PILLAY v SOUTH AFRICAN NATIONAL LIFE ASSURANCE CO LTD 1991 (1) SA 363 (D) A

1991 (1) SA p363

Citation	1991 (1) SA 363 (D)
Court	Durban and Coast Local Division
Judge	Didcott J
Heard	B June 18, 1990; June 19, 1990; July 24, 1990
Judgment	September 28, 1990
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Insurance - Generally - Applicable legal principles - Duty of disclosure - False replies to questions in proposal form - When C insurer entitled to repudiate liability on the grounds thereof - Insurance Act 27 of 1943 s 63(3) - Right to repudiate not dependent on opinion of the relevance of such answers to the risk underwritten, formed when falsity detected and insurer purports to exercise right of repudiation, but on the likelihood of such answers 'having materially affected the assessment of the risk' at time of issue of policy - *Onus* D on insurer to show that false answers materially affected the risk in the estimation of the reasonable person - False answer to questions in proposal form resulting in non-disclosure of fact that insured suffered from mild to moderate hypertension - Such information likely to affect insurer's determination of the premium - False answer 'having E materially affected the assessment of the risk'.

Insurance - Generally - Applicable legal principles - Duty of disclosure - False replies to questions in proposal form - When insurer entitled to repudiate liability on the grounds thereof - Insurance Act 27 of 1943 s 63(3) - Whether words 'the assessment of the F risk' in s 63(3) encompassing only the intrinsic acceptability of the particular risk or whether wider meaning of including the amount of the premium in return for insurer undertaking the risk also encompassed - Latter wider meaning accepted as correct construction. G

Headnote : Kopnota

An insurer's right to repudiate liability on account of false answers to questions in a proposal for a domestic policy of insurance depends, in terms of s 63(3) of the Insurance Act 27 of 1943, not on the opinion of their relevance to the risk the insurer underwrote which it formed when their falsity was detected and the insurer purported to exercise the right, but on the likelihood, demonstrated as a fact, of their having 'materially affected the assessment of the risk' at the time when it issued the policy. And there the *onus* of proof rests on the insurer. H What the insurer has to show is not a materiality from the viewpoint of either partisan side, but a materiality that would have added up to such in the disinterested estimation of the reasonable person.

The Court accepted furthermore, as to the question whether the words 'the assessment of the risk' in s 63(3) of the Act encompassed only the intrinsic acceptability of the particular risk assumed by the insurer, I or whether their meaning extended beyond that topic, including such but covering in addition the amount of the premium in return for which the insurer undertook the risk, that the latter wider interpretation was the correct one.

The Court, accordingly, held that the insured's false answers to questions in a proposal for a life policy whereby he failed to disclose that he suffered from mild or moderate hypertension amounted to representations made to the insurer which were warranted to be true but J were not, as intended in s 63(3), that the information not

1991 (1) SA p364

DIDCOTT J

A disclosed was likely to have affected the insurer's determination of the premium in the event of its accepting the risk and that the insurer, the defendant in the present case, was entitled to repudiate liability under the policy.

Semble: The Court commented that the result in the present case was harsh and inequitable and that the amendment of s 63(3) of the Act should be considered, either by the introduction of a proviso in terms of which the insurer gained the right and was confined to the remedy of B deducting from the proved claim the additional premiums it would have charged throughout the duration of the policy if the true facts had been known to it from the outset, or by the adoption of the French 'proportionality rule' whereby the insurer has to pay the proportion of the proved claim which the actual premium bears to the one it would then have levied.

Case Information

Civil trial in an action on an insurance policy. The facts appear from C the reasons for judgment.

S Gyanda for the plaintiff.

I J B van Heerden for the defendant.

Cur adv vult.

D *Postea* (September 28).

Judgment

Didcott J: The defendant insured the life of the plaintiff's husband under a policy which it issued in her favour a couple of years ago. Five months later he died suddenly from a cerebral haemorrhage. So she claimed the sum of R35000 which it had undertaken in the policy to pay E her on his death. It repudiated liability for the payment. The sequel is this action, one brought to enforce her claim.

The cover provided by the policy was not large, as life insurance goes nowadays. And the plaintiff's husband, aged 46 years, was not old. In those circumstances the defendant did not require him to undergo any F medical examination before it insured his life.

Instead the defendant contented itself with the answers given in the proposal form to the questions concerning the health of the plaintiff's husband that had been put to him there. They included four which were couched thus:

G '(1) Are you troubled, or have you ever been troubled, with any ailment, disease... or abnormality?

(2) Do you suffer from ill-health in any respect whatsoever?

(3) Have you during the past five years consulted any doctor?

(4) Is there anything regarding your health (eg ailments, diseases)... which may affect the risk of the assurance proposed?'

H Each of these questions he had answered in the negative. He had then signed the proposal form.

The plaintiff herself had also signed it beneath some wording, ungrammatical in parts, that went like this:

'I hereby... guarantee that the information provided in this form. I .. which in Sanlam's opinion are (*sic*) relevant to the assurance risk, and which have (*sic*) been signed by... the person whose life is to be assured, is true and complete, and I accept that it shall constitute the basis of the proposed assurance. I agree that, if this guarantee is not complied with, Sanlam can (*sic*) repudiate all liability and that all moneys paid shall be forfeited."Sanlam', I mention in parenthesis, is the defendant's abbreviated name. The policy in turn recorded that

1991 (1) SA p365

DIDCOTT J

A 'the proposal for the policy... shall be the'basis of the agreement embodied in the policy'.

The case pleaded by the defendant was this. The excerpts that I have quoted from the proposal form and the policy entitled it to reject the plaintiff's claim and to retain the

monthly premiums which she had duly paid it. For the answers furnished to the questions that I have B reproduced were all false.

The defendant discharged without difficulty, I consider, the *onus* it bore of proving the falsity of those answers. This it did through the evidence of Dr K S Govender, a medical practitioner whom it called as a witness and who knew what he was talking about, since he had looked after the plaintiff's husband for a number of years. He testified well, C his testimony was substantiated by the entries made contemporaneously on the cards he had kept which were produced at the trial, and I believe all he told me. It was the following.

Far from having consulted no doctor throughout the five years D preceding the completion of the proposal form, far from having been troubled with no single ailment, the plaintiff's husband had called on Dr Govender 40 times during the last four of those five years, seeking treatment on each occasion for some or other disorder that plagued him. Sinusitis was the main one. He suffered from it chronically. He also had sporadic bouts of influenza, gastritis and fibrositis. He was an E inveterate worrier, a man always anxious about his health, indeed almost a hypochondriac who hastened to the doctor the moment he felt unwell or sore. These ailments amounted to nothing worse, however, than distressing nuisances. None had any significance when it came to, none had the slightest bearing on, either the expectancy or insurability of F his life, whether viewed prospectively or retrospectively. That was at no greater risk on account of the lot than it would have been free from them all.

But such was not the end of the story. Dr Govender made it a practice to measure the blood pressure of his patients whenever he examined them, and he did that every time the plaintiff's husband visited him. Normal G readings resulted until, some 16 months before the proposal form was signed, a series of higher ones were registered. Dr Govender diagnosed hypertension, rating its degree as mild to moderate. He prescribed and dispensed medication for it. The blood pressure of the plaintiff's husband was monitored on each subsequent occasion. His condition remained stable throughout the rest of the period that ended with the H completion of the proposal form, neither improving nor deteriorating but kept under control by the medication, which continued to be administered. None of the readings that were taken happened to be recorded at the time or could later be remembered. Each must have ranged, however, between 140 and 160 on the systolic scale and from 90 to 100 on the diastolic one. For the doctor would not otherwise have I diagnosed hypertension which was mild to moderate and stayed at that level. Nor would he have used the particular medication that he chose.

Why the plaintiff's husband answered the questions in the way he did, when such was his medical history, is not entirely clear. The answers were recorded in the presence of the plaintiff and the salesman handling J the

A transaction, each of whom testified about it. According to the plaintiff, her husband informed the salesman that he had suffered from and been treated for influenza, sinus infections, colds and the like, but the salesman brushed the information aside, dismissing the need to mention disorders so common and unimportant or visits to a doctor on the mere score of them. And, though the salesman initially denied having B been given even those trite tidings, he seemed to recall the occasion rather hazily, conceding eventually that he might well have received them and would in that event have responded in the manner attributed to him. The hypertension was quite another matter. Nothing at all got said about it. On that point the salesman was adamant, and the plaintiff C agreed with him. Yet her husband knew all along that he had hypertension. He had been told so by Dr Govender, who warned him that, unless he took his medication regularly, his condition would worsen and might become dangerous, causing grave cardio-vascular disease. So much emerges too from the doctor's evidence. The plaintiff said, and I accept, that her husband had never revealed any of this to her, that she D was totally ignorant of it. Perhaps he wanted her not to worry about him. Perhaps, by the time when he concealed the trouble from the defendant in turn, he had persuaded himself that it did not really matter, thus allaying his own anxieties. Or maybe he deliberately deceived the defendant. But I am now within the realms of surmise. What E counts is that his answers, however

they may be explained, were undoubtedly false. He had consulted a doctor frequently during the previous five years. He did suffer from ill-health in a variety of respects. He had been and still was afflicted with sundry ailments and diseases. And the hypertension at least must be regarded as one that would have interested any insurer.

The falsity of the answers given was not all that counted, however, F when it came to the pleaded defence. No less important was their materiality, the issue on which I shall now concentrate.

According to the proposal form, one recalls, the defendant had the right to repudiate all liability under the policy once false information had been furnished there which, in its sole opinion, was 'relevant to G the assurance risk'. But that term of the insurance contract was trumped by s 63(3) of the Insurance Act 27 of 1943, which governed the policy because it was a 'domestic' one for the purposes of the statute. The subsection provided, in the part now pertinent, that:

> 'Notwithstanding anything to the contrary contained in any domestic H policy or any document relating to such policy, any such policy... shall not be invalidated and the obligation of an insurer thereunder shall not be excluded or limited... on account of any representation made to the insurer which is not true, whether or not such representation has been warranted to be true, unless the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said policy at the time of issue... thereof.'

I The false answers amounted, in the parlance of the subsection, to representations made to the insurer which were warranted to be true but indeed were not. The defendant's right to repudiate liability on account of them depended, we therefore see, not on the opinion of their relevance to the risk it underwrote which it formed when their falsity was detected and it purported to exercise the right, but on the J likelihood, demonstrated as

A a fact, of their having 'materially affected the assessment of the risk' at the time when it issued the policy. And there too the *onus* of proof rested on it. What it had to show, I furthermore believe, was not a materiality from the viewpoint of either partisan side, but a materiality that would have added up to such in the disinterested estimation of the figure whose standards we are well accustomed to B invoking, the reasonable person. Authority for that proposition is derived from *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*1985 (1) SA 419 (A) (at 435F - I) and *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en 'n Ander*1989 (1) SA 208 (A) (at 216B - G), in which the perceptions of the prudent insurer and those of the prudent insured were rejected alike as the C yardstick employed by our law. Neither case, it is true, had to do with the subsection. Each concerned the non-disclosure to an insurer of facts said to have been material, but a non-disclosure not tantamount to a representation, so it seems, and therefore one untouched by the subsection which the common law of insurance governed. To my mind, however, that is now by the way. The subsection altered the common law D by precluding insurers from avoiding liability on the grounds of untrue or incorrect statements made to them that were immaterial. But the materiality on which it insisted did not differ in essence, as I read its wording, from the concept of such familiar to the common law.

The *onus* was plainly not discharged with reference to the minor ailments, the sinusitis, gastritis, fibrositis and influenza, or to E anything connected with them. Indeed, the immateriality of the answers given on all those scores could hardly have been clearer from the evidence, that of Dr Govender in the first place and Mr G S Harry in the second, a seasoned underwriter working for the defendant whom it also called to the stand and who accepted without hesitation that such was F the case. Your reasonable person would not, I feel sure, have thought this tale of banal woe important or interesting enough to warrant the recounting of it to an insurer.

The hypertension was a horse of a different colour. Its seriousness, or potential seriousness at least, is common knowledge and was confirmed G by Dr Govender. It therefore came as no surprise when Mr Harry told me that, had the plaintiff's husband disclosed his affliction with the disease to any insurer which happened to be approached

for a policy on his life, it would unquestionably have required him to undergo a medical examination and furnish it with a report on such, before even considering the request. The defendant in particular, I learnt as well H from Mr Harry, would have insisted on the completion by the doctor examining him of a form specially designed for cases of hypertension. The non-disclosure cost the defendant, I thus conclude, the opportunity it would otherwise have taken to investigate, measure and assess the true magnitude of the risk assumed by it.

I The loss of that opportunity was not, however, the end of the matter. The question then arising was this. What would have happened if, as the result of a full disclosure, the opportunity had been taken? The form mentioned by Mr Harry, one duly produced as an exhibit, was put to him. He was asked to imagine its completion at the time in exact conformity with the evidence given at the trial by Dr Govender, an exercise done J quite

DIDCOTT J

A safely since the evidence had turned out to be beyond dispute. He was asked to suppose, in other words, that the picture then presented to the defendant, the picture it then got of a man aged 46 years whose life was to be insured for a mere R35000, had been one with no feature significantly adverse but for hypertension of some 16 months' duration and of mild to moderate intensity, the blood pressure measuring between B 140 and 160 systolically and from 90 to 100 diastolically, a hypertension besides which medication appropriate to the diagnosis happened to have been keeping under control. Mr Harry's reappraisal of the situation in the light of those circumstances, which we must now regard as the actual ones, was conspicuously candid and fair. Had the C defendant known of them all along, he said with his wealth of experience, the likely effect would have been not its outright refusal to insure the life of the plaintiff's husband, but a readiness to do so in return for a higher monthly premium, one 100 or 150 per cent greater than the amount it charged. So far at least, he maintained, however, it D would undoubtedly have gone. And that I accept. The conclusion to which the evidence leads me on this leg of the enquiry is that the reasonable person, aware of all this and considering it at the relevant time, would have thought information about the hypertension a factor unlikely to influence the defendant's decision whether or not to insure, but likely to affect its determination of the premium in the event of its doing so, E that he or she would therefore have regarded the want of information as a circumstance immaterial to the first question, but material to the second. To that limited degree, it follows, I find the *onus* to have been discharged.

Having heard all the evidence, I remarked when it came to an end that a settlement of the action might be a sound idea. An equitable one, I F thought and ventured to suggest, would provide for the defendant's payment to the plaintiff of R35000, minus a couple of deductions. The first, admittedly small when the policy had run for a mere five months, consisted of the additional premiums that it would have levied had the true state of affairs been apparent to it from the beginning. The second, of greater moment, was the entire expense incurred by it in the G litigation. The plan, in short, was to put it financially where in all probability it would have stood had the hypertension of the plaintiff's husband been disclosed to it before it issued the policy, where it would have stood had it then insured his life at increased premiums and with no litigious sequel. The trial was adjourned at that stage, and at the H request of counsel, so that they might enter into negotiations. These ensued, but no agreement did. The case was accordingly set down for argument.

A single point alone was argued in the end, which had to do with the interpretation of s 63(3). The concealment of the hypertension entitled the defendant to repudiate liability, as we have seen already from the subsection, only if it was 'likely to have materially affected the I assessment of the risk'. And the point was this. What did 'the assessment of the risk' encompass? Was the assessment that Parliament had in mind confined solely to the intrinsic acceptability of the particular risk assumed by the insurer? Or did it extend beyond that topic, including such but covering in addition the amount of the premium in return for which the insurer undertook the risk? Counsel agreed that, J if the wider interpretation was

DIDCOTT J

A the right one, the defence had on the facts of the matter to succeed. That it could not by the same token, were the narrower construction preferred, was likewise common cause.

The broader sense is certainly that implicit in the notion, according to the ordinary law of insurance. The following passages will be found in an essay written by Professor Leon Trakman of Nova Scotia and B published in (1983) 7 *South African Insurance Law Journal* (at 95 - 6):

> 'Materiality is often defined as a contingency, state of affairs or event which has a fundamental effect upon the insurance risk. More specifically, a material non-disclosure or false disclosure is conceived of as a contingency which has so fundamental an effect upon the risk that it undermines the willingness of the insurer to provide insurance C cover either *in toto* or at the premium originally stipulated. In each case the result may well be the same.... (T)he insured may find himself or herself unprotected at the time of a loss,... Irrespective of the fact that the insurance company may still have provided some form of insurance had it known of the true circumstances.... Materiality has a single connotation.... (I)t involves something fundamental or vital to the risk, something without which a particular state of affairs D would not exist. Thus a material non-disclosure exists because the insured has failed to disclose fundamental or vital information which the insurance company requires in order to determine, firstly, whether or not to assume the risk of insurance and, secondly, upon what terms to do so.'

A footnote (at 96) adds that materiality is encountered

> '... not only when the insurance company would not have entered into E the contract had it known of the correct information, but also where the insurance company would have contracted, but on different terms.'

Plenty of support is gained from the English cases for the writer's proposition that materiality relates no less to the determination of the premium at which the risk will be accepted than to the acceptance of the risk itself. Bowen LJ proclaimed, more than a century ago, that every F fact was material and had to be disclosed

> '... which would affect the mind of the underwriter at the time the policy is made, either as to taking the contract or as to the premium on which he would take it.'

G The quotation comes from the judgment delivered in *Tate and Sons v Hyslop* (1885) 15 QBD 368 (at 379). Much the same was either said or implied in *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 (at 883), *Horne v Poland and Others* [1922] 2 KB 364 ([1922] 10 Ll LR 275) (at 276), *Becker v Marshall* [1922] 12 Ll LR 413 (at 414), *Locker and Woolf Ltd v Western Australian Insurance Co Ltd* [1936] 1 KB 408 (at H 415), *Zurich General Accident and Liability Insurance Co Ltd v Morrison and Others* [1942] 2 KB 53 (at 58, 60), *Godfrey v Britannic Assurance Co Ltd* [1963] 2 Lloyd's R 515 (at 529) and *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's R 485 (at 487 - 90). Statutes were cited in some of these which had defined a material circumstance as the sort that influenced an underwriter 'in fixing the premium or determining whether I he will take the risk', as the one put it, and 'in determining whether he would take the risk and, if so, at what premium and on what conditions', to repeat the words of the other. The definitions were held to be by no means peculiar to the business which the legislation regulated, marine insurance and motor vehicle insurance respectively, J but to be declaratory of their

DIDCOTT J

A common law on the point and thus appropriate to all their classes of insurance. Our law reports tell a similar story. It has always been taken for granted here, as far as I have managed to discover, that the enquiry into materiality normally covers both the innate acceptability of the risk and its bearing on the calculation of the premium. I refer in this connection to *Fine v The General Accident, Fire and Life* B *Assurance Corporation Ltd* 1915 AD 213 (at 219), *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1922 AD 33 (at 42), *Pereira v Marine and Trade Insurance Co Ltd*1975 (4) SA 745 (A) (at 755F - G), *Fransba Vervoer (Edms) Bpk v Incorporated General Insurances Ltd*1976 (4) SA 970 (W) (at 975H), *Nel v Santam Insurance Co Ltd*1981 (2) SA 230 (T) (at 240G - H), C Pienaar v Southern Insurance Association Ltd 1983 (1) SA 917 (C) (at 921E - F),

*Anderson Shipping (Pty) Ltd v Guardian National Insurance Co Ltd*1987 (3) SA 506 (A) (at 515E) and the two cases I mentioned earlier, those of *Mutual and Federal Insurance Co Ltd (supra* at 435G, 442G - H) and *President Versekeringsmaatskappy Bpk (supra* at 216F).

Did Parliament intend then that the enquiry under s 63(3) should have D a scope distinctly more limited than the usual and well understood one? The wording which it used gives no indication that I can see of any such intention. That it meant nothing of the kind seems evident on the contrary from what it did say, from its having spoken bluntly and without qualification of 'the assessment of the risk'. Sometimes, I E suppose, the nature and extent of the risk make it so great that no insurer will accept it at any price. By and large, however, its acceptability is a question associated intimately, indeed linked inextricably, with the one of the premium payable for its acceptance. To draw a distinction then between the two questions is quite artificial. F They boil down in reality to a single question that has to be considered as a whole, the question whether a particular risk will be assumed in return for the payment of a particular premium. And the consideration of that question, the determination of the premium at which the risk will be assumed, depends when all is said and done on 'the assessment of the risk', a process fundamental and essential to the final answer.

G This construction of the subsection is reinforced, as I view it, by its failure to have provided machinery for the insurer's recovery of the difference between premiums paid and the higher ones that would have been charged had the truth come to light at the start, a difference amounting perhaps to a lot in the case of a big policy that had lasted H for some time. One can hardly believe that Parliament intended the insurer to be left without a remedy there, or with none at all events but something fashioned contractually to meet the situation, while it remained liable for a risk which it did not undertake and would never have undertaken at the lower figure. The omission is explicable only if an outright escape from liability was then envisaged.

I The conclusion to which I am therefore driven in this case is that the defendant's repudiation of liability must be upheld. I regret the result, I make no bones about saying, since the harshness of it does not strike me in all the circumstances as equitable. The writer of the essay from which I have quoted already had some views on that sort of outcome. J I share them. He wrote (at 96):

1991 (1) SA p371

DIDCOTT J

A '(I)t is questionable whether material non-disclosures or false disclosures should lead to a single and absolute result, namely the cancellation of the insurance policy.... (I)t is strongly contended that material non-disclosures or false disclosures should lead to cancellation only in extreme cases and to lesser remedies in other instances.... If the company would have contracted, but subject to a higher premium, surely the penalty sustained by the insured should be in the nature of a premium increase, rather than an automatic cancellation B of the insurance policy at the fatal moment of an insurance loss.'

That goes, in my opinion, not only for the cancellation of the policy, but also for the repudiation of liability under an uncancelled policy. The amendment of s 63(3) should, I feel, be considered. What I have in mind is the introduction of a proviso covering any state of affairs like the present one, in terms of which the insurer gains the right and is C confined to the remedy of deducting from the proved claim the additional premiums that it would have charged throughout the duration of the policy if the true facts had been known to it at the outset. An alternative idea is the adoption by us of the French 'proportionality rule' which the essay discussed (at 107 - 8). According to that, as I D understand it, the insurer has to pay the proportion of the proved claim which the actual premium bears to the one it would then have levied. As matters stand, however, the plaintiff can get nothing.

I should mention in this connection, and in conclusion, that I do not have to decide whether the plaintiff is entitled to a refund of the E premiums which she paid. It seems from such cases as *Stumbles NO v New Zealand Insurance Co Ltd*1963 (2) SA 44 (SR) (at 53G - H) and the one of *Pienaar* which I cited earlier (at 923H - 924A) that no tender to repay them was required from the defendant, either when it repudiated liability or when it defended the action. No point has been made, at any rate, of the circumstance that it never tendered. And the plaintiff did F not claim their repayment if the repudiation

succeeded, no doubt because the amount involved was too small to warrant the effort. It is therefore unnecessary for me to consider whether s 4 of the Conventional Penalties Act 15 of 1962 hit the provision contained in the proposal form for the forfeiture of all premiums paid.

G Judgment is entered for the defendant, with costs.

Plaintiff's Attorneys: *Praveen Kooblal, Gosai & Associates*. Defendant's Attorneys: *Strauss Daly*.

PRESIDENT VERSEKERINGSMAATSKAPPY BPK v TRUST BANK VAN AFRIKA BPK EN 'N ANDER [1989] 1 All SA 241 (A)

Division:	Appellate Division
Judgment Date:	7 September 1988
Case No:	588/1986
Before:	Rable Wn HR, Van Heerden AR, Milne AR, Kumleben AR, Eksteen AR
Parallel Citation:	1989 (1) SA 208 (A)

• Keywords • Cases referred to • Judgment •

Keywords

Cases referred to:

Anglo-African Merchants Ltd and Another v Bayley [1969] 2 All ER 421 (QB) - Referred to

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

Ewer v National Employers' Mutual General Insurance Association Ltd [1937] 2 All ER 193 (KB) - Referred to

Fouche v The Corporation of The London Assurance 1931 WLD 145 - Distinguished

Greenhill v Federal Insurance Co (1927) 1 KB 65 (CA) - Referred to

Margate Estates Ltd v Urtel (Pty) Ltd 1965 (1) SA 279 (N) - Compared

Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 (AD) - Applied

Netlon (Pty) Ltd and Another v Pacnet (Pty) Ltd 1977 (3) SA 840 (AD) - Referred to

Norman v Gresham Fire and Accident Insurance Society Ltd 1935 LI LR 292 (Unknown) - Referred to

Roberts v Avon Insurance Company Ltd [1956] 2 LI LR 240 - Referred to

Roselodge Ltd (formerly Rose Diamond Products Ltd) v Castle [1966] 2 LI LR 113 (LI) - Referred to

View Parallel Citation

Judgment

VAN HEERDEN AR: Gedurende Junie 1984 het die appellant en die tweede respondent ("Pandora") 'n versekeringsooreenkoms aangegaan. Die bepalings daarvan is vervat in 'n sogenaamde veelgevare-polis wat die appellant op 24 Julie 1984 uitgereik het. Daarvolgens het die appellant vir Pandora verseker ten opsigte van onder andere eiendomskade deur Pandora gely as gevolg van die beskadiging of vernietiging van bates ("die versekerde eiendom") op 'n perseel in McCabestraat, Ficksburg, asook verlies aan bruto wins gely as gevolg van die onderbreking of belemmering van die besigheid wat Pandora op die perseel bedryf het, en wat deur 'n brand meegebring is. Die versekerde eiendom is omskryf as die gehele inhoud van die perseel insluitende sekere bates waarvan Pandora nie die eienaar was nie maar "in trust of op kommissie" gehou het.

Op 21 September 1984, en terwyl die polis van krag was, het 'n brand op die perseel uitgebreek en eiendomskade veroorsaak. Ses dae later het die appellant 'n voorlopige betaling ten bedrae van R50 000 aan Pandora gemaak. In November van dieselfde jaar het ene Herbert, 'n assessor aangestel deur die appellant, en Pandora skriftelik ooreengekom dat die eiendomskade meegebring deur die brand R161 148 beloop het. Die ooreenkoms is egter aangegaan tussen Pandora en Herbert in sy persoonlike hoedanigheid en nie as verteenwoordiger van die appellant nie.

Reeds op 28 September 1984 het Pandora al sy vorderings teen die appellant voortspruitende uit die brand aan die eerste respondent ("Trust Bank") sedeer. In Januarie 1985 het die appellant egter die houding ingeneem dat dit geen aanspreeklikheid vanweë die brand opgeloop het nie, en dat dit die polis "as nietig beskou" het. Gevolglik is die bedrag van R50 000 wat reeds aan Pandora betaal was, teruggevorder.

Die appellant se ontkenning van aanspreeklikheid het gelei tot die instel van 'n aksie in die Witwatersrandse Plaaslike Afdeling. Daarin het Trust Bank, as sessionaris,

Page 242 of [1989] 1 All SA 241 (A)

betaling van die bedrag van R111 148 (R161 148 - R50 000) van die appellant gevorder. Daarbenewens is 'n bevel aangevra waarvolgens verklaar sou word dat by betaling van eersgenoemde bedrag die appellant teenoor Trust Bank aanspreeklik sou wees vir die verlies aan bruto wins wat Pandora as gevolg van die brand gely het met betrekking tot die onderbreking of belemmering van die besigheid wat dit op die perseel bedryf het.

Die appellant het hom verset en ook vir Pandora as derde party tot die geding gevoeg. Laasgenoemde stap was gerig op terugvordering van die voorlopige betaling van R50 000 wat aan Pandora gemaak was, minus 'n bedrag van R5 757,33, synde die premie wat Pandora ingevolge die polis betaal het.

View Parallel Citation

Die appellant het hom in hoofsaak beroep op 'n bepaling van die polis wat soos volg lui:

> "Hierdie versekering is vernietigbaar in die geval van wanvoorstelling, wanbeskrywing en nie-openbaarmaking met betrekking tot enige afdeling of item in geval van wanvoorstelling, wanbeskrywing of nie-openbaarmaking van enige wesenlike besonderhede wat betrekking het op die polis as geheel of op 'n afdeling of item."

Aangesien Pandora versuim het om sekere wesentlike feite voor die aangaan van die versekeringsooreenkoms te openbaar, so het die appellant aangevoer, was dit geregtig om die ooreenkoms te vernietig en het die appellant dit inderdaad gedoen.

Ek kom hieronder terug op die beweerde wesentlike inligting wat nie geopenbaar is nie. Wat die addisionele verwere van die appellant betref, is dit tans slegs nodig om te meld dat ontken is dat Pandora eiendomskade gely het en dat in die alternatief tot die hoofverweer gesteun is op 'n klousule van die polis wat soos volg lui:

> "Indien tydens enige gebeurtenis ten opsigte waarvan 'n eis ingevolge hierdie polis ingestel is of ingestel mag word, daar enige ander versekering (uitgesonder marine-versekering) bestaan wat deur of ten behoewe van die versekerde aangegaan is wat enige bepaalde gebeurtenisse dek wat kragtens hierdie polis verseker is, is die aanspreeklikheid van die maatskappy hierkragtens beperk tot sy eweredige deel van enige bedrag betaalbaar ten opsigte van sodanige gebeurtenis. . ."

Wat hierdie klousule betref, is aangevoer dat ten tyde van die brand Pandora ook deur Maritime and General Insurance Company Limited ("Maritime") verseker was ten opsigte van die gebeurtenis waarop Trust Bank se vorderings gebaseer was. Aldus, so is gepleit, was die appellant se aanspreeklikheid, indien enige, beperk tot sy eweredige gedeelte van enige bedrag betaalbaar as gevolg van die brand.

Aangaande die omvang van die eiendomskade het Trust Bank gepleit dat die bedrag by ooreenkoms tussen Pandora en die appellant se assessor, Herbert, vasgestel is; alternatiewelik dat die som van R161 148 "die vermindering in waarde van die versekerde eiendom as gevolg van die vernietiging en/of beskadiging daarvan deur die brand daarstel". Hierdie bewerings is deur die appellant ontken. In besonder is ontken dat Herbert enige magtiging gehad het om die beweerde ooreenkoms namens die appellant aan te gaan asook dat hy voorgegee het om sulks te doen.

Ek keer nou terug na die hoofverweer en vind dit onnodig

Page 243 of [1989] 1 All SA 241 (A)

om die pleitstukke in hierdie verband, wat heelwat wysigings ondergaan het, in besonderhede te ontleed. Dit was uiteindelik by die verhoor gemene saak dat Pandora versuim het om sekere feite aan die appellant

te openbaar; nl., eerstens, dat Pandora oor 'n tydperk van nagenoeg een jaar voor die aangaan van die versekeringsooreenkoms op 13 Junie 1984 'n hele aantal tjeks uitgereik het wat daarna geweier is, maar dat feitlik al die betrokke bedrae daarna van tyd tot tyd betaal is; tweedens, dat die debietorders ten gunste van Maritime ten opsigte van premies deur Pandora aan Maritime verskuldig in Februarie en Mei 1984 onteer is; en derdens, dat 'n leweransier 'n vloerplanskema opgeskort het. Wat wel in geskil was, is of inligting aangaande else wat Pandora voor 13 Junie 1984 teen Maritime as versekeraar ingestel het, aan die appellant geopenbaar was. Die appellant

se saak was dat daar nege sulke else was en dat dit nie bewus daarvan was toe die versekeringsooreenkoms aangegaan is nie. Trust Bank het egter aangevoer dat besonderhede van ses van die else wel deur 'n assessor, De Swardt, wat namens Pandora opgetree het, aan 'n takbestuurder van die appellant, ene De Wet, op 13 Junie 1984 geopenbaar is. Wat dus uiteindelik gemene saak was, was dat geen besonderhede aangaande drie van die else aan die appellant verstrek was nie. Wat hierdie drie else betref, het Trust Bank, nadat al die partye se sake reeds gesluit was, sy repliek gewysig deur aan te voer dat die appellant afstand gedoen het van sy reg op openbaarmaking van wesentlike feite.

Dit is nog nodig om te meld dat Trust Bank nie getrag het om deur deskundige getuienis die omvang van Pandora se eiendomskade te bewys nie. Inteendeel is slegs gesteun op die reedsgenoemde ooreenkoms tussen Herbert en Pandora.

Die tersaaklike bevindings van die Hof *a quo* kan soos volg saamgevat word:

1) Die appellant kan nie steun op Pandora se versuim om die onteerde tjeks en debietorders en die opskorting van die vloerplanskema te vermeld nie aangesien nie bewys is dat die betrokke inligting wesentlik was nie.

2) Inligting aangaande ses van die nege else teen Maritime is wel deur De Swardt aan De Wet verstrek.

3) Pandora het wel versuim om wesentlike inligting - aangaande die ander drie else - te openbaar, maar die appellant het deur sy gedrag afstand gedoen van sy reg op openbaarmaking van hierdie else.

4) Die appellant het nie bewys dat Pandora ten tyde van die brand ook deur Maritime verseker was nie.

5) Hoewel Herbert nie die appellant kon bind nie, is die ooreenkoms wat hy en Pandora aangegaan het nooit deur die appellant verwerp nie, en die ooreenkoms konstitueer dus *prima facie* bewys van die omvang van die eiendomskade.

In die lig van hierdie bevindings is die appellant gelas om die som van R111 148, met moratore rente, aan Trust Bank te betaal; is verklaar dat by betaling van dié bedrag die appellant teenoor Trust Bank aanspreeklik sou wees vir Pandora se verlies aan bruto wins, en is die appellant se vorderings teen Pandora afgewys. (Die

Hof het ook ander bevele gemaak maar dit is onnodig om daarby stil te staan.) Hierna is verlof aan die appellant verleen om na hierdie Hof te appelleer.

Afskrifte van die oorkonde moes ingevolge A A-Reël 5 (4) (*b*) voor of op 3 Maart 1987 gellasseer gewees het, maar is inderdaad eers op 25 Mei ingedien. Gedurende Februarie is die respondente versoek om toe te stem tot 'n verlenging van die voorgeskrewe tydperk van drie maande en uitstel is toe wel tot 3 April verleen. Einde Maart is 'n verdere tydsverlenging versoek maar die respondente het by monde van hul prokureurs geweier om die aangevraagde toestemming te verleen. Aangesien afskrifte van die oorkonde dus nie betyds ingedien is nie, het die appellant 'n aansoek om kondonasie aanhangig gemaak. Dit het gelei tot die indiening van 'n bestrydende sowel as 'n repliserende verklaring. Die stukke met betrekking tot die aansoek beloop altesaam 363 bladsye, wat op die oog af onverdedigbaar voorkom.

In die funderende verklaring meld die appellant se prokureurs, by monde van 'n vennoot, Beckenstraater, dat die versuim om afskrifte van die oorkonde betyds in te dien hoofsaaklik aan die volgende te wyte was:

(*a*) Die partye het voor die verhoor ooreengekom dat bundels dokumente saamgestel sou word en dat dit nie nodig sou wees om getuies te roep om dié te identifiseer nie. Die bundels saamgestel deur die appellant, aan die een kant, en die respondente, aan die ander kant, het onderskeidelik 260 en 205 bladsye beslaan. Na heelwat van die dokumente is nie tydens die verhoor verwys nie. Die deponent was van mening dat dit onnodig was om sodanige dokumente by die oorkonde in te sluit. Hy het egter eers 'n afskrif van die getuienis behoef ten einde vas te stel na welke dokumente nie verwys is nie.

2) Die afskrif van die getuienis was einde Januarie beskikbaar. Dit het toe egter geblyk dat sekere dokumente nie in die Hofleer was nie, vernaamlik Trust Bank se aansoek om wysiging van sy replikasie waarvan hierbo melding gemaak is en wat toegestaan is nadat al die partye hul sake gesluit het. Mev Du Buisson van Lubbe Opnames het toe ook aangedui dat indien al die dokumente in die bundels by die oorkonde ingesluit moes word, dit 'n verdere drie maande sou verg om die oorkonde te voltooi.

3) Die deponent kon nêrens 'n afskrif van die kennisgewing van wysiging vind nie en die respondente se prokureurs was ook nie in besit daarvan nie. Eers einde Maart het hy dit verkry van die senior advokaat wat namens die appellant by die verhoor verskyn het. Hy sou dit gevind het toe hy opruiming in sy kantoor gedoen het.

4) Finale instruksies ten opsigte van die voorbereiding van die notule kon nie aan mev Du Buisson gegee word nie alvorens bogenoemde kennisgewing beskikbaar was en besluit kon word welke gedeeltes van die bundels in die oorkonde vervat moes word. Sodanige instruksies is daarom eers teen die middel van April gegee.

5) Weens 'n misverstand was mev Du Buisson nie bereid om voort te

gaan met voorbereiding van die oorkonde nie, maar het wel sulks gedoen na wegruiming van die misverstand.

Ek is nie van voorneme om die bestrydende en repliserende verklarings in besonderhede te behandel nie. Dit is genoeg om te meld dat al het Beckenstraater nie altyd spoedeisend opgetree nie, sy versuim sekerlik nie van 'n erge graad was nie; dat die respondente se prokureur (Mostert) onbehulpsaam was ten opsigte van die probleme wat met finalisering van die oorkonde ondervind is, en dat hoewel Mostert op grond van inligting verkry van Lubbe Opnames op 'n stadium kon gemeen het dat Beckenstraater in sekere opsigte baie laks was, die grondslag van hierdie mening moes verval het nadat Mostert insae in Beckenstraater se funderende verklaring gehad het. Een ding wat soos 'n paal bo water staan, is dat Beckenstraater, namens die appellant, steeds van voorneme was om die appèl voort te sit en dat hy deurentyd pogings aangewend het - al was hulle nie altyd toereikend nie - om die oorkonde gereed vir indiening te kry. En aangesien dit vir die respondente duidelik moes gewees het dat die appèl redelike vooruitsigte op sukses gehad het, was die bestryding van die aansoek na my mening heeltemal onredelik. Die

aansoek moet dus toegestaan word, en die billikste bevel is dat die appellant gelas word om die koste daarvan op 'n onbestrede basis te betaal, terwyl die respondente die koste meegebring deur hul verset moet betaal.

Ek kom dan by die onbetwiste versuim van Pandora om sekere feite te openbaar, en behandel eers daardie feite wat op 'n gebrek aan likiditeit dui; d w s die uitreiking van tjeks, betaling waarvan deur die bank geweier is; die ontering van debietorders ten gunste van Maritime; en die opskorting van die sogenaamde Nissan-vloerplan. Dit was by die verhoor uiteindelik gemene saak dat oor 'n tydperk van 'n

jaar voordat Pandora die appellant om versekeringsdekking versoek het betaling van 59 tjeks getrek deur Pandora met 'n totale sigwaarde van bykans R600 000 geweier is. Die betrokke bedrae, met uitsondering van die som van R55 950 verskuldig aan Magnis Truck Corporation (Edms) Bpk, is egter betreklik gou na die weiering vereffen as gevolg van òf die heraanbieding van die oorspronklike tjeks òf die uitreiking van vervangende tjeks.

Wat die debietorders betref, blyk dit dat Pandora tot 10 Junie 1984 deur Maritime verseker was ten opsigte van dieselfde gevare as dié waarop die latere polis van die appellant betrekking gehad het. Die betrokke premies was maandeliks by wyse van debietorders betaalbaar, en in Februarie, en weer in Mei 1984, is die premie van R1 205,29 nie betaal nie, klaarblyklik omdat Pandora se rekening toe met 'n te hoë bedrag oortrek was.

Die vloerplanskema waarna verwys is, het betrekking gehad op nuwe Nissan voertuie wat aan Pandora op krediet gelewer was onderhewig aan die bepaling dat betaling van die koopprys moes geskied binne 48 uur nadat 'n voertuig deur Pandora op sy beurt aan 'n koper gelewer is. Gedurende 1983 is tydens 'n oudit bevind dat sekere voertuie waarvoor die leweransier

Page 246 of [1989] 1 All SA 241 (A)

nie betaling ontvang het nie, nie meer in besit van Pandora was nie. Laasgenoemde het onderneem om die koopprys te betaal, maar dit is nie duidelik wanneer hierdie onderneming gestand gedoen is nie. Teen die begin van 1984 het die leweransier 'n tjek ten bedrae van R55 950 van Pandora ontvang. Hierdie tjek is getrek ten opsigte van 'n voertuig wat volgens die vloerplanskema gelewer was en deur Pandora op 27 Oktober 1988 verkoop is. Die bank het nie die tjek uitbetaal nie en later is vooruitgedateerde tjeks ter vervanging van die gewelerde een van Pandora ontvang. Die latere tjeks is egter ook nie uitbetaal nie. Die leweransier het toe geweier om verdere krediet aan Pandora te verleen, wat meegebring het dat laasgenoemde voortaan voertuie op 'n kontantbasis moes aankoop.

Wessels, die besturende direkteur van Pandora, verduidelik dat hoewel Pandora likiditeitsprobleme ondervind het, sy onderneming kerngesond was. Dit het 'n "geweldige" groeikoers gehad maar het 'n gebrek aan kontant ondervind omdat groot bedrae deur skuldenaars verskuldig was en die waarde van voorraad aansienlik was. Dit was dan die rede waarom fondse nie voorhande was om uitgereikte tjeks ens te bevredig nie. Die solvensie van Pandora blyk egter, aldus die getuie, uit die feit dat die omset van die onderneming in die 1983-84 belastingjaar nagenoeg R4,7 miljoen was terwyl die bruto wins R807 075 beloop het vergeleke met sodanige wins van R488 758 gedurende die vorige jaar. Ten tyde van die aangaan van die versekeringskontrak was die toekomsvooruitsigte rooskleurig en was die getuie se mikpunt om Pandora binne die volgende 18 maande genoegsame wins te laat oplewer om die probleme met

View Parallel Citation

kontantvloei uit te wis. Vanaf Maart tot Julie 1984 het Pandora dan ook 'n stygende winsgewendheid gehad, o a omdat uitgawes drasties gesnoei is. In die lig van hierdie feite het die getuie dit nie nodig geag om Pandora se likiditeitsprobleme onder die aandag van die appellant te bring nie.

Met verwysing na die beslissing van hierdie Hof in *Mutual and Federal Insurance Company Ltd v Oudtshoorn Municipality* 1985 (1) S A 419 (A), het die Hof *a quo* bevind dat die vraag of ongeopenbaarde feite wesentlik is, beantwoord moet word met verwysing na die beskouing wat 'n redelike man (d w s nie 'n redelike versekerde of versekeraar) sou gehad het. Wat die groot aantal gewelerde tjeks betref, was die hof van oordeel dat die betrokke feite waarskynlik 'n redelike man op sy hoede sou geplaas het, maar dat "hy hom geensins oor die morele risiko sou bekommer [het] nie" indien hy ook kennis geneem het van al die ander feite betreffende Pandora se finansiële posisie. En die ontering van die debietorders en die opskorting van die vloerplanskema het in dieselfde kader as die gewelerde tjeks geval.

Indien die Hof *a quo* te kenne wou gee dat inligting nie wesentlik is nie indien 'n redelike man nie sou meen dat dit die risiko beïnvloed nie, kan ek nie akkoord gaan nie. In die uitspraak van Joubert AR in *Oudtshoorn Municipality* word so iets sekerlik nie aan die hand gedoen

Page 247 of [1989] 1 All SA 241 (A)

nie. Wat Joubert AR wel gesê het (op p 435), is dat 'n hof die redelike man-kriterium toepas by beoordeling van die vraag of "the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums". Soos tereg deur die appellant se advokaat betoog, is die vraag dus nie of na die oordeel van 'n redelike man die betrokke inligting wel die risiko beïnvloed nie, maar of dit redelikerwyse 'n effek mag hê op 'n voornemende versekeraar se besluit om al of nie die risiko te aanvaar of 'n hoër premie as die normale te verg. Anders gestel, is die toets of die redelike man sou geoordeel het dat die inligting oorgedra moes word sodat die voornemende versekeraar self tot 'n besluit kan kom. En so 'n oordeel sou hy bereik het indien die inligting na sy mening die voornemende versekeraar redelikerwyse kon beïnvloed het. (Vgl *Roselodge Ltd v Castle* (1966) 2 Lloyd's 113, 133.)

Soos die Verhoorhof aangedui het, gaan dit in die onderhawige geval nie om inligting rakende die voorwerp van versekering nie, maar wel om feite wat met die persoon van die versekerde verband hou en by beoordeling van die sogenaamde morele risiko ter sprake kom. Dat die vermoënsposisie van 'n versekerde so 'n risiko daar *mag* stel, lyi geen twyfel nie. Die Hof het egter sterk steun geplaas op die beslissing in *Fouche v The Corporation of The London Assurance* 1931 W L D 145. In daardie saak het die eiser sy huis teen brand verseker. Die vraelys wat die eiser voor die aangaan van die ooreenkoms ingevul het, het die volgende vraag bevat: "Have you ever been bankrupt or made a compromise with your creditors?" Die eiser se negatiewe antwoord was juis, maar op daardie stadium was die eiser in gebreke om aan 'n vonnisskuld te voldoen, en gedurende die vorige jaar is 'n aantal vonnisse teen hom geneem waarna hy die betrokke vonnisskulde betaal het. Die vraag het ontstaan of hierdie feite as wesentlike inligting aan die versekeraar geopenbaar moes gewees

View Parallel Citation

het. Die Hof het dit ontkennend beantwoord en daarop gewys dat die waarde van die eiser se bates veel meer as die omvang van sy laste beloop het. Die Hof het gesê (op pp 159-60):

> "Giving due weight to the requirement of *uberrima fide*, in my opinion the answer must be in the plaintiff"s favour. To hold otherwise would be to introduce the greatest uncertainty, in fact chaos, into contracts of insurance. The proposer is asked whether he has ever been bankrupt or ever made a compromise with his creditors. I do not say that the frame of the question justifies the inference that the insurer waived his right to obtain information from the proposer disclosing merely a statement of financial embarrassment falling short of bankruptcy or compromise. But I do say that the proposer who is specially asked to answer such a question and who, though experiencing temporary difficulty in paying demands until he himself can collect money

Page 248 of [1989] 1 All SA 241 (A)

> due to him, is perfectly solvent, could not reasonably be expected to realise that it is material to know that several judgments which had been paid had been obtained against him and that one judgment remained unpaid. In considering the materiality of the judgment it would be wrong to regard it as an isolated fact; it must be considered in conjunction with the plaintiff"s financial position."

Opgelet sal word dat die hof gewig geheg het aan die feit dat die eiser spesifiek deur die versekeraar gevra was of hy ooit insolvent was, en die mening gehuldig het dat 'n solvente persoon, wat tydelik likiditeitsprobleme ondervind, nie redelikerwyse sou meen dat in die lig van hierdie vraag hy melding van die vonnisskulde moes maak nie. In die onderhawige geval geld hierdie oorweging nie want Pandora is nooit versoek om 'n vraelys in te vul nie. Hoe dit ook al sy, om redes wat volg meen ek nie dat die beslissing in *Fouche* in die onderhawige geval toepassing vind nie.

Pandora het nie slegs oor 'n lang tydperk knaend likiditeitsprobleme ondervind wat meegebring het dat bedryfskulde nie betyds betaal kon word nie, maar as gevolg van bedoelde probleme is premies wat aan Maritime betaalbaar was ook nie betyds betaal nie. Inderdaad is die premies eers 'n geruime tyd later - in Julie en Augustus 1984 - betaal en dan ook slegs as gevolg van 'n misverstand waarop nie uitgebrei hoef te word nie. Tydige betaling van premies is vanselfsprekend vir enige versekeraar van belang, en omstandighede wat daarop dui dat premies nie, of nie betyds nie, vereffen sal word nie, sou dus *prima facie* volgens die oordeel van 'n redelike man faktore wees wat redelikerwyse 'n versekeraar kan beïnvloed by oorweging van die vraag of 'n risiko aanvaar moet word. Want, soos Lewis R in *Norman v Gresham Fire and Accident Insurance Society Ltd* 1935 Lloyds 292, 301, gesê het:

> "It seems to me . . . that it must be material for an insurance company to know whether or not the person whose risk they are accepting is (to put it quite broadly) a person of substance who can . . . pay his premiums."

Indien 'n redelike man nou Pandora se versuim om premies aan Maritime te betaal sou oorweeg in

samehang met Pandora se algemene en knaende likiditeitsprobleme, sou hy, selfs met inagneming van die solvensie van die maatskappy en die groei van dié se onderneming, oordeel dat 'n voornemende versekeraar wel redelikerwyse op grond daarvan sou kon weier om die risiko te aanvaar. Hy sou ook gewig daaraan heg dat vanweë die likiditeitsprobleme Pandora lig kon swig voor die versoeking om nie koste aan te gaan om voorkoming van die risiko te vermy of te

View Parallel Citation

verminder nie. In hierdie verband moet beklemtoon word dat Pandora nie net om brandversekering aansoek gedoen het nie, maar ook om versekering teen 'n aantal ander risiko's.

Die respondente se advokaat het betoog dat indien 'n vermoënde persoon se tjeks op 'n paar geleenthede onteer is omdat hy toevallig nie vir

Page 249 of [1989] 1 All SA 241 (A)

die nodige fondse in sy bankrekening voorsiening gemaak het nie, 'n redelike man nie sou oordeel dat dit wesentlike inligting is wat aan 'n voornemende versekeraar openbaar gemaak moet word nie. Dit mag so wees, maar in die onderhawige geval het 'n mens te doen met 'n volgehoue en langdurige patroon van versuim om skulde betyds te betaal. 'n Redelike persoon sou ook nie veel gewig geheg het aan Pandora se stygende omset nie want dit kon lig te wyte gewees het aan onoordeelkundige kredietverlening. Inderdaad blyk dit dat Pandora kort voor die aangaan van die versekeringskontrak 'n aansienlike bedrag afgeskryf het as synde onverhaalbare skulde. Dit is egter onnodig om te oorweeg of indien òf die gewelerde tjeks, òf die onteerde debietorders, òf die opskorting van die vloerplanskema, alleen gestaan het, die betrokke inligting oorgedra moes gewees het. Al wat gekonstateer hoef te word, is dat Pandora se versuim om die appellant in te lig dat dit weens 'n gebrek aan fondse kort voor Junie 1984 nie Maritime se premies betaal het nie, gesien in samehang met die ander deurlopende likiditeitsprobleme waarna hierbo verwys is, wel wesentlik was.

Ek kom dan by die versekeringseise. Die appellant het uiteindelik op drie sulke eise gesteun, nl ten opsigte van diefstal van R227 deur 'n petroljoggie, beskadiging van 'n voertuig ten bedrae van R1 616, en inbraakskade van R1 800. Hierdie eise is erken, behalwe dat beweer is dat die tweede eis R1 416 beloop het en dat dié en die derde eis nie uitbetaal is nie.

By die verhoor het ene De Swardt getuig dat hy as makelaar namens Pandora opgetree het en dat hy in Junie 1984 'n telefoniese gesprek met De Wet, die appellant se Bloemfonteinse bestuurder, gehad het. Omdat hy bewus was dat in die versekeringswese vorige eise 'n rol speel by oorweging van aanvaarding van 'n risiko, of die premie wat geverg moet word, het hy eers by Pandora inligting aangaande sodanige eise ingewin. Tydens die telefoniese gesprek het hy toe melding gemaak van eise met betrekking tot diefstal van 'n voertuig, 'n inbraak met 'n verlies van R900; 'n "Skyline" ten bedrae van R1 700, en drie windskerms van R210 elk. (Dit blyk nie of laasgenoemde vier eise op diefstal of beskadiging betrekking gehad het nie.) De Wet het aanvanklik ontken dat De Swardt hierdie inligting aan hom verstrek het, maar moes later toegee dat dit wel kon gebeur het. Dit was egter uiteindelik gemene saak dat geen inligting aangaande die drie eise waaroor die appellant hom bekla het, aan hom verstrek is nie.

View Parallel Citation

Hoewel dit nie in soveel woorde uitgespel is nie, het die verhoorhof blykbaar bevind dat Pandora versuim het om wesentlike inligting te verstrek aangesien sy elsegeskiedenis slegs gedeeltelik vermeld was. Dit was dan ook die houding van beide partye in hierdie hof. Die respondente het egter gesteun op die verhoorhof se verdere bevinding dat die appellant afstand gedoen het van sy reg op volledige openbaarmaking van die eise.

Dat dit in the reël vir 'n versekeraar van

Page 250 of [1989] 1 All SA 241 (A)

belang is om te verneem welke eise 'n voornemende versekerde reeds teen ander versekeraars ingedien het, ly geen twyfel nie (vgl *Roberts v Avon Insurance Company Ltd* (1956) 2 Lloyd's 240, 250). Dit volg

egter nie dat inligting aangaande alle moontlike eise verstrek hoef te word nie. In die algemeen gesproke is sodanige inligting vir 'n versekeraar van belang slegs vir soverre dit verband hou met die risiko waarteen die aansoekdoener hom wil verseker. Indien die risiko brandskade aan 'n woonhuis is, sou 'n redelike man tog nie van mening wees dat 'n enkele vorige eis ten opsigte van haelskade aan koringgewasse redelikerwyse 'n versekeraar se opweging van die risiko kan beïnvloed nie. Sien *Ewer v National Employers' Mutual General Insurance Association Ltd* (1937) 2 All E R 193 201-2.

In casu het die appellant vir Pandora teen onder andere verlies vanweë inbraak en diefstal van geld verseker. Dit is dus duidelik, meen ek, dat ten minste twee van die drie eise onder bespreking wel verband gehou het met die risiko's waarteen Pandora hom wou verseker. Daardie eise het ook kort voor Junie 1984 ontstaan. Gevolglik was die betrokke inligting wat weerhou is wel wesentlik, soos die respondente se advokaat dan ook toegegee het.

Aangesien die Verhoorhof bevind het dat Pandora se likiditeitsprobleme nie wesentlik was nie, is slegs die versuim om eise te openbaar in verband met die beweerde afstanddoening in oënskou geneem. Die tersaaklike gedeelte van Trust Bank se gewysigde replikasie het egter soos volg gelui:

> "1B. Indien bogemelde hof bevind dat PANDORA versuim het om enige feite wat redelikerwys relevant en wesenlik sou wees tot die risiko en die premie aan die verweerder te openbaar, repliseer eiser soos volg:
>
> 1B(*a*) Voor die sluiting van die versekeringsooreenkoms het verweerder geensins belang gestel in die openbaarmaking deur PANDORA van enige sodanige inligting nie;
>
> *1B(b)* Met ontvangs deur verweerder van sluitingsinstruksies op 20 Julie 1984, het verweerder geensins belang gestel in enige inligting soos vervat in die sluitingsinstruksies en dit wat deur SANCURA aan verweerde meegedeel is nie en geen ondersoek ingestel om die bestaan van 'n morele risiko te bepaal nie. Ten alle tye was die verweerder bewus van sy regte in verband met PANDORA se openbaarmakingsplig van enige feite wat redelikerwys relevant en wesenlik mag wees tot die berekening van die risiko en die premie;
>
> *1B(c)* In die vooropstelling het verweerde afstand gedoen van die reg op openbaarmaking deur Pandora aan verweerder van feite wat redelikerwys relevant en wesenlik mag wees."

View Parallel Citation

Wat die likiditeitsprobleme betref, hoef slegs gesê te word dat daar geen getuienis hoegenaamd is wat die replikasie onderskraag nie. Daardie probleme is nooit onder die aandag van De Wet, wat namens die appellant opgetree het, gebring nie, en hy was heeltemal onbewus daarvan. Hy het ook nooit iets gesê of gedoen wat die indruk kon wek dat die appellant nie in die betrokke inligting belang gestel het nie. Die respondente se advokaat het dus tereg toegegee dat hulle nie op 'n afstanddoening ten opsigte van die versuim om bedoelde probleme openbaar te maak, kon steun nie.

Page 251 of [1989] 1 All SA 241 (A)

Omdat ek reeds bevind het dat Pandora ten minste moes openbaar dat as gevolg van die likiditeitsprobleme Maritime se premies nie betaal is nie, is dit streng gesproke onnodig om na te gaan of daar 'n afstanddoening van die appellant se reg op openbaarmaking van Pandora se vorige eise was nie. Ek doen dit tog kortliks.

Die eerste probleem wat ek het, is dat die polis aan die appellant die reg verleen om die versekeringsooreenkoms te vernietig in geval van onder andere "nie-openbaring van enige wesentlike besonderhede wat betrekking het op die polis as 'n geheel of op 'n Afdeling of item". Hierdie is dus nie net 'n geval waarin 'n plig tot openbaarmaking *ex lege* voor die aangaan van 'n ooreenkoms bestaan het nie; die ooreenkoms self verleen 'n reg tot vernietiging ten opsigte van 'n voorafgaande wesentlike verswyging. Dit is dus nie vir my heeltemal duidelik hoe die respondente kan steun op gedrag van die appellant wat die sluiting van die ooreenkoms voorafgegaan het nie. Dit is minstens argumenteerbaar dat hulle hul op die standpunt moes gestel het dat die tersaaklike bepaling van die polis nie die partye se bedoeling getrou weergegee het nie aangesien nie beoog was dat dit op bepaalde gevalle van nie-openbaarmaking sou slaan nie. Ek laat hierdie aspek egter daar.

In die Engelse reg kom 'n afstanddoening van 'n versekeraar se aanspraak op mededeling van wesentlike

feite gewoonlik ter sprake wanneer die aansoekdoener wel sekere inligting openbaar en dié die versekeraar op sy hoede sou plaas dat verdere inligting aangevra moet word. Sien o a Ivamy, *General Principles of Insurance Law* 5de uitg, p 140; *Greenhill v Federal Insurance Company Ltd* (1927) 1 K B 65, 89; *Anglo-African Merchants Ltd and Another v Bayley* (1969) 1 Lloyd's 268, 278; en *Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* (1984) 1 Lloyd's 476, 497-8. In die onderhawige geval sou die vermelding van ses else egter nie dien as waarskuwing dat daar moontlik verdere, ongeopenbaarde, else kon wees nie. Inteendeel sou 'n redelike versekeraar aanvaar het dat Pandora se tersaaklike eisegeskiedenis ten volle vermeld was.

Ek is in elk geval nie oortuig dat die benadering van die Engelse Howe hier te lande toepassing kan vind nie. Dit kom my naamlik voor dat in Engeland die vraag nie is of die versekeraar bewus was, of voorsien het, dat sekere inligting moontlik nie geopenbaar is nie, maar wel of hy redelikerwyse op sy hoede geplaas moes gewees het. Hier te lande word vir dié soort afstanddoening wat ter sprake is juis kennis van die betrokke persoon van alle relevante feitelike omstandighede asook van sy regte geverg: *Netlon Ltd and Another v Pacnet (Pty) Ltd* 1977 (3) SA 840 (A) 872-3. En of afstanddoening nou ook al in alle gevalle 'n tweesydige handeling is (vgl bv *Margate Estates Ltd v Urtel (Pty) Ltd* 1965 (1) S A 279 (N) 294), verg dit na my mening ten minste 'n handeling van die afstanddoenende party waaruit 'n bedoeling blyk om afstand van die reg3

Page 251(1) of [1989] 1 All SA 241 (A)

te doen, en wat aan die ander party gekommunikeer word.

Die gedrag waarop die Hof *a quo* gesteun het, en waarop die respondente se advokaat hom in hierdie hof verlaat het, as aanduidend van 'n afstanddoening, was 'n sogenaamde traak-my-nie-agtige houding wat De Wet in verband met openbaarmaking van Pandora se else sou ingeneem het. Volgens die hof *a quo* was die afleiding geregverdig dat De Wet weinig, indien enigsins, in sodanige else belang gestel het. Hierdie afleiding is gemaak uit De Wet se getuienis en nie uit enigiets wat hy voor sluiting van die versekeringsooreenkoms gesê of gedoen het nie. Die appellant se advokaat het tereg betoog dat hierdie afleiding nie geregverdig was nie. Hoogstens kan gesê word dat De Wet nie die meegedeelde ses else as wesentlik beskou het nie aangesien hy nie eens 'n aantekening daarvan gemaak het nie. Dit lei egter nie tot die gevolgtrekking dat hy geen belang in Pandora se eisegeskiedenis gestel het nie. Hy het dan ook getuig dat die aantal else wat 'n voornemende versekerde teen 'n vorige versekeraar ingestel het, vir hom die belangrikste faktor was. Gevolglik kan nie gesê word dat Pandora se versuim om die orige drie else te vermeld vir hom van geen betekenis was nie.

View Parallel Citation

In elk geval, wat ook al De Wet se houding tydens getuienisaflegging was, het hy nooit teenoor Pandora (of De Swardt) laat blyk dat hy nie belang gestel het in Pandora se eisegeskiedenis nie. Indien dit wel sy subjektiewe beskouing was, het hy nooit na buite konkrete gestalte daaraan gegee nie. Die rede waarom De Swardt van slegs ses else melding gemaak het, was omdat hy onbewus van die ander drie was, en nie omdat De Wet te kenne gegee het dat die bestaan van verdere else hom nie aangegaan het nie. De Wet het dus nooit 'n bedoeling om afstand te doen gekommunikeer nie. Gevolglik kan daar nie sprake wees nie dat die appellant, deur De Wet, voor kontraksluiting afstand gedoen het van 'n reg wat die keersy van Pandora se verpligting was, nl om inligting aangaande alle else wat redelikerwyse relevant kon wees aan die appellant te verstrek. En dit was nooit die respondente se saak nie dat die appellant daarna afstand gedoen het van sy reg om uit die ooreenkoms terug te tree vanweë die onvolledige openbaarmaking van Pandora se eisegeskiedenis.

In die lig van die voorgaande is dit onnodig om in te gaan op die verdere gronde waarop die uitspraak van die hof *a quo* aangeveg is, en wat in elk geval nie beslissend kan wees ten aansien van al die geskilpunte tussen die partye nie.

Daar word soos volg beveel:

1) Die aansoek om kondonasie van die versuim om afskrifte van die oorkonde betyds in te dien, word toegestaan. Die appellant dra die koste van die aansoek op 'n onbestrede basis, en die respondente word gelas om die koste meegebring deur hul verset te betaal.

2) Die appèl slaag met koste, insluitende die koste van twee advokate.

Page 251(2) of [1989] 1 All SA 241 (A)

3) Die bevele van die hof *a quo* word deur die volgende vervang:

"(*a*) Die eiser se vorderings word afgewys met koste, insluitende die koste van twee advokate.

(*b*) Die derde party word gelas om aan die verweerder die som van R44 242 te betaal, insluitende die koste van twee advokate, asook moratore rente op bedoelde bedrag vanaf 1 Februarie 1985 tot datum van betaling van die hoofsom."

RABIE Wn HR, MILNE AR, KUMLEBEN AR en EKSTEEN AR het saamgestem.

Appearances

JR Gautshi, SC and N van der Walt - Advocate/s for the Appellant/s

AW Mostert, SC and P Meyer - Advocate/s for the Respondent/s

Moodie and Robertson, Johannesburg; Siebert and Honey, Bloemfontein - Attorney/s for the Appellant/s

AL Mostert and Kie, Ing, Johannesburg; EG Cooper and Sons, Bloemfontein -Attorney/s for the Respondent/s

QILINGELE v SOUTH AFRICAN MUTUAL LIFE ASSURANCE SOCIETY LTD
[1991] 3 All SA 694 (W)

Division:	Witwatersrand Local Division
Judgment Date:	25 September 1990
Case No:	Not Recorded
Before:	Swart J
Parallel Citation:	1991 (2) SA 399 (W)

• Keywords • Cases referred to • Judgment •

Keywords

Insurance - Disclosure of material information

Cases referred to:

Colonial Industries Ltd v Provincial Insurance Co Ltd 1921 CPD 465 - Referred to

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

Fouche v The Corporation of The London Assurance 1931 WLD 145 - Referred to

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

Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 (AD) - Applied

President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en 'n Ander 1989 (1) SA 208 (AD) - Applied

Whyte's Estate v Dominion Insurance Co of SA Ltd 1945 TPD 382 - Compared

View Parallel Citation

Judgment

SWART J.: The plaintiff is Angeline Lulama Qilingele, a widow. The defendant is the South African Mutual Life Assurance Society Ltd.

Her case, as can be gleaned from her particulars of claim, is briefly as follows. Her late husband Tomazile Elijah Qilingele (to whom I shall refer to as 'the deceased') applied to defendant through Bowring Barclays and Associates (Transvaal Central Division) for life insurance cover. He

View Parallel Citation

nominated plaintiff as the beneficiary of the proceeds of the insurance in the event of his death. During or about June/July 1986 defendant accepted the application of the deceased on the terms and conditions set out in certain Flexidowment Endowment Assurance Contract, the commencement date of which was 1 July 1986. In terms of the said contract defendant undertook, in the event of the death of the deceased, to pay to plaintiff, the nominated beneficiary, the sum of R105 476. Plaintiff alleged that all premiums payable to defendant in terms of the contract had been paid and at the relevant time, namely the date of death of the deceased, the policy was current and of full force and effect. On or about 1 July 1986 the deceased ceded and transferred to plaintiff the benefits arising out of the contract. The deceased died on 6 August 1986 of multiple penetrating injuries of the thoracic organs through a sharp instrument being used by a person or persons unknown. As a result of the aforesaid allegations, plaintiff alleges that defendant was obliged to pay plaintiff under the provisions of the policy but, notwithstanding demand, defendant fails, neglects or refuses to pay the sum claimed or any portion thereof. Plaintiff originally claimed R110 476 (apart from ancillary relief). The amount allegedly payable was by consent amended to R105 476.

Defendant in its plea (which was amended) admitted that on or about 13 May 1986 an application for life insurance, purporting to be made and signed by the deceased, was made to defendant through Bowring

Barclays and Associates (Transvaal Central Division). Defendant, however, pleaded that it has no knowledge of whether the said application was made and signed by the deceased and this allegation was accordingly denied. Defendant pleaded that certain replies to answers in the questionnaire constituting part of the application were not true and that the deceased, in 1984 and 1985, had been dismissed from employment through

Page 695 of [1991] 3 All SA 694 (W)

the abuse of alcohol which the deceased was in duty bound to disclose to defendant, but did not do so with the deliberate intention of inducing the contract. Defendant, ultimately, did not persevere in all aspects of its plea with the result that at the commencement of the trial (apart from the denial that the deceased made and signed the application for insurance) the relevant aspects of defendant's plea appear from the following excerpts from the plea:

'10.2 In the questionnaire constituting part of the said application:

(a) The deceased replied "No" to the question contained in clause 5.2, namely: "Is any other application for insurance on your life now pending or contemplated?"

(b) The deceased stated in clause 7.5 that he had been employed by Drummond Printers for five years as a printer.

10.4 The statements and answers referred to in para 10.2... were not true, in that:

(a) On the same day that the deceased applied to defendant for life insurance he applied for life insurance with two other insurers which issued insurance policies pursuant to such applications.

(b) The deceased had been employed by Drummond Printers as a machine minder from September 1983 to July 1984.

View Parallel Citation

10.5 The incorrectness of the statements and/or answers referred to in para 10.2... above was of such a nature as to materially affect the assessment of the risk assumed by the defendant under the said contract.

10.7 By reason of the aforegoing, defendant, as it was entitled to do, repudiated the said contract of insurance and is accordingly not obliged to pay plaintiff any amount whatever under the said contract.'

Apart from constituting life assurance cover, no relevance was attached to the nature or contents of the policy at the trial and the details thereof need not be considered.

At the commencement of the trial certain amendments were made by consent to the pleadings. In para 5 of the particulars of claim the date '1 June 1986' was substituted by '1 July 1986'. The same amendment was effected in para 7 of the particulars of claim and in prayer *(a)* the sum of 'R110 476' was substituted by 'R105 476'.

The legal representatives of the parties held two pre-trial conferences. In para 1.7 of the minutes of the conference of 7 August 1989 it is recorded that plaintiff requires the names of the employers who dismissed the deceased and the dates of such dismissal (although it later appeared that these allegations played no role at the trial). The answer to this question was, similarly by consent, amended to read as follows: '(1) Marshall Chemical Co and (2) Drummond Printers. The dates of dismissal will be furnished by the defendant later. (1) ñ 1984; (2) 18 July 1984. Paragraph 2.8 of the said minutes refers to the opening of a bank account with the SA Perm.' The word 'thereon' was amended by consent to read 'therein'.

Lastly, the citation of the defendant in the minutes of the conference of 7 August 1989 ('South African Mutual Life Assurance') was amended to read 'South African Mutual Life Assurance Society Ltd'.

Page 696 of [1991] 3 All SA 694 (W)

A second pre-trial conference was held on 14 March 1990. The following excerpts from the minutes are relevant:

'4. The parties agree that the policies and proposal applications made with Sanlam, A A Mutual Life and the defendant are common cause and may be handed in at the trial without formal proof. The defendant's proposal appears at p 1 of the bundle; the A A Mutual proposal appears at p 24 of the bundle and the Sanlam proposal appears at p 41 of the bundle. (This relates to defendant's plea regarding the deceased's reply to question 5.2 of the questionnaire forming part of the application to defendant.)

5. It is common cause between the parties that the deceased died as a result of multiple penetrating injuries of the thoracic organs caused by stab wounds.

9. It is common cause that the issues at the trial are:

9.1 Whether the application for insurance was made by and signed by the deceased?

9.2 Whether the alleged incorrectness of the answer "No" to question 5.2 of the written proposal materially affected the assessment of the risk assumed by the defendant under the contract, thereby entitling the defendant to repudiate the contract.

9.3 Whether the alleged incorrectness of the answer to question 7.5 of the written proposal materially affected the assessment of the risk assumed by the defendant under the contract, thereby entitling the defendant to repudiate the contract.'

View Parallel Citation

It was also common cause at the commencement of the trial that the *onus* regarding the dispute set out in para 9.1 above rested on the plaintiff while the *onus* regarding the issues referred to in paras 9.2 and 9.3 rested on defendant.

Plaintiff then set out to discharge the *onus* resting on her by calling Mr Jakob Makgotlo. His evidence, summarised, runs as follows:

1. During May 1986 he was employed by Joe Noge as a sub-life insurance broker. Noge in turn was employed by Bowring Barclays and Associates (Transvaal Central Division) who did business as insurance brokers. Makgotlo was directly paid by Noge (in whose employment he was) on a commission basis.

2. He passed matric and subsequently attended certain training courses in life assurance. It appeared in cross-examination that he passed matric in 1978. He studied in English. He wrote matric in English. Thereafter he was a clerk in the Chamber of Mines. A greater portion of his work was done in English. Then he joined Liberty Life, A A Mutual and Concord (also an insurance broker) where a great portion of the administration work was done by him in English.

3. He identified the deceased from a *post mortem* photograph at the top of p 66 of the bundle. Although he does not remember how it happened, he canvassed the deceased to sell life insurance cover to him. He was referred to a copy of a proposal for life insurance with defendant and the electro-cardiographic examination appearing at pp 1 - 9 of the bundle. The witness filled in certain portions of said application for the deceased, who was sitting next to him.

Page 697 of [1991] 3 All SA 694 (W)

The deceased, in his presence, on 13 May 1986 twice appended his signature as 'Elijah Qilingele' as appears from p 4 of the bundle at places indicated by an 'X' by the witness.

4. Makgotlo was asked what the reason for the proposed life insurance cover was. It appeared that the deceased wanted to obtain a loan of R150 000 and wanted life insurance as cover for such a sum. Makgotlo pointed out that bare repayment of the R150 000 would leave his family without any benefit and suggested that he obtain cover for R300 000. To accomplish this Makgotlo would 'spread the risk' over three insurance companies and for this purpose three proposal forms were completed and signed on the same occasion and policies were in fact issued by two other insurers. He agreed that he must have seen the deceased before 9 May 1986. The reason is that on that day the deceased signed an application to open a transmission account with the SA Permanent Building Society. The relevance of this account is that applicants for insurance would be advised to open a similar account for purposes of regular payment of the premiums. He did instruct the deceased to do so. He can't remember whether he assisted with the application, but does know about it because details of the account were given to him by the deceased. He was asked why he considered it necessary to spread the risk. It was pertinently put to him in cross-examination that the scheme was devised to avoid the probability that a single insurer for a large sum would probably call for a medical report. After a long

View Parallel Citation

pause, he replied that 'we' sometimes do that. The question was put to him again. He then said that he spread the risk over three insurers, not actually deliberately, so as not to have calls for medicals. It was put to him in cross-examination that he split the risk because he deliberately set out to avoid medicals and in addition did so deliberately to avoid any train of enquiry from the insurers. He admitted the first proposition but denied the second. When asked why he did not put a note in each application referring to the other applications, he replied that he was avoiding medicals. It was also put to him that he knew when the deceased signed the application to defendant, that deceased would purport to warrant as true and complete all the information, which was in fact not so (see para 10.1 under 'declaration' on p 4 of the bundle). This the witness denied.

5. He was questioned in evidence-in-chief and in the course of cross-examination as to how he filled in the application form to defendant. Certain personal details were given to him by the deceased. He was questioned more particularly as to certain pertinent questions in the application form and the answers to those questions which were recorded by him. He wrote the reply to question 5.2 at p 2 of the bundle.

Page 698 of [1991] 3 All SA 694 (W)

He put that question to the deceased, interpreting it to him in Zulu. The deceased gave a reply. (As I recall, it was never canvassed what the reply actually was. It could hardly have been relevant. From what follows, it is clear that question 5.2 was incompletely and wrongly translated to the deceased. Moreover, at a certain stage the witness said that he does not know whether the deceased knew anything about insurance.) The witness accordingly replied 'No'. Whilst he had knowledge of two other applications which would simultaneously be concluded and submitted to insurers, he recorded the reply to question 5.2 as 'No' because he thought it only dealt with pending applications for insurance and that 'pending' only referred to applications which had actually been submitted to other companies. That is what he translated to the deceased. He also explained to him what he understood the meaning of 'pending' to be. 'Contemplated' and what it means was never put to the deceased. The witness did not understand the word 'contemplated' to extend the ambit of question 5.2 at all. He understood that as also referring to an application already in possession of an insurance company. He was also referred to question 8.2 of the Sanlam application at p 43 of the bundle. This reads:

'State the total amount of assurance involved in any unfinalised proposals with other assurers.'

To this the witness recorded an answer 'No'. His reply was that Sanlam wanted to know what cover was 'pending' and he thought this was the same question as 5.2 on defendant's application form and that according to his understanding no other applications were 'pending'. It was put to him in cross-examination whether he did not understand 'contemplated' in 5.2 as having an individual meaning and he replied that he now understood what 'contemplated'

View Parallel Citation

means as a result of a consultation with plaintiff's attorney. He was asked why he had not looked up 'contemplated' in the dictionary. His reply was, after a long pause, that he thought that 'pending' and 'contemplated' were one thing. He was asked why he had asked the deceased the question. His reply was that he did ask him, but translated. The question was repeated and he answered that Old Mutual (defendant) wanted it answered.

6. The witness was also referred to question 5.4 on p 2 of the bundle. This reads: 'Is this application to replace any existing assurance or application with Old Mutual or with any other insurer? (Either on the life to be insured or owned by the proposer.)' The answer was 'No' and the requirement was: 'The introducer must countersign question 5.4 here, irrespective of answer.' The witness identified the signature as that of Noge. The instruction was one from

Old Mutual to the broker and the reason for the question and the signature related to the

payment of commission (see as well the later evidence of Hartwig).

Page 699 of [1991] 3 All SA 694 (W)

7. The witness said that he answered the question 7.5 on p 2 of the bundle. The question reads: 'Have you ever worked for more than one year in any other occupation or trained or studied for any other occupation? If so, please give dates and details below.' The reply to the question was 'Yes'. The details supplied (also in the witness' handwriting) were: '7.5 Drummond Printers - five years as a printer.' The witness said that the reply and details resulted from what the deceased had replied. He had said that he had five years' experience as a printer and that Drummond Printers was one of the companies. The deceased hadn't said that he had been with Drummond Printers five years. He hadn't said how long he had been there. That is what the witness intended conveying, not to state that the deceased had had five years with Drummond Printers. (Mr *Nochumsohn* acting for plaintiff ultimately submitted that the reply and details relating to question 7.5 were ambiguous, not false. This seems to have been accepted by Mr *Pincus*. No cross-examination was addressed to this point and no reliance was ultimately placed on this question and reply on behalf of defendant.) The witness was also referred to p 3 of the bundle where certain replies had been entered to the various questions contained in para 9.1 - 9.6. However, the phrase 'As per medical report' appears in manuscript obliquely across the page at two places. The witness stated that the replies were entered in his handwriting and had been considered necessary by him because he didn't at that stage know whether defendant would call for a medical report. The above-mentioned manuscript phrase was, however, in the handwriting of Noge. (No further relevance attached to this aspect of the questionnaire.)

8. The witness was questioned as to his information relating to the earnings of the deceased. He initially said that the deceased told him he was making a lot of money selling, but no details were given. He was referred to the answer to question 5.9*(b)* at p 2 of the papers where the reply was that the deceased was earning approximately R1 000 per month. However, he was also referred to p 43 of the

View Parallel Citation

papers where in question 7.1 relating to the Sanlam questionnaire, the answer in the witness' handwriting was R12 000 per annum. He said he knew that the deceased earned R1 000 per month. When pertinently asked how he expected the deceased to pay the premiums, he answered that his income varied. He believed that the regular monthly income was at least R1 000 per month. He also said that the deceased said that he could afford R300 000 policies. He was asked how he could believe that the deceased could obtain a loan of R150 000 and his answer was that he was told this and accepted it. When asked why he had not put the agreed amount of R300 000 in one policy, he replied that the purpose was to spread the risk as set out above.

Page 700 of [1991] 3 All SA 694 (W)

It was put to him that the purported answers by the deceased as to his marital status were false in that he was actually divorced. The witness replied that the answers were formulated according to what deceased told him and that the alleged wife was not there when deceased signed.

9. He was then referred to the defendant's rates book. It appeared from his evidence that he was aware of the rates book and the fact that the rates book contained a guide to what the defendant wanted as part of an application for cover. That included a salary ratio to cover. He didn't have the rates book when the deceased's applications were finalised. It was put to him that the general rule was that the cover was 10 times the annual income. His reply was 'No'. He stated that he did not argue that cover could not be obtained where 30% of income would have to be devoted to premiums. He was then referred to various amounts of the applications for cover prepared by him. He was asked what he believed would have happened if each

insurer had been told of the other proposals. His answer was that they would ask for further

medicals. He was also asked whether the proposed cover of R300 000 would have been granted on R1 000 a month. His answer was that it depends on the underwriter. It was put to him that, if proper disclosure had been made resulting in facts emerging not in accordance with the policy and guidelines formulated by the insurer, the latter would have required more information. His answer was that this depends on the underwriter.

10. I put certain questions to the witness. He stated that according to what the deceased told him his average income was R1 000 per month or approximately that. On the courses he attended he was told what insurance application forms contained and how they had to be filled in. But in reply to a question whether the reason for the various questions were explained, he said that the wording on the application form was not explained. He explained that the word 'contemplated' in question 5.2 on p 2 of the papers was understood by him (as I understood him) as being part and parcel of his notion of 'pending', and thus only having relevance if the insurer was already in possession of the application.

11. In re-examination he said that the deceased had undergone a medical examination on defendant's policy and that in his opinion a Black in the townships can live adequately on R600 to R700 per month.

View Parallel Citation

This evidence concluded plaintiff's case. On the issues on which the *onus* rested on defendant, plaintiff did not seek to admit any further evidence. It was clear, at this stage, that the application for insurance had been signed by the deceased and this was formally conceded by Mr *Pincus* on behalf of defendant. As far as the alleged incorrectness of the answer 'No' to

Page 701 of [1991] 3 All SA 694 (W)

question 5.2 of the written proposal is concerned, it is equally clear that the answer was incorrect. Concerning the alleged incorrectness of the answer to question 7.5 of the written proposal, I have already indicated the line followed in argument by counsel on behalf of plaintiff. I think this argument is correct. At best for defendant the reply to question 7.5 was ambiguous and not wrong. In any event, the materiality of the alleged false reply would have been the crucial question and no further evidence or argument was submitted by defendant. The case accordingly falls to be decided on the materiality of the false reply to question 5.2. Counsel did not invite me to make a finding whether deceased perpetrated such false reply or participated therein. I would, in any event, not have been able to make such a finding on the evidence. When questioned by Makgotlo, deceased merely said that he had no other life insurance. In view of the fact that question 5.2 had not been properly translated or explained to the deceased (whose sophistication as far as insurance matters are concerned is in serious doubt) the reply to question 5.2 cannot be regarded as that of the deceased. Makgotlo formulated the reply to question 5.2. Although not contending that Makgotlo was the deceased's agent, and that any relevance attached to it for that reason, Mr *Pincus* submitted that Makgotlo deliberately set out to deceive the defendant. I have no doubt that this is correct. There are two principal reasons. Firstly, Makgotlo was, at the very least, adequately educated in the use and understanding of English. On that basis alone, he could never have understood question 5.2 in the sense alleged by him. This conclusion, in my opinion, becomes conclusive when it is considered that he was not only an experienced insurance representative but had been trained in the preparation of insurance applications. It is inconceivable that an insurer who goes to the length of establishing courses would not explain to prospective representatives the meaning and the underlying reasoning of the various questions in the questionnaire. Secondly, it is quite clear that, whether deriving from deceased's initiative or that of Makgotlo, deceased wanted a policy covering a risk of R150 000 only. On completely spurious grounds, Makgotlo suggested a policy of R300 000 to him (ostensibly not connected with any individual or specific needs of the deceased) and then went ahead by way of three unconnected applications to three various insurers who had no knowledge of the other simultaneously pending applications. No innocent explanation appears why the proposed cover was not sought from one insurer only, say defendant. A pointer to the true reason is contained in Makgotlo's confession that he did not want to invite additional medicals. I have no reason to doubt that this is correct as far as it goes. It clearly denotes knowledge on the part of Makgotlo that had a single insurer had knowledge of a proposed policy of R300 000, it would have been much more on its guard as far as the proponent's health was concerned.

Page 702 of [1991] 3 All SA 694 (W)

View Parallel Citation

It goes further, however, because I reject his evidence that the question of medicals was his only concern. He must be taken to have been aware that, as far as every aspect of the policy is concerned, the insurer would have been more on his guard and more prone to digging, delving or putting uncomfortable questions. I also reject his evidence (if it goes so far) that he did not realise or know that defendant's general rule was to allow a policy of 10 times the applicant's annual salary. The fact that he may or may not have had the rates book when completing the particular application, has no relevance. It is notable that the sum assured or initial cover applied for was R93 713 with a rider of R5 000, being well within the ambit of the aforesaid guidelines. It is, moreover, notable that the aforesaid application was made on the basis of a regular monthly income of approximately R1 000 per month. See p 2 of the papers. The Sanlam application for an additional initial death benefit of R73 000 is made in respect of the same income (this time stated as R12 000 per annum). See pp 42 and 43 of the papers. The details of the application in respect of the A A Mutual policy were not put to Makgotlo specifically, except that the amount of the cover required was approximately R75 000. In fact it was R74 685. See p 25 of the papers. At p 26 it appears that the applicant was alleged to have stated that his own earnings exceed R650 per month and that the joint earnings of himself and his wife exceed R1 000 per month. As far as his own earnings are concerned, this is not in conflict with what was stated in the other applications. To put it differently, in respect of two of the applications it may be accepted that both were made on the basis of the same earnings and the probabilities are that the third application (that to the A A Mutual) was made on the same basis. Whether Makgotlo induced the deceased to apply for inflated cover or did so for the sake of his own commission, I need not decide. It is clear, however, that he spread the risk (as he called it) of this cover over three proposed policies deliberately because of a general apprehension that should the proposal be contained in one application to one insurer it would, at the very least, run into troubled waters.

Mr *Pincus* called three witnesses on behalf of defendant. In respect of two of them notice was given that they would be called as experts. These witnesses can be identified as follows. George Stanley Harry has a diploma in marketing obtained from the Institute of Marketing Management. He has been an underwriter since 1969 with various insurers and since January 1989 he has been employed as a senior underwriter with Sanlam.

Page 703 of [1991] 3 All SA 694 (W)

According to him an underwriter is a risk assessor. He has to decide whether a policy will be accepted at normal rates or otherwise or rejected. Theodore Ernst Hartwig obtained a BSc degree in 1963. He became a Fellow of the Institute of Actuaries in 1970. He is the chief actuary for the defendant and is also an assistant general manager of the defendant. He has been with defendant since 1964. He is responsible for the financial soundness of the company and is in charge of the actuarial division. He stated, in general, that information regarding medical aspects and non-medical aspects are of importance to defendant. He is in charge as far as non-medical information is concerned and has to see that standards are adhered to. Mr Peter Christiaansen Lamprechts is a consultant actuary in private practice and has been and is a valuator to a number of insurance companies and pension funds. He obtained a BSc in 1963 and thereafter became a Fellow of the Institute of Actuaries in 1972. He has had

View Parallel Citation

considerable experience since 1964 and expressed certain views concerning materiality based on his academic qualifications and his practical experience. The expertise of these witnesses was not attacked by Mr *Nochumsohn*. He did, however, object to their evidence *in toto*. A notice of such objection to evidence to be tendered by the experts as irrelevant to the issues, was noted in the minutes of a pre-trial conference held on 7 August 1989. Mr *Nochumsohn* submitted, with reference to the judgment of Joubert JA in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) that the 'reasonable man' test is applicable to materiality and that all the experts can do is possibly abuse the Court's mind over how the reasonable insurer approached the matter. He submitted that the Court does not need expert evidence. Mr *Pincus* submitted that he proposed to put evidence of materiality before the

Court on the basis that evidence is admissible as to what is material. He submitted that there are certain parameters at the extremes of which evidence may appear to be clearly material or immaterial but that between these limits evidence as to materiality may be necessary. He referred me to *Fransba Vervoer (Edms) Bpk v Incorporated General Insurances Ltd* 1976 (4) SA 970 (W) and Gordon and Getz *The South African Law of Insurance* at 120.

I admitted the evidence on that basis and subsequently clarified my ruling to the effect that I was willing to receive the evidence and to consider the admissibility thereof at a later stage. This dispute must consequently still be addressed. In the meantime, however, it is necessary to refer to the evidence of defendant's experts. Their qualifications as experts were either conceded or not attacked. I do not intend to refer to the witnesses strictly in accordance with the sequence in which they were called. Only one was cross-examined. I find it convenient to refer to the other two witnesses first. I do not intend attempting to report the evidence of the three witnesses comprehensively but rather the thrust of their evidence.

Page 704 of [1991] 3 All SA 694 (W)

George Stanley Harry is in the employment of Sanlam as senior underwriter. Sanlam is involved in a similar dispute with plaintiff which is pending. In view of the fact that Mr Harry was not cross-examined, the question of possible bias does not arise. In any event no grounds for such a finding appear from his evidence.

Mr Harry described the functions of an underwriter and referred to certain criteria by which he is guided. An underwriter is a risk assessor who decides the acceptability of an insurance proposal at normal rates or otherwise or the rejection thereof. The underwriter builds up a mind picture and takes all medical and non-medical evidence into account. Regard is paid to the questionnaire forming part of the proposal and the income of the proposer. This is done by all insurers. The underwriter is guided by rate manuals, the applicant's history and by general experience. The rates book of the North American Insurance Company and other manuals are used as guidelines. Generally speaking, 10 times annual income or 100 times monthly income is accepted as a norm. I understood this to mean that cover in an amount 10 times annual income is generally regarded by insurers as normal and acceptable. He was asked to express an

View Parallel Citation

opinion on the ratio of R1 000 per month, at premiums of R325 per month, and cover of R250 000. This he regarded as excessive.

P C Lamprecht is a consulting actuary with ostensible experience in the insurance industry. He was also referred to the questionnaire. He described question 5.2 on p 2 of the bundle (which is linked to question 5.9*(b)*) as a standard question relating to most policies. His view is that question 5.2 is 'very material'. The reason for the question is to provide an indication of the ratio between cover in existence, the need for insurance and the amount applied for. This leads *inter alia* to the making of further enquiries in case a high proportion of income is earmarked for insurance premiums. The question of cover is important to ascertain whether there is over-insurance. In general he supported the evidence of Mr Hartwig (see later) as to the materiality of cover and affordability of premiums.

He was asked for his opinion should the deceased have disclosed to him as underwriter a monthly income of R1 000 and the two other proposed policies. His view was that he would want to decline. Practice differs. In some cases further information is called for. In other cases a smaller policy is offered and in yet others such an application would be declined.

He confirmed the use of rate manuals as guidelines by insurers and stated, with particular reference to p 63 of the bundle, that the Swiss-South African Reinsuring Company Guidelines are regarded as authoritative by South African insurers.

He was not cross-examined.

Page 705 of [1991] 3 All SA 694 (W)

Mr Theodore Ernst Hartwig is the chief actuary of defendant and has been with defendant since 1964.

He described his responsibilities. He is responsible for the financial soundness of the company and is in

charge of the actuarial division. Rates and non-medical aspects relating to insurance particularly are under him and he has to see that standards are adhered to.

He then referred to certain aspects of the questionnaire and the reasons for those questions from the viewpoint of an insurer. He also said that questions 5.2 and 5.9*(b)* (*supra*) are linked and added that question 5.2 is standard practice in the insurance industry. He substantiated this. He has checked the proposal forms of the five leading local insurers (Sanlam, Liberty Life, Southern Life, Momentum and SA Mutual). This question appears in all their proposals. He expressed the opinion that these questions are 'very material'.

He then explained the reasons for the questions. They relate to the amount of cover and the affordability of premiums. The materiality of cover lies in the fact that overseas studies show a link between over-insurance and bad risk. In the case of over-insurance the life to be assured knows something which prevents a contract on a basis of good faith. Over-insurance is consequently what he termed 'anti-selecting'. There should consequently be a reasonable balance between 'value' and 'cover'. An excessive cover is not appropriate. I understood 'value' to refer to the existence and extent of the legitimate interest for which cover is sought. He referred to the fact that a policy is really compensation for loss of income with result that the deceased's estate should not be better off after death. (I have the impression that the latter was mentioned as an

View Parallel Citation

example because a policy could also serve to cover a loan or as an investment. However the same principle could be regarded as applicable.)

Although not regarded as equally important to the question of risk, he also explained the necessity for the affordability of premiums. An insurer is averse to issuing a policy to a person who cannot maintain it. Such a policy will in all probability lapse soon and lead to financial loss to the insurer because costs relating to medicals, underwriting, stamps and so forth exceed the first two months' premiums. Moreover, a lapsed policy means that a client has been over-sold and leaves a disgruntled client.

He then referred to the existence of and the necessity for norms in the industry. The defendant sells over 2 000 policies per day and needs criteria to evaluate each risk so as to exclude the tendency in people to anti-select. He provided details of such criteria (also referred to as guidelines). Page 62*(a)* of the bundle is an extract from the Old Mutual rates book. It was issued in November 1986. The majority of brokers would have access to the rates book.

Page 706 of [1991] 3 All SA 694 (W)

Although it is not a private document, individuals would normally not have such access. As at May 1986 the rule of thumb as regards maximum reasonable cover was 10 times annual salary and this was also the position for many years prior to May 1986. This rule was adopted by other insurers as well. He also referred to p 62*(b)* of the bundle reflecting the same guideline as at September 1987. The present position is reflected at p 59 of the bundle, being applicable since April 1988. The maximum sum assured by guidelines appearing in para 2.1.1.1 reflect a slightly more sophisticated approach due to the fact that the income of young people is less than their potential. Should the guidelines have been applicable to the deceased, the norm would have been 9 - 13 times annual income. He also referred to the North American manual as being significant because reinsurers provide guidelines to underwriting principles. As I understood the position this was to promote standardised principles.

He expressed the opinion that, had this application been put before him in truthful content, there was no doubt in his mind that 'we' would have declined to issue the policy. He was then cross-examined. This covered the following ground:

1. The first point related to the credibility of the last-mentioned opinion. He was referred to the notice in terms of Rule 36(9)*(a)* and *(b)* pertaining to him appearing at p 69 of the bundle and further. He was more particularly referred to para (1) on p 72 reading as follows: 'Finally, had the applicant made a truthful disclosure in this proposal form, the insurance company would have called for further information to ascertain why 40% of income was being spent on life cover.' It was suggested to him that the defendant would not have gone on record with the said notice if the witness had not made such a statement to defendant. This was conceded to

be probably correct. It was also put to Mr Hartwig that the statement in subpara (1) was at variance with his opinion about declining the issue of the policy and he was asked to account for this conflict. This he did as follows: Paragraph (1) refers to the amount of the premium. He reiterated that there are two aspects, ie the amount of cover and the affordability of the premium, the latter being not so strictly relevant

View Parallel Citation

to risk. His above-mentioned opinion really referred to the unacceptability of the amount of cover. There is also a fine distinction between declining and calling for further information in the hope of finding a satisfactory state of affairs. The reference in para (1) to 'truthful disclosure' was not intended to refer to income but to the answer to the question in 5.2.

2. As 'truthful disclosure' (according to the witness) was intended to refer to the amount of cover and presumably to question 5.2; he said para (1) is not very clear and confuses income and cover. I think this answer is satisfactory.

Page 707 of [1991] 3 All SA 694 (W)

It appears from other paragraphs preceding para (1) that the witness would canvass both cover and affordability. See for instance paras *(e)* and *(g)*. In para *(h)* (the only reference to risk) it is stated as an established fact that people who over-insured themselves tend to be bad risks. In paras *(f)* and (i) it is stated in essence that, depending upon the answers to the questions, the company 'may involve itself in a train of enquiry so as to ascertain why in a particular case the applicant is spending so much of his income on insurance or why he requires so much cover' and 'this may lead the insurance company on a train of enquiry'. In para *(k)* it is expressly stated that the insurer 'also' wishes to establish whether the policyholder is likely to be able to maintain premium payments because it is undesirable for a policy to be lapsed after only a few premiums have been paid. It is clear to me that para *(l)* is not in conflict with Mr Hartwig's evidence in the sense that even in respect of question 5.2 the insurer would invariably have reacted no more strongly than to call for further information to ascertain why 40% of income was being spent on life cover. This appears not only from Mr Hartwig's evidence but from the other passages in the notice. I think the framer of the notice rather ineptly lumped a conclusion in para *(l)* without clearly differentiating between cover and affordability and literally conveyed (in conflict for instance with paras *(f)* and (i)) that the company 'would have' called for further information. It was then put to the witness that if the deceased had truthfully answered 5.2 defendant would have called for further information. The reply was that it is within the bounds of possibility that further information could have been called for instead of declining outright. He maintained his opinion, however, that he would have regarded the application as out of the question. It was put to him that had further enquiries been made they may have induced the defendant to issue the policy. This was also conceded to be within the bounds of possibility. He was asked why only the possibility was conceded because, if he had details of overtime, assets and so forth, those answers would have satisfied defendant. The reply was that, if special circumstances exist, he would have expected them to be stated in the proposal and that it would be unlikely that such special circumstances would be forthcoming. I am of the opinion that there is support for the witness in the questionnaire itself. In question 5.9*(b)* the deceased was asked what his regular monthly income is. The reply was approximately R1 000 per month. The same question enjoined him to specify overtime separately. Nothing of the kind appears. His main occupation, moreover, is that of a self-employer selling clothing with a Std VI qualification.

View Parallel Citation

Page 708 of [1991] 3 All SA 694 (W)

Suffice it to say that there is no indication of any income other than from his regular occupation and no indication of income earning or marketable assets. He was asked whether he would have rejected or followed *(l)*. He replied that in his opinion he would have rejected it

outright.

3. Certain hypothetical propositions were then put to the witness. The first was to accept all the present facts but to surmise a policy which had been issued in respect of a proposal dated 13 May 1966 (a 20 years old policy). The witness replied that a discrepancy would not have been investigated due to the age of the policy. In respect of a 10-year-old policy the witness did not think there would have been an investigation. He was asked what the position would have been in respect of a 20-year-old policy if it was investigated and the untruth ascertained. The witness expected that there would be no repudiation. As regards a 10-year policy he said it was difficult to answer. He could not give a hard and fast answer. If this untruth was the only irregularity, he wouldn't expect a repudiation. If the policy was in force and had been paid up regularly over 10 years it would have demonstrated a man of substance. The company investigates policies where claims arise shortly after issue of the policy. It would be a case of allowing the benefit of the doubt: 'Fair is fair.' It was then put to the witness that defendant was not concerned with the question of truthfulness, but with the duration of the policy. The witness did not agree, although stating that there was a cut-off point beyond which it was not worthwhile to investigate. It was again put to him that duration is the much more important factor. His reply was that truthfulness is always relevant but that defendant sometimes chooses to ignore it (I understood this to refer to practical reasons and considerations of fairness and equity as referred to above). He said that the reason for investigation in policies of short duration is the greater probability of irregularity and that they would have overlooked untruthfulness because of the duration (in respect of a 10-year policy) and that in that sense duration is more important.

   On this evidence the point was clearly not conceded or made that in assessing a proposal defendant was not interested in truthfulness or in proper disclosure. To validate such a submission would entail that defendant merely went through the motions of a questionnaire (and possibly later specific questioning) but completely ignored the replies and information elicited, except to pounce on it as a ground for repudiation whenever it suited defendant. This is improbable behaviour, particularly on the part of one of the leaders in the insurance industry. Moreover, the concessions made by the witness in reply to the hypothetical (and with respect, speculative) propositions put to him, also do not sustain the point sought to be made.

Page 709 of [1991] 3 All SA 694 (W)

The witness went no further than to state that despite subsequent discovery of some irregularity, the passage of time coupled with practicality, fairness and business considerations would not necessarily elicit the same reaction as

View Parallel Citation

in a questionable case. One can understand this. However, there is a world of difference, seen in retrospect, between a man who has told an untruth but has demonstrated over 20 years his ability to pay the premiums coupled with a total absence of intention to fleece the insurer and one who has demonstrated no more than his untruthfulness. In any event the question of what an insurer may do after a lapse of 10 or 20 years has, in principle, nothing to do with the manner in which an insurer assesses a proposal put to it. I find that also on this ground the credibility of Mr Hartwig's opinion has not been assailed.

4. The witness was then referred to p 2 of the bundle and was asked whether the signatory (Noge) was not the agent for the insurer. As a matter of fact it was put to the witness that by virtue of Noge's signature he was denoting such agency. The reply was that question 5.4 related to an agreement in the life insurance industry where policies are replaced within a certain period (presumably with reference to the payment of commission) and that as far as he understood the law, the broker (introducer) is not an agent of the insurer. (Mr *Nochumsohn* subsequently argued that Noge was the agent of defendant. This issue remains to be resolved.)

5. Another hypothetical question was put to Mr Hartwig as follows. A man of 41, who had never had life cover, wakes up to how foolish he had been. He earns R10 000 per month. He applies

for cover of R300000, the premiums of which would amount to roughly 40% of his income. The witness was asked whether there is anything wrong in the proposition. His reply was that it is abnormal. The first question is the assessment of risk. Cover and premiums are really distinct. He was pressed whether the end result is not what a proposer had left to live on. The witness agreed but again stressed the importance of the amount of cover in assessing the risk. Affordability, according to him, is less important in assessing risk. The present non-disclosure of the amount of cover he regarded as highly relevant. Affordability is the reason why the policy would probably not have been issued but is not a ground for repudiation. The witness was referred to para *(g)* at p 71 of the bundle and it was put to him that *(g)* and question 5.2 are the same. The witness said that affordability is *ab initio* to assess whether the policy can be maintained. He conceded that the balance of income available after payment of premiums is a relevant consideration. He was asked whether it was not feasible for a man in a Black township to 'come out' on R700 per month. The witness could not answer to this.

Page 710 of [1991] 3 All SA 694 (W)

This line of questioning was in its nature speculative. I think it may demonstrate the possibility that life cover may be sought as a form of investment and that a person with a large income may choose to devote a large part of his income to premiums while still being able to live on the balance. This hypothetical proposer is, however, far removed from the position of the deceased. Moreover, if it is a fact that an assurer in assessing risk has criteria to establish over-insurance and guard against over-insurance, the witness' replies regarding the hypothetical case do not detract from such a fact. As a matter of fact, Mr Hartwig was at pains, once again, to point out the difference between risk and

View Parallel Citation

affordability. I consequently find that this line of cross-examination also does not detract from the validity of the opinion Mr Hartwig expressed at the end of his evidence-in-chief. The matter can also be approached along different lines by simply posing the following question: How can the fact that a man can live on the balance of his salary after payment (or proposed payment) of undisclosed premiums in respect of undisclosed cover be a valid answer to non-compliance with question 5.2 or to the importance (if established) of possible over-insurance as a factor in assessing risk?

6. The witness was then referred to question 5.9*(b)* at p 2 regarding overtime. It was pointed out that the question only refers to overtime and does not require assets and liabilities to be listed. He was also referred to the reference to 'assets and liabilities' in para 2.1.1 at p 58 and he was asked what the position would be if the proposer had other irregular sources of income, for instance, gambling. The reply was that in big policies assets and liabilities are called for and that agents would be trained for that or that a statement would be called for.

   I think this reply is adequate. No matter what minimum business considerations may be relevant to an insurer, I find the reference to gambling as a source of income totally irrelevant. It appears from para 2.1.1 at p 58 of the bundle that the 'difference between assets and liabilities, ie net worth of the life proposed' is regarded as a useful guide in determining an appropriate level of the sum assured. In view of the fact that such a statement is not called for in the questionnaire, the witness' reply seems perfectly reasonable. In cases meeting the normal ratio of income and proposed cover, such statement is presumably not regarded as necessary. Also this line of questioning, in my opinion, does not detract from the evidence of this witness.

7. The witness was then referred to the question of a train of enquiry. He said such train of enquiry was not necessarily caused by any answer adverse to the insurer. As regards state of health, it would depend on the state of the information. He was referred to the particulars in para 2.3 at p 6.

Page 711 of [1991] 3 All SA 694 (W)

The witness agreed that adverse information does appear but pointed out that further

information is provided at the foot of the page. He was referred to the untruthfulness of the answer to question 9.1 at p 3. I accepted that para 9.1*(c)* was referred to where the deceased replied 'no' to the question of respiratory or lung trouble while it appears from question 2.3 and the comments thereon in the medical report at p 6 that there had been respiratory or lung problems in the form of pneumonia. Mr Hartwig replied that this discrepancy had not been used in the underwriting exercise and that this portion of the questionnaire should not have been completed because the medical report had been obtained. The facts were consequently ultimately established and the difference was not of concern.

8. It was finally put to Mr Hartwig that the underwriter was not concerned with the truthfulness of the questions 5.2, 9.1*(c)* and 2.3 but only that the deceased had died so soon. The witness disagreed.

View Parallel Citation

I find that credibility in the sense of demeanour and appearance of the witnesses did not detract from the evidence on defendant's behalf. I have dealt with the cross-examination. The evidence of defendant's witnesses was not contradicted by evidence on plaintiff's behalf. The admissibility of defendant's evidence remains to be resolved and, if admissible, the cogency thereof. I find it convenient to deal with these aspects after discussing the test of materiality.

Mr *Nochumsohn* submitted that, in order to discharge the *onus* on it, it was incumbent upon the defendant to prove that the reasonable man would have considered the incorrect answers to questions 5.2 and 7.5 as being of such a nature as to have materially affected the assessment of the risk assumed by the defendant under the contract. The test is not that of the reasonable insurer or the reasonable insured. It is the opinion of the 'hypothetical *diligens paterfamilias*' which counts. He referred to *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* (*supra* at 435F - I) and to *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en 'n Ander* 1989 (1) SA 208 (A) at 216B - G.

In the *Mutual and Federal* matter Joubert JA (who delivered the majority judgment) said this at 435F - I:

> '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. 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.

Page 712 of [1991] 3 All SA 694 (W)

> The Court personifies the hypothetical *diligens paterfamilias*, ie the reasonable man or the average prudent person. (*Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) at 410H - 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.'

In the *Weber* matter *supra* Joubert JA quoted the following passage with approval:

> '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.'

In a minority judgment Miller JA at 446 decided that the Court's function is objectively to decide in the light of all the relevant circumstances whether 'the reasonable insured' (ie the reasonable man in the same situation and with knowledge of the same facts and circumstances) would have regarded the facts as material.

The majority judgment consequently makes it unnecessary to adopt the approach in for instance *Fransba Vervoer (Edms) Bpk v Incorporated General Insurances Ltd* (*supra*). There the Court firstly had regard to materiality in the sense of information which may influence the insurer's

View Parallel Citation

opinion as to the risk that he is incurring and consequently as to whether he will take it or what premium he would charge if he does take it. (At 975H and 980E.) The next question posed was whether or not a reasonable proposer for insurance could be expected to realise in the circumstances that the fact of the occurrence of accidents in a separate business was likely to be material (at 978B and 980F). See also *Fouche v The Corporation of the London Assurance* 1931 WLD 145 at 156.

In *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk* (*supra*) Van Heerden JA at 216E - F said this with reference to the majority judgment of Joubert JA in the *Mutual and Federal Insurance* matter:

> 'Indien die Hof *a quo* te kenne wou gee dat inligting nie wesentlik is nie indien 'n redelike man nie sou meen dat dit die risiko beïnvloed nie, kan ek nie akkoord gaan nie. In die uitspraak van Joubert AR in *Oudtshoorn Municipality* word so iets sekerlik nie aan die hand gedoen nie. Wat Joubert AR wel gesê het (op 435), is dat 'n hof die redelike man-kriterium toepas by beoordeling van die vraag of "the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums".

Page 713 of [1991] 3 All SA 694 (W)

> Soos tereg deur die appellant se advokaat betoog, is die vraag dus nie of na die oordeel van 'n redelike man die betrokke inligting wel die risiko beïnvloed nie, maar of dit *redelikerwyse* 'n effek mag hê op 'n voornemende versekeraar se besluit om al of nie die risiko te aanvaar of 'n hoër premie as die normale te verg. Anders gestel, is die toets of die redelike man sou geoordeel het dat die inligting oorgedra moes word sodat die voornemende versekeraar self tot 'n besluit kan kom. En so 'n oordeel sou hy bereik het indien die inligting na sy mening die voornemende versekeraar redelikerwyse kon beïnvloed het. (Vgl *Roselodge Ltd v Castle* [1966] 2 LI LR 113 op 133.)'

If the court personifies the hypothetical reasonable man, the court does not stand in the shoes of the insured or the insurer, whether subjectively or objectively, but objectively acts as an independent decider of fact, but not as a court or as an expert in insurance matters or as a layman who, for instance, knows nothing about insurance matters. In the *Fransba Vervoer* matter *supra* the following is stated at 977B:

> 'The question whether or not certain information is material in the assessment of the risk is a question of fact to be determined by the jury in a jury case, or otherwise by the Court acting as a jury (*Hardy Ivamy* at 98; *Colinvaux* para 155 at 93).'

This seems to me, with due respect, to be a correct description of the function of a court if 'jury' is read as 'reasonable man'.

As to what is material, see above and also *Fine v The General Accident, Fire and Life Assurance Corporation Ltd* 1915 AD 213 at 220 - 1:

> 'And in *Joel's* case Fletcher Moulton LJ 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".'

It should perhaps be added that in the *Fransba Vervoer (Edms) Bpk* matter *supra* McEwan J at 974B - E, with reference to s 63(3) of the Insurance Act 27 of 1943, *inter alia* said:

> 'Thus for the special declaration in the plaintiff's policy to be effective the words "wat moontlik die versekerde risiko betref" would have to be read as "wat waarskynlik die risiko betref".'

View Parallel Citation

> I now turn to the question of admissibility of defendant's evidence. As submitted by Mr *Pincus* acting for defendant, the factual position is sometimes that information is clearly material or immaterial. See for instance *Colonial Industries Ltd v Provincial Insurance Company Ltd* 1921 CPD 465 at 471:

Page 714 of [1991] 3 All SA 694 (W)

> 'It is quite competent for me to decide on the materiality to the estimation of the risk of those facts without having heard evidence thereon (cf *per* Solomon J in *Fine v General Accident, Fire and Life Assurance Corporation*

Ltd 1915 AD at 220).'

See also *Fine v The General Accident, Fire and Life Assurance Corporation Ltd* (*supra* at 221):

> 'Nor do I see that the matter would be carried much further, if agents of other insurance companies had been called to say that in their opinion such a fact is material. There is considerable conflict of opinion as to whether such evidence is admissible, but assuming it to be, I am decidedly of opinion that in such a case as this it is quite unnecessary.'

See, however, *Whyte's Estate v Dominion Insurance Company of South Africa Ltd* 1945 TPD 382 at 406 where an intermediary position was dealt with:

> 'But I do not think that the fact which was not disclosed in this case was either so manifestly material or so obviously immaterial as to render evidence unnecessary. At the time of the renewal in 1943, the insured was insuring a car which, generally, he alone drove. Whether the fact that over five years before another car when driven by a native driver had been involved in an accident is material to the risk is a question of fact for the decision of which I think evidence is necessary.'

The matter was consequently referred back to the Court *a quo* to hear evidence on the question of materiality.

In *Fouche v The Corporation of the London Assurance* (*supra*) the principle of the admissibility of evidence as to materiality was also upheld. See at 156:

> 'Of course, a fact may obviously be material without evidence to that effect. On the other hand the insurers may lead evidence to show in what respect they contend a fact is material to the risk and the court may still hold that such fact is not material.'

In *Fransba Vervoer (Edms) Bpk v Incorporated General Insurances Ltd* (*supra*) the question of the admissibility of evidence as to materiality was fully considered at 976F - 977H. McEwan J pointed out that the practice of allowing evidence of materiality is well established not only in England but in this country and that such evidence may not only be expert evidence but evidence as to 'the opinions of the insurer themselves, their agents or insurance brokers on the issue'.

See also the conclusion of McEwan J at 977H as to evidence by the latter:

> 'It seems to me that all that need be said is that the Court will examine such evidence, as it will examine any other evidence, to see whether it is unduly coloured by bias or partiality.'

It appears to me from the foregoing that there is no principle of law excluding evidence as to materiality but that the contrary is in fact the position. Evidence relevant to the question of materiality, whether factual or expert in nature, may conceivably be unnecessary in certain cases but I cannot see it being inadmissible.

View Parallel Citation

Page 715 of [1991] 3 All SA 694 (W)

I can also not see why a different conclusion should be reached merely because the Court is acting as the hypothetical reasonable man. As a matter of fact, in my opinion, both principle and common sense dictate that the Court should not act blindfolded but should be properly enlightened by relevant evidence as to what the parties consider material or immaterial and what the reasons for the attitudes are. This can be done by presenting factual or opinion evidence. The Court acting as the reasonable man must test this and come to the conclusion referred to by Van Heerden JA (*supra*):

> '(O)f dit (the relevant information) *redelikerwyse* 'n effek mag hê op 'n voornemende versekeraar se besluit om al of nie die risiko te aanvaar of 'n hoër premie as die normale te verg.'

I consequently hold the evidence presented by defendant to be admissible. What remains is to establish the cogency thereof and to decide whether defendant has discharged its *onus* about whether the relevant facts not disclosed were material. It appears from the aforesaid that the only relevant facts are those relating to the reply to question 5.2. It also appears that these facts were within the knowledge of the assured and were not communicated to the defendant (see *Fransba Vervoer (Edms) Bpk* (*supra* at 977C)).

Mr *Nochumsohn* made various submissions to the effect that defendant has not discharged its *onus*. He submitted that the evidence of Mr Hartwig shows convincingly that defendant was not nearly as concerned about the incorrectness of the answer to question 5.2 as it was in relation to the duration of the policy at

the date of death. I have already dealt with this submission. He submits that it matters not that Makgotlo had spread the risk so to speak over three insurers in order to avoid medical examinations by the insurers concerned because the deceased did indeed undergo a medical examination. This is true, as far as it goes. However, if the intention of Makgotlo in spreading the risk had been to obviate medical examinations, it does not mean that in the mind of defendant a medical examination would be the only relevant consideration. In this case despite the medical examination and the willingness of defendant to ignore incorrect replies by the deceased regarding his medical position, the evidence on behalf of defendant is that the spreading of the risk remained material because of the question of over-insurance. Regarding the reaction of the reasonable man to the incorrect reply to question 5.2, Mr *Nochumsohn* submitted that the reasonable man would not know anything about and would not concern himself with the inner workings and motivations of an insurance company with reference to the question in issue. I think this is incorrect because it would amount to approaching the question of materiality, whether subjectively or objectively, only from the point of view of the insured. The Court, as a reasonable man, before deciding the issue of materiality, is entitled to be informed also as to the inner workings and motivations of an insurance company.

Page 716 of [1991] 3 All SA 694 (W)

I think this is particularly apposite in view of the fact that the issue here is an incorrect reply to a question specifically posed in the questionnaire by the insurer and not merely a question of non-disclosure. Mr *Nochumsohn* submitted that the reasonable man's concern would be in relation to any possible loss that the insurer might suffer in consequence of an incorrect answer to the

View Parallel Citation

question. But then he must ask himself whether in fact an incorrect answer, in his estimation, would redound to the prejudice or loss of the insurer. The submission is that he must after all conclude that the insurer is not in the position of a seller of goods who will have parted with a valuable consideration in the sense of goods sold and delivered. After all the insurer protects himself, in the event of a failure to pay a premium, by simply cancelling the policy. In these circumstances a failure to pay a premium would not prejudice the insurer. The reasonable man would not concern himself with administrative costs incurred by the insurer up to the date of cancellation. Indeed it would seem that the heaviest of those costs would be commission but, in terms of the evidence of one of the defendant's experts, such loss by way of commission would probably be suffered by the insurer. That is the submission. I do not think the submission is correct. Certain of these aspects have been dealt with in what I have said above. I think the submission does not do justice to defendant's evidence regarding the question of affordability. The submission does not take into account the fact that the test is not actual prejudice and, in my opinion, does not do justice to the test posed by Van Heerden JA in the *President Versekeringsmaatskappy Bpk* matter at 216E - F. The materiality of the question 5.2 and its incorrect reply chiefly relates to the question of risk. Mr Hartwig made it clear that affordability of premiums is not the principal issue as far as risk is concerned.

Mr *Nochumsohn* then submitted that the reasonable man would not concern himself with any ratio of premiums payable to 'regular monthly incomes'. If any such ratio did bother him at all, he would also have recourse to the fact that the income called for is a regular monthly income without regard to perks of one sort or another or, for that matter, the net worth, that is the excess of assets over liabilities of the proposed insured. I do not think this submission can be accepted. I have, to a large extent, already dealt with this matter. In addition the matter cannot be approached solely from the point of view of the insured. Mr *Nochumsohn* also submitted that insofar as affordability of premiums is concerned the reasonable man would not be nearly as concerned about the aforesaid ratio as he would be about whether or not what was left of the man's income after paying his insurance would be sufficient for him to live on.

Page 716(1) of [1991] 3 All SA 694 (W)

In judging the amount so left, he would have regard to other income not of a regular nature as well as to the possibility of the applicant's net worth being sufficient for this purpose. The reasonable man must conclude, after all, that the insured himself is a reasonable man, that he commits himself to paying premiums not lightly or recklessly, but he must know that failure to pay will result in dire consequences for him in the sense of him losing his money for premiums paid. In these circumstances the reasonable

man must conclude that the applicant knew what he was doing when he agreed to pay Rx per month by way of premiums. Thus far the submission. I do not think this submission can be accepted, *inter alia* for reasons already stated. This submission completely loses sight of the fact that it is not only a question of affordability of premiums but of the assessment of risk in cases of possible over-insurance. The reasonable man, moreover, must surely have regard to the fact that, despite specific questions to that effect, the defendant was not informed that the deceased intended paying the

View Parallel Citation

premiums for three policies out of his regular income. Defendant was also not informed of any other income or assets. Mr *Nochumsohn* then submitted that the reasonable man would possibly view the situation from the point of view of the applicant affording the insurance, regarding the premiums concerned, whatever amount it may be, as being in the nature of a forced saving. Insurance companies do create the idea that premiums payable on life policies are indeed forced savings. To this extent the notion of expending money for purposes of insurance as a ratio to income loses its force. In this context the premium will not be regarded as expenditure at all. I accept that life insurance may be regarded as an investment or a forced saving. However, whatever merit this submission may have, it is purely an attack on the aspect of affordability and does not address the assessment of risk.

Mr *Nochumsohn* also suggested that the reasonable man might well relate the incorrectness of the answer to the ultimate circumstances of the deceased's death. He died as a result of multiple penetrating injuries. Had the deceased died in circumstances of a suicide or in other circumstances under which it might be suggested that he deliberately took his life in order that his heirs or beneficiary should benefit, it might well be a factor in the reasonable man's assessment of materiality pertaining to question 5.2, but in the circumstances of the death *in casu* it was submitted that this could hardly have been the case. I think that the circumstances of death in this case merely had a mechanical effect in the sense that, because the policy had been of short duration, the matter was investigated by defendant and in so doing led to the repudiation of the policy.

Page 716(2) of [1991] 3 All SA 694 (W)

I did not understand the evidence on behalf of defendant to be that, if the policy had been of short duration for non-suspicious reasons, the matter would not necessarily have been investigated. In any event, this submission relates to the question of repudiation and has nothing to do with the question whether the information withheld would have been relevant to defendant in deciding whether to accept the risk and, if so, at what premium.

Those were Mr *Nochumsohn's* principal submissions insofar as materiality was concerned. With due acknowledgement to a carefully prepared argument, I think, however, that defendant has discharged its *onus*. Viewing the matter as the hypothetical reasonable man would, and bearing in mind the aforesaid gist of the *dicta* of Van Heerden JA, I think that the incorrect reply to question 5.2 was indeed material for reasons which have already been stated. It may be added that the fact that question 5.2 was specifically posed, denotes to the reasonable man that defendant regarded the reply as relevant. The reasons for such relevancy have been adequately explained in evidence. The witnesses have expressed honestly held opinions as to what the result would have been if defendant had been properly apprised of the facts. These opinions have also been adequately motivated and, taking into account the difference in emphasis in the opinions of Mr Hartwig and Mr Lamprecht, I think they at least establish an opinion that the missing information was relevant to the assessment of risk in the sense expressed by Van Heerden JA *supra*. I may state that, even in the absence of such opinions, I would have come to the same conclusion on the objective evidence. As a matter of fact I have no doubt

View Parallel Citation

as to the probabilities in this regard. See also the *dicta* of Joubert JA in the *Mutual and Federal Insurance* matter *supra* at 436F. See as well the *dicta* of McEwan J in the *Fransba Vervoer (Edms) Bpk* matter at 977H:

> 'The conclusion seems to me to be that, once the Court has found that certain facts were material to the assessment of the risk in any case, it must follow, in the absence of special circumstances, almost automatically that a reasonable man would have disclosed those facts.'

Mr *Nochumsohn* also submitted that the written proposal and the facts of the case denote that Makgotlo was acting as a sub-broker for Noge (whose signature appears at p 2 of the bundle), that Noge was acting as agent for the defendant and that Makgotlo must similarly be regarded as the agent of defendant. I do not think there is any merit in this submission. The reason for Noge's signature (for an entirely different purpose) has been adequately explained in the evidence. Moreover, nothing appears *ex facie* the proposal to designate Noge as an agent. He is expressly described as the 'introducer'.

Page 716(3) of [1991] 3 All SA 694 (W)

The plaintiff's action should accordingly be dismissed with costs including the qualifying expenses of the three expert witnesses for defendant and it is so ordered.

Appearances

BK Pincus - Advocate/s for the Defendant/s

SJ Nochumsohn - Advocate/s for the Plaintiff/s

Walker, Malherbe, Godley and Field, Cape Town - Attorney/s for the Defendant/s

JB Sibiya - Attorney/s for the Plaintiff/s

REFRIGERATED TRUCKING (PTY) LTD v ZIVE NO (AEGIS INSURANCE CO LTD, THIRD PARTY) 1996 (2) SA 361 (T)

1996 (2) SA p361

Citation	1996 (2) SA 361 (T)
Case No	2236/93
Court	Transvaal Provincial Division
Judge	Hartzenberg J
Heard	March 2, 1995
Judgment	April 5, 1995
Counsel	J M C Smit for the plaintiff. R A Kuper for the defendant. A R Gautschi for the third party.
Annotations	Link to Case Annotations

H

Flynote : Sleutelwoorde

Insurance - Generally - Applicable legal principles - Insurable interest - What constitutes - Insurable interest an economic interest which relates to risk which I person runs in respect of a thing which, if damaged or destroyed, will cause him to suffer economic loss, or in respect of an event which, if it happens, will likewise cause him to suffer economic loss - Not mattering whether he personally J has rights in respect of

1996 (2) SA p362

A article, or if event happens to him personally, or if rights are those of someone to whom he stands in such relationship that, despite having no personal right in respect of article, or that event does not affect him personally, he will nevertheless be worse off if article damaged or destroyed, or the event happens.

Insurance - Generally - Applicable legal principles - Double insurance - Clauses B excluding liability - Reiterated that where two policies intended to afford only secondary cover to insured, qualifications cancel each other and both insurers liable subject to any rateable proportion clause.

Insurance - Motor vehicle insurance policy - Clause extending indemnity to permitted drivers - Enforceability of - Insurable interest - Existence of - Insured C having insurable interest in contingent liability of permitted drivers - Clause stipulating that extension 'shall give no right of claim' to 'any person other than the insured' - Enforceability of clause by permitted drivers - Permitted driver for all practical purposes not insured and having no enforceable right against insurer until insured intervenes on his behalf.

Headnote : Kopnota

D The plaintiff was the owner of a truck which had been involved in a collision with a vehicle driven by one Z ('the deceased'). The defendant, the executor of the deceased's estate, admitted, with the consent of the third party, A Ltd, that the deceased had been 90% negligent, and that the plaintiff's damages amounted to R441 000 plus costs. A Ltd, an insurance company, was joined as third party by the defendant on the ground that if it were found that the defendant was liable to E compensate the plaintiff for its damages, he would be entitled to indemnification by A Ltd in terms of an insurance policy issued by A Ltd in favour of the deceased ('the A policy'). At the time of the accident, the vehicle

driven by the deceased was insured by I Ltd in terms of a motor vehicle insurance policy in favour of G (Pty) Ltd ('the I policy'). The deceased had been driving the vehicle with the permission of G (Pty) Ltd. A claim by G (Pty) Ltd under the I policy in respect of the damage sustained by the F vehicle was met by I Ltd. G (Pty) Ltd did not lodge a claim on behalf of the deceased or his estate. The A policy was a personal insurance package covering various risks, including the driving of vehicles not belonging or hired to the insured, '*in so far as the vehicle (was) not otherwise insured*'. Clause 11 of its general terms provided that if there was 'any other insurance covering the same liability, loss or damage we will not be liable to pay . . . more than our rateable proportion of any such claim . . .'. The I policy contained an extension clause which provided that the insured would be G indemnified in respect of, *inter alia*, 'damage to property other than property belonging to the insured'. It also provided that the insurer would indemnify any person who was 'driving or using the vehicle on the insured's order or with his permission', provided that such person was '*not entitled to indemnity under any other policy*'. Clause 5 provided that the 'extension of the company's liability to any person other than the insured shall give no right of claim hereunder to such person, the intention being that the insured shall in all cases claim for and on behalf of such person'. Clause H 8 of its general conditions, which was headed 'Other insurances', was similar to clause 11 of the general conditions of policy A. Although it thus appeared at first blush that each one of the insurers could avoid liability on the basis of the existence of the other policy, counsel were *ad idem* that A Ltd and I Ltd were each to indemnify the defendant for 50% of the judgment. As I Ltd was, however, not before Court, A Ltd argued that it was liable only for 50% of the judgment.

Held, that it was accepted law that where two policies were each intended only to I afford secondary cover to an insured, the qualifications cancelled each other and both insurers were liable, subject to any rateable proportion clause. (At 367D/E-E.)

Held, further, that, as both the policies under consideration contained a rateable proportion clause, the position was that, if the deceased had indeed been doubly insured, the defendant would not be entitled to claim more than its rateable proportion from each insurer. (At 367H-H/I.)

J *Held*, further, that, as I Ltd was not before the Court, this meant that, if the finding were

1996 (2) SA p363

A to be that the deceased was also covered by the I policy, the defendant would only be entitled to indemnification for 50% of the judgment in favour of the plaintiff; if on the other hand it were found that he was not covered in terms of the I policy, A Ltd would be obliged to indemnify the defendant for the full amount. (At 367I-I/J.)

Croce v Croce 1940 TPD 251 discussed and applied.

Held, further, that the damage concerned was damage to the vehicle of a third party B (the plaintiff), and that if the extension clause was enforceable the damage suffered by the plaintiff was without doubt 'damage to property other than property belonging to the insured' in terms of the I policy. (At 369A/B-B.)

Held, further, as to whether the insured had had an insurable interest, that an insurable interest was an economic interest which related to the risk which a person ran in respect of a thing which, if damaged or destroyed, would cause him to suffer an economic loss, or in respect of an event which, if it happened, would likewise cause him to suffer an economic loss: it did not matter whether he personally had rights in respect of that article, or whether the event happened to him personally, or whether the C rights were those of someone to whom he stood in such a relationship that, despite the fact that he had no personal right in the article, or that the event did not affect him personally, he would nevertheless be worse off if the object were damaged or destroyed, or the event happened. (At 372F-H.)

Held, further, that the owner of a motor vehicle accordingly had an insurable interest in D the contingent liability of the drivers who drove the vehicle on his order or with his permission. (At 370I/J-J and 373C/D-D.)

Held, further, as to whether the extension clause conferred enforceable benefits on third parties such as the plaintiff, that it would not be in the interests of the owner or the insurer to create a right for the third party which the third party could enforce at will: the owner would want to be insured to the full extent to which his family members or friends might be held liable to third parties and also to the full extent to which he might E be held vicariously responsible to third parties, and in order to see to it that this result was

achieved the insurer had to indemnify the driver. To protect themselves the insured and the insurer had to agree that only the insured would be entitled to enforce that right on behalf of the driver, and there was no logical reason why they should not be able to do so. (At 373E-G.)

Held, further, that the result was that the driver was in the position of a minor or ward: F the rights which accrued, accrued to him, but he had no *locus standi in judicio* to enforce them. If the insured elected to exercise those rights he was fully covered, but if he failed to do so there was nothing he could do to enforce them. (At 373G-H.)

Held, further, that, although the indemnity in the I policy was clearly to the full extent of the driver's liability, it did not create a right for the driver to accept the benefit which the insured had stipulated for, because of the provision that 'the extension of the company's liability to any person other than the insured shall *give no right of claim* G *hereunder to such a person*, the intention being that the insured shall in all cases claim for and on behalf of such a person': there was thus no ground on which the driver could compel the insured to claim on his behalf, and the position was simply that, until the insured intervened on behalf of the driver, the driver had no enforceable right against the insurer. (At 373I-374A and 374C-C/D.)

Held, further, that in the A policy the deceased was fully indemnified 'in so far as the vehicle (was) not otherwise insured'; that the word 'insofar' meant that the deceased H was fully covered but for cover in respect of the vehicle which the deceased could enforce in his favour; that G (Pty) Ltd did not intervene on behalf of the deceased; that the deceased or his estate could not compel G (Pty) Ltd to intervene, that the result was that the vehicle was not otherwise enforceably insured in favour of the deceased; that in the circumstances A Ltd was to indemnify the deceased's estate fully; that, if G (Pty) Ltd were at a later stage to intervene on behalf of the deceased estate and create I an enforceable right on behalf of the estate, I Ltd would be entitled to rely on the fact that the deceased was doubly insured and would not be liable for more than its rateable proportion; and that A Ltd would be entitled to reclaim from the defendant everything paid in excess of its rateable proportion. (At 374C/D-F/G.)

Held, accordingly, that the defendant had to pay the amount of R441 000 (the agreed damages) plus interest to the plaintiff, and that A Ltd had to indemnify the defendant in respect of the amount of the judgment, interest and costs. (At 374H-I.)

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

A *Austin v Zurich General Accident and Liability Insurance Co Ltd* [1945] 1 All ER 316 (CA)
*Boucher v Du Toit*1978 (3) SA 965 (O)
*Braamfontein Food Centre v Blake*1982 (3) SA 248 (T)
Croce v Croce 1940 TPD 251
Guardian Royal Exchange Assurance Group and Fisher v Commercial Union Assurance Co and Tanner 1976 (2) PH F71 (R)
B *Littlejohn v Norwich Union Insurance Society* 1905 TH 374
O'Flynn v The Equitable Fire Assurance and Trust Co; Joseph and O'Flynn v The Commercial Assurance Co (1886) 1 Roscoe 372
*Old Mutual Fire & General Insurance Co of Rhodesia (Pvt) Ltd v Springer*1963 (2) SA 324 (SR)
*Phillips v General Accident Insurance Co (SA) Ltd*1983 (4) SA 652 (W)
*Quick v Goldwasser*1956 (2) SA 525 (SR)
C *Steyn v A A Onderlinge Assuransie Assosiasie Bpk*1985 (4) SA 7 (T)
*Van Achterberg v Walters*1950 (3) SA 734 (T)
Vandepitte v Preferred Accident Insurance Corporation of New York [1933] AC 70
Weddell and Another v Road Transport and General Insurance Co Ltd [1932] 2 KB 563.

Case Information

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

J M C Smit for the plaintiff.

R A Kuper for the defendant.

A R Gautschi for the third party.

E

Cur adv vult.

Postea (5 April 1995).

Judgment

Hartzenberg J: The plaintiff was for all practical purposes the owner of a mechanical F horse and trailer (the plaintiff's vehicles) on 2 May 1993. The defendant is the executor in the estate of the late Michael Zive (the deceased). The third party, Aegis Insurance Co Ltd (Aegis), carries on the business of insurers. On 2 May 1993 the plaintiff's vehicles collided with motor vehicle PPG 790T, then being driven by the deceased. In its particulars of claim the plaintiff alleges that the negligent driving of the G deceased was the sole cause of the collision. It alleges that it suffered damages in an amount of R515 700,80 and claims that amount plus interest and costs from the defendant.

The defendant pleads lack of knowledge of the plaintiff's allegations, a denial of liability H for the plaintiff's damage or any portion thereof and prays that the plaintiff's claims against it be dismissed with costs. The defendant, however, joined the third party and alleges that, if it be found that it is liable to compensate the plaintiff for some or all of its damages, it is entitled to indemnification by the third party in terms of an insurance policy ('the Aegis policy'). The third party's initial plea was a rather laconic disavowal I of knowledge of the collision and the cause thereof and a denial of liability.

After an initial and a resumed pretrial conference and an amendment of the third party's plea, which was only finalised after the trial had commenced, the facts were for all practical purposes agreed between the parties. The defendant with the consent of the J third party admitted that the deceased was 90% negligent, and that the plaintiff's agreed damages,

HARTZENBERG J

A which amount to R490 000, are to be reduced by 10%. The defendant agrees that judgment be entered against it in favour of the plaintiff for R441 000 and costs. Although there is an agreement by the defendant and the third party that R100 000 of the amount of R490 000 represents damage caused either directly or indirectly by fire, the Court has not been asked to give any decision in respect thereof.

B

It was agreed that the sole question to be decided is whether the third party is to indemnify the defendant for the total amount of the judgment to be entered against it or only for 50% thereof. As a result thereof Mr *Smit*, who appears for the plaintiff, became a mere bystander (be it innocent or not). In order to enable the Court to C decide the issue it was further agreed that the following facts were common cause between the defendant and the third party.

The Aegis policy in favour of the deceased was valid and of full force and effect on 2 May 1993 and the provisions in that policy to which I shall refer were applicable. On 2 May 1993 there existed an insurance policy issued by Heritage Insurance Brokers D (Pty) Ltd underwritten by IGI Insurance Co Ltd (IGI) in favour of Golden Mark Promotions (Pty) Ltd (GMP), which was valid and of full force and effect (the IGI policy). Vehicle PPG 790T in particular appears on the schedule referred to in that policy. The deceased was the driver of vehicle PPG 790T at the relevant time with the permission of GMP. Prior to 2 May 1993 the deceased had not been refused any E motor vehicle insurance or continuance thereof by any insurance company or underwriter. A claim was lodged under the IGI policy by GMP in respect of damage to motor vehicle PPG 790T sustained in the relevant collision. The claim was met by IGI. No claim was lodged under the IGI policy by GMP for the damage sustained by the plaintiff as a result of the collision, as claimed by the plaintiff in its summons or at F all. No claim was lodged by GMP on behalf of the deceased or his estate or by the estate in the respect of the IGI policy. It must further be mentioned that a Ms Younger of IGI gave evidence that, after provision had been made for indemnification of the damage sustained by the plaintiff and upon becoming aware of the Aegis policy, IGI G denied liability for such damage on the basis that the deceased was

entitled to indemnity under another policy.

This judgment deals with the question of enforceability or not of an extension clause in an insurance policy. The Aegis policy was a personal insurance package covering various risks comprising no fewer than 17 different categories. Section E is entitled H 'Motor'. Portion A thereof deals with motor comprehensive insurance whereas portion B deals with motor third party fire and theft insurance. Clause 2*(b)* of portion A reads as follows:

'Your driving of other vehicles

(b) We will also pay all sums for which you are legally liable as a result I of death or injury to persons or damage to property arising out of the driving of a motor vehicle not belonging to nor hired to you under a hire purchase or similar agreement, *insofar as such vehicle is not otherwise insured.*'

The liability is limited to a sum of R3 million.

J There are a number of general terms applicable to all sections of the policy. Clause 11 of the general terms reads as follows:

A 'Other insurance

If at the time that any claim arises under this policy there may be any other insurance covering the same liability loss or damage we will not be liable to pay or contribute more than our rateable proportion of any such claim and costs and expenses in connection therewith. This condition does not apply to the various Personal Accident and Juno Plus sections of this policy.'

B

It is obvious that the deceased was entitled to indemnity for the full amount of R441 000 for which judgment is to be entered against the estate if 'the vehicle is not otherwise insured'.

In s 2 of the IGI policy there appears an extension clause which reads as follows:

C 'The company will indemnify the insured in the event of an accident caused by or in connection with the vehicle or the towing of a disabled vehicle (other than for reward) (as hereinafter defined) attached thereto against all sums including claimants' costs and expenses which the insured shall be legally liable to pay, including all costs and expenses as may be incurred with the D written consent of the company in respect of:

(I) death or bodily injury to any person, excluding:

'(a) any person who is a member of the insured's immediate family;

(b) any person who normally resides at the same residence as the insured, including domestic servants;

(c) any person being conveyed in or on a caravan or in the open portion E of a vehicle or trailer, or entering or getting onto or alighting from any vehicle;

(d) any employee of the insured in the course of his employment.

(II) damage to property *other than property belonging to the insured* or held in trust by or in the custody or control of the insured or being conveyed by, loaded into or unloaded from such vehicle, trailer or towed disabled F vehicle attached thereto.

In terms of this section the company will indemnify any person who is driving or using the vehicle on the insured's order or with his permission, provided that such person:

(a) is not entitled to indemnity under any other policy;

(b) shall as though he were the insured observe, fulfil and be subject to the G terms, conditions and exceptions of this policy; and

(c) has not been refused any motor vehicle insurance or continuance thereof by any insurance company or underwriter.'

The liability of the insurer is limited to R2 500 000.

Clause 5*(d)* of the general conditions of the policy reads as follows:

H 'The extension of the company's liability to any person other than the insured shall give no right of claim hereunder to such person, the intention being that the insured shall in all cases claim for and on behalf of such person, and the receipt of the insured in any case shall absolutely discharge the company's liability hereunder.'

I Clause 8 of the general conditions is very similar to clause 11 of the general conditions of the Aegis policy. It reads as follows:

'Other insurances

If, at the time any claim arises under this policy, there is any other existing insurance covering the same accident, injury, loss or damage, the company shall not be liable to pay or contribute more than its rateable proportion of any J loss, damage, compensation, costs or expenses. However, nothing in this condition

HARTZENBERG J

A shall impose on the company any obligation to make any payment under this policy from which it would have been relieved under any exception applicable to this policy or any section thereof.'

The cover provided by both policies is qualified to the following extent: In terms of the Aegis policy the deceased would not be covered 'insofar as such vehicle is otherwise B insured', whereas in terms of the IGI policy he is covered provided that 'he is not entitled to indemnity under any other policy'. If both policies are enforceable, at first blush the position seems to be that, although cover was afforded to the deceased in two policies against the relevant risk, each one of the two insurers can avoid liability on the basis that, because of the existence of the other policy, it is not obliged to indemnify C the deceased estate. Literally interpreted the result would be that instead of being doubly insured the deceased was not insured at all. Counsel are, however, *ad idem* that that is not how the two policies are to be interpreted. They agree that if both policies are enforceable Aegis and IGI are to indemnify the defendant each for 50% of D the judgment. As IGI is, however, not before Court, the third party contends that in such circumstances it must be ordered to indemnify the defendant for 50% of the judgment only.

It seems to be accepted law now that where two policies are each intended only to afford secondary cover to an insured, the Court is to hold that the qualifications cancel each other and that both insurers are liable subject to any rateable proportion clause. E That appears to be the view expressed in Joubert (ed) *The Law of South Africa* vol 12 para 241 and also in Gordon and Getz *The South African Law of Insurance* 4th ed at 448. For that proposition the authors rely on the judgments in *Guardian Royal Exchange Assurance Group and Fisher v Commercial Union Assurance Co and* F *Tanner* 1976 (2) PH F71 (R); *Weddell and Another v Road Transport and General Insurance Co Ltd* [1932] 2 KB 563 and *Austin v Zurich General Accident and Liability Insurance Co Ltd* [1945] 1 All ER 316 (CA) ([1945] KB 250). Although that approach has so far not specifically been followed by any Court in the Republic of South Africa, the authorities referred to are persuasive and the result to G which they come is fair. It must be borne in mind that as far as the law of insurance is concerned our Courts quite often refer to English cases where there is no direct authority in our law. It is, of course, so that insurance policies here and in England are very similar. It is therefore accepted that counsel were correct in their approach.

H As both policies contain a rateable proportion clause the position is that if the deceased was doubly insured the defendant cannot claim more than its rateable proportion from each one of the insurers. *O'Flynn v The Equitable Fire Assurance and Trust Co; Joseph and O'Flynn v The Commercial Assurance Co* (1866) 1 Roscoe 372. As IGI is not before the Court it means that, if the finding is that the deceased was also covered by the IGI policy, the defendant will only be entitled to I indemnification for 50% of the judgment in favour of the plaintiff. If, on the other hand, it is found that he was not covered in terms of the IGI policy, the third party will be obliged to indemnify the defendant for the full amount.

Mr *Gautschi* for the third party argues that the deceased was properly covered in J terms of the extension clause in the IGI policy. He says that

HARTZENBERG J

A the deceased was doubly insured and that the third party is accordingly only liable for 50% of the defendant's damage and costs. The argument is that that is what was decided

in the matter of *Croce v Croce* 1940 TPD 251, a decision of two Judges in this Division. If that was indeed the decision in the *Croce* matter it is obvious that it is B binding on this Court. Miss *Kuper* for the defendant referred to an article by Prof Ellison Kahn in (1952) 69 *SALJ* entitled 'Extension Clauses in Insurance Contracts'. She also referred to two judgments in the then Southern Rhodesian Court reported as *Quick v Goldwasser*1956 (2) SA 525 (SR) and *Old Mutual Fire & General Insurance Co of Rhodesia (Pvt) Ltd v Springer*1963 (2) SA 324 (SR). In the C aforementioned article and in the two decisions serious doubts were expressed about the correctness of the *Croce* decision. Miss *Kuper* also points out that it was not decided in the *Croce* case that two insurance companies were liable each for only its rateable proportion.

In order to weigh up the two arguments it is necessary to ascertain what was at issue in D the *Croce* case and how much of what was decided in that matter is applicable to the matter now under consideration.

In the *Croce* case there was an extension clause extending the cover of the insured plaintiff to any person who drove his motor car on his order or with his permission. Like in the present matter there was a provision that, if a person covered by the E extension clause incurred liability, the insured alone would be entitled to claim on behalf of such person. There was a further term which gave the right to the insurer to prosecute any claim for damages for its own benefit in the name of the insured. The defendant drove the insured's vehicle with his consent, knowing about the extension F clause. The defendant negligently damaged the plaintiff's car to the extent of £125. The plaintiff gave the defendant (his brother) an undertaking that he would not suffer any financial loss. He indicated that any claim of his against the defendant would be preferred against the insurance company. The insurance company paid the plaintiff £125 and it was common cause that it then, in the name of the plaintiff, sued the defendant. The dispute was between the company and the defendant. The defendant's G defence was that the indemnity afforded to the plaintiff by the insurer was extended to it. The magistrate found, *inter alia*, that if the plaintiff had been the driver of the vehicle the insurer would not have had a claim against it and that the defendant was in exactly the same position as the insured plaintiff. He dismissed the claim.

H On appeal it was argued that the defendant could not raise the indemnification clause against the plaintiff where the insurer was not before the Court. The Court rejected the argument, pointing out that the plaintiff was only the nominal plaintiff and that the defence would have been available to the defendant if the insurer had sued in its own name. In this connection it must be pointed out that the plaintiff clearly elected to I enforce the rights of the driver in terms of the extension clause. In this regard the *Croce* case and the matter under consideration are exactly the opposite of one another. In this case the insured (GMP) did not elect to enforce the deceased's rights in terms of the extension clause.

J The second point argued on appeal was that on a proper construction of the policy the indemnification to the defendant driver did not include

A damage to the insured vehicle. The Court held that it did. That finding was criticised by Beadle J in *Quick v Goldwasser (supra)*. That particular finding does not concern the decision in the present matter. In this case the damage concerned is damage to the vehicle of a third party. If the extension clause is enforceable, the damage suffered by the plaintiff is without doubt 'damage to property other than property belonging to the B insured' in terms of clause 2(ii) of the IGI policy.

The third point argued was whether the insured had an insurable interest in the contingent liabilities of a driver of his vehicle. Grindley-Ferris J at 264 says the following:

> 'The third ground of appeal raises the question that the plaintiff had no C insurable interest in the defendant's contingent liabilities.
>
> *Shawcross*, in his work to which I have referred, gives on p 436 the legal position on this question prior to the passing of 20 & 21 Geo 5 ch 43 s 36(4), but it must not be forgotten that under the English common law the right of a person to contract for the benefit of a then unascertained person differs from that under our system of law. Moreover the contract in this case is not to pay the insured if the driver

> becomes liable; the contract is one by which the D insured stipulates for a benefit to the driver should he become legally liable in damages. I do not think more need be said on this ground of appeal.'

The Court clearly found that the insured had an insurable interest.

Professor *Kahn* in the abovementioned article criticises this finding on the basis that the E insured had no insurable interest in the extension clause. For this contention he relies on the decision of the Judicial Committee of the Privy Council in the matter of *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 (PC), where the facts were that the daughter of the insured in terms of a policy which extended cover to persons driving with the permission of the insured negligently F caused bodily injury to a third party. She was unable to pay the claim and the other party (Mrs Vandepitte) sued the insurer, relying on s 24 of the British Columbian Insurance Act (C 20 of 1925). Section 10 of the same Act provided that a contract of insurance, where the insured has no insurable interest in the subject matter, is void. The G Privy Council non-suited Mrs Vandepitte on the basis, firstly, that the insured did not intend to contract with the insurer on his daughter's behalf, that in any event he had no authority from her to enter into an agreement and that she did not ratify the agreement. Secondly, the Court rejected an argument that the insured acted as trustee to create a beneficial trust in favour of his daughter on the basis that there was no evidence of such H an intention and also because the insured had no insurable interest. Lord Wright put it thus 80:

> 'R E Berry is the contracting party in law, but he has no insurable interest in Jean Berry's personal liability, since natural love and affection does not give such an interest in law.'

I It was held accordingly that, as far as indemnity for the daughter was concerned, the agreement was void due to the provisions of s 10 of the Act. Professor *Kahn* also expresses the view that an insured cannot act as agent for future drivers and that he has no insurable interest in the liability of drivers against third parties.

J In the *Croce* case it was argued that the extension clause was void due

A to vagueness. The argument was rejected. It is not necessary to consider it further for the purposes of this case as it is not contended that the extension clause is void for vagueness. The reasoning of Grindley-Ferris J at 265 on this aspect is convincing.

The last question which was decided in the *Croce* matter was whether there was a B stipulation for the benefit of the third party. On 265 Grindley-Ferris J said the following:

> 'Counsel for the appellant did not press the contention that it was not clear that the undertaking was intended to confer a benefit on third parties. But he did argue that before a driver can claim to have been indemnified he must not only have accepted the contract made on his behalf but he must also have C notified the insurance company of his acceptance and that both these must take place before damage had been suffered. The evidence appears to me to be sufficient to establish an acceptance by the driver prior to the accident because he discussed the question with the insured some time before he used the car. To hold that a driver must notify the company of his acceptance would D render the extension clause practically valueless.'

Before dealing with the two aspects which are of great importance for the decision in this case, ie whether there is an insurable interest for the insured and whether the extension clause confers benefits on third parties which can be accepted and enforced by the third parties, it is necessary to try and ascertain exactly what the findings of the E Court were and to which extent they are binding on this Court.

As I have already indicated, it is clear from the facts of the case that it was the insured who enforced the rights created in the extension clause on behalf of the driver. After all he gave the defendant an undertaking that the defendant would not suffer any financial F loss. The insurance company used his name as nominal plaintiff. As a result thereof he was a party to the action. If the insurance company had sued his brother it would have been necessary for him to intervene if the rights in the extension clause were to be enforced by him. As he was already a party he did not have to be joined to exercise his rights in terms of the extension clause. The plaintiff and the defendant did not both G enforce the defendant's rights in terms of the extension clause. It was either the one or the other. On my interpretation of the facts it was in fact the plaintiff who did so. If the plaintiff was entitled to do so, it was not necessary for the defendant to accept any

benefit. In my view it was unnecessary for the Court to consider the question whether H the defendant had accepted the benefit or not. It was not necessary to do so where it was not him but the plaintiff, on his behalf, who relied on the extension clause. The finding then that the defendant accepted the benefits in terms of the extension clause was *obiter*. It is not binding on this Court. In short, the Court found that the insured had an insurable interest in the contingent liabilities of drivers of the vehicle, that the I defendant was such a driver and that the plaintiff as insurer was entitled to enforce the rights of the defendant. This Court is bound by those findings.

Despite the criticism expressed by Prof *Kahn* I am of the view that a person who insures his motor vehicle has an insurable interest in the contingent liability of drivers of J the vehicle who drive on his order or with his permission.

1996 (2) SA p371

HARTZENBERG J

A In *Gordon and Getz (op cit* at 92) the author points out that *MacGillivray* defines the following as a 'good working definition' of insurable interest:

> 'Where the assured is so situated that the happening of the event on which the insurance money is to become payable would, as a proximate cause, involve the assured in the loss or diminution of any right recognized by law or in any B legal liability there is an insurable interest in the happening of that event to the extent of the possible loss or liability.'

It immediately catches the eye that for an interest to be insurable there must be the 'loss or diminution of any *right* recognised by law or in any *legal liability*'. It is likely that C this definition prompted counsel to submit in *Phillips v General Accident Insurance Co (SA) Ltd*1983 (4) SA 652 (W) at 659B that an insurable interest required that the insured must have the use of the property or be under a legal obligation to replace the article.

D In *Littlejohn v Norwich Union Insurance Society* 1905 TH 374 Wessels J said:

> 'The authorities show that an insurable interest is *sui generis*, and does not depend either upon a *jus in re* or *a jus ad rem*.'

He held that a husband who had insured the property of his wife in his own name had an insurable interest as he personally was in a worse position after the destruction E thereof than what he was before that. That decision, as far as I know, had never been questioned by another South African Court. Although *Gordon and Getz* in the third edition criticised that definition, they state as follows at 99 of the fourth edition:

> 'However the submission made in earlier editions of this work, namely that the *dictum* quoted from *Littlejohn v Norwich Union Fire Insurance Society* is too F wide, needs to be re-examined, particularly as it relied for support on *Macaura v Northern Assurance Co Ltd* which, insofar as it relates to shareholders' interest in company property, has been rejected by American and Canadian Courts. For this reason the test for the contract of insurance should be a more extensive interpretation of the approach adopted in *Littlejohn's* case, namely that if the insured can show that he can lose G something of appreciable commercial value by the loss, destruction or damage to the thing insured, he will have an insurable interest therein.'

In *Van Achterberg v Walters*1950 (3) SA 734 (T) Millin J, in a case where the lessee was contractually bound to insure the furniture, linen, cutlery and things of a like H nature of the lessor, said at 740G:

> '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.'

De Villiers J in *Phillips v General Accident Insurance Co SA Ltd (supra)*, following I the decision in *Littlejohn v Norwich Union (supra)*, held that a husband had an insurable interest in the jewellery separately owned by his wife where he felt himself morally obliged to replace it in case of the loss thereof. It is true that the learned Judge in the alternative justified his finding that there was an insurable interest on the basis that the wife in case of hardship may be obliged to sell the ring in question to provide for J household necessities and that the husband had an interest therein.

1996 (2) SA p372

HARTZENBERG J

A An insurable interest must be the economic interest of the insured. It can range from

the full value of the property (in the case of the owner) to a very small percentage thereof (where in the case of destruction the insured stands to lose a small percentage of the value of the property). A good example of a smaller interest in the value of the B property can be found in the facts of the matter in *Steyn v AA Onderlinge Assuransie Assosiasie Bpk*1985 (4) SA 7 (T). The occupier of a house, owned by the provincial administration, insured it against fire. It burnt down. The occupier was financially worse off after the fire than before it as he was deprived of free occupation, water and electricity until such time as the provincial administration would have C demolished the house to build a road.

It was certainly possible to get an indication from the roads department when it was intended to build the road. The monthly value of the occupation could be determined by comparing the property to similar properties and to fix a market-related monthly D rental and add the water and electricity thereto. To work out what the occupier's insurable interest was was therefore a simple arithmetical calculation of a figure per month over a period until the road construction would have started.

In the *Littlejohn* case *supra* and the *Phillips* case *supra* the Court held that a person other than the owner, who has no legal claim in his own name against, for instance, one E who damages or destroys the property, nevertheless has an insurable interest where his own position will be worse in case of damage or destruction. The *ratio* seems to be that where the relationship between the person with the legal right in the property and the insured is such that the insured will be worse off in that, for example, he has to forfeit a benefit or be morally responsible, or through circumstances forced, to replace F the article the Court will recognise that he has an insurable interest. It seems then that in our law of indemnity insurance an insurable interest is an economic interest which relates to the risk which a person runs in respect of a thing which, if damaged or destroyed, will cause him to suffer an economic loss or, in respect of an event, which if G it happens will likewise cause him to suffer an economic loss. It does not matter whether he personally has rights in respect of that article, or whether the event happens to him personally, or whether the rights are those of someone to whom he stands in such a relationship that, despite the fact that he has no personal right in respect of the article, or that the event does not affect him personally, he will nevertheless be worse H off if the object is damaged or destroyed, or the event happens.

The owner of a motor vehicle stands to lose a lot if his spouse or a member of his household negligently gets involved in a collision whilst driving the vehicle. Apart from the damage to the vehicle itself, third parties may sue the driver for damage to other vehicles or even bodily injury where, for instance, a third party was a passenger in the I vehicle in question. It is of great *economic interest* to the owner that the members of his family be insured against such claims by third parties. If a servant drives the vehicle by order of the owner the owner will be vicariously liable to third parties for damage negligently caused. It may pose a difficult factual question whether the servant acted J within the scope of his employment. To have that question answered by a court may lead to

1996 (2) SA p373

HARTZENBERG J

A extra costs in a court case. It is not only in a case of the servant that the owner may be held to be vicariously responsible for damage to third parties.

If an acquaintance drives the vehicle with the permission of the owner and it turns out that he did so for the benefit of the owner whilst the latter had the right to control the manner in which he drove the vehicle, the owner will likewise be vicariously liable to B third parties. *Boucher v Du Toit*1978 (3) SA 965 (O) and *Braamfontein Food Centre v Blake*1982 (3) SA 248 (T) at 251A. Again complex factual disputes may arise as to whether the driver drove the vehicle for the benefit of the owner, or whether the owner had control over the manner in which he was driving the vehicle. If the C owner is held to be vicariously liable and the servant or acquaintance turns out to be financially unable to pay the damage, the owner will be the one who has to pay the bill. That, in my view, is a clear economic interest in the contingent liability of the driver. It follows that, whilst I am bound by the conclusion in the *Croce* case that the owner has D an insurable interest in the contingent liabilities of the driver, I am also in full agreement with that conclusion.

It must, however, be borne in mind that the owner wishes to insure himself. He would hate to get involved in a protracted trial as a co-defendant with a penniless driver who denies liability where the owner realises that the most economic way to finalise the matter is to admit liability and pay the third party. For that reason it will not be in the interests of the owner or the insurer to create a right for the third party which the third party can enforce at will. The owner wants to be insured to the full extent to which his family members or friends may be held liable to third parties and also to the full extent to which he may be held vicariously responsible to third parties. In order to see to it that that result is achieved the insurer is to indemnify the driver. To protect themselves the insured and the insurer agree that only the insured will be entitled to enforce that right on behalf of the driver. I can think of no logical reason why the insured and the insurer cannot agree in those terms. The result thereof is that the driver is in the position of a minor or a ward. The rights which accrue, accrue to him but he has no *locus standi in judicio* to enforce them. He is left completely in the hands of the insured. If the insured elects to exercise those rights he is fully covered, but if the insured fails to do so there is nothing which he can do to enforce the rights. After all, there is no privity of contract between him and the insurer and the insured specifically stipulated that the driver will not be able to exercise his rights unless it is done by the insured himself on behalf of the driver.

The wording of the extension clause in the IGI policy does not allow for any doubt that the insurer 'will indemnify any person who is driving or using the vehicle on the insured's order or with his permission'. The indemnity is clearly to the full extent of the driver's liability. But no right has been created for the driver to accept the benefit which the insured has stipulated for, because

> '*(t)*he extension of the company's liability to any person other than the insured shall *give no right of claim hereunder to such person*, the intention being that the insured shall in all cases claim for and on behalf of such person'.

1996 (2) SA p374

HARTZENBERG J

I cannot see on what ground the driver can compel the insured to claim on his behalf. It may possibly be argued that the expression 'the insured shall in *all* cases claim for and on behalf of such person' in clause *5(d)* of the IGI policy means that the insured is to claim in every case where a right accrues on behalf of a driver. In my view that is clearly not the intention of the parties and the word 'all' means that in every case in which the rights which accrue to the driver are claimed they must be claimed by the insured. There is no agreement between the driver and the insured on which the driver can rely to force the insured to do so. If the driver cannot do so the third party who suffered damages can obviously not be in a better position than the driver. The position is simply that, until the insured intervenes on behalf of the driver, the driver has no enforceable right against the insurer. For all practical purposes he is not insured. Should the insured intervene and claim on his behalf he is fully covered.

In the Aegis policy the deceased is fully indemnified 'insofar as such vehicle is not otherwise insured'. That phrase is vague. It cannot possibly mean that if any insurance of whatsoever nature pertains to the vehicle the deceased would no longer be covered. The word 'insofar' indicates that the deceased is fully covered but for cover in respect of the vehicle which the deceased could enforce in his favour. GMP did not intervene on behalf of the deceased. The deceased or his estate cannot compel GMP to intervene. The result is that the vehicle at present is not otherwise enforceably insured in favour of the deceased. In the circumstances Aegis is to indemnify the deceased's estate fully. If GMP intervenes hereafter on behalf of the deceased estate and creates an enforceable right in favour of the estate, IGI can rely on the fact that the deceased was doubly insured. It will not be liable for more than its rateable proportion. Moreover Aegis will be entitled to reclaim from the defendant everything paid more than its rateable proportion as the insured may not be indemnified for more than the full amount of its damage. If GMP had intervened before litigation, then clearly the deceased would have been doubly insured and the estate could only claim its rateable proportion from each of the insurers.

It was common cause in this case that, if each one of the two insurers was only liable to indemnify to the extent of its rateable proportion, that proportion would be 50% each. No attempt was made to indicate on what basis a rateable proportion is to be determined.

I make the following order:

1. The defendant is ordered to pay an amount of R441 000 to the plaintiff together with interest thereon at 15,5% per annum from date of judgment to date of payment.
2. The defendant is ordered to pay the plaintiff's costs of suit.
3. The third party is ordered to indemnify the defendant in respect of the amount of the judgment, interests and costs.

Plaintiff's Attorneys: *Ivan Pauw & Botha*. Defendant's Attorneys: *Mendel Cohen & Partners Inc*. Third Party's Attorneys: *Webber Wentzel*.

SOUTH AFRICAN EAGLE INSURANCE CO LTD v NORMAN WELTHAGEN INVESTMENTS (PTY) LTD 1994 (2) SA 122 (A) G

1994 (2) SA p122

Citation	1994 (2) SA 122 (A)
Case No	335/92
Court	Appellate Division
Judge	Joubert JA, HOEXTER JA, SMALBERGER JA, NESTADT JA and VIVIER JA
Heard	H November 12, 1993
Judgment	November 30, 1993
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Insurance - Generally - Applicable legal principles - Applicability of s 63(3) of Insurance Act 27 of 1943 - 'Representation' as intended in s 63(3) - Meaning of - Clear that it is a pre-contractual statement (as to a I fact or state of facts) and, unlike a term, does not become part of the contract - 'Memo' in policy in respect of cover for theft of motor vehicles that insured 'warranted that all vehicles left in the open must be locked at all times out of business hours and all keys must be removed and kept in a locked safe' - Such not a representation as intended in s 63(3) but a contractual undertaking - Breach thereof entitling insurer to J repudiate liability.

1994 (2) SA p123

Headnote : Kopnota

It is clear that a 'representation', for the purposes of s 63(3) of the Insurance Act 27 of 1943, is a precontractual A statement (as to some fact or state of facts) and, unlike a term, does not become part of the contract of insurance. This is the ordinary meaning of a representation and this is the sense in which it is unambiguously used in the section. (At 126C read with 125I-J.)

The Court accordingly held that what was termed 'memo 2' in a multi-peril policy of insurance in terms whereof the appellant had insured the respondent against, *inter alia*, the theft of its motor vehicles 'left in B the open' on its premises, namely that the respondent 'warranted that all vehicles left in the open must be locked at all times out of business hours and all keys must be removed and kept in a locked safe', did not contain either a statement of fact or even a representation as to future conduct: its language was unequivocally that of a contractual undertaking. (At 126G/H-H/I.) The Court held, accordingly, that 'memo 2' was not a representation as intended in s 63(3) of the Insurance Act 27 of 1943 with the result that the provisions of that section did not avail the C respondent. (At 127C.) As 'memo 2' (the contractual undertaking) had been breached by the respondent (the keys of the stolen motor vehicle having been kept in a cupboard and not in a locked safe), the respondent's claim should have been dismissed in the Court *a quo*. (At 127H read with 124D-D/E.)

The decision in the Witwatersrand Local Division in *Norman Welthagen Investments (Pty) Ltd v South African Eagle Insurance Co Ltd* reversed. D

Case Information

Appeal from a decision in the Witwatersrand Local Division (Hartzenberg J). The facts appear from the judgment of

Nestadt JA.

R W Nugent SC for the appellant referred to the following authorities: *Lewis Ltd v Norwich Union Fire Insurance Co Ltd* 1916 AD 509 at 515; E Oblowitz Bros v Norwich Union Fire Insurance Society Ltd and Another 1924 CPD 349 at 351-2; *Norwich Union Fire Insurance Society Ltd v SA Toilet Requisite Co Ltd* 1924 AD 212 at 216; *Kliptown Clothing Industries (Pty) Ltd v Marine & Trade Insurance Co of SA Ltd*1961 (1) SA 103 (A) at 106G; *Imprefed (Pty) Ltd v American International Insurance Co Ltd*1981 (2) SA 68 (W) F at 72D (upheld on appeal at 1983 (3) SA 335 (A)); Gordon and Getz *South African Law of Insurance* 3rd ed at 202-3, 219-20; MacGillivray and Parkington *Insurance Law* 8th ed paras 581, 728 and 742; Christie *Law of Contract in South Africa* 2nd ed at 179, 328-9; Wessels *Law of Contract in South Africa* 2nd ed vol 1 paras 1015, 1090-1; Ivamy *General Principles of Insurance Law* 5th ed at 158, 161-3; Joubert (ed) *Law of South Africa* vol G 12 paras 162, 165 and 168; *Jordan v New Zealand Insurance Co Ltd*1968 (2) SA 238 (E); *Van Heerden and Another v Smith*1956 (3) SA 273 (O); *Feinstein v Niggli and Another*1981 (2) SA 684 (A) at 695B-G; S W J van der Merwe (1972) *THRHR* 197 at 200; M F B Reinecke (1984) *TSAR* 95 at 97-8; Patterson *Essentials of Insurance Law* at 354-5; Arnould *Law of Marine Insurance and* H *Average* 16th ed vol 2 paras 598-603; *Beattie v Lord Ebury* (1872) LR 7 ChD 777 at 804; Davis in 1989 Supplement to *South African Law of Insurance* at 24; Kahn *Contract and Mercantile Law Through the Cases* at 874.

W H G van der Linde for the respondent referred to the following authorities (the heads of argument having been drafted by *S F Burger SC*): I P Q R Boberg 'Insurance Warranties are Trumps' (1966) 83 *SALJ* 220; *Jordan v New Zealand Insurance Co Ltd*1968 (2) SA 238 (E); Christie *The Law of Contract in South Africa* 2nd ed at 180, 217; Gordon and Getz *The South African Law of Insurance* 3rd ed at 203, 218, 228-30, 241, 415-6; MacGillivray and Parkington *Insurance Law* 8th ed paras 765-73, 774; J Broodryk v Smuts NO 1942 TPD 47 at 54; *Lewis Ltd v Norwich Union Fire*

1994 (2) SA p124

NESTADT JA

A *Insurance Co Ltd* 1916 AD 509 at 514-5; Reinecke (1984) *TSAR* 95 at 97; Joubert (ed) *Law of South Africa* vol 12 para 168; Van der Merwe (1972) *THRHR* 200.

Cur adv vult.

B *Postea* (November 30).

Judgment

Nestadt JA: Pursuant to a so-called multi-peril policy, the appellant insured the respondent against *inter alia* loss arising from the theft of any of the respondent's vehicles 'left in the open' on its premises. C During the currency of the policy one of such vehicles was stolen. The respondent claimed its value. The appellant repudiated liability on the ground that there had been a breach of what is termed memo 2 (the memo) in the 'Theft' section of the contract. In terms of this provision the respondent 'warranted that all vehicles left in the open must be locked at D all times out of business hours and all keys must be removed and kept in a locked safe'. Though the vehicle in question (which was stolen out of business hours) was locked, its keys were not kept in a safe. Instead they were retained in a cupboard in the respondent's (locked) premises. It is clear therefore that the clause was not complied with. This notwithstanding, Hartzenberg J, in an action brought by the respondent in E the Witwatersrand Local Division, granted judgment (in the sum of R42 588) against the appellant for the value of the stolen vehicle. In doing so the learned Judge applied s 63(3) of the Insurance Act 27 of 1943 (the Act). The issue in this appeal is whether he was correct in doing so.

The material part of s 63(3) reads:

> F 'Notwithstanding anything to the contrary contained in any domestic policy . . . such policy . . . shall not be invalidated and the obligation of an insurer thereunder shall not be excluded or limited . . . on account of any representation made to the insurer which is not true, whether or not such representation has been warranted to be true, unless the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said G policy at the time of issue or any reinstatement or renewal thereof.'

The subsection was added to s 63 by s 19 of the Insurance Amendment Act 39 of 1969. The amendment must be seen against the background of the common-law rule that a warranty, being an essential or material term, must be strictly complied with; that if it is breached, the insurer is entitled H to repudiate the claim whether or not the undertaking is material to the risk and even if non-compliance has no bearing on the actual loss that takes place (Gordon and Getz *The South African Law of Insurance* 4th ed at 218). This principle, however, often resulted in hardship to insured persons (as in, for example, *Jordan v New Zealand Insurance Co Ltd*1968 (2) SA 238 (E)). The aim of s 63(3) was to remedy this by protecting I claimants under insurance contracts against repudiations based (in the words of Kriegler AJA in *Qilingele v South African Mutual Life Assurance Society*1993 (1) SA 69 (A) at 74B) 'on inconsequential inaccuracies or trivial misstatements in insurance proposals'. This is achieved by limiting the insured's right to avoid liability to the case where the breach of warranty probably would (to repeat the words of the enactment) J have 'materially affected the

1994 (2) SA p125

NESTADT JA

A assessment of the risk under the . . . policy at the time of issue . . . thereof'. But the warranty must relate to an underlying representation (made to the insurer). This requirement is central to the operation of the section. Hence the enjoinder in it that the policy is not to be invalidated 'on account of any representation made to the insurer which is not true' (whether or not such representation has been warranted to be B true). In other words, and as Joubert (ed) *Law of South Africa* vol 12 para 168 states, 'the section focuses on representations and deals with warranties . . . rather obliquely'. Where, therefore, the warranty is not founded on a representation, it will retain its full common-law effect (Kahn *Contract and Mercantile Law Through the Cases* at 743).

C I have said that the matter for decision is whether s 63(3) applies. That this is so appears from an agreed statement of facts forming part of a special case which, in terms of Supreme Court Rule 33, was placed before the trial Court for its adjudication. Such statement raises neither the issue whether the memo, although warranted, was nevertheless not material, D nor whether, if it was breached, the appellant was entitled to repudiate the claim (rather than cancel the policy). Furthermore, these points were not broached in the Court below. Accordingly, the argument of Mr *Van der Linde*, who appeared for the respondent, that it was open to him to raise them, must be rejected. The consequence of this is to be considered in E conjunction with the appellant's concession that the fact that the keys of the vehicle were kept in a cupboard (where they were found after the theft) rather than in a locked safe did not at any time materially affect the assessment of the risk. So this element of the section does not feature either. In these circumstances, and since it was common cause that the policy under consideration is a domestic one (as defined in s 1 of the F Act), the narrow question that arises, and on which the appeal (in the main) turns, is whether the memo, though warranted, is a representation within the meaning of s 63(3). If it is, the section would operate to save the respondent from the consequences of the warranty having been breached. In this event its claim was rightly allowed and the appeal must fail. On the other hand, if, as the appellant contends, the memo was simply a term G of the policy, s 63(3) would not apply, the respondent should therefore have been non-suited and the appeal must succeed. This is because seeing, as I have said, there is no dispute that the memo was made material, its breach would in the ordinary course have entitled the appellant to repudiate liability under the policy.

H It is necessary in the first place to ascertain the meaning of 'representation' ('voorstelling' in the Afrikaans text) as used in s 63(3). Representation in the present context is a well-established, indeed, basic juristic concept. It is a statement made to induce another to enter into a contract. In relation to insurance, *American Jurisprudence* vol 43 2nd ed para 734 gives the following useful definition: I

> 'A "representation", in the law of insurance, is an oral or written statement by the insured or his authorised agent to the insurer or its authorised agent, made prior to the completion of the contract, giving information as to some fact or state of facts with respect to the subject of the insurance, which is intended or necessary for the purpose of enabling the insurer to determine whether it will accept the risk, and at what premium. Stated differently, a representation is not, strictly J speaking,

NESTADT JA

> A part of the insurance contract, but is collateral thereto. It is a statement made to the insurer before or at the time of making the contract, presenting the elements upon which the risk is either accepted or rejected.'

Whether the statement may relate to the representor's future intentions, ie whether what has been called a promissory representation is included, B is subject to controversy (see *Gordon and Getz (op cit* at 230-1) and in particular the writers referred to in note 138 as also MacGillivray and Parkington on *Insurance Law* 8th ed para 612). It may be that the requirement of 'not true' and 'incorrectness' in the section militates against such a statement qualifying as a representation. In the view I take of the matter, however, it is unnecessary to decide the point. What C is clear (and important for our purposes) is that a representation is a pre-contractual statement and, unlike a term, does not become part of the contract. This is the ordinary meaning of a representation and this is the sense in which it is unambiguously used in the section. Accordingly, there is no room for the application of the rule that in the case of remedial D legislation (which s 63(3) undoubtedly is) a construction which extends the remedy will if possible be adopted *(Slims (Pty) Ltd and Another v Morris NO*1988 (1) SA 715 (A) at 734D-F). In any event, such an approach would be contrary to the principle that statutory invasion of the common law is restrictively interpreted *(Stadsraad van Pretoria v Van Wyk*1973 (2) SA 779 (A) E at 784F-H) and that the Legislature is presumed to have used a word in its ordinary, popular sense (Steyn *Die Uitleg van Wette* 5th ed at 6-7). Perhaps Parliament should have gone further in protecting insured persons (as has been done in some jurisdictions in the United States of America; see *American Jurisprudence (op cit* para 758) and *Gordon and Getz (op cit* at 227)). But it has not done so.

F Normally a representation is contained in a proposal form signed by the person seeking insurance and addressed to the insurer for its acceptance. There are, however, other forms that a representation could take; it may be oral and it may be implied *(inter alia* from conduct). It may even be inserted in the policy, but this does not prevent it from being construed as a representation (Ivamy *General Principles of Insurance Law* 5th ed at G 307; see also *Prima Toy Holdings (Pty) Ltd v Rosenberg*1974 (2) SA 477 (C) at 484). Has there, *in casu*, in any manner been a representation to the appellant relating to where the keys of the vehicles would be kept? In my opinion there has not. To begin with, the memo (on which, as I have said, the respondent's case rests) does not, so it seems to me, contain either a H statement of fact or even a representation as to future conduct. Its language ('all keys must be . . . kept in a locked safe') is unequivocally that of a contractual undertaking. The use of 'It is warranted' and 'must' fortifies this conclusion. 'Warranty' speaks for itself. The word 'must' is primarily of mandatory effect *(Black's Law Dictionary* 5th ed at 919); it connotes that which is imperative *(Berman v Cape Society of Accountants* I *and Auditors* 1928 (2) PH M47 (C)). So no question of the memo being true or untrue (compare the wording of s 63(3)) arises. Also of significance is that the appellant 'at all times intended that memo 2 . . . should constitute a term of the policy'. (I quote from the stated case.) This too tends to show that it is not a representation. Regarding a fire policy which provided that the insured 'warranted that (it) keeps a complete set J of books . . . and that

NESTADT JA

A same are locked in a fireproof safe', Innes CJ in *Lewis Ltd v Norwich Union Fire Insurance Co Ltd* 1916 AD 509 at 515 said:

> 'That the clause above is a warranty and not an ordinary representation is clear. Not only is it expressly so styled, but the nature of its provisions and the absence of any indication to the contrary in the context leave no doubt that it was meant to be exactly what it was called. B And the language is plain; a complete set of books in connection with the business must be kept, and they must be locked in a

> fireproof safe or otherwise guarded as directed.'

I can see no difference in principle between that case and this one.

There is, however, a more basic reason for concluding that the respondent made no representation and that s 63(3) cannot therefore avail it. One C must consider how the memo was introduced into the policy. This appears from the agreed statement of facts. There was no proposal form. What happened was that details of the insurance required by the respondent were set out in a written application for insurance which was submitted on its behalf by a broker to the appellant. The appellant was prepared to insure the respondent. But it required certain terms, including the memo, to be D part of the contract. In the result, the policy which was then issued (and accepted by the respondent) included the clause in question. Clearly, therefore, it emanated from the appellant. It was the appellant who, in advance, stipulated on what terms it was prepared to insure the respondent. All the respondent did was to accept what amounted to an offer E by the appellant. The respondent itself made no prior statement which induced the appellant to contract. Indeed the stated case records that 'no relevant representations were made' by or on behalf of the respondent 'prior to the issue of' the policy. Counsel, however, whilst not disputing this, submitted (on the strength of what is stated in *Law of South Africa (op cit* at 165)) that, by agreeing to the policy in the terms laid down by F the appellant, the respondent impliedly represented that it would comply with the memo. I am unable to accede to the argument. It is not one which is raised in the stated case. In any event, it is flawed. I have difficulty in seeing how the acceptance of an offer can be construed as a representation (in the sense under consideration) that the offeree will perform his contractual obligations. By the time the policy was issued to G the respondent, the appellant had assessed the risk and fixed the premium. The respondent's acceptance can in no way be said to have induced the appellant to contract. Certainly there was no evidence before us to this effect.

The result is that, contrary to what the Court *a quo* held, s 63(3) was not applicable and the memo having been breached, the respondent's claim was H bound to fail.

The following order is made:

(1) The appeal succeeds with costs.

(2) The order of the Court *a quo* is set aside. The following order is substituted:'The plaintiff's claim is dismissed with costs.'

Joubert JA, Hoexter JA, Smalberger JA and Vivier JA concurred.

Appellant's Attorneys: *Deneys Reitz*, Johannesburg; *Webbers*, Bloemfontein. Respondent's Attorneys: *J A Redelinghuys*, Johannesburg; *McIntyre & Van der J Post*, Bloemfontein.

STANDER v RAUBENHEIMER 1996 (2) SA 670 (O)

1996 (2) SA p670

Citation	1996 (2) SA 670 (O)
Case No	A31/94
Court	Oranje-Vrystaatse Provinsiale Afdeling
Judge	Malherbe R, BECKLEY R
Heard	August 8, 1994
Judgment	August 11, 1994
Counsel	C Ploos van Amstel namens die appellant (eiser). D G Grobler namens die respondent (verweerder)
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

B Versekering - Versekeringsmakelaar - Plig van teenoor versekerde - Versekerde het huishoudelike polis uitgeneem in terme waarvan inhoud van huise met grasdakke nie gedek is nie - Versekerde het van adres verander en makelaar c daarvan in kennis gestel maar nie van feit dat nuwe huis grasdak gehad het nie - Makelaar het versekerde ook nie oor tipe dak uitgevra nie - Huis brand af - Versekeraar repudieer eis vir verlies van inhoud - Versekerde stel eis teen makelaar in op grond daarvan dat makelaar sy kontraktuele plig teenoor versekerde om nodige besonderhede te bekom versuim het - Plig op makelaar om D toe te sien dat inhoud van huis behoorlik verseker is - Omdat makelaar geweet het dat inhoud van grasdakhuis nie beskerming onder polis geniet het nie, was daar plig op hom om nodige vrae oor dak van nuwe huis aan versekerde te vra - Versekerde se eis teen makelaar toegestaan.

Headnote : Kopnota

E Die verweerder (respondent) was die eiser (appellant) se versekeringsmakelaar en E Bpk sy versekeraar vir soverre dit die inhoud van sy huis betref het. Toe die versekering uitgeneem is het die eiser se huis voldoen aan die omskrywing van 'geboue' in die polis; met ander woorde dit was van 'standaardkonstruksie' en het *nie* 'n grasdak gehad nie. Gedurende 1988 het die eiser 'n nuwe huis met 'n grasdak laat bou. Hy het die verweerder telefonies opdrag gegee om die versekeraar van F die nuwe adres in kennis te stel. Die eiser het nie aan die verweerder openbaar dat die huis 'n grasdak gehad het nie en die verweerder het hom ook nie daaroor uitgevra nie. In 1990 het die huis met inhoud en al afgebrand. E Bpk het die eiser se eis vir die verlies van die inhoud gerepudieer op grond daarvan dat die eiser nie openbaar het dat die huis 'n grasdak gehad het nie, maar nogtans 'n *ex gratia* uitbetaling van R30 000 aan die eiser gemaak. Die eiser het die balans van sy skade (die ooreengekome bedrag van R33 164) in 'n Provinsiale Afdeling van die G verweerder gevorder op grond daarvan dat hy sy kontraktuele plig as makelaar versuim het deurdat hy nagelaat het 'om besonderhede aangaande die dakstruktuur . . . te bekom en aan die versekeringsmaatskappy te openbaar'. Die verweerder het gepleit dat dit die eiser se plig was om te openbaar dat die huis 'n grasdak gehad het maar toegegee dat hy geweet het dat die eiser se huisinhoud nie gedek sou gewees het nie indien dit in 'n grasdakhuis beskadig of vernietig sou word. Die eis is deur die Hof *a quo* afgewys. Op appèl,

H *Beslis*, wat betref die inhoud van die verweerder se kontraktuele verpligtinge, dat die eiser se getuienis dat die verweerder uitdruklik onderneem het om toe te sien dat die

eiser 'te alle relevante tye gedek en verseker is teen die intrede van skade aan die inhoud van eiser se woonhuis, waar ook al geleë en ongeag die konstruksie' daarvan, nie deur die verweerder weerlê is nie. (Op 674I-675A.)

Beslis, verder, dat die verweerder se erkenning dat hy stilswyend onderneem het I om 'in die uitoefening van sy pligte as makelaar redelike en behoorlike sorgsaamheid en kundigheid aan die dag te lê' in ooreenstemming was met wat regtens van 'n versekeringsmakelaar verwag word. (Op 675B.)

Beslis, verder, dat dit uit die verweerder se toegewing dat hy geweet het dat die eiser se huisinhoud nie gedek sou gewees het nie indien dit in 'n grasdakhuis beskadig of vernietig sou word gevolg het dat die verweerder nie sy uitdruklike onderneming teenoor die eiser gestand kon doen sonder om by die eiser vas te stel J of sy nuwe huis nie moontlik 'n grasdak gehad het nie. (Op 675E.)

1996 (2) SA p671

A *Beslis*, derhalwe, dat aangesien die verweerder geweet het dat die inhoud van 'n grasdakhuis nie beskerming sou geniet nie, hy sy plig slegs behoorlik kon uitvoer deur die nodige vraag of vrae daaroor te vra. (Op 676H/I.) Appèl gehandhaaf.

Flynote : Sleutelwoorde

Insurance - Insurance broker - Duty of to Insured - Insured having taken out domestic policy in terms of which contents of houses with thatched roofs not B covered - Insured having changed residential address and having informed broker thereof but not of fact that new house had thatched roof - Broker also not having questioned insured about structure of roof - Insured's house burning down - Insurer repudi-ating claim for loss of contents - Insured suing broker on basis that broker failed in his contractual duty to obtain relevant information from him - Broker having duty to make sure that contents of insured's home properly insured - Inasmuch as broker aware of fact that thatched houses not C covered by policy, duty on him to ask insured necessary questions regarding structure of roof - Insured's claim against broker allowed.

Headnote : Kopnota

The plaintiff (appellant) had insured the contents of his home with E Ltd, and the defendant (respondent) had been his broker. When the plaintiff had taken out the insurance, his home had complied with the definition of 'buildings' ('geboue') in the policy; in other words, it was of 'standard construction' ('standaardkonstruksie') and D did *not* have a thatched roof. During 1988 the plaintiff had a new home built. Although he telephonically requested the defendant to inform E Ltd of his new residence, he neglected to inform the defendant of the fact that it had a thatched roof. The defendant also did not question the plaintiff about the structure of the roof. During 1990 a fire destroyed the house and its contents. E Ltd repudiated the plaintiff's claim relating to the contents of the house on the ground that the plaintiff had failed to disclose the fact that the house had a thatched roof, but nevertheless E made an *ex gratia* payment to him of R30 000. The plaintiff claimed the balance of his damages (an agreed amount of R33 164) from the defendant in a Provincial Division on the ground that he had failed to perform his contractual duty as broker by neglecting to obtain from the plaintiff and disclose to the insurer details regarding the structure of the roof in question. The defendant pleaded that it had been the plaintiff's duty to disclose the fact that the house had a thatched roof but conceded that he was aware thereof that the contents of the house would not have F been covered if they were damaged or destroyed in a house with a thatched roof. The Court *a quo* dismissed the claim. On appeal,

Held, as to the nature of the defendant's contractual obligations, that the plaintiff's testimony that the defendant had expressly undertaken to ensure that the plaintiff was at all relevant times covered against damage to the contents of his home, wherever situated and however constructed, had not been controverted by the defendant. (At 674I-675A.)

G

Held, that the defendant's admission that he had impliedly agreed to act with reasonable and proper skill and care in the exercise of his duty as broker was consistent with what was legally expected from insurance brokers. (At 675B.)

Held, further, that it followed from the defendant's concession that he had known that the contents of the plaintiff's house would not be covered if they were damaged or destroyed in a house with a thatched roof that the defendant could not fulfil his H express undertaking *vis-à-vis* the plaintiff without first ascertaining from him whether his new house had a thatched roof. (At 675E.)

Held, accordingly, that, inasmuch as the defendant knew that the contents of a house with a thatched roof would not be covered by the policy, he could only fulfil his duty by asking the plaintiff the necessary question or questions regarding the structure of the roof. (At 676H/I.) Appeal upheld.

I

Die Hof het die volgende besliste sake in sy uitspraak aangehaal/The following decided cases were cited in the judgment of the Court:
*Gordon v A A Mutual Insurance Association Ltd*1988 (1) SA 398 (W)
McNealy v The Pennine Insurance Co Ltd, West Lanc Insurance Brokers Ltd and Carnell [1978] 2 Lloyd's LR (CA).

J

1996 (2) SA p672

Case Information

A Appèl teen 'n beslissing van 'n enkel Regter (Edeling R). Die feite blyk uit die uitspraak van Malherbe R.

C Ploos van Amstel namens die appellant (eiser).

D G Grobler namens die respondent (verweerder).

Cur adv vult.

B

Postea (11 Augustus 1994).

Judgment

Malherbe R: Hierdie appèl is gerig teen die uitspraak van my Kollega Edeling in die Hof *a quo* waarin hy appellant se vordering teen respondent afgewys het met C koste. (Gerieflikheidshalwe verwys ek na appellant en respondent onderskeidelik as eiser en verweerder soos wat hulle in die verhoor gesiteer was.)

Die feite van die saak is eenvoudig en kan soos volg saamgevat word:

1. Verweerder was eiser se versekeringsmakelaar vir soverre dit die inhoud van eiser se huis betref.

D 2. Hierdie huisinhoud was by die SA Eagle Versekeringsmaatskappy Bpk verseker teen verlies of skade veroorsaak deur 'n hele aantal gebeurlikhede, onder andere brand, storm of diefstal.

3. Toe die versekering oorspronklik uitgeneem is, het eiser se huis voldoen aan die omskrywing van 'geboue' in die betrokke polis, met E ander woorde dit was van sogenaamde standaardkonstruksie en het *nie* 'n grasdak gehad nie.

4. Eiser het van tyd tot tyd verhuis en het telkens aan verweerder telefonies opdrag gegee om sy verandering van adres aan die versekeraar oor te dra. Dit het verweerder getrou gedoen.

5. Gedurende 1988 het eiser 'n nuwe huis laat bou. Hierdie huis het 'n F grasdak gehad. Eiser het weereens vir verweerder telefonies opdrag gegee om die versekeraar in kennis te stel van die nuwe adres waar die versekerde huisinhoud voortaan sou wees. Tydens hierdie gesprek het eiser nie aan verweerder openbaar dat sy nuwe huis 'n grasdak het nie en verweerder het hom ook nie uitgevra oor die tipe dak van die huis nie.

G 6. Die betrokke polis is daarna jaarliks hernu sonder dat die ver-sekeraar ingelig is dat die huisinhoud in 'n huis met 'n grasdak is.

7. In September 1990 brand eiser se huis af en word die inhoud daarvan ook deur die brand verwoes.

8. Die versekeraar repudieer eiser se eis vir die verlies van die inhoud H van die huis op grond daarvan dat hy nie geopenbaar het dat sy huis 'n grasdak het nie, maar maak nogtans aan hom 'n *ex gratia* betaling van R30 000.

9. Eiser vorder die balans van sy skade (die ooreengekome bedrag van R33 164) van verweerder op grond daarvan dat verweerder sy kontraktuele plig as makelaar versuim het deurdat hy nagelaat het

I 'om die nodige besonderhede te bekom en aan die verseke-ringsmaatskappy te verskaf en in besonder het verweerde-r nagelaat om besonderhede aangaande die dakstruktuur van die woning . . . te bekom en aan die versekeringsmaatskappy te openbaar'.

J In kort is eiser se saak dus dat toe hy aan verweerder kennis gegee het van

1996 (2) SA p673

MALHERBE R

A sy laaste adresverandering verweerder vir hom moes uitgevra het oor die dakstruktuur van die nuwe huis terwyl verweerder pleit dat dit eiser se plig was om te openbaar dat die huis 'n grasdak het.

Namens eiser het hyself en ene Peter Trisos, 'n ervare versekeringsmakelaar, getuig. Verweerder het geen getuienis aangebied nie.

B Trisos het getuig oor die pligte van 'n makelaar wanneer die versekerde hom in kennis stel van 'n adresverandering soos in die onderhawige geval. Ek haal slegs die volgende passasies uit sy getuienis aan:

> 'Let us assume that I have moved as your client, I have changed my residential address, what questions will you then ask me? - Before or after renewal?
>
> Well when I ask you to do the necesary amendments. - To amend the risk?

C Yes. - I would ask you if there is any amendment to the risk, what area you are staying in, are there any vacant properties around your risk, anything pertaining to the risk. May I give an example, if we could have a house that is fully burglar-barred, on the first occasion we would need to ask you if your new house still has burglar-bars or not, and construction obviously, is it standard or not.

. . .

D *Court:* I beg your pardon, would not? - I believe that brokers, a lot of brokers would not ask the question.

> About what? - Whether there was a thatched roof house or not, or whether the house was thatched.
>
> If he moved to a new house? - That is correct.
>
> Whether it has a thatch or not - yes.

E So are you saying your competition is not as good as you are? - I am saying that if I do not ask the question I probably err.

> You probably? - I probably err.
>
> You have error. And you are saying there are insurance companies and are you suggesting that they all err in doing so, or are you saying it is normal not to do it. Not to ask. This is what counsel wants, you see. - Normal practice would be F to ask, if you do not ask then I think you are making an error.
>
> You are making an error if you do not ask? - Yes

. . .

> So you are adamant that you will ask each and every insured that phones in to change his address with you, one of your clients, that you will ask him whether his roof is not of thatch? - Whether there is anything pertaining to the risk that G changes and is the construction standard.'

Die Hof *a quo* het aanvaar dat Trisos 'n deskundige op die betrokke gebied is en sê in sy uitspraak dat Trisos 'n goeie indruk as getuie gemaak het. Nadat die geleerde Verhoorregter Trisos se getuienis opgesom het, sê hy egter die volgende in sy uitspraak:'Mnr Trisos is deur geen getuie weerspreek nie en sy getuienis moet in breë trekke aanvaar word. Daar is egter niks wat hy gesê het wat my noop om tot die konklusie te kom dat daar 'n regsplig weens algemene beginsels of in die omstandighede van hierdie saak, op die verweerder gerus het om homself te vergewis van die konstruksie van die nuwe huis se dak en dienooreenkomstig stappe te neem nie. Die bestaan van so 'n plig sal na my mening afhang van die presiese aard en omvang van

elke afsonderlike makelaarsooreenkoms. Ek is ook van mening dat die effek van die res van die getuienis, naamlik die getuienis van die eiser self en die dokumentêre getuienis, tot die teendeel getuig, naamlik dat daar waarskynlik geen sodanige verstandhouding of verpligting ingevolge die onderhawige kontrak bestaan het nie.'

J Hierdie bevinding is in stryd met wat Trisos getuig het en is, met eerbied, nie geregverdigd nie.

1996 (2) SA p674

MALHERBE R

A Eiser het getuig dat hy aanvanklik van die betrokke makelaarsfirma se dienste gebruik gemaak het om sy korttermynversekering (insluitende die versekering van sy huisinhoud) te behartig

'omdat hulle vir my verduidelik het dat hulle is spesialiste en hulle gee mens gemoedsrus, hulle kyk na dat jou korttermynverskering reg loop, jou versekering reg loop, dat daar nie sal foute insluip nie'.

B

Hy getuig verder dat verweerder uitdruklik teenoor hom onderneem het

'dat hy na my versekering sal omsien. Dat dit altyd reg sal wees en dat ek nie hoef te bekommer oor versekering nie . . . (en) dat hy die versekering vir my in stand sal hou.'

C Met betrekking tot eiser sê die geleerde Verhoorregter dat hy 'n swak indruk as getuie gemaak het, dat sy getuienis onaanvaarbaar is

'. . . en die konklusie waartoe ek kom, is dat hy wel deeglik bewus was van die tersaaklike gedeelte van die polisvoorwaardes en die feit dat sy nuwe huis nie meer gekwalifiseer het in terme van die voormelde polisvoorwaardes nie. Vir redes wat slegs aan homself bekend is, het hy die feit dat sy huis 'n grasdak het D teenoor sy makelaar sowel as SA Eagle opsetlik of nalatiglik verswyg toe hy hulle in kennis gestel het van sy nuwe adres en daarna, en moes dit te alle tersaaklike tye vir hom duidelik gewees het dat die verweerder nie geweet het van die bestaan van die grasdak nie.'

Ek meen met eerbied dat hierdie konklusie nie geregverdigd is nie.

E Eerstens, is dit nie heeltemal duidelik na watter 'tersaaklike gedeelte' van die polisvoorwaardes die geleerde Regter verwys nie. Voor ons was die advokate dit egter met mekaar eens (en ek stem daarmee saam) dat Edeling R waarskynlik verwys na die omskrywing van 'inhoud' en 'geboue' op bl 12 van die polis. Daar is geen getuienis dat eiser die polis, of hierdie gedeelte daarvan, gelees of bestudeer F het nie en, indien wel, of hy dit behoorlik verstaan het nie. Trouens, eiser getuig uitdruklik dat hy die polis *nie* gelees het nie. Die onbetwiste getuienis van Trisos is dat ongeveer 98% van kliënte *nie* polisdokumente lees nie. Tweedens, is daar geen basis vir die stelling dat eiser opsetlik verswyg het dat sy nuwe huis 'n grasdak het G nie. Die vraag kan gevra word waarom hy dit sou doen en die risiko loop dat hy groot skade gaan ly? Namens verweerder het mnr *Grobler* tereg nie hierdie bevindings van die geleerde Verhoorregter probeer ondersteun nie.

Om op te som tot dusver: Na my mening is die geleerde Verhoorregter se bevindings met betrekking tot die effek van Trisos se getuienis en die geloofwaardigheid van eiser in die algemeen, nie geregverdigd nie.

H Alhoewel die geleerde Verhoorregter Trisos se getuienis aanvaar het dat

'dit ook die plig is van 'n makelaar om toe te sien dat sy kliënt behoorlik verseker is',

I is dit in hierdie saak nie nodig om op Trisos se getuienis te steun om te bepaal wat verweerder se kontraktuele verpligtinge teenoor eiser was nie. Ek sê dit omdat eiser self duidelike en aanvaarbare getuienis daaroor afgelê het soos hierbo aangetoon en sy getuienis nie deur weerleggende getuienis ontsenu is nie. Hierdie getuienis van eiser klop met die bewering in die besonderhede van vordering, nl dat J verweerder onder-neem het om toe te sien

1996 (2) SA p675

MALHERBE R

'dat eiser te alle relevante tye behoorlik gedek en verseker is teen die intrede van skade aan die inhoud van eiser se woonhuis, waar ook al geleë en ongeag die konstruksie van sodanige woonhuis'.

In sy verweerskrif het verweerder erken dat hy stilswyend onderneem het om

'In die uitoefening van sy pligte as makelaar redelike en behoorlike B sorgsaamheid en kundigheid aan die dag te lê'.

Hierdie erkenning is in ooreenstemming met wat regtens van 'n professionele versekeringsmakelaar verwag word en wat soos volg omskryf word deur Ivamy in *General Principles of Insurance Law* 5de uitg op 516:

'It is the duty of the agent, in the exercise of the authority entrusted to him, to C act with reasonable and proper care, skill and diligence.

If he is a professional agent, such as a broker, the standard by which the duty is to be measured is that of persons of experience and skill in his profession and in the place where he was employed to perform it. . . .

Whether he has actually acted with the required degree of skill depends in each case on the circumstances.'

D

Hierdie passasie is met goedkeuring aangehaal in *Gordon v AA Mutual Insurance Association Ltd*1988 (1) SA 398 (W) en ek vereenselwig my met eerbied daarmee.

Namens verweerder het mnr *Grobler* tereg toegegee dat verweerder geweet het dat E eiser se huisinhoud nie onder die betrokke polis gedek sou wees indien dit in 'n grasdakhuis beskadig of vernietig sou word nie. Hieruit volg dit na my mening dat verweerder nie sy uitdruklike onderneming teenoor eiser gestand kon doen sonder om by eiser vas te stel of sy nuwe huis nie moontlik 'n grasdak het nie. Steun vir hierdie standpunt word gevind in Trisos se getuienis omtrent die pligte van 'n F makelaar in sulke omstandighede, asook in *McNealy v The Pennine Insurance Co Ltd West Lanc Insurance Brokers Ltd and Carnell* [1978] 2 Lloyd's LR 18 (CA) waarop mnr *Ploos van Amstel* sterk gesteun het in die Hof *a quo* sowel as op appèl.

In die *McNealy*-saak het die appellant aan die versekeringsmakelaars (die tweede G en derde respondente) opdrag gegee om sy motor te verseker. Hulle het hierdie opdrag aanvaar en die versekering by die eerste respondent uitgeneem. Eerste respondent het lae premies aangebied aan 'n beperkte klas van motoreienaars. So byvoorbeeld is 'bookmakers', 'jockeys and others connected with racing', 'whole or part-time musicians' uitgesluit om versekering teen die lae premies te bekom. Die H makelaars het vir appellant gevra wat sy beroep is en hy het volkome eerlik geantwoord dat hy 'n 'property repairer' is. Hy is egter nie gevra of hy nie moontlik een van die uitgeslote beroepe beoefen nie. Hy was inderdaad ook 'n 'part-time musician' en eerste respondent het sy eis gerepudieer. Wat die pligte van die makelaars in daardie omstandighede betref, sê die geleerde Regters van appèl onderskeidelik die volgende:

I Denning MR:

'It was clearly the duty of the broker to use all reasonable care to see that the assured, Mr McNealy, was properly covered. . . . I am afraid the broker did not do his duty. He did not go through that list with Mr McNealy at all. He simply asked him what was his occupation. . . . The broker ought to have gone on and asked: "Have you ever been or are J you a full or part-time musician?" '

1996 (2) SA p676

MALHERBE R

A Shaw LJ:

'I agree. . . . It was within the knowledge of the broker that there were numerous categories and classes of persons who were not acceptable to the intended insurers. It seems to me that this was so special a category that specific questions should have been put to the proposer to see whether he fell within that or any other unacceptable category.'

B

Waller LJ:

'I agree. . . . It was clearly his duty to make as certain as he reasonably could that the plaintiff, Mr McNealy, came within the categories acceptable to the Pennine Insurance Co, and the only way in which he could properly do that . . . was to show him the list and probably go C through it with him to make sure that the plaintiff understood that he had to be outside those particular risks. . . .'

In sy uitspraak haal die geleerde Verhoorregter die kopstuk van die *McNealy*-uitspraak

aan en vervolg dan soos volg:'Na my mening is die regsbeginsels uiteengesit in die betrokke passasie nie heelhuids van toepassing op die onderhawige saak nie. Dit word bepaal deur die besondere omstandighede van daardie saak. Die belangrikste punt wat daardie saak onderskei van die onderhawige is dat in die McNealy-saak 'n spesifieke polis in terme waarvan sekere persone uitgesluit is deur die makelaars aan die eiser bemark is in reaksie op sy versoek en opdrag dat 'n geldige versekering van sy voertuig bekom moet word, sonder om enige poging aan te wend om vas te stel of hy vir die betrokke polis waarop deur die makelaars besluit is, kwalifiseer. In die onderhawige saak het ons glad nie te doene met 'n geval waar die makelaars enige aanbeveling aan hul kliënt maak of enigiets aan hom bemark nie. Dit is inteendeel 'n geval waar die kliënt opdrag aan die makelaars gee om 'n spesifieke opdrag uit te voer, naamlik om die versekeraar van 'n bestaande polis in kennis te stel van 'n wysiging van 'n tersaaklike adres. Hierdie opdrag is tot daardie mate behoorlik uitgevoer. Dit is so dat sodanige nuwe adres juis 'n verandering in die risiko faktor teweeggebring het, maar die vraag of daar 'n kontraktuele ver-pligting op die makelaars gerus het om ook die moontlikheid van sodanige verandering in die risikofaktor weens die verandering in die risiko-adres te ondersoek, en toepaslike stappe te neem om die instandhouding van die versekering te bewerkstellig, is geheel en al te onderskei van die vraag wat ter sprake was in die McNeally-saak.'

Met eerbied meen ek nie dat hierdie onderskeiding korrek is nie: Alhoewel verweerder in die onderhawige saak nie 'n aanbeveling aan eiser gemaak het of iets H aan hom bemark het nie, was dit verweerder se plig om toe te sien dat eiser se huisinhoud by die nuwe adres behoorlik verseker is. Aangesien verweerder geweet het dat die inhoud van 'n grasdakhuis nie beskerming onder die bestaande polis sou geniet het nie, kon hy sy plig slegs behoorlik uitvoer deur die nodige vraag of vrae daaroor aan eiser te vra, soos beslis is in die *McNealy*-saak. Dit is nie onredelik I om dit van 'n professionele makelaar te verwag nie. Dit is hierdie plig wat verweerder nie nagekom het nie.

Die omvang van eiser se skade is nie in geskil tussen die partye nie. Trouens, dit is reeds in sy verweerskrif deur verweerder erken. Dit was ook gemenesaak tussen die partye dat indien eiser die beweerde kontrakbreuk bewys, verweerder deur hom J aanspreeklik is vir die volle omvang van sy skade.

1996 (2) SA p677

MALHERBE R

A Gevolglik slaag die appèl met koste. Die bevel van die Hof *a quo* word tersyde gestel en vervang met die volgende:

> 'Vonnis ten gunste van eiser in die bedrag van R33 164 plus rente op gemelde bedrag *a tempore morae* teen 18,5% per jaar en koste van geding.'

B Beckley R en Cillié R het saamgestem.

Appellant (Eiser) se Prokureurs: *Wessels & Smith*. Respondent (Verweerder) se Prokureurs: *Symington & De Kock*. C

STEYN v AA ONDERLINGE ASSURANSIE ASSOSIASIE BPK 1985 (4) SA 7 (T)

1985 (4) SA p7

Citation	1985 (4) SA 7 (T)
Court	Transvaalse Provinsiale Afdeling
Judge	De Villers R
Heard	February 22, 1984
Judgment	March 2, 1984
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Versekering - Versekerbare belang - Begrip dien alleenlik om te onderskei tussen afdwingbare en nie-afdwingbare c kontrakte waar die kontrak as 'n weddenskap bestempel kan word - Ondersoek moet eerder wees om te bepaal of 'n kontrak op 'n weddenskap neerkom al dan nie - Eiser het huis waarvan hy kostelose okkupasie gehad het vir solank as wat elenaar daarvan dit nie benodig het nie, verseker - Sodanige kontrak nie 'n weddenskap nie en kontrak afdwingbaar - Eiser nie in D staat om te eis aangesien hy nie geopenbaar het dat hy 'n ongerehabilliteerde insolvent was nie - Die feit dat sommige amptenare van maatskappy (nie die persone met wie eiser ooreengekom het nie) daarvan geweet het, het nie beteken dat E maatskappy daarvan kennis gedra het nie.

Versekering - In die algemeen - Toepaslike regsbeginsels - Geen regverdiging vir die toepassing van beginsels van Engelse versekeringsreg (insluitende teorie van versekerbare belang) in Suid-Afrika nie - Geen rede waarom versekeringskontrak nie ingevolge beginsels van F Romeins-Hollandse reg benader moet word nie.

Headnote : Kopnota

Die eiser het aksie ingestel teen die verweerder assuransiemaatskappy ingevolge twee versekeringskontrakte; een wat sy meubels gedek het en die ander wat 'n huis gedek het. 'n Vuur het die huis en die inhoud daarvan vernietig en vir die doeleindes van die aksie was daar ooreengekom oor die kwantum van die verlies. Die enigste twee punte in geskil by die G verhoor was: *(a)* dat, alhoewel die verweerder toegegee het dat die eiser 'n versekerbare belang gehad het in die meubels, hy geen sodanige belang in die huis gehad het nie; en *(b)* dat die eiser nie geopenbaar het nie dat hy 'n ongerehabiliteerde insolvent was toe hy die versekeringskontrakte aangegaan het. Dit het geblyk dat die eiser die betrokke huis bewoon het ingevolge 'n skikkingsooreenkoms wat uit litigasie voortgespruit het en dat hy die huis kosteloos bewoon het en H gratis water en elektrisiteit ontvang het vir solank as wat die Provinsiale Administrasie, die eienaar daarvan, dit nie benodig het nie. Die verweerder het aangevoer dat die eiser se reg om die huis kosteloos te bewoon, nie 'n versekerbare belang was nie aangesien die Provinsiale Administrasie op enige stadium sy padbouprogram kon begin en sodoende die huis kon sloop.

Beslis, dat dit dikwels uit die oog verloor is dat die "versekerbare belang" begrip alleenlik gedien het om te I onderskei tussen afdwingbare en nie-afdwingbare versekeringskontrakte waar die kontrak as 'n weddenskap bestempel kon word: die ondersoek moes eerder gewees het om te bepaal of die kontrak neergekom het op 'n weddenskap, en nie deur vas te stel of die versekerde 'n versekerbare belang gehad het al dan nie.

Beslis, verder, dat dit duidelik was dat die eiser nie 'n weddenskap met die verweerder aangegaan het nie en die J ooreenkoms was derhalwe afdwingbaar.

1985 (4) SA p8

A Beslis, verder, dat dit die plig van die eiser was om die verweerder in kennis te stel dat hy 'n ongerehabiliteerde insolvent was: hierdie inligting was vir die verweerder belangrik en dit sou die eiser se goedere nie verseker het nie as dit geweet het dat hy 'n insolvent was.

Beslis, verder, op die getuienis, dat die verweerder maatskappy nie ingelig was oor die insolvensie van die eiser nie.

Beslis, verder, dat alhoewel sekere amptenare van die B verweerder maatskappy moontlik geweet het dat die eiser insolvent was, dit nie beteken het dat die amptenaar met wie die eiser gekontrakteer het dit geweet het en dit kon derhalwe nie die kennis van die maatskappy gewees het nie. Eise van die hand gewys.

Semble: Daar bestaan geen regverdigingsgrond vir die toepassing in die Suid-Afrikaanse versekeringsreg van die beginsels van C die Engelse versekeringsreg (insluitende die teorie van versekerbare belang) en daar is geen rede waarom die versekeringskontrak nie ingevolge die beginsels van die Romeins-Hollandse reg benader moet word nie.

Flynote : Sleutelwoorde

Insurance - "Insurable interest" - Concept of serves only to distinguish between enforceable and unenforceable contracts where contract could be regarded as a wager - Enquiry should rather be to determine whether contract amounted D to a wager or not - Plaintiff insuring a house to which he had right of free occupation for as long as owner thereof did not require the land - Such not a wager and contract enforceable - Plaintiff unable to claim, however, as he had not disclosed that he was an unrehabilitated insolvent - Fact that certain officials (not being the persons with whom plaintiff had contracted) knew thereof, did not mean that company had knowledge thereof.

E Insurance - Generally - Applicable legal principles - No justification for the application of the principles of English insurance law (including the theory of insurable interest) in South Africa - No reason why the contract of insurance should not be considered according to the principles of the Roman-Dutch law.

Headnote : Kopnota

F The plaintiff instituted action against the defendant insurance company in terms of two insurance policies; one covering his furniture in a house and the other covering the house itself. A fire had destroyed the house and all its contents and for the purposes of the action the parties had agreed on the *quantum* of the loss. The only two points in issue at the trial were: *(a)* that, although the defendant conceded that the plaintiff had an insurable interest in the furniture, he had no such interest in G the house; and *(b)* that the plaintiff had not disclosed that he was an unrehabilitated insolvent when he concluded the insurance contracts. It appeared that the plaintiff occupied the house in question in terms of a settlement agreement arising from litigation. He occupied the house and received water and electricity free of charge for as long as the Provincial Administration, the owner thereof, did not require it. The defendant contended that the plaintiff's right to stay H in the house free of charge was not an insurable interest as the Provincial Administration could at any stage begin its roadbuilding programme and demolish the house.

Held, that it was often forgotten that the concept of insurable interest served only to distinguish enforceable and unenforceable insurance contracts where the contract could be regarded as a wager: the enquiry should rather be to determine I whether or not the contract amounted to a wager, and not by determining whether the insured had an insurable interest.

Held, further, that it was clear that the plaintiff had not entered into a wager with the defendant and the agreement was enforceable.

Held, further, that it was the duty of the plaintiff to have informed the defendant that he was an unrehabilitated insolvent: for the defendant this information was important and it would not have insured his goods had it known that he was an insolvent.

Held, further, on the evidence, that the defendant company had J not been informed about the plaintiff's insolvency.

1985 (4) SA p9

DE VILLIERS R

Held, further, that, although certain officials in the A defendant company possibly knew that the plaintiff was insolvent, this did not mean that the official who had contracted with

the plaintiff knew this and it could accordingly not be said that the company had knowledge thereof. Claims dismissed.
Semble: There is no justification for the application in the South African law of insurance of the principles of the English law of insurance (including the theory of insurable interest) B and there is no reason why the contract of insurance should not be considered according to the principles of the Roman-Dutch law.

Case Information

Aksie op versekeringspolisse. Die feite blyk uit die uitspraak.

C *E Bertelsmann* namens die eiser.

P P Delport namens die verweerder.

Cur adv vult.

Postea (Maart 2). D

Judgment

DE VILLIERS R: Die eiser spreek die verweerder assuransiemaatskappy aan ingevolge die bepalings van twee versekeringskontrakte: eerstens, 'n versekeringskontrak wat gehandel het oor 'n huiseienaarspolis waarin meubels in 'n huis verseker is, en die tweede kontrak waarin die huis self E verseker is.

Dit is gemeensaak dat die huis afgebrand het ten gevolge van 'n vuur wat ontstaan het buite die beheer van die eiser. Indien die eiser sou slaag, het die partye ooreengekom dat die eiser geregtig sal wees op 'n bedrag van R240 500 vir die verlies van die meubels en wat die huis self betref op 'n bedrag van R37 F 143.

Dit is ook gemeensaak dat die eiser 'n ongerehabiliteerde insolvent was toe hy die aansoek om versekering onderteken het.

Die verweerder het twee verwere geopper met betrekking tot die eiser se eis. Eerstens dat die verweerder toegee dat die eiser 'n versekerbare belang gehad het met betrekking tot die meubels G en goedere binne-in die huis, maar dat die eiser nie 'n versekerbare belang gehad het in die huis wat hy verseker het nie, en gevolglik dat daardie ooreenkoms nie afdwingbaar is teen die verweerder maatskappy nie. Die tweede verweer wat geopper is, was dat die eiser insolvent was op die dag dat hy die ooreenkoms met die verweerder maatskappy gesluit het, dat H hy verplig was om die maatskappy hiervan in kennis te stel, maar versuim het om dit te doen en dat indien die verweerder hiervan geweet het, hy nie die ooreenkoms met die eiser sou aangegaan het nie.

Dit is gemeensaak dat die eiser die betrokke huis bewoon het ten gevolge van 'n skikkingsooreenkoms, bew A, wat hy aangegaan I het in 'n saak wat voor hierdie Hof gedien het. Die tersaaklike bepalings van hierdie ooreenkoms was dat die eiser die betrokke huis (wat hy verseker het) kosteloos kon bewoon vir solank as wat die Provinsiale Administrasie, wat die eienaar van die grond was waarop die huis geleë was, dit nie benodig het nie. Dit blyk dat die Provinsiale Administrasie J genoeë geneem het met die reëling.

DE VILLIERS R

A 'n Verdere bepaling van die ooreenkoms, bew A, dui dat die eiser ook geregtig sou wees op die gebruik van water en elektrisiteit teen geen betaling nie.

Namens die verweerder is aangevoer dat die eiser se reg om sonder betaling in die huis te bly, en die ander voorregte wat hy kosteloos geniet het, nie 'n versekerbare belang daargestel B het nie, omrede die Provinsiale Administrasie te eniger tyd met hul padbouprogram kon begin en gevolglik die huis kon sloop.

Dit is insiggewend dat daar geen poging deur die verweerder aangewend is om te probeer aantoon dat die ooreenkoms as sulks neerkom op 'n weddenskap en om dié rede nie afdwingbaar was nie.

C Omrede die versekeringsreg in Suid-Afrika tot 'n baie groot mate beïnvloed is deur die

Engelse reg, is dit amper as vanselfsprekend aanvaar dat die beginsels van toepassing in die Engelse versekeringsreg ook geld vir versekeringskontrakte in Suid-Afrika. Vandaar dat die teorie van versekerbare belang D reeds vir etlike dekades as deel van ons reg beskou is. Na my mening bestaan daar geen regverdigingsgrond hiervoor nie, en is daar geen rede waarom die versekeringskontrak nie ingevolge die beginsels van die Romeins-Hollandse reg benader moet word nie.

Dit kom my voor dat die maatstaf van versekerbare belang waaraan 'n versekeringskontrak gemeet word om te bepaal of dit E neerkom op 'n weddenskap, onnodiglik die kontraktuele vryheid van die versekerde en veral die versekeringsmaatskappy aan bande lê. Dit is 'n tegniese verweer wat dikwels as 'n nagedagte opgewerp word, soos in die huidige saak gebeur het, en ook in die saak van *Phillips v General Accident Insurance Co* F *(SA) Ltd* 1983 (4) SA 652 (W) gebeur het, en wat, indien streng toegepas, tot onbillike gevolge lei.

Met die doel om die trefwydte van die teorie van versekerbare belang uit te brei, om sodoende te verseker dat die versekerde nie 'n onreg aangedoen word nie, is vreemde redenasies soms gebruik om in 'n bepaalde geval te bevind dat die versekerde G wel 'n versekerbare belang in die versekerde saak gehad het. Die rede hiervoor is veral te vinde in die billikheidsreël wat vereis dat 'n niksvermoedende versekerde wat oor baie jare sy premies betaal het nie tekort gedoen word deur 'n tegniese verweer wat deur die versekerde maatskappy opgewerp word, veral waar die maatskappy ten volle op hoogte van sake was, en geweet het dat dit 'n weddenskap was, en dit nieteenstaande jaar na H jaar die premies ontvang het.

Die toonaangewende saak waar daar 'n begin gemaak is om die teorie van versekerbare belang nie eng toe te pas nie, is die saak van *Littlejohn v Norwich Union Fire Insurance Society* 1905 TH 374 waar WESSELS R op 380 die volgende sê, nadat hy die I Engelse en Amerikaanse gesag op die aspek nagegaan het:

> "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."

Die outeurs Gordon en Getz *South African Law of Insurance* 2de uitg huldig nie hierdie benadering nie. Dit moet derhalwe J aanvaar word dat volgens hulle benadering die versekerde nie sou kon slaag in sy eis nie,

DE VILLIERS R

omrede hy nie 'n versekerbare belang in die versekerde saak A gehad het nie. Hierdie afleiding volg natuurlike wyse uit 'n strenge toepassing van die beginsel van versekerbare belang, want hoewel Littlejohn 'n belang in sy vrou se winkel en inhoud gehad het, was dit nie 'n versekerbare belang nie. Al voordeel wat hy uit sy vrou se winkel gekry het, was dat hy die bestuurder was en hy en sy vrou uit die winkel gelewe het. Dit B was nie bewys dat dit sy enigste bron van inkomste was nie.

'n Verdere voorbeeld van hoe die trefwydte van die begrip verbreed is, word toegelig in die saak van *Steyn v Malmesbury Board of Executors and Trust and Assurance Co* 1921 CPD 96. Die verhuurder het sy grond verhuur waarop daar kafmiedens was. Ingevolge die huurkontrak kon die huurder die kafmiedens C gebruik. Die Hof bevind dat die versekerde 'n versekerbare belang gehad het in die kafmiedens omrede die verrotte kaf stikstof, fosfaat en potas in die grond sou sit.

Dat die begrip nie altyd logies toegepas word nie, hoef dus nie beklemtoon te word nie. Dit word aanvaar dat 'n persoon wat sy lewe verseker 'n versekerbare belang het, hoewel daar geen D sprake hiervan is nie. Sy belang is niks anders as 'n morele belang om te sorg dat sy erfgename begunstig word. Sy belang kan vergelyk word met dié van 'n ouer wat die motor wat hy vir sy kind present gegee het en dit dan verseker.

In beide gevalle ly die versekerde nie skade nie en het klaarblyklik nie 'n versekerbare belang nie. Die erflater staan E onder geen verpligting om sy lewe te verseker, en die ouer ook nie om die motor te verseker nie. Tog word aanvaar dat daar wel 'n versekerbare belang is wat die erflater betref, en is dit te betwyfel of die versekerde in

die tweede voorbeeld 'n versekerbare belang het, indien die begrip streng toegepas word.

Dit is hierdie losse toepassing van die dekveld van die begrip F versekerbare belang wat tot baie onsekerheid lei, en kan daar amper gesê word dat dit alleen 'n leidraad is en geen vaste beginsel nie. Dit word dikwels uit die oog verloor dat die begrip alleenlik dien om te onderskei tussen afdwingbare versekeringskontrakte en nie-afdwingbare versekeringskontrakte G waar die kontrak as 'n weddenskap bestempel kan word. Die ondersoek moet myns insiens eerder gaan oor die vraag of die kontrak neerkom op 'n weddenskap of nie, en nie deur te bepaal of die versekerde 'n versekerbare belang het al dan nie. Om te bepaal of die ooreenkoms 'n weddenskap is, kan dit wees dat die feit dat die versekerde nie 'n versekerbare belang gehad het nie, in ag geneem word, maar dit beteken nie dat indien die H versekerde nie 'n versekerbare belang gehad het nie, die ooreenkoms neerkom op 'n weddenskap.

Wanneer daar 'n ondersoek ingestel word of 'n betrokke kontrak neerkom op 'n weddenskap of nie, is dit vanselfsprekend dat daar ondersoek ingestel word oor die vraag wat die bedoeling van die partye was toe hulle die kontrak gesluit het. Dit kan I bepaal word deur te kyk na die kontrak self en ook na omliggende omstandighede.

In gevalle waar die versekerde 'n morele belang het, soos waar die erflater sy lewe verseker, of die ouer die motor wat hy aan sy kind geskenk het, verseker, kan die vraag of die ooreenkoms neerkom op 'n weddenskap opgelos word deur aanwending van die Romeins-Hollandse regsbeginsel van 'n beding ten behoewe van 'n J derde. Die erfgename neem

1985 (4) SA p12

DE VILLIERS R

A die voordele van die lewensversekeringskontrak aan en kan daar dus geen sprake wees van 'n weddenskap nie. Dit sou ook geld waar die kind die voordeel van die versekeringsooreenkoms aanvaar wat sy ouers met die versekeraar gesluit het.

Wat die huidige geval betref, is dit opmerklik dat die B verweerder net aangevoer het dat die versekerde nie 'n belang in die huis gehad het nie. Daar is geen poging aangewend om ondersoek in te stel na die vraag of die ooreenkoms 'n weddenskap is of nie. Trouens, ek sou my verbaas het indien die maatskappy wat ten volle op hoogte van sake was en gevolglik bewus was dat dit 'n weddenskap was, sou aanvoer dat die ooreenkoms nie afdwingbaar was omrede dit 'n weddenskap was en C dit terwyl hulle vir die afgelope aantal jare die premies ontvang het.

Afgesien hiervan is dit duidelik dat die premies aktuarieel bereken word met inagneming van baie omstandighede. Dit is ook so dat die premies in baie gevalle van tyd tot tyd aangepas word met inagneming van ekonomiese en ander faktore. Die D versekerde word dan die kans gebied om òf die verhoogde premies te betaal - òf te aanvaar dat die ooreenkoms op die hernuwingsdatum verval.

Dit is duidelik dat, wat die assuransiemaatskappy betref, die premies uitgewerk word om hulle 'n redelike vergoeding te verskaf, nie alleen vir die moontlikheid om in sekere gevalle E 'n baie hoë uitbetaling te maak nie, maar ook om hul bedryfskoste te dek. Wat die versekerde betref, is die premies weer hoog omrede hy jaar na jaar die premiegelde moet betaal terwyl die kans dat die gebeurtenis plaasvind relatief klein is, met die gevolg dat die versekerde (soos in die huidige geval) sy goedere gewoonlik onderverseker.

F Dit is ook so dat die versekerde indien hy 'n sê in die saak het, sou verkies dat die gebeurtenis nie plaasvind nie. Dit volg logies nie alleen omrede so 'n hoë persentasie versekerdes onderverseker is nie, maar ook vanweë die ongerief. In teenstelling hiermee wil die wedder graag hê dat die gebeurtenis plaasvind en is hy nie geneig om jare te wag dat die gebeurtenis, indien ooit, plaasvind nie, en is hy gewoonlik G uit op winsbejag.

Met die voorgaande in gedagte, is dit na my mening duidelik dat die eiser nie 'n weddenskap met die verweerder aangegaan het nie, en is die ooreenkoms derhalwe afdwingbaar.

Ek is verwys na die saak van *Green v Heyman*1963 (3) SA 390 (T) H en veral *Van Achterberg v Walters*1950 (3) SA 734 (T), waar die begrip versekerbare belang bespreek

is. Omrede my benadering is dit nie nodig om na die sake te verwys nie, behalwe dat indien die huidige saak aan die maatstaf van versekerbare belang gemeet word, is die woorde van MILNE R in I die saak van *Van Achterberg* ter aangehaalde plaatse op 740F tersake, naamlik:

> "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."

Dit bring my nou tot die tweede punt waaroor ek uitsluitsel moet gee voor ek die feite behandel. Dit gaan hier oor die vraag of die versekerde moes openbaar dat hy 'n J ongerehabiliteerde insolvent was, toe hy die ooreenkoms met die verweerder gesluit het. Dit amptenare van die

1985 (4) SA p13

DE VILLIERS R

maatskappy het hierna verwys as die morele risiko, naamlik die A risiko wat verbonde is of te make het met die persoon van die versekerde. Is hy 'n persoon wat weens een of ander gebrek in sy persoon die risiko dat hy homself sal vergryp aan die bepalings van die kontrak en sodoende die aanspreeklikheid van die maatskappy sal beïnvloed, sal vergroot. Toe die eiser aansoek gedoen het vir 'n hernuwing van sy assuransiekontrak, moes hy weer 'n aansoekvorm voltooi. Hieruit blyk dit dat hy B gemeensaak was om opnuut aansoek te doen vir versekering van sy eiendom en dat die verwysing na 'n hernuwing van sy bestaande versekeringsooreenkoms 'n verkeerde indruk skep. Inderdaad het die ou versekeringskontrak ten einde geloop en het hy 'n nuwe ooreenkoms aangegaan met die versekeringsmaatskappy. Dat die maatskappy nie weer die persele C besoek het nie, en sekere verdere informasie vanaf die ou kontrak woordeliks oorgeskryf het in die nuwe ooreenkoms, het nie die gevolg dat die nuwe ooreenkoms eintlik die ou ooreenkoms is wat net weer vir 'n jaar verleng word nie. Dit was toegegee deur die verweerder dat daar geen spesifieke vraag D gevra is of die eiser 'n ongerehabiliteerde insolvent is nie. Daar is aangevoer dat dit die eiser se plig was om dit aan die maatskappy te openbaar. Ek is egter van mening dat dit die plig was van die eiser om aan die verweerder maatskappy te openbaar dat hy 'n ongerehabiliteerde insolvent was. Hy was bewus daarvan dat hy op 'n stadium nie sy krediteure kon betaal nie. E Dit maak nie saak dat die eiser getuig dat hy borg gestaan het vir die skulde van sy maatskappy wat bankrot gespeel het nie. Dit is voor die hand liggend dat die eiser daarvan bewus was dat hy nie meer vrylik kan kontrakteer nie. Gevolglik is ek van mening dat hy aan die verweerder moes meegedeel het dat hy insolvent was en nog nie gerehabiliteer nie. Vir die maatakappy was hierdie kennis klaarblyklik belangrik. Ek is meegedeel, en F aanvaar dit, dat die maatskappy nie die eiser se goedere sou verseker het indien hulle daarvan bewus geword het dat hy 'n ongerehabiliteerde insolvent was nie. Dit is vir my moeilik om te begryp waarom daar nie 'n spesifieke vraag in die verband in die aansoekvorm verskyn nie. In *Grusd v norwich Union Fire Insurance Society Ltd* 1922 WLD 146 kom WARD R tot die G gevolgtrekking dat waar 'n assuransiekontrak hernu word dit die plig is van die versekerde, of hy daarna gevra is of nie, om aan die maatskappy te openbaar dat hy 'n ongerehabiliteerde insolvent is. In hierdie verband sê WARD R:

> "It was further suggested that as the proposal only applied to the original contract and not to the renewal on the dates of H renewal, the assured was only under an obligation to disclose facts which were material to the risk and that there was no obligation on him to disclose, unless a question was then specifically asked, whether he had been insolvent or not. It seems to me, however, that it is of great importance for the insurance company, because whether a man is bankrupt or not affects the whole personality of the assured."

I WARD R verwys ook na die volgende paragraaf wat voorkom in *Fire Insurance* 5de uitg op 197:

> "The duty of disclosure attaches to the renewal of a policy to the same extent as to the making of the original policy and the renewed insurance is equally liable to be avoided by reason of the breach of this duty."

Mnr *Bertelsmann* het nie sterk daarop gestaan dat daar nie so 'n plig op sy kliënt gerus het nie, maar het aanvaar dat die maatskappy van hierdie feit bewus was omrede hy dit voorheen J aan 'n amptenaar openbaar het.

1985 (4) SA p14

DE VILLIERS R

A Die vraag wat derhalwe beantwoord moet word, is of die verweerder homself gekwyt het van die bewyslas om te toon dat hy nieteenstaande die ooreenkoms daarvan verskoon is om die eiser te vergoed ingevolge die bepalings van die ooreenkoms. Die eiser het getuig dat hy te Zandfontein op Brits betrokke B was in 'n silika sandmyn. Hy het getuig dat hy in 1979 sekere versekeringskontrakte aangegaan het met die verweerder maatskappy, soos uiteengesit op bew J, wat 'n opsomming is van die verskeie kontrakte wat aangegaan is in hierdie tydperk. Hy het ook die voorgeskiedenis gegee van die omstandighede wat geheers het toe hy hierdie kontrakte aangegaan het. Hy en sy C vrou het borg gestaan vir die skulde van 'n privaatmaatskappy bekend as Topkor. Topkor is gesekwestreer en gevolglik is die boedels van homself en sy vrou ook gesekwestreer in 1977 omrede hulle nie die skulde van Topkor kon betaal nie. Gedurende hierdie tydperk het hy 'n belang gehad in 'n silika myn en was al die myntoerusting en sekere van die myn se voertuie verseker by Standard General D Versekeringsmaatskappy, waar die toerusting van Topkor ook verseker was.

Sy versekeringskontrakte het ten einde geloop by Standard General Insurance Company omdat Topkor gelikwideer was. Hy het toe besluit om sy privaat-eiendom te verseker. Hy het die saak met ene Potgieter bespreek wat hom aan 'n sekere Venter, een E van die bemarkingsagente verbonde aan die verweerder maatskappy, voorgestel het. Met die ontmoeting het Potgieter aan Venter gesê, "Hierdie is Steyn, van wie ek jou vertel het, wat belangstel in versekering." Volgens die eiser het Venter besonderhede by hom geneem en onderneem om te reël vir sy versekering. Hy is terug na sy silika myn. Hierna het 'n sekere F Saayman hom besoek om die sake wat hy wou verseker te ondersoek en sy huis wat hy ook wou verseker, te inspekteer.

Saayman het deur die huis geloop en na alles gekyk. Al wat Saayman van hom wou geweet het, was waar hy voorheen verseker was. Hy het aan Saayman gesê by die Standard General. Daarop G het Saayman aan hom gevra waarom hy nie verder verseker by Standard General nie, waarop hy aan Saayman gesê het dat hy en sy vrou se boedels gesekwestreer was omdat die maatskappy bekend as Topkor gesekwestreer is en hulle nie die skulde van die maatskappy kon betaal nie. Hy was begerig om by 'n ander maatskappy sy huis en die inhoud te verseker.

H Nadat Saayman die huis deurgeloop het, was hy tevrede dat alles in orde was en het hy toe vir Saayman 'n tjek van R1 369 op 29 Junie 1979 gegee vir die polisse wat vermeld is op bew J. Gerieflikheidshalwe is die polisse wat op bew J uiteengesit is na verwys as nommers A, B, C, D, E, F, G, H, J, omdat die I syfers wat op die indiwiduele polisse voorkom baie lank is. Hy het verder getuig dat die inligting aangedui op polis A, wat aantoon: "Huiseienaarspolis uitgereik aan Steyn" waarvan 'n woonhuis vir R120 000 verseker word, nie volledig was nie. Daar was twee verdere geboue wat aan Eggo Sand behoort het wat blykbaar ook op die polis genoteer moes gewees het.

In 1980 het hy 'n eis ingestel vir 'n radio en 'n yskas wat J vermeld was onder K in die polis, bew J. Hy het 'n onderhoud gevoer met 'n sekere

1985 (4) SA p15

DE VILLIERS R

mnr Muller te Pretoria nadat hy sy eis voltooi het: sy eis is A aanvaar. Hy is uitbetaal vir die stoof, die hoëtroustel is herstel deur Hifi Installations te Pretoria op rekening van die verweerder.

Later, op 3 Oktober 1981, het hy vir die betrokke woonhuis wat hy in gewoon het en waaroor dit in hierdie saak gaan, in sy eie naam verseker by die verweerder. Hy het verwys na polis A op B bew J. Die waarde waarteen hy die huis verseker het, is toe verhoog na R80 000 en die inhoud van die huis is verhoog na R65 000. Hy was met vakansie by die strand toe hy gehoor het dat sy huis afgebrand het. Hy het teruggekeer, 'n lys gemaak waarin hy uiteengesit het welke goedere beskadig is (dit word vervat op bew E). Die eis is by die maatskappy ingedien; later ontvang hy 'n brief van die maatskappy waarin hy in kennis C gestel word dat die verweerder nie

verantwoordelikheid vir die skade aan die huis en die inhoud aanvaar nie.

In kruisondervraging is aan die eiser gestel dat Saayman sou ontken dat hy enige kennis gedra het van die feit dat die eiser 'n ongerehabiliteerde insolvent was ten tye van die aansoek vir D die polis, en verder dat daar nooit verwys is na die insolvensie van Topkor nie. Die eiser het egter volgehou dat hy aan Saayman oorgedra het dat hy en sy vrou se boedels gesekwestreer is omrede Topkor in likwidasie geplaas is. Dit is ook gestel dat die eiser se siening dat die ou polis met 'n paar veranderings hernu is, verkeerd is. Dat die sogenaamde E hernuwing wat die eiser van praat, 'n nuwe aansoek vir 'n nuwe polis was.

Die volgende getuie namens eiser was ene Potgieter wat getuig het dat hy die eiser goed ken, hulle is goeie vriende en hulle is ook sakekennisse. Hy het van Steyn se persoonlike omstandighede geweet; dat Topkor in likwidasie was, dat beide F Steyn en sy vrou se boedels gesekwestreer was. Gedurende 1977 wou die eiser 'n lid word van 'n motortoerklub van die verweerder. 'n Gesprek het toe plaasgevind tussen eiser en 'n sekere Nagel wat op daardie stadium 'n eisebestuurder van die verweerder was, en ene Muller en 'n sekere Ferreira in die kantore van die AA waar hy teenwoordig was. Hulle het tee G gedrink, en hy onthou dat daar gemeld was dat Steyn en sy vrou se boedels gesekwestreer was. Hy was seker dat Muller teenwoordig was tydens die gesprek. Hy onthou dat hy self aan Nagel en Muller hierdie feite gedurende die gesprek oorgedra het.

Twee jaar hierna, ongeveer 1979, gesels hy en Steyn in verband met versekering. Hy raai toe vir Steyn aan om sy eiendom en H besittings by die verweerder te verseker. Hy het toe vir Venter, 'n vroeëre kollega van hom, gaan spreek en die posisie van die eiser uiteengesit, en gesê dat die eiser begerig was om sy versekering na die verweerder oor te plaas. Hy het aan Steyn verduidelik dat die eiser sy goedere by 'n ander maatskappy I verseker het voordat Steyn se boedel gesekwestreer is.

Toe is hy en Venter uitmekaar met 'n onderneming waar Venter aan Potgieter sê dat Steyn, hoewel hy nie op daardie stadium hierdie soort versekering by die verweerder behartig het nie, sou sorg dat Steyn geholpe raak en self die versekering van Steyn se goedere sou behartig. Volgens Potgieter het hierdie gesprek in Pretoria voor die Robert Koch gebou plaasgevind. Hy J het gesien dat Venter 'n nota maak in sy

1985 (4) SA p16

DE VILLIERS R

A sakboekie. Hy het die sakboekie, bew M, identifiseer en na 'n nota verwys waar die volgende voorkom onder die datum 22 Junie 1979: "Jan Venter, AA, Hardy".

In kruisondervraging is aan Potgieter gestel dat Venter sou ontken dat daar aan hom genoem is dat Steyn insolvent was, en B dat hy en Potgieter nie sulke goeie vriende was as wat Potgieter wou voorgee nie en ook nie meer sake gedoen het nie, omrede Potgieter, wat een van die verweerder se geregistreerde makelaars was, se kontrak met die verweerder beëindig is omrede daar 'n tekort aan geld was wat Potgieter nie betyds oorbetaal het nie. Potgieter het erken dat die probleem tussen hom en die verweerder was dat hy nie die premies wat hy namens hulle C gevorder het betyds oorbetaal het nie en as gevolg hiervan is sy agentskap beëindig by die verweerder.

Muller, wat huidiglik 'n vryskut makelaar te Kaapstad is, het getuig dat hy tussen 1970 en 1980 by President Versekeringsmaatskappy en later by die Mutual werksaam was. D Vanaf 1976 tot 1980 was hy werksaam by die verweerder maatskappy. In 1976 was hy eise-superintendent van die verweerder maatskappy. Later het daar 'n probleem ontwikkel toe hy in Bloemfontein in die maatskappy se diens was en ten gevolge daarvan het hy self besluit om uit die maatskappy se diens te tree.

Sy werk by die verweerder maatskappy was om eise te behandel. E Die gesprek kan hy onthou, toe Steyn by hul toerklub wou aansluit; hy, Potgieter, Steyn, Nagel en Ferreira was teenwoordig. Hy kan onthou dat beide Potgieter en eiser gemeld het dat Steyn insolvent was.

In Oktober of November 1979 het hy weer vir Steyn gesien, nadat Steyn 'n eis by die verweerder maatskappy ingedien het. Dit was F in verband met 'n yskas en hoëtroustel wat beskadig is deur weerlig. Hy het geweet dat die hoëtroustel wat ook beskadig is, gerepareer is deur Hifi Installations. Hy het onthou dat hulle vir Steyn 'n kontant bedrag

gegee het om 'n nuwe yskas by Dion's te koop. Die eis is eintlik ingestel in 1980. Op daardie stadium was hy volledig daarvan bewus dat die eiser 'n ongerehabiliteerde insolvent was en wat hom betref, solank 'n G premie vooruit betaal word, speel insolvensie geen rol by 'n aansoek om versekering by die verweerder maatskappy nie.

Hy was nie daarvan bewus dat 'n insolvent se aansoek om versekering afgewys is deur die verweerder maatskappy nie. Daar verskyn ook geen vraag in die aansoekvorm wat direk of indirek H verband hou met die moontlike insolvensie van die aansoekdoener nie.

Hy berei al die dokumente voor wanneer daar 'n eis aanhangig gemaak word en stuur dan die stukke na die ander departement met sy aanbeveling oor die bedrag wat uitbetaal moet word. Op daardie stadium is die stukke aan Ferreira voorgelê wat die I uitbetaling dan goedgekeur het of nie.

Hy was nie seker of Ferreira die hele tyd by was ten tye van die gesprek waar Nagel, Potgieter en Steyn by was nie. Volgens hom het Ferreira inen uitgeloop. Sover hy onthou was Ferreira en Nagel op hoogte van die feit dat Steyn 'n ongerehabiliteerde insolvent was. Hy het toegegee dat sy werk as eiseklerk niks te J make gehad het met die uitneem van 'n polis nie, al wat die eiseklerk doen, was om seker te maak dat die polis nog van krag

1985 (4) SA p17

DE VILLIERS R

was ten tye dat die goedere wat verseker was, beskadig of A vernietig was, en blykbaar om die bedrae wat geëis word om die goedere te vervoer of te repareer, te kontroleer.

Hy het toegegee dat die betrokke polis deur die Rustenburgse kantoor uitgereik was en dat die kantoor op Pretoria niks te make gehad het met die uitreiking van daardie betrokke polis B nie. Hy het verder getuig dat dit algemene kennis by hom en ander amptenare van die verweerder maatskappy was dat Steyn insolvent was.

Met die uitbetaling van die eis in 1979 - 80, het hy nie aan Ferreira genoem dat Steyn insolvent was nie. Dit was die saak vir die eiser.

Die eerste getuie vir die verweerder was ene Saayman wat getuig het dat hy voorheen in diens van die verweerder was. Op die C stadium van die eiser se onderhandelinge met die verweerder was hy te Rustenburg 'n inspekteur, in diens van die verweerder maatskappy. Hy het 'n vaste salaris gekry en het nie op 'n kommissie basis gewerk nie.

Hy het verwys na die twee aspekte wat in ag geneem word by die uitreiking van 'n polis, naamlik sogenaamd die morele risiko en D die fisiese risiko. Hy het met Steyn in 1979 in aanraking gekom, hy kon nie meer onthou hoedat dit gebeur het nie, of van wie hy 'n boodskap gekry het nie, maar dit kan redelik aanvaar word dat hy 'n boodskap gekry het van òf Steyn persoonlik, òf van iemand wat vir hom daarvan sou vertel het dat hy vir Steyn E moet sien. Hoe dit ook al sy, op 29 Junie 1979 gaan hy uit met al sy dokumente na die hoewe waar Steyn gebly het. Steyn verduidelik toe aan hom wat hy alles wil verseker en dat sekere van die geboue en implemente behoort aan Eggo Sand, ander aan ene Hattingh, en dat sekere geboue en goedere aan homself behoort. Hy was bereid om al hierdie sake te verseker by die F maatskappy. Hy het verwys na bew K, wat 'n goeie samevatting is van wat hulle daaroor ooreengekom het.

Hy het getuig dat al die polisse inderdaad uitgereik is en, omdat die polisse saamgehang het met mekaar, het hy vier kwitansies uitgereik: een vir polisse C, D, A en B; 'n tweede kwitansie vir polisse E, F, G; 'n derde ene vir H, en 'n vierde ene vir J. Eggo Sand is aan hom genoem; hy het van Steyn G verstaan dat sekere eiendom aan Eggo Sand behoort en dit is om dié rede dat verskillende polisse uitgeneem is en dat Eggo Sand as die belanghebbende genoteer is, byvoorbeeld, in polis A.

Hy het toegegee dat die R120 000 nie alleen die woonhuis van Steyn gedek het nie, maar ook twee geboue ingesluit het. Die tjek, bew B, vir R1 369 is aan hom oorhandig op 29 Junie 1979. H Hy het 'n kwitansie, bew H, uitgeskryf vir hierdie bedrag wat die premie op die drie polisse E, F en G gedek het. Hy het ontken dat Steyn te enige tyd aan hom genoem het dat hy insolvent is. As Steyn so gesê het, sou hy geweier het om Steyn se eiendom te verseker. Dit was volgens hom reëlreg teen die opdrag van die maatskappy.

Hy was nie seker of 'n insolvent I wettiglik so 'n aansoekvorm kon teken nie. Volgens hom was dit baie belangrik dat sy maatskappy in kennis gestel word of die aansoekdoener insolvent was al dan nie. Dit was vir hom vanselfsprekend dat 'n aansoekdoener verplig was om die feite te openbaar omrede die morele risiko so hoog is in geval van 'n ongerehabiliteerde insolvent dat die verweerder sou weier om so J 'n persoon se goedere te verseker.

1985 (4) SA p18

DE VILLIERS R

A Hy het ontken dat hy aan Steyn gesê het dat hy navraag sou doen by die Standard General, oor Steyn se vorige versekering by daardie maatskappy. Hy het van die eiser vernéem dat hy voorheen verseker was by Standard General Versekeringsmaatskappy. Wat hom betref was daar hoegenaamd geen B rede om navraag te doen by Standard General oor hierdie aangeleentheid nie. Hy het verwys na die aansoekvorm wat Steyn voltooi het, bew G, en het getuig dat geen van die antwoorde wat Steyn gegee het op bew G enigsins vir hom agterdogtig gemaak het nie en hy derhalwe nie by Standard General self gaan navraag doen het nie.

As Steyn aan hom gesê het dat hy 'n ongerehabiliteerde insolvent was, dan sou dit nie vir hom nodig gewees het om C enige navraag te doen nie, en sou hy summier geweier het om voort te gaan met Steyn se aansoek om versekering.

Hy het erken dat daar in bew M, wat ingehandig is, en wat 'n aansoek is om versekering, wel 'n vraag gevra word, naamlik of die applikant insolvent was of nie, en dat so 'n vraag nie in D bew G voorkom nie. Volgens Saayman kan die rede vir die verskil daaraan toegeskryf word dat bew M 'n aansoek vir versekering deur 'n maatskappy is, terwyl bew G 'n aansoek deur 'n indiwidu is om versekering. Dit was moeilik vir my om Saayman se redenasie te volg.

Venter het getuig dat hy die takbestuurder te Bloemfontein is. E Hy is sedert 1939 aktief betrokke in versekeringswêreld. Hy was onderskrywingsuperintendent by die verweerder maatskappy sedert 1967. Alle aansoeke het hy self deurgegaan om te besluit of die applikant kan aanvaar word of nie. Hy het saam met Van der Merwe gewerk as medebestuurders. Omdat daar naderhand 'n groot mate van wedywering tussen hom en Van der Merwe ontstaan F het, is besluit dat hy in vervolg homself sou toespits op die makelaarskant van die besigheid. Dit het nie beteken dat hy geen versekering sou doen nie, inderdaad was daar vyf persone wat by hom ingestap het en wie se versekering hy behartig het. Die eiser in hierdie saak was die vyfde persoon. Hy is uitgevra oor sy ondervinding in die assuransiebesigheid. Dit is duidelik G uit die eksamens wat hy geslaag het, sy ondervinding en sy kennis van versekering, dat hy sy vakgebied goed bemeester het, en 'n uitgebreide kennis van versekering gehad het.

Hy het ook bevestig dat die verweerder maatskappy nie sake met 'n ongerehabiliteerde insolvent sou doen nie. Daar is 'n goeie rede hiervoor. Die ondervinding het geleer dat daar 'n toename H in eise by sy maatskappy hier teen die end van Januarie of na die lang vakansies is. Dan kry hulle te make met fiktiewe verliese en/of gevalle waar die eis gelaai is, wat gewoonlik die gevolg daarvan is dat mense na 'n vakansie 'n tekort aan geld het. Dit is juis hierdie aspekte wat vir hulle as maatskappy en vir alle versekeraars 'n bron van kommernis is en I 'n probleem-area daarstel. Volgens hom is die kans dat 'n persoon wat reeds betalingsprobleme gehad het en gesekwestreer is, groter om homself te vergryp aan die bepalings van die ooreenkoms as 'n persoon wat nog nie sulke probleme gehad het nie. Hierdie risiko is so aktueel dat waar daar reeds probleme ondervind word met mense wat nie voorheen betalingsprobleme gehad het nie, die maatskappy die morele risiko ingevolg van 'n J insolvent so hoog aanslaan dat hulle so 'n persoon se goedere nie sal verseker nie.

1985 (4) SA p19

DE VILLIERS R

Hy het Muller se getuienis dat op voorwaarde dat 'n premie A betaal word assuransie aanvaar word en aangeneem word, nieteenstaande die aansoeker insolvent is, verwerp. Dit, sê hy, is nie soos wat sy maatskappy met sulke aansoeke handel nie. Hy het ontken

dat hy vir die eiser in Augustus/September ontmoet het deur Potgieter, wat hom voorgestel het aan Steyn voor die B Robert Koch-gebou. Hy was van mening dat dit voor die Volkskasgebou was, maar was nie te seker hieroor nie, aangesien dit lank gelede was. Potgieter het vir hom gesê dat Steyn die man is wat reeds besigheid by die AA gehad het. Daarna het hy weer vir Steyn gesien ongeveer 30 Oktober; Steyn het by sy kantoor ingekom te Sentrakorgebou. Steyn wou 'n polis hernu. Hy het toe vir mev Avenant gevra om die rekords in verband met die C aansoek te trek. Sy sê, nadat sy die komperstrokie gekry het, dat die betrokke versekering reeds op 29 Junie 1980 verval het weens nie-betaling van premies. Hy het gesê dat alles op daardie stadium was nog presies dieselfde, behalwe dat hy die inhoud van die huis nou wou verseker vir R55 000. Hy het verwys na bew L, die komperstrokie; hy het ook verwys na polis K op D bew J, wat uitgereik was op 3 Oktober 1980.

Geen nuwe voorwaardes is in die aansoekvorm ingevul nie. Die voorwaardes van die ou polis het nog gedien as basis vir die nuwe polis; hy het geen ander gesprek met Steyn gehad nie; Steyn het glad nie aan hom aangetoon dat hy insolvent is nie; E hy het dit nie geweet nie; hy was nie bewus van enige gesprek met enige van die amptenare betrokke in sy maatskappy oor die feit dat Steyn insolvent was nie. Indien Steyn hom dit gemeld het, sou hy vir Steyn gesê het hy wil nie met hom besigheid doen nie.

Hy ken vir Potgieter etlike jare; hy was nie gretig om met F Potgieter die besigheid te doen nie, die rede daarvoor was dat Potgieter se agentskap gekanselleer was omrede sy maatskappy gesukkel het om premies wat aan Potgieter betaal is, uit Potgieter te kry. Potgieter was begerig om weer 'n agentskap by hulle te kry en as gevolg daarvan het hy dikwels by hulle G aangedoen.

Hy het verder getuig dat hulle in 1977 'n kompermasjien gekry het. Om die een of ander rede het daar 'n gerug die rondte gedoen by hul agentskappe, verteenwoordigers en plaaslike kantore dat, omdat daar nou 'n komper aangeskaf was, alle dokumente vernieig kon word, wat inderdaad gedoen is; om dié rede kon die tersaaklike stukke in die huidige saak nie H ingehandig word nie.

Mevrou Avenant het getuig dat sy by die verweerder maatskappy werk sedert Julie 1980, sy was die sekretaresse van mnr Venter. Destyds was hul kantore in Sentrakorgebou. Sy onthou dat Steyn hulle besoek het. Hy wou mnr Venter spreek; sy het vir hom deurgeneem na mnr Venter. Sy het besonderhede van die bestaande I polis van Steyn by hom gekry en met behulp van die rekenaar bepaal dat die polis reeds verval het omrede die premie nie betaal is nie.

'n Nuwe polis is uitgereik met dieselfde voorwaardes daarin vervat as die ou polis. Die bedrag waarvoor die inhoud van die huis verseker is, is verhoog na R55 000. Steyn het die premie van R450 betaal. Op 2 Oktober 1981 het sy weer vir Steyn J gesien; op daardie stadium het hy ingekom

DE VILLIERS R

A om die polis te hernu. Die polis is hernu, die huis is verseker vir R80 000 en die inhoud is verhoog na R65 000; die premies is verhoog na R618,85 wat Steyn betaal het.

Sy het getuig dat Steyn nooit aan haar genoem het dat hy insolvent was nie. Indien dit genoem is, sou sy hom onmiddellik B na haar bestuurder verwys het. Sy is opgelei om enige feit wat die risiko van 'n polis mag beïnvloed aan haar hoofbestuurder te noem.

Dit in hooftrekke is die getuienis vir die eiser en die getuienis vir die verweerder.

Die algemene indruk wat ek gekry het van die getuies is dat Steyn, net soos die getuies Venter, mev Avenant en mnr Saayman, C 'n goeie indruk op my gemaak het. Die probleem-area in hierdie saak lê egter by die getuienis van Potgieter, wat as getuie nie beïndruk het nie, en Muller, wat my allermins beïndruk het.

Potgieter het vir my die indruk gegee dat hy nie seker van sy feite was nie; hy het verder die indruk gegee dat hy maklik D iets sou sê waarvan hy nie heeltemal seker is nie. Die algemene indruk wat ek van hom kry, is dat hy praat van aspekte wat hy nie eintlik werklik iets van weet nie.

Wat Muller betref, heg ek geen waarde aan sy getuienis nie. Ek verwerp dit. Ek voel dat hy vir my nie die waarheid vertel nie, en die rede hiervoor is die volgende: wanneer hy vir my sê dat hy in die versekerings-wêreld so lank besigheid gedoen het, en E dan vir my wil kom vertel dat die feit dat 'n persoon insolvent is geen verskil maak by die uitreiking van die polis nie, is dit, tensy hy my 'n leuen vertel oor sy ondervinding, 'n opsetlike onwaarheid. Wat vir my verder tref, is die wyse waarop hy hier aan die Hof wil verduidelik dat solank 'n polis opbetaal word dit glad nie saak maak of die persoon bankrot is of nie.

F Daar is ander aspekte van sy getuienis wat my ook nie beïndruk nie; ek het nie nou tyd om daarna te verwys nie. Wanneer ek nou na die getuienis kyk van die twee getuies wat namens die verweerder verskyn het en wat my wel baie beïndruk het, Venter en mev Avenant en Saayman, die drie, dan is daar iets wat vir my opmerklik is in hulle getuienis, en dit is, G hulle getuienis is logies, hulle getuienis pas in by dit wat hulle sê is hulle maatskappy se reëling. Derdens is daar getuienis wat toon dat hierdie maatskappy mense wat insolvent is inderdaad nie sal verseker nie. Venter sê dat hy 'n persoon wat insolvent is nie sal verseker nie, Saayman beaam dit en mev Avenant sê dat indien sy hiervan bewus sou word sy dit aan haar hoofde sou noem, klink dit vir my nie alleen logies nie, maar H baie meer waarskynlik as die stelling wat gemaak was deur Potgieter en Muller.

Dit is hierdie onwaarskynlikheid in die getuienis van die eiser en sy getuies wat na my mening 'n baie groot rol speel by beoordeling van hierdie feite. Indien ek die saak benader op I die getuienis alleen is dit vir my duidelik dat ek kan peil trek op Venter se getuienis, soos aangevul deur Saayman. Beide het 'n goeie indruk op my gemaak, beide se getuienis pas in by die logiese rede waarom daar 'n groter risiko is om 'n ongerehabiliteerde insolvent te verseker. Beide het getuig dat hulle nie bewus was dat Steyn insolvent was nie. Mevrou Avenant bevestig hulle getuienis. Daar bestaan geen werklike rede J waarom die drie getuies leuens hier sou kom vertel nie. Maar veral bestaan daar geen rede

DE VILLIERS R

waarom hulle, en dit het veral betrekking op Saayman en Venter, A sou instem om die goedere van 'n ongerehabiliteerde insolvent te verseker teenstrydig met die uitdruklike beleid van hul maatskappy nie. Dit geld veral vir Venter. Steyn was nie 'n vriend of 'n kennis van hom nie. Hy was 'n wildvreemde persoon. Venter het geen voordeel uit die versekering gekry nie, hy het B nie op 'n kommissiebasis gewerk nie. Sy verhouding met Potgieter was nie van so 'n aard dat hy enige spesiale rede gehad het om die reëls van sy maatskappy te verbreek om 'n vriend van Potgieter te help nie. Trouens, uit Venter se getuienis is dit duidelik dat Potgieter 'n oorlas van homself gemaak het.

Saayman was op daardie stadium 'n inspekteur; dit was een van die hoogste poste wat in die platteland beskikbaar was; hy was C nie afhanklik van besigheid wat hy geskryf het nie. Hy het seer sekerlik nie vir Steyn geken nie en weer ontstaan die vraag, waarom sal Saayman teen geen vergoeding, teen geen voordeel Steyn verseker terwyl hy weet Steyn is insolvent? Volgens sy kennis 'n insolvent nie 'n aansoek om versekering D kan teken nie?

Om terug te keer na die waarskynlikhede: Dit is hoogs onwaarskynlik dat Venter vir die eiser sou verseker, teen sy beter wete, naamlik dat dit teen die maatskappy se beleidreëls was om 'n ongerehabiliteerde insolvent te verseker, en dit veral waar die eiser 'n vreemdeling vir Venter was en Venter E geen voordeel uit die optrede kon put nie.

Ek is van mening dat Steyn nie oneerlik is nie. Ek dink die probleem lê daarin dat Steyn aanvaar het dat die maatskappy geweet het hy is insolvent, maar dat hy fouteer wanneer hy sê dit is genoem, en die rede daarvoor is die volgende: Steyn was self van mening dat insolvensie nie 'n rol speel nie. As insolvensie dan nie 'n rol speel nie, dan vra 'n mens jou die vraag af, waarom sal hy dit noem? Om dit te koppel aan Topkor, F vind ek dit moeilik om die kloutjie by die oor te bring. Wanneer daar gepraat was oor Topkor sou dit nie noodwendig volg dat hy moet sê hy en sy vrou is ook insolvent nie, dit volg nie.

Wanneer ek die getuienis van die eiser opweeg teen die getuienis van die verweerder is

daar nie by my die minste G twyfel dat die verweerder maatskappy nie ingelig was oor hierdie insolvensie van die eiser nie.

Op die veronderstelling dat die verweerder maatskappy by monde van Muller geweet het dat die verweerder insolvent is, ontstaan die vraag of kennis aan Muller kennis aan die maatskappy is? 'n Mens is bewus daarvan dat wanneer daar aan 'n maatskappy se verteenwoordiger feite openbaar word dit nie nodig is vir die H aansoekdoener om feite te openbaar wat die maatskappy reeds van weet nie. Dit beteken nie die maatskappy as sulks nie; dit beteken die persoon wat die versekering skryf. Die stelling wat gemaak word in hierdie bew G is 'n stelling wat gemaak word en feite wat gemaak word aan die maatskappy se verteenwoordiger I wat die kontrak aangaan, nie aan 'n verteenwoordiger van die maatskappy wat nie betrokke is by hierdie kontrak van versekering nie. En daar staan dit duidelik dat hy verklaar dat die bostaande besonderhede waar en juis is, en hy geen wesenlike feite weerhou het nie.

Daardie feite moet openbaar word aan die persoon wat die kontrak met die versekerde namens die maatskappy aangaan, of daardie persoon die een is wat die kontrak namens die J maatskappy teken, en of daardie

---

1985 (4) SA p22

DE VILLIERS R

A persoon alleenlik die feite inwin waarop die persoon wat die kontrak later namens die maatskappy uitreik, maak geen verskil nie. Kennis aan 'n lid van die versekeringsmaatskappy is nie noodwendig kennis aan die maatskappy vir doeleindes van die opstelling van die ooreenkoms nie. Muller was 'n B eise-superintendent. As sulks het hy geen direkte belang gehad by die aangaan van 'n versekeringskontrak nie. Al was Nagel en Ferreira op hoogte van die feit dat die eiser insolvent was, beteken dit nie noodwendig dat Venter wat die ooreenkoms met Steyn gesluit het, daarvan bewus was nie.

Ek is derhalwe van mening dat die verweerder maatskappy nie in kennis gestel was dat Steyn 'n ongerehabiliteerde insolvent was C toe die versekeringskontrak gesluit is nie, en gevolglik word die eise van die hand gewys met koste.

Eiser se Prokureurs: *Van der Merwe, Du Toit & Fuchs*. Verweerder D se Prokureurs: *Klagsbruns*.
