ERWIN ROSLIA LUDOVIC SPRANGERS V FGI NAMIBIA LTD

CASE NO. (P)I 578/2000

2002/01/29

Maritz, J.

CONTRACT
INSURANCE LAW
LAW OF EVIDENCE

Insurance contracts – onus of proof - plaintiff bears the onus to prove the contract; its terms and that, *prima facie*, the event giving rise to the claim falls within the ambit of the risk insured under those terms - if insurer denies liability on the ground of a breach by the insured of one of the terms of the policy, the onus is on the insurer to plead and to prove such breach

Pleadings – purpose of - intended to define the issues between the parties - it enables the litigants to focus their attention during preparations for and at the trial itself on evidence necessary to address those issues and on the legal principles relevant thereto; it limits the ambit within which the court will allow the trial to be conducted and ultimately, contributes to a more expeditious and cost-effective adjudication

of the case - general denials of an unspecified nature by an insurer that the insured has failed to comply with his/her obligations under the insurance contract does not assist in defining the real issues between the parties and falls to be discouraged.

Insurance contract – meaning of “accidental loss” – includes loss as a consequence of theft

Insurance contract – duty of insured to take reasonable measures to avoid loss or damage - inappropriate to measure the contractual duty by using the same criteria as those applicable to the determination of “reasonableness” within a delictual context - must be interpreted in view of the legal relationship between the plaintiff and the defendant and with the commercial purpose of the contract in mind - purpose of the condition is to ensure that the insured will not refrain from taking precautions which he knows ought to be taken because just because he is covered against loss by the policy – element of reckless disregard of risk

CASE NO. (P)I 578/2000

THE HIGH COURT OF NAMIBIA

In the matter between:

ERWIN ROSLIA LUDOVIC SPRANGERS **Plaintiff**

and

FGI NAMIBIA LTD **Defendant**

CORAM: MARITZ, J.

Heard on: 2000/05/03; 2000/10/23 and 24

Delivered on: 2002/01/29

JUDGEMENT

MARITZ, J. : The plaintiff was insured under a “FGI Coverall” policy issued by the defendant. Amongst the risks the plaintiff sought to insure himself against, was the “accidental loss, damage or destruction anywhere in the world” of his personal property and of certain items specified in a schedule to the policy. The specified items included an 18ct gold necklace and a diamond ring.

The plaintiff claims that the necklace and ring as well as 6 pairs of earrings, 8 T-shirts and 4 leather jackets were stolen during a burglary of his family’s rented holiday chalet at Houtkapperspoort in the Western Cape. According to him, the replacement values of the necklace and the ring are N$26 640.00 and N$23 258.00 respectively. The combined value of the other items is N$20 328.00. As a consequence, he filed a claim with the defendant for indemnification under the insurance policy in the sum of N$70 226.00.

The defendant caused the claim to be investigated by an insurance assessor, one Mansfeldt. During the investigation Mansfeldt accused the plaintiff of dishonesty and, acting on his recommendation, the defendant repudiated the claim. Aggrieved by the repudiation and, incensed by the accusation of dishonesty, the plaintiff issued

summons against the defendant for payment of N$70 226.00, interest thereon and costs.

The issues.

The terms of the insurance agreement and the repudiation of the plaintiff's claim by the defendant are common cause in this action. The scope of the issues on the pleadings was further limited in the course of a pre-trial conference. As regards the quantum of the claim, the parties agreed that the defendant's obligation to indemnify the plaintiff under the policy was limited to N$49 070.00 – being N$24 000.00 for the necklace, N$20 070.00 for the ring (the "specified items") and N$5 000.00 for the other personal property of the plaintiff (the "unspecified items"). They also agreed on some of the other issues that are not material and need not be mentioned for purposes of this judgment.

According to the plaintiff only two issues remains: (a) Were all the items, in respect of which the plaintiff is claiming an indemnification under the policy, actually stolen during the burglary? (b) If so, is the defendant absolved from indemnifying the plaintiff because of the latter's failure to comply with his contractual obligation to prevent the loss as required by Clause A.1. of the policy's "General Terms and Conditions"?

Whilst the defendant agrees that those are amongst the remaining issues, it contends that there are two further ones: (c) Was the insurance policy of full force and effect at all relevant times to the insured event? (d) Did the plaintiff comply with all his other obligations in terms of the policy? In addition, it moved an amendment of its plea during closing argument and, if the Court is to allow it, a fifth issue will be introduced: (e) Is the defendant excused under Clause B.1. of the "General Terms and Conditions" of the policy from paying the plaintiff's claim by reason of plaintiff's alleged fraudulent claims in respect of some of the items allegedly stolen?

Given the manner in which the issues unfolded in pleadings; during the subsequent negotiations and in the course of the trial, counsel for the plaintiff, Mr Coetzee, challenges the existence of the third and fourth issues and opposes the application for an amendment which, if allowed, will introduce the fifth issue. Expediency requires that the issues mentioned by the defendant be dealt with earlier, rather than later in this judgment.

Was the policy of force and effect?

The *causa* of any insurance claim is, of course, based in contract. The existence of a valid and binding insurance contract between the parties that covers the risk, which is the subject matter of the claim, is a *sine qua non* for an enforceable action. The plaintiff

bears the onus to prove the contract; its terms and that, *prima facie*, the event giving rise to the claim falls within the ambit of the risk insured under those terms (*Tuckers Land and Development Corporation (Pty) Ltd v Loots*, 1981 (4) SA 260 (T) at 264D; *Eagle Star Insurance Co Ltd v Willey,* 1956(1) SA 330 (A) at 334; *Agiakatsikas, NO v Rotterdam Insurance Co Ltd*, 1959 (4) SA 726 (C) at 727G).

The defendant admits the terms of the policy of insurance issued by it. In its plea, the defendant denies that the plaintiff has complied with "all his obligations in terms of the policy and that the policy was of full force and effect at all relevant times". That denial, however, did not remain unqualified. When the defendant was asked to specify the terms of the insurance agreement which, according to it, were relevant to plaintiff's cause of action but not expressly included in his Particulars of Claim, the defendant annexed a copy of the schedule to the policy and pleaded that it too was "of force and effect on the date of the alleged loss". The first page of the policy schedule so relied on by the defendant expressly records the period of insurance to be "from 01/02/96 to 01/02/99" – i.e. inclusive of the date on which the theft took place. Furthermore, from the admitted terms of the policy it is evident that the schedule it cannot exist as a binding contractual instrument outside the scope of the policy itself. Pleading, as the defendant did, that the schedule was of force and effect at the time the

insured event took place, it admitted by necessary implication that the policy (of which the schedule was an integral part) was also of force and effect. Counsel for the plaintiff therefore assumed during his opening address and during the presentation of the plaintiff's case that the existence of a valid and binding insurance contract at the time of the alleged theft was no longer in issue.

In addition, the plaintiff also confirmed during his testimony that he was insured under the policy at the time of the theft. Mr. Heathcote, appearing on behalf of the defendant, did not take issue with him on that point. On the contrary, the cross-examination of both the plaintiff and his wife was premised on the binding nature of the policy's terms and conditions. The defendant's opportunistic attempt during closing argument to revive an issue that was no longer part of its case is therefore rejected.

Did the plaintiff comply with his other obligations?

In its plea the defendant denies that the plaintiff has complied with his obligations in terms of the insurance agreement. In the context of insurance claims, litigants will be well advised to bear the remarks of Hoexter, J.A. in *Resisto Dairy (Pty) Ltd v Auto Protection*

Insurance Co Ltd, 1963 (1) SA 632 (A) at 645A-B in mind before pleading a denial of contractual compliance in such sweeping terms:

> "There are many cases in our reports in which it has been held or assumed that, if an insurer denies liability in a policy on the ground of a breach by the insured of one of the terms of the policy, the onus is on the insurer to plead and to prove such breach. (Norwich Union Fire Insurance Society Ltd v SA Toilet Requisites Co. Ltd., 1924 AD 212 at p. 225; Gangat v Licences and General Insurance Co. Ltd., 1933 NPD 261 at p. 269; Kliptown Clothing Industries (Pty.) Ltd v Marine and Trade Insurance Co. of SA Ltd., 1961 (1) SA 103 (AD) at p. 106; Pretorius v Aetna Insurance Co. Ltd., 1960 (4) SA 74 (W) at p. 75; Merchandise Exchange (Pty.) Ltd v Eagle Star Insurance Co. Ltd., 1962 (3) SA 113 (C) at p. 114.)" (emphasis added).

General denials of an unspecified nature by an insurer that the insured has failed to comply with his/her obligations under the insurance contract does not assist in defining the real issues between the parties and falls to be discouraged. Pleadings are intended to define the issues between the parties; it enables the litigants to focus their attention during preparations for and at the trial itself on evidence necessary to address those issues and on the legal principles relevant thereto; it limits the ambit within which the court will allow the trial to be conducted and ultimately, contributes to a more expeditious and cost-effective adjudication of the case. The requirements of a fair trial demand that each party should know the case he or she will be required to meet.

An insured may have multiple obligations under an insurance contract, some hidden in the fine print thereof and others, at best, only marginally relevant to the institution or enforcement of a claim. In that context, a general denial of "compliance" in the hope that the insured may overlook one of them in the presentation of the case, thereby opening the door for the insurer to escape liability on account of the omission, does not serve justice. An insurer, who intends to rely on any contractual non-compliance by an insured as part of its defence against an insurance claim, should specifically plead the obligations that have not been complied with.

Clause A.2 of the "General Terms and Conditions" of the policy makes it "a condition precedent that any person claiming indemnity or benefit must observe the terms, conditions and endorsements of this policy, otherwise all cover shall be forfeited." Used in the context of an insurance contract, the expression "condition precedent" does not imply a suspension or resolution of the contract if not fulfilled, but rather, as Hoexter, J.A. pointed out in *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd, supra*, simply "to indicate that the so-called conditions are material terms of the contract" (at 644).

Other than the plaintiff's alleged non-compliance with the contractual duty to not to make a fraudulent claim and to prevent

loss (with which I shall presently deal), the defendant failed to refer in the pleadings or in the course of the trial to any other specific non-compliance on the part of the plaintiff. Whether the plaintiff acted in breach of his duty not to file or prosecute a fraudulent claim, depends, in the first instance, on whether the Court will find on the first question in favour of the defendant, i.e. whether all the items for which an indemnification was claimed had, in fact, been stolen. If not, the question of fraud contemplated in the application for an amendment does not arise at all. Whether the plaintiff acted in breach of a contractual duty to prevent loss, is the second question mentioned earlier in this judgment and with which I shall deal with hereunder.

Those two questions aside, the only other non-compliance suggested by the defendant (and then for the first time during closing argument) is that the plaintiff failed to adduce evidence that he had paid the prescribed insurance premiums. It has been authoritatively decided in a number of other cases that, normally, the *onus* to prove that it has been relieved of its obligation to indemnify the insured because of the latter's failure to pay the insurance premiums timeously is borne by the insurer (See e.g. *Penderis and Gutman NNO v Liquidators, Short-Term Business, AA Mutual Insurance Association Ltd*, 1992 (4) SA 836 (A) at 839G, *SA Eagle Versekeringsmaatskappy Bpk v Steyn*, 1991 (4) SA 841 (A) at 846A-G). Whether the insurer attracts such an *onus* in any particular

case, must, however, always be decided with reference to the terms of the insurance contract in question.

I find it unnecessary to grasp that nettle in the circumstances of this case: Clause A.6 of the General Terms and Conditions of the policy, which imposes an obligation on the insured to pay the agreed premium, requires of the insured to "provide proof of such payment to us (the insurer) in the event of a claim". *In casu,* the defendant admits that the plaintiff has duly notified it of the alleged theft and also that he has otherwise complied with the other contractual formalities relating to the filing of the claim. The wide scope of that admission sweeps within its ambit an admission that payment of the premium was proved at the time the plaintiff filed his claim with the defendant.

Did the loss occur?

This issue is purely a factual one. The plaintiff bears the *onus* to prove that the loss has occurred. Accepting that burden, both the plaintiff and his wife testified that the specified and unspecified items were stolen during the burglary. The defendant took issue with them on those allegations – not so much because it had any direct evidence to the contrary, but rather because the conduct attributed to them after the burglary were inconsistent with their claims.

It is common cause between the parties that the plaintiff reported a burglary at his rented holiday chalet in Houtkapperspoort to the South African police during the night of May 25, 1998. Inspector Simon and another police officer of the uniform branch at the nearby Hout Bay police station responded to the report and called on the plaintiff and his wife at the scene of the alleged burglary. In the course of a cursory investigation both the plaintiff and his wife furnished Simon with information about the burglary and the items allegedly stolen. Simon took a short statement from the plaintiff that he later passed on to Inspector Van Antwerpen of the detective branch for further investigation. Van Antwerpen interviewed the plaintiff's wife the next morning. The plaintiff was not present at the time. Van Antwerpen did not take any statement from her but agreed with her that she and the plaintiff would furnish the police with a list of the stolen items before their return to Namibia. In the course of the same morning the plaintiff's wife also mentioned the incident to certain members of the staff at Houtkapperspoort. Upon their return to Namibia they filed an insurance claim with the defendant which, after investigation, was repudiated.

The defendant repudiated the claim mainly because, according to its investigations, neither the defendant nor his wife had informed the police or the staff at Houtkapperspoort at the time of the value and other details of some of the specified items stolen and because they had informed them that only one leather jacket had been stolen,

whereas they later claimed indemnification for four. There were also other reasons for the repudiation, such as that the combined value of the stolen items recorded by the police was R1 000.00 whereas the sum of R 70 224.00 was later claimed. During the trial it became apparent that the value of R1 000.00 was not mentioned by the plaintiff or his wife and that it was merely recorded in a police computer database as a standard default value in the absence of particulars about the actual value of the items allegedly stolen.

Mr Heathcote contends on behalf of the defendant that, given the value of the ring and necklace, one would have expected the loss thereof to be foremost in the minds of the plaintiff and his wife when they reported the burglary to the police and when Plaintiff furnished a statement to Inspector Simon. I agree. The plaintiff's wife received the uniquely designed ring from him on the occasion of their marriage and the necklace on the fifth anniversary thereof. Both carried considerable sentimental value in addition to the rather substantial monetary value thereof. They were her favourite pieces and apparently the most valuable jewellery she and her husband possessed.

According to their testimony, they immediately realised that those items were amongst the goods stolen. Even if they were still uncertain about which other items had been stolen, they could have informed the police on their arrival of the loss of those valuable

items. Had they failed to mention those items in their initial reports to the police, it would have been an important consideration suggesting that the loss had not actually occurred but was later fraudulently fabricated for personal gain.

Both the plaintiff and his wife insisted during evidence that they not only mentioned the loss of the ring, necklace and four leather jackets amongst the items stolen but that they had also given a rough estimate of the value of the ring and necklace to the police. Not so, testified inspectors Simon and Van Antwerpen. Had it been mentioned, it would have been recoded either in the Plaintiff's police statement or on the docket cover. Had the police been aware that items of such considerable value had been stolen, the investigation might have been handled differently. Ms. Blow, one of the staff at Houtkapperspoort, also testified on behalf of the defendant that the plaintiff's wife only mentioned the loss of her ring, the plaintiff's leather jacket and some T-shirts during a discussion the next morning.

Considering the conflicting evidence, I must immediately mention that Inspector Simon conceded under cross-examination that he no longer had any independent recollection of the conversations that had taken place during his investigation. His recollection of some of the other events were also rather vague or, in certain respects, incorrect. Given the lapse of time and the numerous cases of a

similar nature dealt with by him, his evidence of what had been or had not been said is almost exclusively based either on what he had recorded in writing at the time or on what he, in retrospect, thought he would have done had certain facts about the stolen goods been communicated to him as claimed by the plaintiff and his wife.

He contradicted himself on whether it had been reported that all or only some of the jewellery had been stolen. He could not remember if it had been mentioned to him that all the jewellery was in one particular container and that the container was also missing. He insisted that if mention had been made of the ring and necklace or of their respective values, he would have expressly mentioned them in the statement he had taken of the plaintiff as well as in the investigation diary of the docket. He conceded though that he had thought at the time that there could have been rings and necklaces amongst the jewellery reportedly stolen but he could not even remember if he had bothered to make enquiries about it or about the value thereof. As far as he was concerned, he only took a statement to open a police docket and did not intend to investigate the crime – that, he thought, would be done by the detective branch. In any event, a list of the stolen goods had to be provided to the police the next day. He insisted (on account of what he had written in the statement of the plaintiff) that mention had been made of only one leather jacket (“ ‘n leerbaadjie”) as opposed to four.

The evidence of both the plaintiff and his wife about the theft of their property and the reports they had made to the police and Houtkapperspoort's staff is clear and detailed. The plaintiff testified that he had reported to the police that the box containing his wife's jewellery (including the ring and necklace), a bag containing the leatherjackets and some T-shirts had been stolen. He admitted that he signed the statement taken by Inspector Simon but claimed that he had done so without reading it.

His evidence was corroborated by that of his wife. She recalled in the course of her evidence how upset she had been because of the burglary and the loss of her ring and necklace in particular. When the police arrived, she continuously spoke about the incident. She made mention of the items stolen and the values of the ring and necklace. She also mentioned it to Inspector Van Antwerpen, who, according to her, was clearly not really interested in investigating yet another burglary. She also related the loss of her wedding band to the Houtkapperspoort staff but could not recall if she had made any mention of the value thereof to them.

Evaluating the conflicting evidence I must immediately say that the plaintiff's wife impressed me with the spontaneous and frank manner in which she gave her evidence. She responded to questions without hesitation and there was a natural and unaffected

flow to the answers given by her. Her testimony about why she attached so much value to the ring and necklace; why she decided to take them along on holiday; why she did not wear them the night of the robbery and her reaction when she found them to have been stolen (along with the other items) has a clear ring of truth to it. She was consistent in her answers and willing to concede on points that might have had a negative impact on her husband's case. Her recollection was clear; her evidence detailed and her demeanour in the witness stand natural and exemplary.

The only real criticism of her evidence relates to the transcription she made of a number of recorded telephone conversations whilst the defendant was investigating the case. She, on one occasion, omitted to transcribe certain words. Those words, the defendant contends, were crucial to the question whether she had mentioned the value of the ring and necklace to the police. I have considered them and they seem to be somewhat ambiguous and also rather difficult to hear. The plaintiff's wife is not a trained or experienced transcriber and given the available transcription facilities and the audibility of the recording, I am satisfied that the words were omitted because of a *bona fide* oversight. I am also of the view that the ambiguity of the words (in the context of the conversation as a whole) does not derogate from her evidence in any significant respect.

Although he was not as impressive a witness as his wife, the plaintiff's evidence is corroboratory of and, almost in all respects, consistent with that of his wife. He did not contradict himself in any material respect and he appeared most aggrieved by the assessor's suggestions of dishonesty in the submission of his claim. He too, clearly recalled the incident and persuasively related the facts to Court. His demeanour in the witness stand was satisfactory.

The same cannot be said for the quality of the evidence given by witnesses on behalf of the defendant. I have already alluded to some of the unsatisfactory elements in Simon's evidence but I do not find any deliberate dishonesty in his evidence. He frankly admitted that his recollection was limited and mainly based on the statement taken by him at the time. Given the frequency of similar crimes reported to and investigated by him before and after the incident as well as the time that had lapsed since then, the vagueness of his recollection is understandable.

What then is the significance of the variations between the statement of the plaintiff as recorded by Simon and the plaintiff's later claims? The statement is a very short one – intended, as Simon testified, for a police docket to be opened. By his own admission, he did not investigate the crime - that, he thought, would be done by the detectives in due course. It was a routine case without any apparent clues that he attended to late at night. The responsibility

to investigate it was not his and further details, if needed, could be obtained by detectives to whom the docket would be allocated for further investigation. Hence, the brevity of the statement. Many important particulars were not recorded and, given the expectation that a list of stolen items and their values would be furnished at a later stage, I am not surprised that the statement did not specify the ring and necklace as having been amongst the stolen jewellery or, for that matter, the value thereof.

As to the number of leather jackets stolen, there could have been a misunderstanding. They were all in one bag. Whether Simon thought the reference to “one” related to the number of jackets missing notwithstanding the plaintiff’s referral to them in the plural or picked up from the plaintiff’s wife’s incessant talking that evening that inside the bag were two leather waistcoats and two matching jackets is difficult to say. Given his lack of independent recollection, Simon was for obvious reasons unable to assist. It leaves at least the possibility of a misunderstanding. The plaintiff, knowing that he still had to furnish a list of the stolen items, did not read the statement and failed to notice or to correct the misunderstanding.

The reasons cited by the plaintiff’s wife for having taken her wedding band and anniversary necklace along on holiday are convincing. So too are her reasons for not taking them along the evening in question. Given the limited nature of the amendment

being sought by the defendant, it seems that it is not really any longer in dispute that the burglary had occurred. It was not suggested in cross-examination to the plaintiff or his wife that they had simply simulated a “burglary”. But even if it is still disputed, I am satisfied on the evidence that it had taken place. The combination of these considerations bears favourably for the plaintiff on the probabilities of the case.

Having already made an initial report to the police and having been requested to furnish a written list of the items stolen and their values in due course, one does not expect the same degree of spontaneity in disclosure during subsequent interviews with the police. The disclosure made to Inspector Van Antwerpen and to the staff at Houtkapperspoort nevertheless bears on the honesty of the plaintiff’s claims.

Inspector Van Antwerpen testified that he had asked the plaintiff’s wife the day after the burglary about the items stolen. She made mention of her jewellery, a leather jacket and some clothes. He did not ask her about the type or the value of the missing jewellery. When he wanted to complete the list of missing items, she indicated that she could not furnish him with the exact values thereof and they agreed that she and the plaintiff would compile the list in due course and bring it to the police station before their departure. They did not do so and only after he had closed the docket and the

insurance assessor had made inquiries, did the plaintiff telefax a list to him.

Ms. Blow, one of the staff at Houtkapperspoort, testified that the plaintiff's wife had spoken to her about the burglary at about 10h00 the next day – apparently before Inspector Van Antwerpen arrived on the scene. She was very upset and specifically mentioned that her ring had been stolen. She cannot recall that any value was mentioned in connection with it, but, according to her, would have remembered it had that been the case. Mention was also made of a leather jacket of her husband and of some T-shirts. She later related the report to Mr. Mansfeld, the insurance assessor. She admitted that she had been telephoned by the plaintiff's wife about a report she had allegedly made to Mansfeld but testified that she had declined to discuss the matter. When confronted with a transcript of the recorded conversation, she denied that she was a participant in that conversation, saying amongst others, that she could not speak Afrikaans. However, after she had been afforded an opportunity to listen to the tape recording of the conversation, she agreed that the recorded voice sounded like hers but maintained that she could not remember the conversation. Her evidence is unsatisfactory in a number of respects and should, in my view, be approached with circumspection.

The evidence of Inspector Van Antwerpen is also unsatisfactory in some respects. He conceded that he might not have received the list of stolen items allegedly handed in by the plaintiff at the Hout Bay police station because it could have been mislaid by a police officer, yet surprisingly, shortly after making that concession boldly insisted that the plaintiff's evidence that he had delivered the list to an officer at the police station was untrue. According to him, he asked the plaintiff's wife which items had been stolen and she mentioned exactly what the plaintiff had said in his earlier statement. If he was interested in more details than that contained in the statement, why did he not ask for more? Why did he not take a statement from her? If the plaintiff's wife had mentioned earlier the morning to Ms. Blow that she was upset about the loss of her wedding band, what are the likelihood that she would not have mentioned at least the wedding band to Van Antwerpen – and if she did not mention the loss of that item (as he testified) can an adverse inference be drawn if she had also failed to mention to him the loss of her necklace?

Considering the evidence as a whole and for the reasons earlier stated, I am satisfied that the plaintiff has proven on a balance of probabilities that the specified and unspecified items for which he is seeking an indemnification from the defendant had been stolen during the burglary at Houtkapperspoort on May 25, 1998.

Does "accidental loss" include loss as a consequence of theft?

The defendant has a two-trenched defence against the claimed obligation to indemnify the plaintiff. Firstly, it argues that loss of an article as a consequence of theft is not an "accidental loss" contemplated under the multi-risks section of the policy. The fall-back argument is that, in cases of loss as a consequence of theft, the clause operates to exclude liability if the insured fails to take reasonable steps to prevent the theft and that, on the facts, the plaintiff has failed to do so.

As regards the first defence: A similar view was initially taken on the pleadings but later abandoned by counsel and dismissed by King J in *Paterson v Aegis Insurance Co Ltd,* 1989 (3) SA 478 (C) at 481D:

> "Although it was initially in issue it was conceded at the trial - and correctly so - that the circumstances of the loss (i.e. theft) constituted an accident and that accordingly the disappearance of the chain was an accidental loss within the context of the indemnity provided by the all risks section of the policy."

That the word “accidental” is also so understood and applied in the insurance industry is apparent from the insurance agreement referred to in *Bulldog Hauliers (Pty) Ltd v Santam Insurance Ltd,* 1992 (1) SA 418 (W) at 419G.

But not only is the submission without substance, it also derogates from the admissions made by defendant in its plea: The plaintiff’s allegation that the defendant undertook to indemnify him “for the theft or loss” of the specified and unspecified items in terms of the policy, was admitted. The defendant did not retract that admission and is bound by it.

Is the defendant absolved from indemnifying the plaintiff because of the latter’s alleged breach of Clause A.1. of the policy?

The defendant pleads that it is absolved from indemnifying the plaintiff as a consequence of the latter’s breach of Clause A.1. of the policy’s “General Terms and Conditions” because he had failed to take reasonable measures to prevent the loss of the specified and unspecified items. That clause, which applies to the entire policy, reads as follows:

> “You shall
> (i) exercise all due care and precaution, and/or
> (ii) do all things reasonably necessary and/or required in order to

(a) ensure and maintain the safety of the property insured; and/or

(b) keep such property in a proper and efficient state of repair

so as to prevent any loss, damage or accidents of whatsoever nature from occurring."

The plaintiff, on the other hand, submits that Clause A.1. must not be read in isolation but in the context of the insurance policy as a whole and that, if so interpreted, he did not act in breach thereof. In support of those contentions, Mr. Coetzee, refers to the commercial object of the policy in general and of the multi-risks section thereof in particular.

Clauses imposing on the insured a duty to prevent loss of or damage to the insured property, although not always similarly worded, have almost become a standard in short-term insurance policies. Thus, they have been the subject of judicial interpretation in a number of cases in this and other jurisdictions. Although there is a substantial degree of consistency when it comes to the approach to be adopted to the interpretation of such clauses (compare for example the restatement of the law in that regard by Smalberger JA in *Fedgen Insurance Ltd v Leyds,* 1995 (3) SA 33 (A) at 38B-E), judicial views differ on the actual meaning thereof.

As Comrie J pointed out (in *Santam Ltd v CC Designing CC,* 1999 (4) SA 199 (C) at 204B-211C) during an analysis of judicial precedent in

point, one finds on the one end of the scale the judgement of Margo J in *C & B Motors (Pty) Ltd v Phoenix of SA Assurance Co Ltd,* 1973 (3) SA 919 (W) and on the other end that of Holmes J in *Nathan NO v Ocean Accident and Guarantee Corporation Ltd,* 1959 (1) SA 65 (N). Interpreting a similar clause in determining the liability of Phoenix Assurance, Margo J held (at 923G of the judgement) that "(i)t involves the simple test of whether or not the plaintiff, or those responsible for the conduct of its affairs, were negligent in regard to the precautions taken by them for the safety of the money". Holmes J, on the other hand, expressed the view that the insurer would be liable irrespective of such negligence (or even recklessness) on the part of the insured when he said at 74A of the judgment:

> "For the purposes of this judgment I think that it is sufficient to say that in my view condition 6 does not apply to negligent or reckless driving on the part of the insured. If the insurers had intended this condition to exclude liability for such driving, it would have been simple to say so explicitly. The words used being vague, the *contra proferentem* rule must be applied. I stress that at the outset of the policy (s 1) the company undertakes (subject to the conditions, etc) to indemnify the insured against "loss or damage to any motor car described in the schedule hereto''. That is a perfectly clear statement and I think that it would need a perfectly clear condition or exception to whittle down the undertaking."

Comrie J prefers the view somewhere in between. He concludes (at 211B-C):

> "In my opinion, what the appellant insurer had to show in order to take advantage of condition 5 was that the insured, through Cloete, acted recklessly in the sense explained by Diplock LJ in *Fraser v Furman* (supra at 61) and emphasised by Roskill J in *Lane v Spratt* (supra at 171-2). The questions to be asked are thus: whether Cloete recognised the dangers to which he was exposed; and, if so, whether he deliberately courted them by taking measures which he himself knew were inadequate to avert them, or about the adequacy of which he simply did not care."

Some justification in the degree of divergence in the judicial views expressed may perhaps be attributed to semantic and contextual differences in the clauses and insurance contracts that the learned Judges were called upon to interpret. As Comrie J was quick to point out at 210J of his judgement in the Santam-case "(i)t is conceivable that a term in one policy may have a different meaning and effect to the same or a very similar term when found in another policy".

What is clear, however, is that it is inappropriate to measure the contractual duty imposed on an insured to take reasonable steps to prevent loss or damage by using the same criteria as those applicable to the determination of "reasonable conduct" within a delictual context. For example: Whilst the owner-driver of an insured motor vehicle involved in a collision may be guilty of negligent driving, his or her negligence can hardly be raised by the insurer to

avoid liability under an insurance agreement intended to cover just such a risk.

Indemnification against loss or damage resulting from a risk insured against is the primary commercial purpose of short-term insurance cover – whether the insured was blameless in the event or not. If an insurer intends to limit its exposure only to the risk of loss or damage occasioned by blameless acts or omissions of the insured, it will have to stipulate that in the clearest of terms. Doing so, will so significantly reduce the cover normally extended under insurance agreements of that nature that it will make little commercial sense to include in such contracts insurance cover for loss or damage caused to third parties by the insured.

I am of the view that clause A1 of the "General Terms and Conditions" of the policy must be interpreted in view of the legal relationship between the plaintiff and the defendant and with the commercial purpose of the contract in mind. Within that context the phrases "exercise all due care and precaution" and "do all things reasonable, necessary and/or required" mean, as "between as the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that …(the insured's)… omission to

take any particular precautions to avoid accidents should be negligent; it must be at least reckless, i.e. made with actual recognition by the insured himself that a danger exists, not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not refrain from taking precautions which he knows ought to be taken because he is covered against loss by the policy" (per Diplock LJ in *Fraser v B N Furman (Productions) Ltd (Miller Smith & Partners, Third Parties),* [1967] 3 All ER 57 (CA) at 60I).

This interpretation is reinforced when one considers that the "multi-risks" section of the policy extends the indemnity to "accidental loss, damage or destruction anywhere in the world" of articles specified in the policy. In *Paterson v Aegis Insurance Co Ltd,* 1989 (3) SA 478 (C) at 482D-483H King J remarked on the interpretation of a similar clause tht negligence excludes liability under the all risks cover in an insurance policy:

> "In fact I have a number of difficulties with this proposition. In the first place it seems to me to cut across and undermine the whole concept of all risks insurance. This type of insurance obviously does not cover such contingencies as inherent vice, ordinary wear and tear and the wilful or unlawful act of the insured, but I would assume, unless I was driven to a contrary conclusion, that the one contingency it did cover, pre-eminently, when it speaks of 'accidental loss', is loss occasioned by the negligence of the insured.

My apprehension is, I believe, based on a firm foundation. Goddard LJ is reported in *Woolfall & Rimmer Ltd v Moyle and Another* [1941] 3 All ER 304 (CA) at 311 to have said concerning a similarly worded clause that if it was to be interpreted as requiring the insured not to be negligent it would be tantamount to the insurer's saying 'I will insure you against your liability for negligence on condition that you are not negligent'. If the 'condition' is to be interpreted in this way then it will be incompatible with the indemnity which the all risks section provides and, if one bears in mind that one of the objects of this type of insurance is to protect the insured against the consequences of his own negligence, then in my view a court must endeavour to reconcile the two apparently repugnant provisions and do so in a way which will uphold the policy, and if this cannot be done then it seems to me that the provisions which would be destructive of the insurance cover should be disregarded. The policy must if at all possible be given commercial efficacy. The commercial object of the policy is to indemnify the insured for the consequences of his negligence. In my view this must be taken to have been the intention of the parties when they contracted. It cannot have been the intention that the insurer would be able to avoid a liability if it could establish negligence on the part of the insured, that being the very conduct which the all risks section was intended to cover.

... Plaintiff has paid a high premium for this cover, and the higher the premium rate the more extensive the risk which is covered, and in my view it would seriously undermine the purpose of the cover, be destructive of the commercial efficacy of the policy and not be a true reflection of the intention of the parties if the policy was to be interpreted so as to entitle the insurer to avoid liability under the all risks section where the insured has been shown to be negligent in the sense discussed above...

> This is in keeping with the well-established rules of interpretation particularly applicable to insurance policies. Thus: the Court will incline towards upholding a policy and will interpret it, where the true interpretation is not clear, in favour of the insured - see *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co Ltd* 1961 (1) SA 103 (A) at 108; *Pereira v Marine and Trade Insurance Co Ltd* 1975 (4) SA 745 (A) at 752; limitations placed by an insurer on a clearly expressed obligation to indemnify are to be restrictively interpreted - see *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* 1964 (1) SA 349 (A) at 354 - because it is the duty of the insurer to make clear what it wishes to exclude - see *Price and Another v Incorporated General Insurances Ltd* 1983 (1) SA 311 (A) at 315 (where an earlier Appellate Division decision to this effect is quoted with approval); *Lourens NO v Colonial Mutual Life Insurance Society Ltd* (supra at 392).
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> The condition here is not clear, certainly insofar as it purports to apply to the all risks section; it should not be construed so as to entitle the insurer to avoid liability where the insured has been negligent for that would be to render the cover for accidental loss nugatory and manifestly this was not the intention of the parties; the object of the insurance must not be defeated or rendered practically illusory as it would indeed be if an accidental loss occurred and the insurer was able to avoid liability by the application of the 'reasonable precautions' provision in such a way as to abrogate its obligation to make good the loss merely on the basis of the negligence of the insured."

In considering whether or not the plaintiff acted in breach of his duty to prevent a loss, I must bear in mind that "if an insurer denies liability in a policy on the ground of a breach by the insured of one

of the terms of the policy, the onus is on the insurer to plead and to prove such breach." (per Hoexter J in *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 644G and the authorities referred to by him. See also: *Marine and Trade Insurance Co Ltd v Van Heerden NO* 1977 (3) SA 553 (A) at 558D; *Waksal Investments (Pty) Ltd v Fulton* 1985 (2) SA 877 (W) at 883G; *Fulton v Waksal Investments (Pty) Ltd* 1986 (2) SA 363 (T) at 377 and *Paterson v Aegis Insurance Co Ltd* 1989 (3) SA 478 (C) at 481G).

The evidence of the plaintiff and his wife are that, given the high crime rate, they had security concerns about their intended holiday in the Western Cape. For that reason they specifically enquired about the safety and security at Houtkapperspoort holiday chalets when they made a reservation for their stay. The employee who took the reservation assured them that it was "a very safe" resort and that they had never had a burglary before. On arrival the plaintiff scouted around to satisfy himself about the security of the place. He noticed that the resort was fenced in. The fence running parallel to the road was constructed with wood. The wooden uprights were secured tightly next to one another. From the photographs handed up as exhibits, it is apparent that the fence was of a reasonable height and solidly constructed. The other fences were constructed with poles and wires. They appeared to be electrified. Access to the resort was via a road with electrically operated booms across it. The road went past, what appeared to be a guardhouse. There were

personnel on duty for 24 hours of the day. They thought that the person on night duty was a security guard. The rented chalet inside the resort could be locked. There was, however, no security gate in front of the door and the windows did not have burglar bars in front of them. The cupboards inside the chalet were not lockable.

Although the plaintiff's wife was aware of a safe deposit facility at the resort's offices, it was only available for use between 08h00 and 16h00 daily and she decided not to make use of it. She explained that she wore her ring, necklace and a set of earrings every day. She would normally take them off at night. That was also what she did the day in question. She stored them together with her other earrings in a wooden jewellery box, which, in turn, was hidden underneath clothes on the top shelve of one of the cupboards. When, on the spur of the moment, they decided at about 20h30 to eat out, they left the chalet without dressing up. They made sure that all the windows were closed and that the door was locked before departing. Shortly after their return they noticed that the chalet had been burgled.

The defendant can hardly complain about the fact that the plaintiff's wife decided to take some jewellery (including the specified items) along on holiday. Not only did she attach sentimental value to them (the ring was her wedding band and the necklace a 5th anniversary gift) but also, admittedly concerned about her appearance, she liked

to adorn herself. It was undoubtedly for those reasons that the plaintiff incurred the extra expense of taking out special risks insurance to cover their loss “anywhere in the world”. There would have hardly been a need for such insurance if the items always remained locked in a bank’s vault. The defendant accepted that risk and required of the plaintiff to pay an extra premium for the cover.

Mr Heathcote suggests that she should have locked the items in the safe deposit box at the resort’s offices. The facility is only offered in respect of personal valuables and I do not understand him to submit that the stolen clothes should have been stored there. It is of no consequence in this case that she had failed to store the stolen earrings there because, even if the claim in respect of the earrings would have been disallowed, the value of the remaining unspecified items well exceeds the maximum of N$5000.00 allowed in terms of the policy for personal effects.

The only remaining question is whether she should have made other arrangements about the ring and necklace. She wore those items daily. Being on holiday, one can hardly expect her to rush back every day before 16h00 to lock away the specified items and again wait until 08h00 the next day to collect them before departing for the day’s sightseeing! She and the plaintiff did not plan to go out the evening. When they decided to do so, the safe deposit facility was no longer available. At that point in time she had to choose

between taking the jewellery along or leaving them stored away behind closed doors in an area she thought was safe and secure. So satisfied was she about the security of the area that she did not even entertain the thought that their chalet would be burgled.

It seems to me that with an increased tendency of crime at night, the odds of being robbed at gunpoint was about as good as that of a burglary in the circumstances I have referred to earlier. Had she taken the specified items along and lost it during a robbery, would the defendant have taken the view that she should have elected to leave the items behind in the secure resort?

In my view, the defendant failed to prove that the plaintiff had acted in breach of his duty to prevent loss of the items in question. It did not establish on the evidence that the plaintiff or his wife was negligent by leaving the items locked in a chalet at the resort, let alone that they subjectively recognised and considered the possibility that the chalet could be burgled; that the items could be stolen and that they deliberately courted that possibility by taking measures which they knew were inadequate to avert the theft or simply did not care whether they would be stolen or not. Even if they should have been aware of the possibility of a theft, they acted in my view prudently in the circumstances when they locked the items inside a chalet (out of sight of a person passing by) in a resort,

which they bona fide believed to be secure and with no history of burglaries.

The amendment

In the course of closing argument, the defendant applied for an amendment of its plea by the introduction of an alternative plea at the end of paragraph 5.2 thereof in the following terms: “In the further alternative, the defendant is entitled to repudiate the plaintiff’s claim in that in breach of clause B.1 of the General Terms and Conditions of the insurance contract the plaintiff claimed and/or instituted and/or persisted with the claim in relation to 3 leather jackets and/or a necklace and/or a ring in a fraudulent manner.”.

Although the amendment is opposed by the plaintiff, I am satisfied that the issues raised by the amendment have been thoroughly canvassed in evidence and traversed in argument and that the plaintiff will not be prejudiced if it were to be allowed. Hence, the application is granted and the defendant’s plea is accordingly amended. No costs were occasioned by the amendment and none is allowed.

In view of the earlier findings of this Court that the four leather jackets, the ring and the necklace were amongst the items that had been stolen during the burglary, it follows that the plaintiff’s claim

for indemnification in respect of those items were not shown to be fraudulent as alleged in the amended plea.

In the result, the following order is made:

1. Paragraph 5.2 of the defendant's plea is amended by the addition of the following sentence at the end thereof:

   "In the further alternative, the defendant is entitled to repudiate the plaintiff's claim in that in breach of clause B.1 of the General Terms and Conditions of the insurance contract the plaintiff claimed and/or instituted and/or persisted with the claim in relation to 3 leather jackets and/or a necklace and/or a ring in a fraudulent manner."

2. The defendant is ordered to pay to the plaintiff -

   (a) the sum of N$49 070.00

   (b) interest on the sum of N$49 070.00 calculated at the rate of 20% *per annum* from 20 September 1998 to date of payment and

   (c) costs of suit.

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Maritz, J.