power line had been made by S A Airways whose aircraft regularly used the aerodrome or by any other itinerant pilot/operator",

but that, nevertheless, an official of the Department would visit Oudtshoorn "in the near future" for the purpose of inspecting the aerodrome and, if necessary, to carry out "flight tests" and to "discuss the whole situation with all concerned". Arrangements were in due course made between the Municipality and the Department for the arrival of the latter's representative at the Oudtshoorn aerodrome at 2 pm on 5 November 1968. The official did not arrive at the appointed time, nor at any time thereafter, and for reasons which need not be gone into neither the proposed inspection nor the flight tests took place. In a letter to the Municipality dated 10 December 1968, however, the Secretary for Transport explained that the main purpose of the aborted visit of its representative had been to establish whether the poles and power line really constituted "'n hindernis". It was suggested in this letter that the Municipality's Engineers' Department should determine the elevation angles of the poles within the approach area to the runway. It was also suggested that the poles be clearly marked. The Secretary for Transport also mentioned in his letter to the Aero Club that if the power line were "found to be an obstruction" certain steps would need to be taken, one of which was "conspicuous marking" of the power line.

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As I have mentioned, six white markers had already been installed.

In June 1969 the Municipality was asked by the Department of Transport to appoint an aerodrome manager. Mr Schultz was duly appointed and thenceforth discharged his duties as such in addition to his duties as Town Clerk. There appears to have been a distinct lull during 1969 in regard to complaints or discussions or warnings relative to the alleged "hazard" constituted by the poles and overhead wires at the aerodrome. After the aborted visit of an official of the Department and the subsequent correspondence thereanent which ended in December 1968, nothing deserving of mention appears to have happened or been written or debated in connection with the condition of the aerodrome until February 1970, when the Aero Club informed the aerodrome manager in writing that it proposed to instal an electric flare path on the main runway.

On 14 April 1970 the Aero Club addressed a letter to the aerodrome manager in these terms:-

> "As you are aware the runway lights have now been handed over to the Municipality of Oudtshoorn.
>
> We would therefore advise you to kindly send the Divisional Controller of Civil Aviation, Private Bag 193, Pretoria, a registered letter containing the following:-
>
> 1. A single electric flare path has now been installed on runway 21 only on the Oudtshoorn Airport.
> 2. Caution should be exercised on the approach for high tension wires.
> 3. The windsock has been illuminated at night and works in conjunction with the electric flare path.
> 4. Any member of the Oudtshoorn Aero Club can be contacted to switch on the lights.
> 5. The lights will only be switched on upon request.
> 6. The Municipality should give a telephone number in addition to 4 above, where pilots can contact some suitable person to switch on the lights.
> 7. Pilots should be warned through the Division of Civil Aviation that only runway 21 is illuminated."

By letter dated 8 June 1970 the aerodrome manager faithfully conveyed the terms of the Aero Club's letter to the Divisional Controller of Civil Aviation, who, in response thereto, thanked and congratulated the Municipality and the Aero Club on their initiative and interest regarding the aerodrome and assured the aerodrome manager that "details of the new facility will be published in the next notice to Airmen - for general information". On 30 July 1970 the Department, in accordance with its undertaking to the aerodrome manager, issued a "notam" relative to the Oudtshoorn airport for the information of all pilots. Such notam included the following:

> "Warning: Owing to a powerline crossing a portion of the Northerly approach area, caution is needed when coming in to land at night on runway 21."

It was not long before the issue of this "notam" that the Municipality sought tenders for insurance in respect of its various activities. On 6 July 1970 the "Mutual Brand" company wrote to the Municipality to the effect that although it was prepared to undertake the insurance in respect of various others of the Municipality's enterprises, it was not willing to undertake public liability insurance in respect of the Oudtshoorn aerodrome.

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But, as we have seen, this initial declinature notwithstanding, the company issued a policy, which included the desired public liability insurance, on 20 August 1970. It is not in dispute that the Municipality's application for such insurance did not contain reference to the complaints or warnings or discussions concerning the pole and overhead electric wires which were in some quarters regarded as a possible hazard or obstruction to aircraft coming in to land at the Oudtshoorn aerodrome. It was not, nor could it, reasonably have been contended (save only in regard to the height of the pole) that the Municipality had no knowledge of what I may conveniently and compendiously call "the ado" about the pole and the overhanging electric wires. Nor is there any evidence to suggest that the appellant had knowledge of those matters from some other source. In these circumstances Mr *Browde* contended that notwithstanding that nothing concrete had been proved in regard to the alleged danger or hazard presented by the pole and overhead wires, it was the duty of the Municipality at least to disclose to the would-be insurer the facts that there had been allegations of danger and that the proposed thorough investigation of such allegations had not yet been finally concluded. Mr *Burger* strongly resisted that contention; he submitted that by the time the application for insurance was made in 1970, the complaints or warnings of Mr Gillis on behalf of

the Aero Club during 1967 and 1968 had become matters of the past, especially after the installation by the Municipality of the six markers. If I may attempt to describe as briefly as possible the pith of Mr *Burger's* contention, it was that the Municipality's duty did not extend to disclosure of long past fears which had been allayed.

It is part of our law that a person making a proposal for insurance is under a duty to disclose to the insurer material facts of which he has knowledge - material, that is, to the question of "estimating the risk", which in turn would involve the question of acceptance or refusal of the proposed insurance and in the case of acceptance, the question of the premium to be charged. That there is such a duty of disclosure was at no stage in dispute between the parties to this litigation, nor was its existence in any way challenged, which is not surprising for it has long been recognised and accepted by this Court as being part of our law. In *Fine* v *The General Accident Fire and Life Assurance Corporation Ltd* 1915 A D 213 at p 218, SOLOMON, JA, said that it was "well-settled law that insurance policies are contracts *uberrimae fidei*" and at p 219 he quoted with apparent approval this *dictum* by FLETCHER MOULTON, LJ, in *Joel* v *Law Union and Crown Insurance Co* (1908, 2 KB at p 863):

> "The insurer is entitled to be put in possession of all material information possessed by the insured."

In *Colonial Industries Ltd* v *Provincial Insurance Co Ltd* 1922 AD 33 at p 40, after quoting from a judgment by Lord Blackburn that

> "in policies of insurance . . . . . there is an understanding that the contract is *uberrimae fidei*, that if you know any circumstance at all that may influence

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> the underwriter's opinion as to the risk he is incurring . . . . . you will state what you know",

DE VILLIERS, JA, added:

> "Although this was not an insurance case there is no doubt that this is a correct exposition of the English law with which our law agrees".

And more recently CORBETT, JA, has said:

> "Insurance policies are, admittedly, contracts *uberrimae fidei* and this casts upon the insured, or strictly the proponent for insurance, the duty to disclose to the insurer, before conclusion of the contract, all facts material to the risks which are known to the insured."

(*Pereira* v *Marine and Trade Insurance Co Ltd* 1975 (4) SA 745 (A) at p 755 F.) The need for honest disclosure of known facts relative and material to the risk, in the interest of fairness to the insurer, has been recognized for very many years. The cases which testify thereto in the English law reports are legion and many of such cases, right up to the present day, refer back for their source to the *dicta* of Lord Mansfield in *Carter* v *Boehm* (1766) 3 Burr 1905, and reported at 97 E R 1162. The words "*uberrimae fidei*" must not, of course, be taken too literally. One may be less than honest but one cannot be more honest than honest. After the very many years in which the term has been used in this context, it is not, I think, potentially misleading. *McGillivray and Parkington* accept it as a "convenient though not strictly accurate expression". (*Insurance Law*, 7th Ed, para 614 at p 251.)

Only "material" facts are required to be disclosed but in the course of the years problems have arisen regarding the proper test of materiality. In *Lambert* v *Co-operative Insurance Society Ltd* (1975) 2 Lloyd's Rep 485, the Court of Appeal was asked to hold that the criterion of materiality was what "a reasonable insured" would consider to be material in regard to the risk. The Court declined to do so; it held that the existing law in England was this: "what is material is that which would influence the mind of the prudent insurer . . . . ." In the course of his judgment, however, MACKENNA, LJ, drew attention to the fact that in 1954 the Law Reform Committee,

> "a very respectable body including at that date Lord Justice Jenkins, Lord Justice Parker, Mr Justice Devlin, Mr Justice Diplock and other famous men",

had recommended that the law relating to the materiality of matters not disclosed should be changed so as to require that

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> "for the purpose of any contract of insurance no fact should be deemed material unless it would have been considered material by a reasonable insured".

(See p 488 col 1 and 489 col 2.) At the end of his judgment Lord Justice MACKENNA said: (at p 491 col 1)

> "I would only add to this long judgment the expression of my personal regret that the Committee's recommendation has not been implemented. The present case shows the unsatisfactory state of the law."

Both LAWTON, LJ, and CAIRNS, LJ, shared the misgivings of MACKENNA, LJ, in regard to the existing test of materiality in England and to have been alive to the "injustices" which might flow therefrom. (See p 492, col 2 and p 493.)

In argument before us Mr *Browde* referred to what is in all probability the most recent decision of the Court of Appeal in England on this subject. It is the case of *Container Transport International Inc and*

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Reliance Group Inc v *Oceanus Mutual Underwriting Association (Bermuda) Ltd*, reported in the May 1984, issue of Lloyd's Rep (vol 1, part 5, p 476). The Court affirmed that an insurer was entitled to avoid a contract under s 18(1) of the Marine Insurance Act, 1906

> "If there was undisclosed before the contract was concluded any circumstance which a prudent insurer would take into account when reaching his decision whether or not to accept the risk or what premium to charge: the yardstick was 'the prudent insurer and not the particular insurer . . .'"

Here, too, reference was made (by KERR, LJ,) to the report of the Committee referred to in *Lambert's* case and to a recommendation following upon a later investigation (1979/1980) to the effect that there should be no change in regard to marine insurance but that in regard to insurance other than marine . . . . .

> "the standard of materiality . . . . . should be determined by reference to what a 'reasonable assured' would expect to be material".

(p 491.) The decisions of the English Courts have by no means been consistent in this regard. More than forty cases were referred to in the judgments delivered in the *Oceanus* case, reflecting various shades of opinion.

It will be noted that the recommendations referred to in the judgments in *Lambert's* case and in the *Oceanus* case use the words "the reasonable insured" when describing the test recommended. This very clearly predicates an objective test, which immediately introduces the familiar "reasonable man". In order to avoid any possible confusion I wish to make it clear that whatever other possible connotations the term "the reasonable insured", as used in the said recommendations, may suggest, I use those words (or the words "the reasonable proponent") in the context of this judgment in the sense of "a reasonable man in the situation of the insured and possessed of knowledge of all the facts and circumstances known to the insured".

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It seems to me that in the relevant context nothing more or less than that is conveyed by the words "the reasonable insured".

I have been concerned to refer in some detail to the prevailing law in England on this subject because it was Mr *Browde's* contention that the English law corresponded with ours not only in regard to the requirement of disclosure of material facts but also in regard to the test of materiality. I also understood Counsel to suggest that *dicta* in this Court, and more particularly the *dictum* of DE VILLIERS, JA, in the *Colonial Industries* case, (1922 AD at p 42) reveal acceptance of the test prevailing in English law. The passage relied upon reads as follows:

> "The only question that remains is: were the facts material? To this there can be but one answer, if we bear in mind that every fact is material which would affect the minds of prudent and experienced insurers in deciding whether they will accept the contract, or when they accept it, in fixing the amount of premium to be charged."

This passage stated the general principle underlying the requirement of disclosure but I am not convinced

that it was intended to deal specifically with the question whether the determinant of materiality related to the expectations of the prudent insurer only, to the total exclusion of what a "reasonable insured" would regard as material for the insurer's purposes and therefore to be disclosed. In *Fine's* case, *supra*, SOLOMON, JA, said (at p 218)

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". . . . . the question is narrowed down to this, was this a fact material to be known by the defendant company in estimating the risk"

and later, at p 220, referred with obvious approval to a *dictum* by FLETCHER MOULTON, LJ, in *Joel* v *Law Union and Crown Insurance Co* (1908, 2 K B 863 at p 884) to the effect that if a reasonable man would have recognized that it was material to disclose the knowledge in question there was no excuse for not disclosing it. In *Fransba Vervoer Bpk* v *Incorporated General Insurances Ltd* 1976(4) SA 970 (W) at p 978, MCEWAN, J, after considering several decisions of the Courts, including *Fine's* case and the *Colonial Industries* case, said:

> "It seems to me, therefore, that one should be careful not to say that the test of the reasonable insured, which has been accepted by our Courts, has gone by the board, and to recognize the possibility that no matter how material certain information may be from the point of view of the insurance company, the Court may still find that a reasonable proposer for insurance could not be expected to have realized that the information was material and consequently that he was therefore not bound to disclose it."

(See also *per* JANSEN, J, (as he then was) in *Roome NO* v *Southern Life Association of Africa* 1959(3) SA 638 (D & CLD at p 641 F-G.)

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The object of devising a means or criterion for determination of the materiality of undisclosed facts must surely be to ensure, as far as is possible, that justice is done to both parties. The insurer is to be protected against non-disclosure which could gravely prejudice him but at the same time the insured ought not to be unfairly required to forfeit his rights under a policy which he entered into in good faith in accordance with his (objectively regarded) reasonable belief that all that was material had been disclosed. If I might return momentarily to *Carter* v *Boehm* and to Lord Mansfield, the following passages at p 1165 of 97 E R are not without interest and significance in relation to this topic:-

> "The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waives being informed of. . . . . .
>
> Men argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other.
>
> The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.
>
> The question therefore must always be 'whether there was, under all the circumstances at the time the policy was under-written, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run'."

The test which makes the expectations of the reasonable insurer the yardstick of materiality may often redound very harshly to the insured's disadvantage. That has been clearly recognized in cases relating to insurance other than marine insurance, in respect of which the English legislation defines what is material. It is not difficult to visualize circumstances in which the reasonable proponent for insurance, having knowledge of a particular fact but lacking the experience and expertise of the insurer in the particular field concerned, does not and could not reasonably be expected to realize or suspect that such fact may have a special significance for the insurer. (See the example given by FLETCHER MOULTON LJ, in *Joel's* case, *supra*, at p 884). Such a notional proponent would, if the test of the prudent insurer's expectations only were applied, be most unfairly exposed to the risk of forfeiture of his rights under the policy. By applying the test of what the reasonable insured would disclose as material, the risk that he might be unfairly deprived of his rights under the policy would be substantially reduced, if not entirely eliminated.

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And this would not necessarily be achieved at the expense of the insurer, for he could avail himself of the opportunity he always has to require the proponent, prior to conclusion of the contract, or renewal thereof, to answer questions relating to aspects with which the reasonable insurer would realize that the layman (the insured) would in all probability be unfamiliar. The protection which the simple expedient of careful questioning could afford the insurer is suggested in an article by R A Hassan (1969) in *Modern Law Review* (vol 32, 615.)

It must also be remembered that in cases of non-disclosure the principal inquiry relates to the acts or omissions of the insured. It is he who is under a duty to disclose material facts; it is he who is alleged to have failed to do so. It appears to me, therefore, that when in a case of this kind the question before the Court is whether undisclosed facts were material in the sense indicated above, the Court's function is objectively to decide in the light of all the relevant circumstances whether "the reasonable insured" (i e a reasonable man in the same situation and with knowledge of the same facts and circumstances) would have regarded the facts as material. Such an approach is in full accordance with the general principles of our law. In *Weber* v *Santam Versekeringsmaatskappy Bpk* 1983(1) SA 381 at 411, JOUBERT, JA, quoted with approval the following observation of Lord Wright in *Fibrosa Spolka Akcynja* v *Fairbairn Lawson Combe Barbour Ltd* (1942) 2 All E R 122 (HL) at p 140 G:-

> "The Court is thus taken to assume the role of the reasonable man, and decides what the reasonable man would regard as just on the facts of the case. The hypothetical 'reasonable man' is personified by the Court itself. It is the Court which decides."

I turn now to consider which, if any, of the facts relied upon by the appellant, a reasonable insured would, in the existing circumstances, have regarded as material to the insurer's risk and therefore to be disclosed. In so far as the communications of the Aero Club and the discussions and other correspondence which took place during 1967/8 relative to the pole and overhead electric wires are concerned, I consider that there is substance in Mr *Burger's* contention that nothing concrete was established and that the warnings of danger, if such they were, appeared during the interregnum from 1969 to mid-1970 to have lost significance. It may be that at that stage, during what I have called the interregnum, the reasonable proponent for public liability insurance would not have considered it necessary to disclose to an insurer that there had been warnings of possible danger but that the Municipality having taken certain steps (viz. the provision of markers) the warnings had not thereafter been persisted in and that all appeared to be well.

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The one positive fact, namely, that the height of the pole was in excess of what was prescribed, was not known to the Municipality at that time, nor to the Department of Transport or the Civil Aviation authorities, who had approved of the plans and the erection of the pole, and therefore could not be disclosed. If the application for insurance had been made at that time, it might well be (but I express no firm opinion on the point) that a contention that there was no call to disclose the correspondence and discussions which had taken place would have been upheld; the reasonable proponent for insurance might well have considered that such correspondence and discussions were not material to the question of the risk or the premiums to be charged in the event of a contract of insurance being concluded.

But perhaps unfortunately for the Municipality, the application for insurance was not then made, but only later, during or about June 1970. The materiality must be determined by reference to that later time. (See Hardy Ivamy, *General Principles of Insurance Law*, 4th Ed, p 142.) What happened at such later time was that, to the knowledge of the Municipality, a flare path was installed on runway 21 at the aerodrome which was thus available for aircraft doing night-flying. Furthermore, the information was given to the Municipality not merely to serve as a courtesy notification, but also, and perhaps predominantly, to draw attention to sources of possible danger and to ensure that those who might use the aerodrome at night were properly warned. It is significant that the warning contained in the numbered paras 1 and 2 of the letter dated 14 April 1970 to the Airport Manager (reproduced earlier herein) harked back to the need for care when approaching runway 21 because of "high tension wires". In effect the "hazard" of the pre-

interregnum period was revived. It goes without saying that the hazard would be likely to be regarded as intensified rather than diminished when runway 21 was approached at night. The letter also requested the Airport Manager to notify the Controller of Civil Aviation accordingly and that body thought fit to issue, for the information of all pilots, the warning I have reproduced earlier herein.

With all that information before him I consider that the reasonable proponent would highly probably have considered that this new element of risk would be not only a relevant factor but one of some importance to an insurer who was considering whether to accept the proposed insurance and, if so, what premium to fix.

I have come to this conclusion only after giving anxious consideration to the possibility that the reasonable proponent might have regarded the warning notice to pilots as being no more than a routine procedure, predicating no new risk or need for caution, but I am satisfied that a conclusion to that effect would not be realistic.

In the result I am driven to the conclusion that the facts I have specified ought to have been disclosed to the appellant and that the failure to do so affords the appellant the right to avoid the Municipality's claims. The appellant has chosen to enforce that right.

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The appeal is allowed with costs, which shall include costs in respect of two Counsel.

The order of the Court *a quo* is set aside and there is substituted therefore an order entering judgment for the defedent with costs, which shall include costs in respect of two Counsel.

GALGUT AJA concurred in the judgment of MILLER JA.

Appearances

J Browde, SC and FJ Bashall - Advocate/s for the Appellant/s

WG Burger, SC and RG Comrie, SC - Advocate/s for the Respondent/s

Deneys Reitz, Johannesburg; Webber and Newdigate, Bloemfontein - Attorney/s for the Appellant/s

Findlay and Tait Inc, Cape Town; Siebert and Honey, Bloemfontein - Attorney/s for the Respondent/s

Nafte v Atlas Assurance Co., Ltd.
1924 WLD 239

Witwatersrand Local Division

1924. April 17, 23, 24, 25, 29, 30; July 15.

KRAUSE, J.

Flynote

Insurance. --- Fire. --- Fraud. --- Onus of proof. --- Amount recoverable. --- Value of goods destroyed.

Headnote

In, an action on a fire insurance policy the defence was that of fraud on the ground that articles destroyed had been over-valued and that certain articles which the plaintiff claimed had been destroyed were undamaged.

Held, for the defence of fraud to succeed the defendant must prove not only that the claim was wrong but also that the plaintiff knew that he was making a false claim.

Held, further, that when a defence of fraud fails the onus is on the insured to show the real and actual value of the goods destroyed since all he is entitled to is a full indemnity within the limits of his policy for the loss he has sustained.

Held, further, that the following rules apply in ascertaining the real and actual loss:

(i) The value of goods destroyed is the value at the time of loss.

(ii) The value is the value at the place of the fire.

(iii) No addition is to be made for *pretium affectionis*.

(iv) No allowance is to be made for consequential loss.

Case Information

Action on a fire insurance policy.

The plaintiff married out of community of property to Isaac Nafte, sued the defendant company for loss occasioned by fire to

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furniture, household goods and personal effects, contained in a building, situate on the farm Bankpan, district Bethal, all of which things were insured for the sum of £1,200 with the defendant company.

The following facts were not disputed.

The plaintiff married Isaac Nafte in about April, 1921. At the time and until the fire took place Isaac Nafte was in partnership with his brother, Jack Nafte. They were engaged in farming operation under the style of Nafte Brothers, and seem to have acquired the land from the Crown under the Land Settlement Act of 1912. A considerable sum was still owing to the Crown on the purchase-price of the farm, and this was covered by a bond.

The house in which the goods were was also insured by the partners with defendant company against loss by fire for about £1,250, and the policy itself was ceded to the Government as collateral security.

Some two or three months after the marriage the partnership as well as the private estates of the partners were sequestrated. In about October, 1921, a compromise of 7s. 6d. in the £ was come to with the concurrent creditors.

This compromise was carried out and the partners obtained their rehabilitation a day or so before the fire.

The furniture, etc. in the house had been insured until January, 1922 in the name of Nafte Bros. This policy lapsed, however, and thereupon the plaintiff took out the present policy in her own name on the 7th February, 1922. The fire took place on the 22nd June, 1922, during the currency of the policy. Both the house and its contents were practically totally destroyed. The company paid out the damage done to the house, or rather compromised for a sum of £750.

About a week before the 22nd June the plaintiff came to Johannesburg, accompanied by her husband, for medical treatment, and both were in Johannesburg when the fire occurred.

Jack Nafte seems to have gone to Bethal, a distance of some 16 miles, with a neighbour, Morris Hyman, on the day previous to the fire, and to have returned to, and slept the night of the fire, at Hyman's farm (about three miles distant). He only returned to Bankpan the morning after the fire had taken place. When he left he locked up everything securely. Only natives appear to have been on the farm when the fire occurred. As soon as plaintiff was informed of what had happened the insurance company was notified

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and Mr. Bevan, a member of the firm of fire assessors, Ratcliffe and Co, was sent by the defendant company to make the necessary investigations. Mr. Bevan arrived on the farm on the 27th June in a taxi, driven by a certain Scheepers. On his arrival he started taking the measurements of the building, assisted by a native, and sent for Mr. Jack Nafte in the meantime. Bevan and Nafte then made an inspection of the house.

The further facts appear from the judgment.

R.F. MacWilliam, for plaintiff, on the facts.

C.F. Stallard, K.C. (with him *J.T. Barry*), for the defendant, on the facts.

Cur. adv. vult.

Postea (July 15).

Judgment

KRAUSE, J. (after setting out the facts as above, proceeded):

The defendant company resists the claim on the ground of fraud, and pleads a breach of condition 13 of the policy, viz., "If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy

. . . all benefit under this policy shall be forfeited." Paragraph 5 of defendant's plea reads "That the claim of £1,200 in respect of furniture, household goods and personal effects which has been made by plaintiff, or on plaintiff's behalf, is grossly excessive and is fraudulent within the meaning of the aforesaid condition, and by reason thereof plaintiff has forfeited all right to claim under the policy."

The nature of the fraud relied on appears more clearly from the particulars to paragraph 5 of the plea supplied to the plaintiff: these particulars are divided into three sub-heads, viz., (a) articles over-valued; (b) articles claimed as destroyed which were undamaged by fire; (c) articles claimed as destroyed which were not on the premises at the time of the fire.

Now, he who alleges fraud and relies upon it as a defence, must prove it up to the hilt, and in this case it is necessary for the defendant company, not only to establish the facts alleged in the particulars given, but also to bring home to the plaintiff a knowledge of these facts.

For example, with reference to particulars under (a) it was held in *Park v Phoenix Insurance Co.* (1860, 19 UCQB 110), that the

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insurers must prove that the over-valuation by the insured was not due to a mistake. This, in my view,

merely means, that the insurers must produce evidence to show that there was an intentional and wilful over-valuation.

The only evidence as to over-valuation called by the defendant was Vivian Dawson, a salesman in the employ of Messrs. Randall Bros. & Hudson, who testified that in April, 1921, the firm sold to Messrs. Shakolsky & Cohen, of Bethal, a blue dinner service for £9 15s. wholesale, and said that transport and packing would be another £1. The retail profit in crockery seems to be about 25 per cent or 30 per cent. In the particulars supplied, however, this dinner service is given under sub-head (c), viz., articles claimed as destroyed but which were not on the premises at the time of the fire.

Portions of this dinner service were found in the debris and were produced in Court, and Mr. Bevan, the principal witness for the company, explained that in his report to the attorneys he never stated that there was no dinner service on the premises, and that he was not to blame for this mistake.

In order to appreciate the difficulty plaintiff was placed in it may here be remarked that it was only months after the fire that the company took up the attitude that the claim was fraudulent. For months the plaintiff was requested to give particulars of the articles destroyed, where they were obtained and the price they cost. The plaintiff undoubtedly did her best to comply with the company's requests as it was known that most of the goods destroyed were wedding presents and were not bought by the plaintiff personally, she had to rely on the information given to her by the donors. The situation she was placed in was certainly not an enviable one, and it was so unnecessary if the company intended to repudiate responsibility on account of fraud, because the real fraud relied on is not so much the over-valuation of the goods but the entire absence of the goods alleged to have been destroyed on the premises. In her particulars of claim the plaintiff gave the value of the dinner service as £18. In this she was clearly mistaken. Still the plaintiff cannot be held to blame for this; nor do I think the donor acted *mala fide*. Possibly the actual retail price at the time would have been anything between £15 and £18.

In view of the conclusion that I have come to in respect of the plaintiff's evidence it will not be necessary, on the question of fraud, to examine in detail the evidence relating to the particulars

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given. I accept the evidence of the plaintiff to the effect that when she left the farm with her husband to come to Johannesburg the goods set out in her list were in the house and that she had no knowledge, either before or after the fire, that any of these goods had been removed by anyone. The plaintiff gave her evidence in a very straightforward manner, she was not shaken in cross-examination, and her demeanor was such as to impress me that she was telling the truth.

The evidence for the defence, in so far as it directly affected the veracity of the plaintiff, was not of much weight, and although the examination of the debris satisfies me that some of the articles claimed as destroyed could not have been and were not there at the time of the fire, I believe plaintiff's evidence that she did not know this and had no reason for believing that these articles did not share the fate of all the articles left in the house by her.

The defence, therefore, of fraud fails, and the onus is on the plaintiff to show that the goods claimed were in fact destroyed by fire and to establish the "real and actual" value of such goods --- (per COCKBURN, C.J., at p. 307 in *Chapman v Pole* (1870, 22 LT 306)) --- because the contract of fire insurance is purely a contract of indemnity against losses actually sustained. [(Cf. *North British and Mercantile Insurance Co. v London, Liverpool and Globe Insurance Co.* (1877, 5 Ch.D. 569); and *Darrell v Tibbitts* (5 QBD 560 C.A.).]

The list of goods handed to the company by the plaintiff represents, in my view, the goods which were in the house when she left the farm and which she believed to have been in the house at the time of the fire. The valuation placed upon the articles, is also a fair one. There are a few exceptions, with which I shall deal later on and which are due to mistakes and the peculiar nature of the information upon which the plaintiff had to rely.

As already stated, some things were not and could not have been there at the time of the fire. It will, therefore, be necessary to examine the evidence which leads one to this conclusion.

The only witness for the company on this point is Mr. Bevan, the fire assessor. It would appear that although the fire took place on the 22nd June, Mr. Bevan did not arrive on the farm until the 27th June, on a cold and bleak day. The company at that time had not yet received a detailed list of goods destroyed, nor did Mr. Bevan know what goods were alleged to have perished in the fire; he only knew vaguely that

wedding presents were included, and presuming

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that cutlery, silver and hardware articles are usually to be found amongst wedding presents, he was especially on the look-out for the remains of such articles when he examined the debris. In my view his cursory examination of the debris was possibly due to this want of information. Although I have no reason to doubt Mr. Bevan's *bona fides*, I cannot and do not accept his evidence, especially where it is in conflict with that of the taxi-driver Scheepers and the two native boys who assisted him in the examination of the debris.

In answering, therefore, the questions stated herebefore, I have come to the conclusion that Mr. Bevan arrived on the farm Bankpan between 9.30 and 10 a.m. and left again at about 12 noon, and arrived in Bethal at about 1 p.m, or lunch time, that not more than in hour and a half, or at most two hours, could have been spent in the actual examination of the debris; that the inspection was not of a thorough, but of a cursory nature --- there was no sieve used, as is usually done, but only stable forks and spades, and two natives, who, because it was cold and because Mr. Bevan was not their employer were not too keen on their work, and that the remains of articles which one would expect to find on such an examination would only be cutlery, silver and other hardware of a fairly substantial and indestructible nature.

In view both of Mr. Wittome's evidence that one would or might not be able to identify or find after a fierce fire, such as this was, traces of linen articles, clothes and even woollen articles, and because of the, in my opinion, cursory and unsatisfactory examination of the debris made by Mr. Bevan, I am not prepared to accept his evidence that the alleged absence of traces of these and some other articles in the debris establishes the fact that the number of articles claimed to have been destroyed were not actually present in the house at the time of the fire. It would be extremely dangerous for the Court to act on such evidence.

The origin of the fire is a mystery, whatever one's suspicions might be. There was every opportunity for evil-disposed persons to remove valuable articles, such as silver-ware, etc, before setting fire to the place, and I am satisfied that the reason why Mr. Bevan, even with the incomplete examination of the debris that he did make, did not find traces of the articles enumerated under sub-head (c) of the particulars, viz., "All E.P.N.S and silverware (except two antimony candlesticks), £1.19 5s," was that these articles must have been and had been so removed. The locality where these articles should have been was definitely indicated and ascertained,

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and the search there was such that I think traces of them should have been found if they had been there.

As already pointed out, Mr. Bevan's evidence does not satisfy me that any of the other articles under sub-head (c) were not there. It is not likely that these articles would have been removed. The examination was too incomplete to enable one to say that they were not there. The plaintiff's evidence, therefore, stands uncontradicted on this point. Because Mr. Bevan says he did not discover them or find such a quantity of debris as would, in his opinion, account for their presence, does not prove their absence, and certainly does not disprove plaintiff's evidence.

I cannot, therefore, accept the defendant's evidence that "all items from 4 pairs of curtains to end of claim (less value represented by debris at outside figure £100) . . . £337 17s. 0d.," appearing under sub-head (c) of the particulars, should be struck out. The value of these things at the time of the fire is another question, and with this I shall presently deal.

The articles appearing under subhead (b) of the particulars, viz., "articles claimed as destroyed which were undamaged by fire", should, in the view that I take of the case, be more properly dealt with under sub-head (a), "over-valuation." Some of these articles were undoubtedly damaged, but the extent of the damage, and therefore of the actual loss sustained, is purely a question of value.

The claim made in respect of such articles that might not have suffered actual damage is so small that it would be absurd to look upon it as evidence of a fraudulent intent.

The amount recoverable under a policy of insurance in the event of a fire, must not exceed the sum necessary to indemnify the insured fully against any loss which he may have actually sustained in consequence of the fire (per Lord SELBORNE at p. 110 *Westminster Fire Office v Glasgow Provident*

Investment Society (1888, 13 AC 699)). He is not entitled to recover the amount specified in the policy unless it represents his actual loss (Cf. *Chapman v Pole* (1870, 22 LT 306)). The main purpose of the policy is to fix the total amount of the premium and to mark the limit beyond which the liability of the insurers is not to extend. The insured is, therefore, entitled to a full indemnity within the limits of his policy (Cf. *Westminster Fire Office v Glasgow Provident Investment Society, supra*, at page 711), for the loss which he has sustained in respect of the subject-matter of the insurance. (Cf. BOWEN, L.J., at p. 401, *Castellain v Preston*

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(1883, 11 QBD 380).) The premium in this case was £6 0s. 9d. and the amount insured was £1200 and embraced furniture, household goods and personal effects, the property of and in private use of the plaintiff.

The policy in this case is what is termed an "unvalued" or "open" policy, *i.e.*, the insured is only entitled to recover the value of the subject-matter, as proved by him, subject to the limitation imposed by the amount specified in the policy; or, as Lord COCKBURN, C.J. at page 307 in *Chapman v Pole* (1870, 22 LT 306), puts it: "You (the Jury) must not run away with the notion that a policy of insurance entitles a man to recover according to the amount represented as insured by the premiums paid . . . he can only recover the 'real and actual value' of the goods." (Cf. also *Dailby v India and London Life Assurance Company* (1854, 15 CB 365, per PARKE, B. at p. 387); *Castellain v Preston* (1883, 2 QBD 380, *per* BRETT, L.J., at p. 380).)

The plaintiff in her particulars values the amount of her loss at £1,129 18s. 0d. I have already indicated, that from this amount should be deducted the articles which, I have come to the conclusion on Mr. Bevan's evidence, were not and could not have been on the premises at the time of the fire, viz., an amount of £119 5s. 0d. Thus an amount of £1,010 13s. 0d. is left over.

In ascertaining this "real or actual" value of the articles destroyed certain definite rules have been laid down and adopted by the Courts, and these I propose to follow.

Firstly, the value must be the value of the subject-matter at the time of the loss. In *Hunter v Standard Fire Insurance Co.* (1879, 26 Grant (U.C.) 341) it was held, that the assured was entitled to recover the stock-in-trade insured as at the date of the fire, though, in fact, greater than at the time of insuring; and in *Equitable Fire Insurance Co. v Quinn* (1861, 11 L. Can. 170) it was decided, that the insured was entitled to recover the market-value of his stock-in-trade as at the date of his loss. (Cf. also *Re Wilson and Scottish Insurance Corporation* (1920, 2 Ch. 28); *Hercules Insurance Co. v Hunter* (1856, 14 Shaw (Ct. of Sess.) 1137).) The value of the subject-matter at any other time is immaterial; in particular its value at the commencement of the risk, or its prime cost need not be taken into consideration. (Cf. *Equitable Fire Insurance Co. v Quinn, supra*; *Harrison v Western Assurance Co.* (1903, 1 Com. L.R. (Can.) 490).)

Secondly, the value of the subject-matter is its value at the

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place of the fire (Cf. *Liverpool, London and Globe Insurance Co. v Valentine* (1898, 7 Q.L.R, Q.B. 400)).

Thirdly, the value is the real and intrinsic value of the subject-matter, in other words, no addition is allowed for merely sentimental value or *pretium affectionis*. (Cf. Lord MONCRIEFF at p. 114 in *Hercules Insurance Co. v Hunter* (1856, 14 Shaw (Ct. of Sess.) 1137); and WARRINGTON, J., at p. 826, in *Re Egmont's (Earl) Trusts, Lefroy v Egmont (Earl)* (1908, 1 Ch. 821).)

Fourthly, no allowance is to be made for loss of prospective profit or other consequential loss. (Cf. *Equitable Fire Insurance Co. Quinn* (1861, 11 L. Can. 170).)

Questions of considerable difficulty often arise in the application of these rules. The present case, as a matter of fact, presents certain peculiarities. Many of the articles destroyed were wedding-presents. The plaintiff therefore did not buy them herself --- some of the donors were traders who purchased the articles at wholesale and not retail prices. Most of the articles were intended for personal use in the household, and were so used for more than a year. Some of the presents again were bought at auction sales.

No hard and fast rule therefore can be laid down as what basis of calculation has to be adopted --- in some cases the market value of the property destroyed, in other cases the cost of reinstatement is the

correct basis, because the assured cannot be adequately indemnified unless, so far as money can do so, he is restored to the position which he occupied at the time of his loss. (Cf. *Westminster Fire Office v Glasgow Investment Society* (1888, 13 AC 699, per Lord SELBORNE at p. 713).)

In the case of a partial loss, the cost of reinstatement is in many cases the only available measure of indemnity, and the basis of market value has no application.

But, whichever basis is adopted, it is only as a basis for calculating the real value of the property, and the assured does not recover the market value or the cost of reinstatement as such.

Where the market value is the real value then payment thereof is an adequate indemnity; even any enhancement of the market value before the loss would be recoverable, *e.g.*, *In re Wilson and Scottish Insurance Corporation* (1920, 2 Ch. 28), it was held, that, in an insurance on a motor car, the increase in value was recoverable if it had accrued since the last renewal.

1924 WLD at Page 248

Where the cost of reinstatement is taken as the basis of calculation certain allowances should be made for the difference in value between the property destroyed and the new property of a similar description by which it is replaced (Cf. PENNEFATHER, B., at p. 50 in *Vance v Forster* (1841, 12 Circ. R. 47)).

In fire insurance, however, there is not, as there is in marine insurance (Cf. *Aitchinson v Lohre*, 4 AC 755), any certain standard by which the relative values of old and new property are to be measured. Each case must depend upon its own circumstances.

Where the articles which are insured are in daily use and are provided by the assured for use and enjoyment or convenience in connection with his business or private life, they are to be regarded as something more than mere pieces of merchandise. Consequently, the market value of the particular article destroyed, or the price for which it could have been sold at the time of the loss, is not necessarily the true measure of indemnity. To be restored to his original position, the assured must replace what he has lost, and he is not fully indemnified unless the amount recoverable under his policy is sufficient for that purpose. (Cf. *Grant v Aetna Insurance Co.* (1862, 15 Moo. P.C. 516); for a contrary view see *Hercules Insurance Co. v Hunter* (1836, 14 Shaw (Ct. of Sess.) 1137).)

In applying these rules to the articles destroyed, or damaged in this case, I have taken into consideration the facts already referred to and the fact; that as far as the market value of articles is concerned, I am satisfied from the evidence and from what is after all common knowledge, that in June, 1922, there had been a considerable drop in the market value of most of the articles insured as compared to April, 1921 --- a drop of say approximately 15 per cent. Furthermore, because the articles insured were in daily private use, they were in June, 1922, no more new but second-hand, and as such of much less value. Allowance, in my view, should be made for this factor, and I think if I were to add 5 per cent to the 15 per cent, making therefore on the articles in general daily use a deduction in all of 20 per cent, it would be equitable and fairly represent the actual or real loss that the plaintiff has suffered.

There are, however, a few articles which were not totally destroyed but only damaged, and in respect of these the plaintiff is

1924 WLD at Page 249

not in law entitled to claim the full market value, but is entitled to such an amount as would enable her to restore the articles in the same condition as it was before the fire.

In my opinion, the real value of the bedroom suite was not more that £26; and the £14 should be deducted from this item. The settee and chair should be reduced by £5 to £20. The stove and cylinder could be replaced by an expenditure of, say, £5 --- therefore £30 should be deducted from this item. Deducting these amounts, total £49, from the £1,010 13s., leaves an amount of £961 13s.

For the reasons above stated and making the allowances already referred to, I propose to reduce this amount by 20 per cent, leaving therefore an amount of approximately £770.

This sum, in my view, would adequately indemnify the plaintiff for the loss that she has suffered.

There will, therefore, be judgment for the plaintiff for £770 and costs.

Plaintiff's Attorneys: *Saner & Nathan*; Defendant's Attorney: *G.W.J. Macfarlane*.

[M.M.]

NAPIER v COLLETT AND ANOTHER
[1995] 2 All SA 457 (A)

Division:	Appellate Division
Judgment Date:	30 March 1995
Case No:	535/93
Before:	E M Grosskopf JA, Vivier JA, Eksteen JA, van den Heever JA and Olivier AJA
Parallel Citation:	1995 (3) SA 140 (A)

• Keywords • Cases referred to • Judgment •

Keywords

Cases referred to:

Becker, Gray and Co v London Assurance Corpn 1918 AC 101 (A) - Considered

Concord Insurance Company Limited v Oelofsen NO 1992 (4) SA 669 (AD) - Applied

Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries 1987 (1) SA 842 (AD) - Applied and discussed

International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (AD) - Applied

S v Mokgethi en Andere 1990 (1) SA 32 (AD) - Applied

View Parallel Citation

Judgment

E M GROSSKOPF, JA: The appellant is the person appointed by the Committee of Lloyds to act on its behalf in the Republic of South Africa. The respondents are a syndicate of persons who own and run race horses. The respondents were the owners of a horse called "Shooting Party". This horse was insured under a Lloyds Bloodstock Insurance Policy. It died on 18 July 1991. The respondents sued the appellant under the policy for the value of the horse. This action succeeded before

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Plewman J in the Witwatersrand Local Division. With the leave of the court *a quo* the matter now comes on appeal before us.

The insuring clause of the policy reads as follows in so far as it is relevant to the present case:

> "NOW WE THE UNDERWRITERS hereby agree . . . that in the event of the death during the period of this Insurance of any animal specified in the Schedule (or, for Insurances with an annual period only, in the event of the death of any such animal occurring within ninety days after the expiry of the Insurance as a result of any accident occurring . . . during the currency hereof. . .) we will indemnify the Assured in respect of the actual value of such animal at the time of the accident . . . causing death, up to but not exceeding the limit of the Underwriter's liability specified in the Schedule in respect of such animal."

The policy was concluded for a period of one year from 10 April 1990 to 9 April 1991. In March 1991 the period of ninety days referred to in the insuring clause was extended to 120 days. Accordingly, if the death of Shooting Party on 18 July 1991 was the result of an accident which had occurred during the currency of the policy, the underwriters would *prima facie* be liable. It was common cause that Shooting Party was in fact injured in an accident on 27 September 1990. The main question argued before us was whether this accident was the cause of its death.

The issue is consequently one of causation. The law in this regard has been analysed by this court in recent years in a number of different contexts. See, in particular, *S v Mokgethi en Andere* 1990 (1) SA 32

(A) at 39D-47B (criminal law); *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-701F (law of delict) and *Concord Insurance Co Ltd v Oelofsen N O* 1992 (4) SA 669 (A) at 673I-674B (law of insurance). Despite the differences between various branches of the law, the basic problem of causation is the same throughout. The theoretical consequences of an act stretch into infinity. Some means must be found to limit legal responsibility for such consequences

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in a reasonable, practical and just manner (cf the passage from Fleming *The Law of Torts* quoted at p 701 B-C of *Bentley's* case (*supra*)). Many criteria have been suggested for this purpose. See *Mokgethi's* case (*supra*) at p 39I-40C. The traditional view in insurance law is set out as follows in *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A) at p 862 C-D:

> ". . . when there are two or more possible causes . . . the proximate or actual or effective cause (it matters not which term is used) must be ascertained, and that is a factual issue . . . an earlier event may be a dominant cause in producing the damage or loss; it may be the *causa sine qua non* but the issue is, is it the *causa causans*? . . . [The] rule to be applied is *causa proxima non remota spectatur*."

In the *Concord Insurance* case, *supra* at p 673I, the court again dealt with the complex legal questions which arise

> "where several factors concurrently or successively contribute to a single result and it is necessary to decide whether any particular one of them is to be regarded legally as a cause."

In this regard the court said (at p 674A-B):

> "In criminal law and the law of delict legal policy may provide an answer but in a contractual context, where policy considerations usually do not enter the enquiry, effect must be given to the parties' own perception of causality lest a result be imposed upon them which they did not intend."

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> This passage is not in conflict with what was said in *Shooter's* case, *supra*. The justification for the proximate cause rule is that it reflects the presumed intention of the parties to an insurance contract. See *Becker, Gray and Company v London Assurance Corporation* 1918 AC 101 at p 112-14.

The effect of these various authorities is, it seems to me, as follows. The general approach to questions of causation as laid down in authorities like *Mokgethi's* case and *Bentley's* case (both *supra*), based as it is on principle and logic, is equally applicable to insurance law. Its application will of course be subject to the provisions of the particular insurance policy in question. However, the particular policy will seldom affect the basic approach, and causation in insurance law will usually require much the same treatment as that accorded to it in other branches of the law.

The initial enquiry will normally be whether there is "factual causation." The nature of this enquiry was dealt with in *Bentley's* case, *supra*, at p 700E-H, and that exposition, with the necessary changes to apply it to an insurance claim rather than a claim in delict which was there in issue, is equally applicable to insurance law. If this initial enquiry leads to the conclusion that the prior event was a *causa sine qua non* of the subsequent one, the further question arises, viz., whether there is a sufficiently close relationship between the two

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events to constitute the former the legal cause of the latter. As indicated above, various expressions have been used to describe this relationship. These expressions are all necessarily somewhat vague. In applying them in the context of insurance law one would have prime regard to the provisions of the insurance policy. Thus the policy may extend or limit the consequences covered by the policy, e g, by laying down exceptions. But in addition to any specific provisions, matters such as the type of policy, the nature of the risk insured against and the conditions of the policy may assist a court in deciding whether a factual cause should be regarded as the cause in law.

I turn now to the facts. They are largely undisputed.

On 27 September 1990 Shooting Party, while running in a race, sustained a compound fracture of the medial sesamoid bone of the near forelimb. After discussion between themselves, three veterinary

surgeons, Drs Ross, Roberts and Meyer, agreed that surgical treatment of the animal's injury should be attempted. On 9 October 1990 the horse underwent surgery. Three fragments of the fractured sesamoid bone were removed.

A period of time to enable the horse to recuperate then passed and on 22 and 25 April 1991 Drs Ross and Roberts respectively examined the horse. Neither of them gave evidence, but their reports were before the court. At this stage the horse had recovered well in the sense that its life was not in danger from the accident or its *sequelae*. However, the veterinarians considered that Shooting Party was suffering from degenerative joint disease as a result of the accident and the surgery. Dr Ross, who had from the beginning considered that the prognosis for the operation was "poor to guarded" and had recommended euthanasia, was in April 1991 still in favour of "destruction on humane grounds". Dr Roberts's view was slightly different. He recommended "euthanasia on

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economic grounds as this colt is only suitable to turn out to pasture and it is unlikely that he has any stud value."

The insurance policy contained special provisions relating to euthanasia. They read as follows:

> "This Insurance does not cover intentional slaughter . . . except that Underwriters will not invoke this particular exclusion as a defence (*a*) where the Underwriters shall have expressly agreed to the destruction of the animal, or (*b*) where an insured animal suffers an injury or is afflicted with an excessively painful disease and a qualified Veterinary Surgeon appointed by the Underwriters shall first have given a certificate that the suffering of that animal is incurable and so excessive that immediate destruction is imperative for humane reasons, or (*c*) where an insured animal suffers an injury and a qualified Veterinary Surgeon appointed by the Assured shall first have given a certificate that the suffering of that animal is incurable and so excessive that immediate destruction is imperative for humane reasons without waiting for the appointment of a Veterinary Surgeon by the Underwriters."

Paragraphs (*b*) and (*c*) were clearly not applicable. There could be no suggestion

that Shooting Party's suffering was so excessive that immediate euthanasia was imperative. The respondents were accordingly required to obtain the underwriters' consent in terms of paragraph (*a*) if they wished to destroy the horse and be covered under the policy.

The respondents obtained a further opinion from Dr M A J Azzie, a very experienced veterinarian. Dr Azzie examined Shooting Party on 21 May 1991. He concluded that the horse was suffering from degenerative changes in the fetlock joint complicated by osteo-arthritic changes. This condition was progressive and irrecoverable. Dr Azzie also recommended euthanasia.

The appellant was not satisfied with this and a further report was requested from Prof R Gottschalk of the University of Pretoria at Onderstepoort. Prof Gottschalk examined Shooting Party on 6 June 1991. His conclusions were stated as follows:

"1. The lameness present precludes this horse from taking part in athletic pursuits in the immediate future.

2. The radiographic signs are indicative of degenerative joint disease, which tends to be progressive in nature. Although the radiographic signs are not severe at present, the clinical signs indicate that more severe pathology may be present in the joint. To confirm this an arthroscopic investigation would be necessary.

3. If the horse is kept in an environment where he would not be forced to exercise (eg. paddock rest) I am of the opinion that he would not suffer unduly, and that the condition would probably improve with the passage of time.

4. Should the horse be forced to exercise, or be used for racing, he would suffer undue pain, this course of action should not be undertaken on humane grounds.

5. The fetlock condition would not preclude this horse's use for breeding purposes if sympathetically managed."

In his evidence Prof Gottschalk stated that he would not have recommended euthanasia on the strength of his examination. However, since he and Dr Azzie had a difference of opinion on this score, he advised that it be resolved by way of an arthroscopic examination. This

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is a procedure whereby an instrument (an arthroscope) is inserted into the joint. This enables a veterinarian to see what is happening inside.

Before the arthroscopic procedure took place Prof Gottschalk undertook further radiographic and ultrasound examinations of the affected joint. These confirmed his view that there was nothing seriously wrong with Shooting Party and that he would probably make a complete recovery in time. At that stage Prof Gottschalk was definitely of the view that euthanasia was not justified, and he would not have performed an arthroscopy to confirm his own diagnosis. However, he was "committed to investigate a colleague's feelings as well" and went ahead with the examination.

The arthroscopic examination took place on 18 July 1991. Shooting Party was first placed under general anaesthetic. Prof Gottschalk performed the operation. Dr Azzie was also present. The examination revealed that Prof Gottschalk's diagnosis was correct - there was nothing seriously wrong with Shooting Party. Unfortunately, however, the horse died under anaesthetic. The medical cause of death was either heart failure or lung collapse

or a combination of the two conditions precipitated by the anaesthetic.

The question now to be considered is whether Shooting Party died as a result of the accident on 27 September 1990.

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Purely as a matter of factual causation the answer must be yes. Had Shooting Party not suffered the accident he would not have undergone surgery, no dispute would have arisen about the seriousness of his condition after the operation, arthroscopy would not have been decided upon to resolve this dispute, and the fatal anaesthetic would not have been administered.

The question then is whether there was a sufficiently close relationship between the accident and the death to render one the legal cause of the other.

This question can best be examined, I consider, by working backwards from effect to cause. The direct physical cause of Shooting Party's death was heart failure or lung collapse or both. They were in turn caused by the administration of anaesthetic. This was necessary for the arthroscopy, which was performed by Prof Gottschalk to show Dr Azzie that the latter's diagnosis was wrong, which in fact it was. Had there not been this incorrect diagnosis the arthroscopy would not have been performed and the horse would not have died.

The causal relationship between the accident and the death is accordingly an indirect and fortuitous one. The accident itself was not fatal. It caused an injury which was treated by surgery. Although veterinary opinion differed as to the success of the surgery, there was no suggestion that the horse's life was in danger. The only question in dispute was whether his injuries were serious enough to warrant euthanasia. And it is this dispute that led to the death of Shooting Party.

In these circumstances, it seems to me, the effective cause of Shooting Party's death was the administration of anaesthetic which flowed from the attempts by the respondents, supported by a mistaken diagnosis, to secure the underwriters' consent to the destruction of the animal. In my view the horse did not, within the meaning of the policy, die as a result of the accident on 27 September 1990.

This conclusion disposes of the appeal and it is not necessary to consider a further submission by the appellant that in any event the death of Shooting Party fell within one of the exceptions in the policy.

The following order is made:

1. The appeal is allowed with costs, including the costs of two counsel.

2. The order of the court *a quo* is set aside and the following substituted:

Judgment for the defendant with costs, such costs to include the costs of two counsel.

VIVIER JA, EKSTEEN JA, VAN DEN HEEVER JA and OLIVIER AJA concurred.

Appearances

DA Gordon, SC and RJ Salmon - Advocate/s for the Appellant/s

P Coetzee, SC - Advocate/s for the Respondent/s

Garlicke and Bousfield Incorporated, Durban; Webbers, Bloemfontein - Attorney/s for the Appellant/s

Harvey Nossel and Company, Johannesburg; Israel and Sackstein, Bloemfontein - Attorney/s for the Respondent/s

OTTO v SANTAM VERSEKERING BPK EN 'N ANDER
[1992] 4 All SA 490 (O)

Division:	Orange Free State Provincial Division
Judgment Date:	6 March 1992
Case No:	Not Recorded
Before:	Lichtenberg JP, Edeling J
Parallel Citation:	1992 (3) SA 615 (O)

• Keywords • Cases referred to • Judgment •

Keywords

Contract - Performance – Defective Motor Vehicle Insurance - Liability

Cases referred to:

Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (AD) - Referred to

Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (AD) - Applied

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Judgment

EDELING R: Die appellant het 'n aksie teen die twee respondente as gesamentlike en afsonderlike verweerders ingestel vir betaling van die bedrag van R5 372 synde die koste verbonde aan die herstel van eiser se motorvoertuig se masjien nadat dit beskadig is weens oorverhitting. Eiser het nie in sy eis teen enige van die twee respondente of teen hulle gesamentlik geslaag nie en kom in hoër beroep na hierdie Hof teen die bevinding van die landdros.

Die presiese aard van die hof *a quo* se bevinding blyk nie duidelik uit die oorkonde of uit die verhoorlanddros se 'redes vir uitspraak' nie. Nietemin meen ek dat dit weens die konklusie waartoe ek gekom het in hierdie saak op appèl nie van enige wesentlike belang is nie.

Dit blyk dat appellant se motor verseker was deur eerste respondent ingevolge 'n sogenaamde 'persoonlike Multiplex'-polis. Ingevolge die

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bepalings van die polis was eerste respondent aanspreeklik vir skade aan die voertuig, met dien verstande dat eerste respondent na eie keuse die voertuig mag herstel of vervang of die bedrag van die skade in kontant mag betaal.

Gedurende Desember 1987 en terwyl sodanige versekering van krag was, is eiser se voertuig in 'n ongeluk beskadig en het eerste respondent daarna aanspreeklikheid ingevolge die versekeringsooreenkoms vir die skadeloosstelling van sodanige skade aanvaar. In terme van die voormelde bepaling van die versekeringsooreenkoms het eerste respondent verkies om die skade aan die voertuig te herstel, eerder as om, soos hy geregtig was om te doen, die bedrag van die skade aan appellant te betaal.

Dit was tydens argument voor hierdie Hof gemene saak dat eerste respondent daarna aan tweede respondent opdrag gegee het om die herstelwerk te doen en dat eerste respondent nadat die voertuig deur tweede respondent aan die eiser terugbesorg is as synde behoorlik herstel, die koste daarvan aan tweede respondent betaal het.

Tydens die eerste daaropvolgende rit wat deur appellant onderneem is, is die masjien van die voertuig weens oorverhitting beskadig. Dit is bevind dat die oorverhitting plaasgevind het omdat 'n waterpyp deurgeskaaf is en die water wat die masjien moes verkoel, uitgelek het. Die waterpyp is deurgeskaaf omdat die katrol van die lugreëlaar teen die pyp geskuur het sodra die lugreëling aangeskakel is. Dit was egter nie die geval voor die voertuig in die ongeluk beskadig is nie. Die getuienis het voorts aangetoon dat

die voorste gedeelte van die voertuig tydens die ongeluk na die masjien van die voertuig se kant toe ingebuig is, maar dat die onderste gedeelte van die raamwerk tydens die herstel van die voertuig deur tweede respondent nie ver genoeg teruggebuig is na sy oorspronklike posisie nie en dat die katrol van die lugreëlaar die betrokke waterpyp deurgeskuur het, soos voormeld.

Die gebrekkige herstel van die onderste gedeelte van die raamwerk

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is vasgestel toe die skade aan die masjien deur 'n onafhanklike instansie, Wessels Motors, herstel is. Dit is onder die aandag van tweede respondent gebring en laasgenoemde het toe die betrokke gebulgde gedeelte van die raamwerk kosteloos behoorlik herstel.

Paragrawe 10, 11 en 12 van die eiser se besonderhede van eis lees as volg:

'10. Tans weier en/of versuim eerste verweerder en/of tweede verweerder om eiser te vergoed vir die herstelwerk wat eiser noodsaaklikerwys moes laat verrig en het eiser derhalwe skade gely ten bedrae van R5 372.

11. Eiser se eis is teen eerste verweerder as versekeraar van die voertuig en beweer eiser dat die skade wat hy gely het deel vorm en voortspruitend is uit die ongeluk waarin hy betrokke was.

12. Alternatiewelik is eiser se eis teen tweede verweerder ten opsigte van die skade wat hy gely het as gevolg van tweede verweerder se nalatigheid en swak vakmanskap met die installering van die enjin en herstel van eiser se voertuig.

Eerste respondent handel in sy verweerskrif nie spesifiek met para 11 van die besonderhede van eis nie, maar dit blyk nogtans uit die verweerskrif as geheel gelees dat die eerste respondent se verweer is dat dit

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geensins ingevolge die poliskontrak verplig is om die skade aan die masjien te vergoed nie. Tweede respondent het eenvoudig al die bewerings soos vervat in para 12 van die besonderhede van eis asook enige aanspreeklikheid vir die betrokke skade ontken.

Die verhoorlanddros se redes vir uitspraak lees as volg:

'Redes vir uitspraak

Dit was 'n absolute noodsaaklikheid vir eiser om te bewys dat eerste verweerder onvakkundige herstelwerk gedoen het. Eers na hierdie bewys kon aanspreeklikheid voortgevloei het. Nie een van die getuies in eiser se saak kon getuig dat die voertuig na eerste verweerder geneem is met 'n spesifieke opdrag vir herstelwerk nie. (Aanvanklik getuig eiser so, maar later ontken hy dit spesifiek.) As daar dan nie 'n opdrag bewys is nie, hoe kan gesê word dat die opdrag nie nagekom is nie?

Die hof het geen ander keuse gehad as om te bevind dat die eiser hom nie gekwyt het van sy bewyslas nie.'

Behalwe dat die redes vir uitspraak aantoon dat die landdros geen bevinding met betrekking tot geloofwaardigheid van enige van die getuies gemaak het nie, meen ek dat daar vir doeleindes van hierdie uitspraak nie verder na sodanige redes verwys hoef te word nie. Geeneen van die partye het tydens argument voor hierdie Hof enigsins daarna verwys nie.

Uit die voorgaande blyk dit dat appellant se saak teen eerste respondent gegrond is op eerste respondent se verpligtinge uit hoofde van die versekeringsooreenkoms en die eerste respondent se keuse in terme daarvan om die voertuig te herstel. Eiser se saak teen tweede respondent is gebaseer op delik. Die getuienis dat die onderste raamwerk van die voertuig nie behoorlik herstel is soos voormeld nie en dat die skade aan die masjien veroorsaak is weens sodanige onbehoorlike herstelwerk, is nie weerspreek nie en moet aanvaar word. Dit is nie namens eerste respondent of tweede respondent in argument

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voor hierdie Hof in twyfel getrek nie. Die *quantum* van sodanige skade as synde die noodsaaklike herstelkoste is ook nie bevraagteken nie en dit kan vir doeleindes van hierdie uitspraak as korrek aanvaar word.

Dit is namens eerste respondent betoog dat die versekeringsooreenkoms gevolgskade uitgesluit het en dat die getuienis aantoon dat die gevorderde skade nie uit die ongeluk voortgespruit het nie maar uit die tweede respondent se onvakkundige herstelwerk. Daar is op gewys dat die kontrak uitdruklik bepaal dat eerste respondent nie teenoor appellant aanspreeklik sou wees vir 'enige gevolglike verlies van welke aard ook al' nie en dat eerste respondent die appellant reeds ten volle vergoed het vir die ongelukskade wat hy gely het. Voorts is betoog dat die gevorderde skade in elk geval te ver verwyderd van die aanvanklike risiko is waarteen die appellant verseker was.

Dit is wel so dat appellant in para 11 van sy besonderhede van eis uitdruklik beweer dat die skade wat hy gely het deel vorm en voortspruitend is uit die ongeluk waarin hy betrokke was. Die getuienis toon egter dat die appellant nie daardeur wou voorgee, en dat dit nooit sy saak was, dat die masjien in die ongeluk of weens die ongeluk beskadig is nie. Soos reeds gesê was eerste respondent uit hoofde van die bepalings van die versekeringsooreenkoms teenoor appellant aanspreeklik vir die skade aan die voertuig wat in die ongeluk opgedoen is. Eerste respondent het in terme van die ooreenkoms gekies om die skade te herstel en die

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verpligting om dit te doen spruit dus wel voort uit die versekeringsooreenkoms. Derhalwe was daar 'n kontraktuele verpligting op die eerste respondent om die skade aan die voertuig opgedoen in die ongeluk behoorlik en vakkundig te herstel in so 'n mate dat die voertuig vir alle praktiese doeleindes herstel word tot dieselfde toestand waarin dit was voordat die ongeluk plaasgevind het. Die feit dat eerste respondent tot die kennis van appellant nie self die herstelwerk verrig het nie en opdrag gegee het aan tweede respondent om dit te doen, verander geensins aan eerste respondent se gemelde kontraktuele verpligting teenoor appellant nie. Eerste respondent het tweede respondent aangestel en betaal om die werk te doen ter uitvoering van eerste respondent se verpligting teenoor appellant. Tweede respondent se gebrekkige herstelwerk en die gevolglike skade aan die masjien van die voertuig moet dus, vir sover dit eerste respondent se kontraktuele verpligting teenoor appellant betref, nie aan tweede respondent toegedig word nie maar aan eerste respondent asof eerste respondent self die onvakkundige en gebrekkige herstelwerk verrig het en aldus kontrakbreuk gepleeg het. Die skade aan die masjien van die voertuig is dus, vir sover dit die appellant betref, veroorsaak deur sodanige kontrakbreuk aan die kant van eerste respondent.

Daar is namens eerste respondent verwys na die volgende bepalings van die versekeringsooreenkoms onder die opskrif 'Algemene uitsonderings' op bl 4 daarvan:

> 'Algemene uitsonderings
>
> Hierdie algemene uitsonderings sal in alle opsigte van toepassing wees op die versekering ingevolge hierdie polis verleen behalwe in soverre hulle gewysig mag wees

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> deur enige spesiale uitsonderings in enige besondere afdeling van hierdie polis.
>
> 1. Tensy uitdruklik anders luidend in enige besondere afdeling van hierdie polis vermeld dek hierdie polis nie die volgende nie:
>
> *(a)* Enige eis wat uit enige kontraktuele aanspreeklikheid voortspruit.
>
> *(b)* Enige gevolglike verlies van welke aard ook al.'

Daar is ook verwys na 'n bepaling op bl 46 van die betrokke polis ingevolge waarvan eerste respondent aanspreeklik is vir skade aan die versekerde voertuig, met dien verstande, onder andere, dat eerste respondent nie aanspreeklik is vir

> '*(a) (g)*evolglike verlies hoe dit ook al ontstaan; waardevermindering, slytasie of meganiese of elektriese gebrek, onklaarraking, weiering of breekskade'.

Hierdie bepalings kan die eerste respondent nie van aanspreeklikheid weens sy voornoemde kontrakbreuk onthef nie. Die verwysing na 'kontraktuele aanspreeklikheid' in die aanhaling hierbo sluit nie die eerste respondent se aanspreeklikheid uit hoofde van die versekeringsooreenkoms en enige keuse wat hy ingevolge daarvan uitgeoefen het, in nie. So 'n interpretasie sou daarop neerkom dat die versekeringsooreenkoms 'n nulliteit is. Eerste respondent kan nie daarop steun om sy kontraktuele aanspreeklikheid te ontduik nie. Die verwysing na 'gevolglike verlies' het ook nie betrekking op die skade wat veroorsaak is weens die gebrekkige herstel van die voertuig, dws op eerste respondent se

kontrakbreuk nie. Die skade aan die masjien is nie gevolgskade in die sin waarin daardie begrip in die aangehaalde passasies gebruik word nie en kan eerste respondent hom ook nie op daardie bepalings beroep om hom van

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aanspreeklikheid te onthef nie. Bygevolg is eerste respondent aanspreeklik vir die herstelkoste van die masjien en moes appellant se eis teen eerste respondent toegestaan gewees het.

Die vordering teen tweede respondent steun op die nalatigheid van die tweede respondent weens tweede respondent se onvakkundige herstel van die gebulgde onderdeel. Die getuienis toon aan, soos reeds gemeld, dat tweede respondent versuim het om dit behoorlik na die oorspronklike posisie terug te buig en dat dit tot gevolg gehad het dat die katrol van die lugverkoelingseenheid teen 'n waterpyp geraak het en dit deurgeskuur het toe dit aangeskakel is en begin draai het.

Die inhoud van appellant se argument by die verhoor word nie in die oorkonde gereflekteer nie, maar die feit dat tweede respondent se aansoek om absolusie nadat appellant en eerste respondent se sake gesluit is, van die hand gewys is, dui daarop dat appellant waarskynlik in sy aksie gegrond op delik teen tweede respondent volhard het. Appellant se kennisgewing van appèl met betrekking tot tweede respondent lees as volg:

> *'(a)* Die landdros het fouteer deur te bevind dat appellant nie bewys het dat die tweede respondent 'n opdrag gehad het, hetsy direk, indirek of by wyse van aflelding en/of erkenning en/of aanvaarding om die herstelwerk te doen nie, veral in die lig van die feit dat die herstelwerk wel deur tweede respondent gedoen is.
>
> *(b)* Die landdros het fouteer deur nie te bevind dat, op die oorwig van waarskynlikhede, appellant sy saak bewys het nie, veral in die lig van die feit dat tweede respondent nie getuienis aangebied het nie.

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> *(c)* Die landdros het fouteer deur met die aansoek om absolusie van die tweede respondent, die absolusie nie toe te staan nie en na sluiting van die tweede respondent se saak, sonder om getuienis aan te bied, absolusie wel toe te staan.'

Die verhoorlanddros se redes vir uitspraak, wat reeds hierbo aangehaal is, is gedateer 25 Mei 1989. Die kennisgewing van appèl is gedateer 29 Mei 1989. Die indruk word geskep in para *(a)* van die kennisgewing van appèl dat dit appellant se saak was dat die verhoorlanddros moes bevind het dat appellant aan tweede respondent (waarskynlik indirek) opdrag gegee het om die herstelwerk te doen. In die lig van die gevolgtrekking waartoe reeds gekom is ten opsigte van die gronde van aanspreeklikheid aan die kant van eerste respondent is dit nie verder ter sake nie.

Paragraaf *(b)* van die kennisgewing van appèl is 'n blote veralgemening, maar dit mag moontlik geïnterpreteer word dat appellant se 'saak', waarna verwys word, die saak is soos beweer in appellant se besonderhede van eis. Paragraaf *(c)* van die kennisgewing van appèl doen niks meer as om 'n gebrek aan kennis van die bewysreg aan die kant van appellant se regsverteenwoordiger te illustreer nie.

In die appellant se hoofpunte van betoog voor hierdie Hof word daar ten opsigte van die meriete van die appèl slegs met betrekking tot eerste respondent se aanspreeklikheid submissies gemaak. Die enigste verwysing na tweede respondent se aanspreeklikheid kom voor in die heel laaste paragraaf waarin die argumente uiteengesit is en lees as volg:

> '12. Die houding wat hierdie versekeringsmaatskappy ingeneem het, het veroorsaak dat tweede respondent as 'n party gevoeg is en is dit
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> met eerbied in die omstandighede billik en regverdig dat eerste respondent gelas word om tweede respondent se koste te betaal.'

Hierdeur word aangedui dat appellant nie voortgaan met sy appèl teen tweede respondent met betrekking tot die meriete sowel as koste nie. Tydens argument is daar egter verder namens appellant aan die hand gedoen dat die appèl ten opsigte van tweede respondent ook moet slaag en dat tweede respondent aanspreeklik teenoor appellant gehou moet word. Daarna is daar namens eerste respondent betoog dat die appèl ten opsigte van eerste respondent nie kan slaag nie maar dat appellant wel sy saak teen tweede respondent bewys het. Tweede respondent se advokaat het weer die houding ingeneem dat die appèl ten opsigte van eerste respondent moet slaag maar dat daar nooit moes voortgegaan gewees het met 'n appèl teen tweede respondent nie. Aangesien appellant se advokaat sy betoog uitgebrei het deur, soos voormeld, ook te vra dat tweede respondent aanspreeklik gehou moet word, is hy gevra om aan te dui presies waarvoor hy vra en het hy toe aangedui dat daar uit hoofde van die kennisgewing van appèl, wat wel die tweede respondent betrek, gevra word vir vonnis teen beide die respondente gesamentlik en afsonderlik, as die een betaal die ander kwytgeskeld te word, insluitende koste in beide Howe op dieselfde basis.

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Nóg die pleitstukke nóg die getuienis toon enige grondslag vir kontraktuele aanspreeklikheid aan die kant van tweede respondent teenoor appellant nie, en dit is duidelik dat tweede respondent nie verbintenisregtelik teenoor appellant aanspreeklik is nie. Die enigste moontlikheid is 'n deliktuele aanspreeklikheid en dit word gekompliseer deur die feit dat daar 'n samelopende kontraktuele aanspreeklikheid van eerste respondent met betrekking tot dieselfde skade is. Na aanleiding van die gewysdes wat deur my nagegaan is het ons Howe feitlik deurgaans in gevalle van 'n sameloop van kontrakbreuk- en deliktuele aksies te doen gehad met 'n situasie waar daar slegs twee partye betrokke is, dws die eiser en die verweerder, en daar gesteun word op deliktuele aanspreeklikheid waar daar ook kontraktuele aanspreeklikheid is.

Dit is wel bekend dat in ons reg kontrakbreuk as sodanig nie sonder meer as 'n delik erken word nie. Dit word as delik erken slegs in daardie gevalle waar die optrede wat die kontrakbreuk daarstel op sigself en afgesien van die kontraktuele verhouding 'n selfstandige delik uitmaak. Die gewraakte optrede moet dus benewens die skuldelement ook onregmatig wees. Kyk A van Aswegen *Die Sameloop an Eise om Skadevergoeding uit Kontrakbreuk en Delik* Proefskrif vir die graad LLD (Universiteit van Suid-Afrika) Januarie 1991 para 5.1 op 292-4 en sake daar aangehaal soos saamgelees met para 2 op 220-2. In die onderhawige geval het ons met betrekking tot die gebrekkige herstel van appellant se motorvoertuig 'n kontraktuele verbintenis tussen appellant en eerste respondent en 'n verdere kontraktuele verbintenis voortspruitende uit die eerste verbintenis, tussen eerste respondent en tweede respondent. In effek is tweede respondent dus 'n subkontrakteur vir eerste respondent vir soverre eerste respondent die voertuig moes herstel. Die vraag is nou of tweede respondent se gebrekkige herstel van die motorvoertuig op sigself genome en onafhanklik van tweede respondent se verpligtinge teenoor eerste respondent en eerste respondent se verpligtinge teenoor appellant,

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'n delliktuele aanspreeklikheid van tweede respondent teenoor appellant skep wat dan saamloop met eerste respondent se kontraktuele aanspreeklikheid teenoor appellant.

Die feite in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) stem in 'n mate ooreen met die voornoemde situasie in soverre daar ook drie partye by 'n moontlike kontraksaanspreeklikheid betrokke was en waar daar gepoog is om op 'n same- lopende delliktuele aanspreeklikheid te steun. Die appellant was 'n firma van raadgewende strukturele ingenieurs terwyl die respondent 'n glasvervaardiger was. Appellant het sekere professionele dienste in verband met die beplanning en konstruksie van 'n glasvervaardigingsaanleg vir die respondent verrig. Laasgenoemde het appellant gedagvaar vir skadevergoeding uit hoofde van skade wat hy sou gely het as gevolg van appellant se beweerde professionele nalatigheid. Appellant het eksepsie teen die respondent se besonderhede van vordering aangeteken op grond daarvan dat dit nie genoegsame bewerings bevat het waarop die aksie kon berus nie. In die alternatief is daar ook gevra vir skrapping van sekere bewerings, maar laasgenoemde is nie relevant vir doeleindes van hierdie uitspraak nie. Die eksepsie was nie suksesvol nie en, nadat

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verlof verleen is, is daar na die Appèlafdeling geappelleer. Die feite toon aan dat daar oorspronklik 'n kontraktuele verbintenis tussen die partye bestaan het, maar dat hierdie situasie verander het toe die partye ooreengekom het dat die kontraktuele verbintenis ingevolge waarvan appellant as raadgewende ingenieur sekere werk moes doen met betrekking tot die ontwerp en oprigting van die glasfabriek aan 'n derde party ('Salanc') geassigneer word. Daarna was Salanc die party wat in direkte kontraktuele verbintenis met die respondent gestaan het en die effek van die assignasie was dus om die appellant se status op daardie stadium te verander na dié van 'n subkontrakteur *vis-à-vis* die respondent. Net soos in die onderhawige geval was die appellant dus te alle tersaaklike tye (en ten spyte van die assignasie) bewus daarvan dat die fabriek opgerig moes word en die werk verrig moes word tot voordeel van die respondent as elenaar daarvan. In die *Lillicrap*-saak het die appellant net soos die tweede respondent in die onderhawige saak te alle relevante tye homself voorgehou as 'n deskundige wat die nodige kennis en vaardigheid het om die betrokke werk behoorlik te verrig.

Hoewel daar wesentlike verskille is tussen die grondslag van die beweerde delliktuele aanspreeklikheid in die *Lillicrap*-saak in teenstelling met die grondslag daarvan in die onderhawige saak, meen ek dat die beleidsoorwegings wat genoem word in die meerderheidsuitspraak met betrekking tot die vraag of 'n delliktuele aksie gegrond op die *actio legis Aquiliae* tuishoort in 'n kontraktuele opset soos in die *Lillicrap*-saak teenwoordig was, eweseer van toepassing is in die onderhawige saak. Kyk op 500G-503A van die meerderheidsuitspraak. Grosskopf Wn AR handel met betrekking tot die situasie wat geskep is toe die respondent in daardie saak 'n subkontrakteur geword het op 502H-503A van die uitspraak as volg:

> 'Up to the present I have considered the policy considerations which, in my view, render it undesirable to extend the Aquilian action to the duties subsisting between the parties to a contract of professional service like the present. Would
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> these considerations fall away if the contract were assigned, as happened in 1976? In my view the answer must be in the negative. The relationship between the three parties is still one which has its origin in contract. One must assume that their respective rights and obligations were regulated to accord with their wishes, and that the contractual remedies which would be available were those which the parties desired to have at their disposal. The same arguments which militate against a delictual duty where the parties are in a direct contractual relationship, apply, in my view, to the situation where the relationship is tripartite, namely that a delictual remedy is unnecessary and that the parties should not be denied their reasonable expectation that their reciprocal rights and obligations would be regulated by their contractual arrangements and would not be circumvented by the application of the law of delict.'

Hierdie oorweging is myns insiens eweseer van toepassing op die onderhawige saak. Ek is

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derhalwe nie oortuig dat die tweede respondent, bo en behalwe sy kontraktuele verpligting teenoor *eerste respondent*, ook nog 'n bykomstige regsplig gehad het *teenoor die appellant* om die voertuig behoorlik te herstel of om te waak teen die veroorsaking van skade aan die voertuig weens enige nalatige versuim aan sy kant nie of dat 'sy nalatige versuim om die voertuig behoorlik te herstel wederregtelik was *vis-à-vis* die appellant nie. Ek is gevolglik van mening dat tweede respondent nie as gevolg van onregmatige daad aanspreeklik gehou kan word teenoor appellant nie. Sien ook die opmerking van Corbett HR in *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) op 570B-C met verwysing na die *Lillicrap*-saak.

Wat die meriete betref is ek gevolglik van mening dat die landdros, wat tweede respondent betref, tereg nie uitspraak ten gunste van appellant gegee het nie.

Ten aansien van die koste is dit duidelik dat die appellant geregtig is op 'n kostebevel teen eerste respondent met betrekking tot sy saak teen eerste respondent in die landdroshof sowel as op appèl. Hoewel die appellant se aksie teen tweede respondent sowel as sy appèl teen die bevinding van die landdros nie slaag nie, meen ek dat sy advokaat se versoek dat die appellant gelas moet word om sy koste op 'n prokureur en kliëntskaal te betaal, nie toegestaan behoort te word nie. Ek is eweseer ook van mening dat die versoek in die argumentshoofde namens die appellant dat eerste respondent beveel moet word om die tweede respondent se koste in die landdroshof sowel as op appèl te betaal nie toegestaan

kan word nie. Na my mening is daar geen rede waarom daar van die normale benadering afgewyk moet word nie, naamlik dat die koste deur die onsuksesvolle party betaal moet word.

Bygevolg slaag die appèl met betrekking tot appellant se vordering teen eerste respondent met koste en word die appèl met betrekking tot appellant se vordering teen tweede respondent van die hand gewys met koste. Die bevel van die landdros word gewysig om as volg te lees:

1. Vonnis word toegestaan ten gunste van eiser teen eerste verweerder in die bedrag van R5 372 tesame met rente daarop bereken teen 12% per jaar vanaf datum van dagvaarding tot datum van betaling sowel as koste van geding.

2. Eiser se vordering teen tweede verweerder word van die hand gewys met koste.

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Lichtenberg RP het saamgestem.

Appearances

CHG van der Merwe - Advocate/s for the Appellant/s

C Ploos van Amstel- Advocate/s for the First Respondent

AJR van Rhyn - Advocate/s for the Second Respondent/s

Claude Reid - Attorney/s for the Appellant/s

Claude Reid - Attorney/s for the First Respondent

McIntyre and der Post - Attorney/s for the Second Respondent

PHILLIPS v GENERAL ACCIDENT INSURANCE CO (SA) LTD
[1983] 3 All SA 101 (W)

Division:	Witwatersrand Local Division
Judgment Date:	15 June 1982
Case No:	Not Recorded
Before:	De Villiers J
Parallel Citation:	1983 (4) SA 652 (W)

• Keywords • Cases referred to • Judgment •

Keywords

Insurance - Insurable interest

Cases referred to:

Littlejohn v Norwich Union Fire Insurance Society 1905 TH 374 - Referred to

Price and Another v Incorporated General Insurances Ltd 1980 (3) SA 683 (W) - Followed

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Judgment

DE VILLIERS J: In this matter the plaintiff claims, under a general domestic policy of insurance, R247 representing the value of a crucifix and R9 700 representing the value of a diamond ring. The amounts are not in dispute.

The defendant raises two issues:

Firstly, whether the plaintiff had an insurable interest in the goods and, secondly, whether the plaintiff in terms of the policy of insurance took all reasonable precautions to guard against loss or damage of the goods.

Both Phillips, the plaintiff, and his wife appeared to me to be genuine people. Mrs Phillips is 50 years of age and I gauged her husband's age to be about ten or so years older. Both of them made a good impression upon me and I now take up the evidence of Mr Phillips.

He married his wife, Mrs Phillips, on 10 June 1967 and purchased

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the diamond engagement ring for some R9 000. He bought this ring in order that his wife should wear it. In fact she did wear it on all occasions except when she was attending to the cooking of their meals. He testified that although he was under no legal obligation, he felt morally obliged to replace the ring should his wife lose it.

He testified that the gold crucifix his wife bought out of her house-keeping money. He and his wife were married by antenuptial contract. His wife was a person who was not negligent or careless in respect of her property. She had never lost any item of jewellery and she looked after her jewellery as a reasonable prudent person would.

During October 1980 he concluded the insurance agreement which forms the basis of this contract. A valuation of all the items of jewellery was made, and each item valued. In the insurance agreement his wife is referred to as C Phillips. He indicated that this was her name, Charlotte Phillips, and it is also common cause that when this policy was issued the insurance company was well aware that the two items belonged to Mrs Phillips.

Mr Phillips also testified that on a previous occasion the defendant had paid R200 to have a ring belonging to his wife which was damaged repaired in terms of the present insurance policy.

In November 1980 he was the manager of an estate agency business in Johannesburg. He employed his wife as an agent. On 26 November, a certain Luigi came into their office. He asked the people there whether he could read their palms. He himself volunteered and Luigi read his palm. He was very much impressed with this Luigi because of the uncanny knowledge that he displayed about Phillips' past. He described in some detail that Phillips had been married before, which was so.

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He also indicated how the marriage had broken up, which was more or less correct and he related other matters, amongst others that Phillips had had a lean time as an estate agent in Durban, which was also so. The upshot of it was that he thought it would be a good idea if his wife's palm was also read by this Luigi. She was agreeable, after Luigi read her palm he left the office.

On 28 November at about 5 pm he returned home and found Luigi at his house. He had apparently arrived there at an earlier stage and had had a discussion about spiritualism with his wife. They had a general discussion about spiritualism and associated matters. Both the plaintiff and his wife were interested in spiritualism. Luigi had supper with them and left at about 8 pm. He made a very good impression on them. He was an excellent talker, fitted in well with his surroundings, knew how to behave himself and, as Phillips said, he would have made the best salesman in the world. Luigi indicated to them that he was married and living in the vicinity of Meyerton. Just before Luigi left he suggested that they give him some or other article to take to his church to be blessed which would then bring happiness to them. He decided to give Luigi a silver tray. It was an article which his wife had inherited. It is clear that he decided on this article with his wife's consent. Luigi also told them that he would like something made out of porcelain so that he could also take that along with him to have it blessed. His wife then went to another room and brought a small

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porcelain object which was also handed to Luigi. Luigi invited his wife and himself to visit him on 6 December at Meyerton so that they could then meet his wife and family.

He did not see Luigi again until midday, between 12 pm and 1 pm on 2 December, when his wife rang him and asked him whether he could see Luigi, who wanted to speak to him. Luigi came to his office and told him that it was necessary for him to get rid of some or other aura, or some or other "vibe" which was influencing his business and that in order to do so, he had to provide Luigi with a cheque for R2 000 which Luigi would then have blessed by his church, and would return the next day. That would be 3 December.

R2000 was rather a large sum of money for him, having regard especially to the fact that he was overdrawn at the bank in rather a substantial amount. However, he decided to ring up his wife and find out her view. He spoke to her and she was agreeable that he give the money to Luigi. He made arrangements with the bank, made out a cash cheque for R2 000, exh "B1", which he handed to Luigi.

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At that stage he was not aware of the fact that his wife had given certain articles, amongst others the diamond ring, to Luigi, and that she had also made a payment to Luigi in the sum of some R800. He testified that after 2 December he did not see Luigi again. On 10 December, he had occasion to discuss certain matters with his wife. She then told him that she had given the ring to Luigi, and also mentioned the R800 she had also given to Luigi. As a result they went to see their brokers and reported the matter to the police. Both he and his wife made statements to the police.

The claim form, exh "A33", was completed together with their statements. All of these statements and forms were filled in on 11 December.

In cross-examination, he said the tray was an heirloom belonging to his wife. He had it replated. His palm had not been read before, it was something that was new to him. He also indicated that he had given the ring to his wife to wear. He did not notice that between 28 November and 2 December she was not wearing this ring. The reason for this was that she wore many rings and he did not take particular notice whether she wore a particular ring or not. He also conceded that his wife had given certain pearl necklaces

to her children. She parted with the pearls freely, it was her property and the reason why she gave the pearls to her children was because of the fact that she did not like wearing pearls.

His wife had her own banking account and did as she pleased with her own property. He was certain that his wife would not have parted with the engagement ring without first discussing it with him. He would not have allowed his wife to give the ring to Luigi to bless, even though he trusted Luigi, because apart from its intrinsic value he attached a great sentimental value to it.

The reason why he trusted Luigi to the extent to which he did, he says, was attributable to the fact that there was a bond between them, which was strengthened by the fact that they held the same religious beliefs.

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Mrs Phillips confirmed his evidence in the main. When she married the plaintiff she was a divorcee and was not well off. The crucifix was bought from money which she had saved out of her housekeeping money. Before she had met Luigi, she had never parted with possession of the engagement ring, never mislaid it and had worn it for a number of years. She also testified that she never mislaid any of her other items of jewellery.

She recounted that on 26 November when Luigi read her palm it was quite incredible to her how near he was to the truth in respect of her past life. He told her that she had grown sons who were married. He recounted the difficult times which they had had in Durban, which was correct. She found him, and I quote her words more or less:

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> "A *bona fide* sincere young man who had a good knowledge of palmistry and was well versed in the spiritual religion."

On 25 November, Luigi had suggested to her that he visit her later in order to discuss spiritualism and to read her palm again. She agreed and two days later Luigi arrived at about 3.30 pm. This must be on 28 November, although she did not refer to the date. After some discussion she gave Luigi her wedding ring and the crucifix. He was going to take them and have them blessed in his church, which "would bring love and happiness" to herself and her husband. Later her husband came home. She did not tell him about the wedding ring. She also referred to the incident in respect of the tray which was a family heirloom and the ornament which she removed from the cabinet, both of which were given to Luigi to bless. She further indicated that about two days later, and this would be 2 December, Luigi arrived at her house at 10 in the morning. He asked her for some money in excess of R800. She did not have so much money and gave him a cheque for R800. He wanted the money for a religious purpose, and to get rid of a bad vibration which was surrounding her on that day. She trusted him because he had returned the wedding ring to her when he arrived that morning. She was not concerned about the bracelet and the tray, because those items, she understood, would be returned to her later. On that particular day Luigi went into a trance and when he got out of the trance he said to her that she possessed a ring and that there was a bad vibration which was caused by this ring. He wanted it to have it blessed at his church so that the bad vibration could be removed.

She knew what he was talking about, because it was clear to her that he was referring to the gold and diamond engagement ring. She was, however, certain that he could easily have known about this ring because on each occasion that he read her palm she had worn the ring. This, however, did not occur to her on that particular day. She fetched the ring, which was on her dressing table, and gave it to him. It seemed to her that he put it into one of his socks.

Luigi then told her he wanted something woollen to bless. The idea was that he would take this article, bless it, return it to her and that she would then do with it as she pleased. The two of them went to Greatermans where she bought, on the suggestion of Luigi, two rugs for approximately R300 and gave them to him. She had decided to give the rugs to friends of hers after Luigi had blessed them.

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She then phoned her husband on Luigi's suggestion to find out whether he could see him.

She also referred to a cheque of R100, exh "B1", which she had given to Luigi on the day he read her palm. She also gave him R5. She said that her husband did not know that she paid Luigi R105; that he did not know that she had purchased two rugs for R300 and given those rugs to Luigi; nor that she had given him a cheque for R800 or that she had given him the engagement ring. She said that she had no qualms about giving the ring to him because he had returned her wedding ring. She was, however, worried about what her husband would do. She thought that, if he knew about it, there would really be trouble. That is why she did not tell him about this.

She described Luigi as being slightly built, tall, dark, big brown eyes, good looking. She herself was naïve but careful and not gullible. In respect of the R100 that she had paid Luigi to read her palm, she thought that that was her own business. She was earning approximately R1 000 per month and could do with her money as she thought fit. She was, as she said, a little independent, a private and simple person.

When asked why she did not tell her husband that she had parted with the ring to Luigi on that particular day, 2 December, she said her husband would be "as made as a snake" because her husband was not as gullible as she was.

As far as the ring was concerned, she said that, if her husband had objected to her giving the ring to Luigi, she would not have tried to persuade him because she knew her husband and knew how far she could go with him. She was sure that he would not have allowed her to part with the ring.

Having thought about the events, she felt certain that Luigi must have mesmerized both herself and her husband. A factor which seems to me to have played an important part when she parted with the ring was the fact that Luigi had returned her gold wedding ring.

That concluded the evidence for the plaintiff.

Trevor Grey gave evidence for the defendant. He is an insurance broker. He negotiated the present insurance policy on behalf of the plaintiff during September 1980. He gave evidence that some of the items were taken off the list of items to be insured because the plaintiff said that his money was tied up and the premium was too high. In respect of the R2000 cheque, plaintiff had told him that he had given the cheque to a gypsy to bless and that the cheque would be returned in a day or two, and he thought that the plaintiff had told him that the money would be doubled.

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The evidence of the plaintiff in this regard was that he had given the R2 000 to Luigi on the understanding that Luigi would return it the next day. Luigi had also told him that he was going to invest some R6 000 with a building society, of which his company was the agent.

In cross-examination Grey conceded that he had extensive experience in short-term cover. Fifty per cent of his business consisted of this type of insurance. He was aware that the present agreement covered the jewellery belonging to Mrs Phillips and also indicated that he had placed a considerable amount of insurance with the defendant company, where husbands insure their wives' jewellery. Defendant had accepted this type of insurance, had never raised any objections; he was certain that in the present case the company would honour its obligation in terms of the insurance policy and that Mrs Phillips' jewellery was properly covered.

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He, however, had some misgivings as to whether the plaintiff in the present case could succeed because of the way in which the jewellery got lost.

When he became aware of the approach taken by the company in the present case, he got in touch with them, and asked them what their practice would be in the future on this type of insurance, namely where a husband insures the jewellery of his wife under the same circumstances as in the present case, to which

they answered that they would not raise as a defence the question whether the husband had an insurable interest.

He was personally of the view that Phillips did have an insurable interest in the jewellery and, having regard to the evidence of Grey, I am quite satisfied that Grey in the present case would not have negotiated this policy of insurance if he had any idea that the company would take the point that the plaintiff had no insurable interest in his wife's jewellery. Grey only became aware of this after he had been summoned as a witness. He found this hard to believe when Phillips informed him of this; as a result he interviewed the manager of the company and was assured that the company would not take the point of insurable interest in any future case.

That was the case for the plaintiff and the defendant.

At the outset, I would have liked to have heard what the company's views were in respect of the defence raised by them. I would also have liked to have heard how they viewed this contract which, on the face of it, made it quite clear that Phillips was insuring his wife's jewellery. That evidence was not placed before me and this Court must now try and evaluate the situation on the evidence which is before it, with this observation, however, that, if anything is left unexplained by the company which is and will strengthen the plaintiff's case, I will hold that against the company for not putting its case before the Court.

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I accept the evidence of Phillips and his wife. They can be criticised on rather unimportant aspects. I have no doubt that they were genuinely infatuated by this youngster and that, had reason prevailed, the two items would not have been lost. I am, however, certain that, as far as Mrs Phillips is concerned, she was more taken up with this spiritualistic cult or religion than her husband and that she fell an easy prey to Luigi's power of persuasion, which caused her to part with the engagement ring. It seems to me that she was genuinely taken in by Luigi, and that she parted with the ring in the *bona fide belief that Luigi would return it.*

The case involves two issues as I see it. Firstly, whether the plaintiff had an insurable interest in the diamond engagement ring, and secondly whether he complied with para 1 of the general conditions of the policy (exh A at 28), namely whether he took reasonable precautions to guard against loss or damage of the articles insured. Having regard to the evidence, I do not think that the defendant can rely on para 7 of the general conditions which refer to "wilful act or connivance of the insured".

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I will first deal with the first issue raised. In Halsbury *Laws of England* vol 25 at 329 para 636 insurable interest is defined as follows:

> "A husband has an insurable interest in his wife's property, so long as they are living together and sharing its use. Even in the case of property which in its nature cannot be shared, for example articles of clothing or jewellery, the husband presumably has an insurable interest if he is financially responsible for replacement. It is supposed that a wife has a similar insurable interest in the property of her husband which she shares and, if she is the money partner, in his personal belongings."

Mrs *Blum* for the defendant argued that a spouse has an insurable interest if he or she has the use of the property and/or is under a legal obligation to replace the article if it is destroyed or lost. The question whether a spouse has an insurable interest is not viewed within such a narrow compass in South Africa.

In *Littlejohn v Norwich Union Fire Insurance Society* 1905 TH 374 WESSELS J, after dealing with American and English cases on the point, says at 380:

> "In the case of *Gaulstone v Royal Insurance*, 1 F & F 276, the English Court decided that a husband has an insurable interest in the property settled on his wife's separate use, they residing together and sharing in the use of the property. Now although the English law relating to husband and wife differs materially from ours, this case shows that a husband has a material interest in his wife's property, even though he has no legal estate in that property.
>
> The principle to be deduced from these cases appears to be this.

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> If the insurer can show that he stands to lose something of appreciable commercial value by the destruction of the thing insured, then, even though he has neither a *jus in re* nor a *jus ad rem* to the thing insured, his interest will be an insurable one."

Mrs *Blum* relied on a passage in Gordon and Getz *South African Law of Insurance* 2nd ed at 92, where the authors, with reference to the case of *Littlejohn (op cit)*, say:

> "Both these statements are, however, too wide: they do not emphasize the fundamental rule that the interest must have a legal basis. If it does have such a basis an expected benefit, however remote, confers an insurable interest."

I am of the view that the author places too much emphasis on the insurable interest, and loses sight of what the real inquiry is, namely whether the contract, having regard to all the surrounding circumstances and especially the intention of the parties, amounts to a betting or wagering agreement. If there is any doubt, the benefit should in my view be given to the insured, having regard to fact that normally the company has throughout the period of insurance accepted the insurance premiums and that such a defence is really a technical one. I concede that one of the factors to be taken into consideration in deciding whether the agreement amounts to a wager or not is whether the husband has an insurable interest in the article insured.

It is, however, not the only yardstick. A further question which arises is whether the insurable interest must exist at the time of entering into the agreement, or need it only exist at the time a claim is brought in terms of the agreement. It may be that at the time of entering into the agreement the husband had an insurable interest in the article insured, but that as time passed his interest ceased to exist. What happens to the premiums paid in the meanwhile? Why should a company which enters into this type of agreement be entitled to keep the premiums and also escape liability? On the other hand, what is the

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situation where an insurable interest does not exist when the contract is entered into but comes into existence at a much later stage?

If the insured's claim must be judged solely on an enquiry as to whether he has an insurable interest in the article insured, the problem of seeing that right be done would in certain circumstances result in extending the meaning of the phrase, whereas, if a robust approach as to what the true intention of the parties was were adopted, the problem would more readily be solved. Take as an example a husband who insures a coat belonging to his wife. He is under an obligation to provide her with clothing. Does this mean that he has to provide her with a costly mink coat? If not, which would be the case where the parties are not well off, then the husband would presumably not have an insurable interest in the coat.

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However, if he were rich and under an obligation to provide her with such an expensive coat, he would have an insurable interest. In the former case, a person who should have the benefit of insuring the article is excluded, and in the latter case the rich man who can easily bear the loss has the benefit of being able to insure the article.

It seems to me to be more logical to approach the problem with a view primarily to seeing if the agreement is a betting or wagering agreement, ie where the one party risks his money against the company on the result of a doubtful event.

It must be remembered that in modern insurance practice, the premiums are usually actuarially computed by evaluating the risk and many other factors, something which very seldom if ever occurs in a wager.

I now deal with the facts in the present case.

The following factors emerge from the evidence and are important. Firstly, that the insurance company accepted the premiums. They must therefore have accepted that the plaintiff had an insurable interest in the diamond ring, because I cannot see how they could otherwise have accepted the insurance. A further matter which I think of importance is that the insurance company was well aware that the plaintiff was insuring his wife's jewellery.

In regard to the plaintiff there are matters which need not sound in money but have a value to the person

insuring them. The plaintiff said that he purchased the ring for his wife to wear; his outlay was some R9 000. He thought it a good idea that she should wear it. It gave him a certain satisfaction to see his wife wearing this ring. To my mind he had an interest in that ring to see that it be replaced if lost. Having seen the plaintiff it is clear that he insured the ring against loss, and that as far as he was concerned this was not a wager. The ring was valued at its purchase price and his whole intent in insuring it was in order that if it be lost, it be replaced, because, although not legally bound to replace it, he nevertheless felt himself under an obligation to do so. That obligation was not the obligation where his wife could sue him to replace it.

A further factor which I think is of importance is the following. If it be said that a husband has an insurable interest provided he has some use of the article insured, then it can be argued in the present case that,

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if hard times befell the plaintiff, his wife would be obliged to sell the ring in order to provide for household necessities. The husband clearly has an interest in the estate of his wife.

If one has regard to the case of *Price and Another v Incorporated General Insurances Ltd* 1980 (3) SA 683 (W) it seems to me that a practice has grown up that a husband has an insurable interest in his wife's jewellery.

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For these reasons I am of the view that the plaintiff, on the principle laid down in the *Littlejohn* case *op cit*, had an insurable interestin the engagement ring which was insured. If I am wrong in coming to this conclusion, then I am satisfied on all the facts that this agreement cannot be said to be either a betting or wagering agreement.

I now deal with the second point raised by the defendant, namely whether he complied with para 1 of the general conditions of this policy, which reads as follows:

> "Precautions. The insured shall take all reasonable precautions to guard against loss, damage or liability as specified within the policy."

Mrs *Blum*, to my mind correctly, conceded that, up until the plaintiff was approached by Luigi on 2 December to advance him a further R2 000 he was not aware that his wife had parted with the ring, and that there was no evidence to indicate that he should have had such a suspicion. I agree with that view. The evidence is quite clear that Phillips could not have known that his wife was going to part with this expensive ring.

However, it was argued that, when Phillips was approached by Luigi on 2 December and asked for a R2 000 loan, he should have become suspicious and have enquired from his wife whether she had parted with any other money or valuables to Luigi.

Having regard to the evidence as a whole, I do not think that Phillips had any reason to think that his wife had parted with other items. He himself had been persuaded to make the R2 000 available to Luigi, and was merely getting his wife's view on this. There are no facts which would tend to indicate that Phillips should have had a suspicion. As I have said, he appeared to me to be a simple person, and it is clear that he was easily influenced by Luigi. People who have a common religious belief often have a bond of trust and friendship created by their belief. Phillips could ill afford to advance the R2 000 to Luigi; he did not have it and had to borrow it from the bank after making the necessary arrangements. It was money which he had to repay to the bank. The very fact that he parted with the money shows that he trusted Luigi completely, otherwise he would not have given the money to him. The fact that he discussed the loan with his wife is not indicative of the fact that he had any misgivings.

On the assumption that when he was approached for the R2 000 he should have become suspicious of Luigi's actions, the question arises whether he could really have done anything about the loss which had already occurred. The suggestion that he could have confronted Luigi takes the matter no further.

The relevant portion of the clause reads:

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> "shall take all reasonable precautions to guard against loss, damage or liability".

There is no *onus* on the insured to take steps for the recovery of the insured article *after* the loss has occurred. It certainly does not require from the insured in this case to have asked Luigi whether he had the ring and, if so, to return it.

As I see it Phillips at no stage had any reason to believe that his wife had parted with the ring, or that he should have made any inquiries when he spoke to her on 2 December. He was misled by his wife. He had no reason not to trust her, and were it not for her foolishness the loss would not have occurred. Having observed Phillips for some time I am of the view that he would also under these circumstances have parted with the ring, which of course is not in issue.

For these reasons I must hold in favour of the plaintiff and in the result judgment is granted in the sum of R9 247 and costs.

Appearances

K Blum - Advocate/s for the Defendant/s

D Marais - Advocate/s for the Plaintiff/s

Deneys Reitz - Attorney/s for the Defendant/s

Damant, Bostock and Company - Attorney/s for the Plaintiff/s