Santam Bpk v CC Designing BK
[1998] 4 All SA 70 (C)

Division:	Cape of Good Hope Provincial Division
Date:	13 August 1998
Case No:	A74/98
Before:	Comrie, Fagan and Desai JJ
Sourced by:	G Josman and ML Sher
Summarised by:	L Bejai

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Contract – Insurance – Interpretation – An important purpose of motor insurance is to procure cover in respect of the insured's own negligence – Obliges the insured to take all reasonable steps and precautions to avoid accidents and losses – The Court must consider whether the insured recognised the dangers to which he was exposed and if so, whether he deliberately courted them by taking measures which he knew himself were inadequate to avert them.

Insurance – Obliges the insured to take all reasonable steps and precautions to avoid accidents and losses – The Court must consider whether the insured recognised the dangers to which he was exposed and if so, whether he deliberately courted them by taking measures which he knew himself were inadequate to avert them.

Interpretation – Insurance agreement – The Court favoured a restrictive interpretation which excludes liability for reckless conduct whether in the driving of the motor vehicle, its maintenance or it's safekeeping – The Court held that the question was whether the insured had been reckless in the manner in which he sold the motor vehicle – The issue was one of fact i.e. what the insured actually foresaw, how he in fact reacted and his state of mind in conducting himself as he did.

Editor's Summary

The Appellant (an insurance company) had insured a motor vehicle belonging to the Respondent. The principal risk underwritten was defined as: "Verlies van of skade aan enige voertuig wat in die bylae beskryf word en die toebehore en onderdele daarvan ...". The policy was subject to a number of "general conditions", one of which provided: "Die versekerde moet alle redelike stappe doen en voorsorgmaatreëls tref om ongevalle en verliese te voorkom" ("Condition 5").

The Respondent represented by one "Cloete" decided to sell the insured motor vehicle. It was subsequently advertised. Cloete negotiated with a potential buyer, one "Solly" who offered to buy the vehicle for R150 000-00. Cloete had requested that the payment be made in cash. Over a weekend Solly advised Cloete that the money had been deposited in cash into the close corporation's bank account and that he had faxed a copy of the deposit slip to Cloete's office. As it was a weekend, Cloete requested the manager of the bank (who was a friend) to check whether the monies had in fact been deposited and whether it was by cash or cheque. The manager confirmed that the money had in fact been deposited but he could not confirm whether payment was by cash or cheque. Cloete then handed the motor vehicle to a person acting on behalf of Solly. Two days later when Cloete telephoned the bank to confirm that he could draw a cheque to settle the balance owing on the hire-purchase, he was advised that the cheque deposited by Solly was fraudulent and that the credit had been reversed.

The Respondent instituted an action against the Appellant for payment in respect of the loss of the motor vehicle. The Appellant's defence on the merits was that the Respondent had failed to take all reasonable steps and precautions to avoid the loss of the insured motor vehicle and was accordingly in breach of Condition 5 of the Insurance policy. The court *a quo* found that the Appellant had not proven that Cloete had been negligent and accordingly found in favour of the Respondent. The instant case was an appeal against this order. The Court was required to consider the interpretation of Condition 5 in the light of the policy as a whole.

Held – The cover afforded by the policy ("omskrewe gebeurtenisse") was widely stated (loss of or damage to any insured vehicle) and included loss or damage caused by the negligence of the respondent or someone acting on its behalf. An important purpose of motor insurance is to procure cover in respect of the insured's own negligence. Condition 5, however, obliges the insured to take all reasonable steps and precautions to avoid accidents and losses. The Court pointed out that the taking of reasonable precautions as between the insured and the insurer was not necessarily the same as absence of negligence in the delictual sense. *In casu* the Appellant had to prove that the Respondent had acted recklessly. The issue was thus whether Cloete recognised the dangers to which he was exposed and if so, whether he deliberately courted them by taking measures which he knew himself were inadequate to avert them.

The Court favoured a restrictive interpretation of Condition 5 which excludes liability for reckless conduct whether in the driving of the motor vehicle, its maintenance or it's safekeeping. The Court held that the question was whether Cloete had been reckless in the manner in which he sold the motor vehicle. The issue was one of fact i.e. not what Cloete should have reasonably foreseen or how he ought prudently to have acted, but what he actually foresaw, how he in fact reacted and his state of mind in conducting himself as he did. On the facts the Court held that Cloete had not acted recklessly as alleged by the Appellant.

The appeal was accordingly dismissed with costs.

Notes

For Insurance, see *LAWSA* (Vol 12, paragraphs 1-412)

Cases referred to in judgment

("**C**" means confirmed; "**D**" means distinguished; "**F**" means followed and "**R**" means reversed.)

South Africa

Aetna Insurance Co v Dormer Estates (Pty) Ltd 1965 (4) SA 656 (N)

Auto Protection Insurance Co Ltd v Hanmer-Strudwick 1964 (1) SA 349 (A)

C & B Motors (Pty) Ltd v Phoenix of SA Assurance Co Ltd 1973 (3) SA 919 (W)–**D**

De Wet v Santam Bpk 1996 (2) SA 629 (A).

Fedgen Insurance Ltd v Leyds 1995 (3) SA 33 (A)

Kruger v Coetzee 1966 (2) SA 428 (A)

Nathan NO v Ocean Accident and Guarantee Corporation Ltd 1959 (1) SA 65 (N)

Paterson v Aegis Insurance Co Ltd 1989 (3) SA 478 (C)

Price and another v Incorporated General Insurances Ltd 1983 (1) SA 311 (A)

S v Beukes en 'n ander 1988 (1) SA 511 (A)

S v Van As 1976 (2) SA 921 (A)

Theodorides v AA Mutual Assurance Association Ltd 1986 (3) SA 906 (O)

Turdeich v *National Employers' General Insurance Co Ltd* 1982 (2) SA 219 (C)

Waksal Investments (Pty) Ltd v Fulton 1985 (2) SA 877 (W)

United Kingdom

Fraser v BN Furman (Productions) Ltd [1967] 3 All ER 57 (CA)

W & J Lane v Spratt [1970] 1 All ER 162 (QBD)

Woolfall & Rimmer Ltd v Moyle and another [1941] 3 All ER 304 (CA)

Judgment

COMRIE J

This is an appeal from a decision of Selikowitz J in the Eastern Circuit Local Division sitting at George. Leave to appeal to this Court was granted by the learned trial Judge.

The appellant is an insurance company. Under a written policy it insured two motor vehicles belonging to the respondent close corporation, one of them being a 1995 Mercedes Benz C220. The principal risk underwritten was defined as:

"Verlies van of skade aan enige voertuig wat in die bylae beskryf word en die toebehore en onderdele daarvan ..."

There was an extension of risk in respect of certain passengers. The policy was subject to a number of so-called "general conditions", one of which provided:

"5. *Voorkoming van verlies*

Die versekerde moet alle redelike stappe doen en voorsorgmaatreëls tref om ongevalle en verliese te voorkom."

The facts giving rise to the claim were in outline as follows. The respondent, represented by one Cloete, decided to sell the Mercedes, which was accordingly advertised in the "Burger" newspaper. Thereafter, Cloete was persuaded to advertise the Mercedes in a trade magazine, SA Auto Trader, which afforded wider coverage. In response to the latter advertisement Cloete was contacted telephonically by one Solly, who claimed to be from Rustenburg, though he

seems also to have had a connection with Pretoria. In the course of the next few days, again over the telephone, Cloete and Solly negotiated the sale of the Mercedes for R150 000 in cash. It should be noted that Solly agreed to purchase the vehicle without first having seen it and without having sent someone to examine it on his behalf. Solly relied on verbal assurances given by Cloete. The price was to be paid into a bank account in George controlled by Cloete. It was to be transferred to that account from a bank elsewhere to which Solly would pay the money.

On a Saturday afternoon Solly telephoned Cloete to advise that he had faxed a copy of a deposit slip from a

bank in Pretoria reflecting a deposit in an amount of R160 000 (and not R150 000) in favour of Cloete's account. Cloete went to his business and retrieved the fax, which appeared to bear out what Solly had told him. Because Cloete knew his own bank manager personally, one of the staff (Wolmarans) was sent to the bank that same afternoon. Wolmarans was able to confirm to Cloete that R160 000 had been received by his branch, but he was unable to say whether the deposit in Pretoria was by cheque or in cash. The rather poor quality faxed copy of the deposit slip (about which more later) suggested to Cloete that the deposit was in cash. He asked Solly about this and accepted Solly's confirmation that it was indeed cash. Cloete resolved to proceed with the transaction. The arrangements were that Cloete would deliver the Mercedes to Solly more or less halfway at Bloemfontein the next day (Sunday); that the overpayment of R10 000 would be sorted out in the course of the following week; and that once the balance of the hire purchase agreement had been paid off, Cloete would send the registration papers to Solly (though he does not appear to have had Solly's address).

The next day Cloete and a friend travelled to Bloemfontein where, at a service station, the Mercedes was delivered to an unknown man representing Solly. Cloete returned to George with his friend. During the following week it emerged that what had been deposited in Pretoria was not cash, but a false cheque ostensibly drawn by "SA Meubelmark" in favour of Cloete's account. The deposit slip faxed to Cloete had been altered. The cheque was dishonoured; the credit was reversed; and the matter was reported to the police and to the appellant. The police never found the Mercedes. Cloete's telephonic means of communication with Solly dried up.

The appellant initially repudiated liability on the ground that a loss sustained in the course of a commercial transaction was not covered by the policy. By the time of the trial, however, the appellant accepted that if the Mercedes had in fact been lost, then that was a loss within the meaning of the policy. In taking this stance, the appellant was probably influenced by the decision in *De Wet v Santam Bpk* 1996 (2) SA 629 (A). The evidence established the loss in fact. The appellant's defence on merits was that the respondent, through Cloete, in breach of condition 5, had failed to take all reasonable steps and precautions to avoid the loss of the insured vehicle. The parties proposed to the trial Judge, who agreed, that this issue be tried first, while the question of the value of the Mercedes would stand over for later determination. Cloete was the only witness. After hearing argument Selikowitz J found in favour of the respondent and made a declaratory order accordingly, from which the present appeal lies.

It appears from the judgment that counsel in the court *a quo* advanced different interpretations of condition 5. It was agreed that the appellant bore the onus of proving a breach of the condition. It appears further to have been agreed that unless the appellant could at least establish negligence on the part of the respondent

– negligence measured in delictual terms by the standard of the reasonable man – then the defence would fail. Upon that basis Selikowitz J analysed the evidence and reached the conclusion that the respondent, represented by Cloete, had not been proved, on a balance of probabilities, to have been negligent. He said : "In my view, Cloete was simply caught by a sly and efficient fraudster". The learned trial Judge consequently found it unnecessary to decide the proper interpretation of condition 5.

I would prefer, however, to deal first with the interpretation of condition 5 in the light of the policy as a whole. It will be noted that the cover afforded by the policy ("omskrewe gebeurtenisse") was widely stated (loss of or damage to any insured vehicle). That was wide enough to include loss or damage caused by the negligence of the respondent or someone acting on its behalf. Thus if Cloete, for example, had driven the Mercedes negligently, and damaged it, that would have been an occurrence falling within the ambit of the insured risks, as defined. So too negligence might arise, under the passengers' extension. Indeed, it is well known, and was accepted by counsel for the appellant, that an important purpose of motor insurance is to procure cover in respect of the insured's own negligence. Condition 5, however, obliges the insured to take all reasonable steps and precautions to avoid accidents and losses. To construe the condition as an exclusion of liability where loss or damage is caused by the insured's negligence, in the delictual sense (*Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E–G), would take away a significant part of the cover afforded by the definition of the risks. The approach of our courts to provisions of this kind was recently restated by Smalberger JA in *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38B–E:

> "The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464–5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted *(Auto Protection Insurance Co Ltd v Hanmer-Strudwick* 1964 (1) SA 349 (A) at 354C–D); for it is the insurer's duty to make clear what particular risks it wishes to exclude *(French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd* 1931 AD 60 at 65; *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* (*supra* at 354D–E). A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy *(Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (A) at 108C*)*."

An earlier statement of the aforegoing approach is to be found in the judgment of Ogilvie Thompson JA in *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* 1964 (1) SA 349 (A) at 354A–F.

> "As was pointed out, in relation to this very same condition No. 6 now invoked by appellant, in *Resisto Dairy (Pty), Ltd v Auto Protection Insurance Company Ltd,* 1963 (1) SA 632 (AD) at pp 643–45, the so-called conditions of the

policy are in truth terms of the contract, and the *onus* rests upon the insurer invoking a condition to prove the breach upon which it relies. In *Pretorius v Aetna Insurance Company Ltd,* 1960 (4) SA 74 (W), a virtually identical clause to the above-cited clause 6 was, with due regard to the *onus*, considered by Snyman AJ, *inter alia*, in relation to a cut tyre; but neither that decision nor the previous cases therein mentioned dealing with, or touching upon, similarly worded clauses are of direct assistance in the present appeal.

Inasmuch as this clause 6, now invoked by appellant, places a limitation upon the obligation to indemnify expressed in clear terms in the body of the policy, the provisions of the clause are to be restrictively interpreted. For, apart from the general rules of interpretation applicable to contracts of insurance set out in *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Company of South Africa Ltd* 1961 (1) SA 103 (AD) it is specifically

> 'an accepted principle in interpreting insurance contracts that it is the duty of the insurer to make it clear what particular risks he wishes to exclude'

(*per* Wessels JA, in *French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd* 1931 AD 60 at p 65). Furthermore, while the Court will, of course, always give effect to a clear term restricting the insurer's liability, it is to be borne in mind that, as was said in *Scottish Union and National Insurance Company Ltd v Native Recruiting Corporation Ltd,* 1934 AD 458 at p 464,

> 'an insurance contract is a contract to indemnify a person against loss, and if vague language is used in a condition or exception of risk, the Court must give a reasonable meaning to such vague language.'"

See too *Price and another v Incorporated General Insurances Ltd* 1983 (1) SA 311 (A) at 315.

In the *Hanmer-Strudwick* case, *supra*, the policy obliged the insured to maintain the insured vehicle in efficient condition, coupled with an obligation to take all reasonable steps to safeguard it from loss or damage. The appeal went off on the duty to maintain, as to which Ogilvie Thompson JA expressed the opinion at 355H:

> "adopting what was said in *Lewis'* and *Barker's* cases, *supra*, the obligation to take all reasonable steps to maintain 'in efficient condition' imposed by clause 6 should in relation to tyres – with which alone this appeal is concerned – be construed as meaning no more than an obligation to take all reasonable steps to keep the vehicle's tyres in such a state as the ordinary reasonable man would consider adequate for the purpose of negotiating the hazards normally encountered on the streets and highways."

Aetna Insurance Co v Dormer Estates (Pty) Ltd 1965 (4) SA 656 (N) concerned insurance of money. James J said at 659H:

> "It is not easy to define within any degree of exactness what the 'reasonable precautions' were which should have been taken by Pyper; but it is, I think, clear that his conduct should be tested by comparing it with what the ordinary reasonable man would consider adequate in the circumstances. See *Auto Protection Insurance Co v Hanmer-Strudwick,* 1964 (1) SA 349 (A) at p 356."

In *C & B Motors (Pty) Ltd v Phoenix of SA Assurance Co Ltd* 1973 (3) SA 919 (W) Margo J went a little further. Dealing with a similar condition in respect of

similar insurance the learned Judge referred to *Hanmer-Strudwick* and *Dormer Estates*, both *supra*, and said at 923G:

> "In my view, Mr Nestadt's submission is correct. It 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."

To the extent that the policy in that case may have been intended to afford cover against loss caused by the insured's negligence, I think with respect that Margo J erred, for reasons which will appear later in this judgment. I content myself for the moment with the observation that the learned Judge read more into the remarks of Ogilvie Thompson JA at 355, quoted above, than the learned Judge of Appeal actually said.

Both counsel referred us to *Nathan NO v Ocean Accident and Guarantee Corporation Ltd* 1959 (1) SA 65 (N). The insured crashed an insured vehicle, and killed himself, while attempting to escape apprehension by the traffic police. He had what are nowadays called relevant previous convictions. One of the insurer's defences was that the insured was in breach of condition 6 which obliged him "to take all reasonable steps to safeguard from loss or damage and maintain in efficient condition". Holmes J considered South African and English authorities, and concluded at 74A:

> "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 (sec. 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."

It was accordingly held that the insured/deceased had not breached condition 6 (though on the facts, in my opinion, he drove recklessly). In excluding reckless driving from the ambit of the condition, Holmes J went with respect somewhat further than I would be prepared to go. What is instructive, however, is the substantial divergence between the opinions expressed respectively by the two learned Judges. Holmes J would have held the insurer liable even if or though the insured/deceased drove recklessly, whereas Margo J would have excluded liability under the policy for ordinary negligence.

Some other South African decisions may be mentioned briefly.

In *Turdeich* v *National Employers' General Insurance Co Ltd* 1982 (2) SA 219 (C) an all risks policy contained the following condition:

> "Duty of maintenance

(4) The insured shall take all reasonable steps and precautions to ensure the maintenance and safety of the property to which this insurance relates."

Adopting a restrictive construction, Vos J held that the plaintiff's inadvertence or forgetfulness, even if negligent, was not excluded by the condition.

In *Waksal Investments (Pty) Ltd v Fulton* 1985 (2) SA 877 (W) a high wind blew the roof off the insured building. Nestadt J had to construe a fairly lengthy

condition which among other things obliged the insured to "take all reasonable precautions for the maintenance and safety of the property insured". The learned Judge did not accept Margo J's statement in the *C & B Motors* case, *supra*, that the test was whether the insured was negligent. He said at 886G:

"I am not sure whether that is the position here. It must be remembered that it is a term of the policy that defendant indemnify plaintiff against its liability to third parties arising *inter alia* from its fault or negligence. In such a case there is authority that not every type of negligence on the part of the insured would constitute a breach. (*Turdeich v National Employers' General Insurance Co Ltd* 1982 (2) SA 219 (C).)"

The judgment on appeal [1986 (2) SA 363 (T)] in my view takes this aspect no further, but see at 372F–373C.

In *Theodorides v AA Mutual Assurance Association Ltd* 1986 (3) SA 906 (O) all risks cover was subject to a general condition 8:

"8. Die versekerde moet alle redelike voorsorgmaatreëls vir die instandhouding en veiligheid van die versekerde eiendom tref."

As I understand the judgment, Findlay AJ held that the condition was not sufficiently clear to exclude liability if there was negligence on the part of the insured.

In *Paterson v Aegis Insurance Co Ltd* 1989 (3) SA 478 (C) all risks cover was subject to a condition which read:

"The policy holder must take all reasonable precautions for the maintenance and safety of the property insured under this policy and the company will not be liable for any loss, damage, injury or liability arising from a deliberate or fraudulent act by the policy holder."

King J held on the facts that the plaintiff insured was not negligent. The learned Judge, however, expressed his grave reservations as to whether negligence was the proper test to be applied. He concluded his discussion by saying at 483F:

"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."

De Wet v Santam Bpk, *supra*, bears some resemblance to the present appeal on the facts. The insured was swindled out of his motor car by means of a false cheque in circumstances which amounted, it was held, to theft by false pretences. The vehicle was eventually located in Lesotho, but the police in that country refused to hand the vehicle back until a prosecution for theft had been finalised. The Appellate Division held that what had been stolen was the vehicle and not the proceeds of the sale. There was thus potentially a loss of the subject matter of the policy. It was held further, however, that the vehicle had not in fact been lost, because it had been found, its whereabouts were known, and the insured would get his car back (from the Lesotho police) in the fullness of time.

It was accordingly unnecessary for the court to interpret and apply precisely the same condition 5 (it was the same insurer). At 642F Corbett CJ said:

"In die omstandighede is dit nie nodig om die derde geskilpunt te besleg nie. In die verbygaan wil ek net meld dat daar heelwat verdagte omstandighede, veral in verband met die tjek, was wat appellant op sy hoede behoort te gestel het. Aan die ander kant kan die appellant tereg daarop wys dat hy die bankbestuurder oor die tjek geraadpleeg het. Ek neem dit egter nie verder nie."

These remarks were clearly *obiter*. Furthermore, the learned Chief Justice did not attempt to interpret the condition. He confined himself to a few observations on the facts. The passage which I have quoted is, with respect, of no assistance in arriving at the proper construction of condition 5.

I turn to three decisions of the English courts. The first of them is the well known case of *Woolfall & Rimmer Ltd v Moyle and another* [1941] 3 All ER 304 (CA) which was cited in some of the judgments to which I have already referred. The insured was a firm of painters and decorators. The policy insured the firm against liability to their workmen either at common law or under certain statutes. While engaged on a job, a scaffolding platform collapsed injuring three workmen and killing another. The accident was caused by the negligence of the foreman. The insurer repudiated liability *inter alia* on the ground that the insured was in breach of a condition reading:

"The assured shall take reasonable precautions to prevent accidents and to comply with all statutory obligations."

Lord Greene MR pointed out at 307H:

"In approaching the construction of that condition, it is important to remember the context in which it is found. A duty to take

care is a duty which arises by virtue of the relationship between the person on whom such a duty lies and the person towards whom it is to be discharged. That relationship may arise by contract, or it may arise by mere operation of law, by reason of the fact that two persons are thrown into a particular relationship with one another. In the present case, the duty that this condition purports to impose is a contractual duty imposed on the insured towards the underwriters, who are indemnifying the insured against a variety of risks, a very important proportion of which arises in cases of negligence either by the insured himself or by persons for whose negligence he is vicariously responsible to his employees."

And, at 308D:

"The effect of the argument of counsel for the appellants would be to exclude from the scope of the indemnity which the policy purports at the outset to give a very large and important class of case which in the body of the policy is expressed to fall within it. It is perfectly true that the document must be read as a whole, and that wide and comprehensive words of obligation imposed on the underwriter in the body of the policy may be cut down by subsequent clauses in the document, but, quite apart from any question of repugnancy – and I very much doubt whether that word is really applicable in this case – I consider that a policy of this kind is not to be approached with the idea that a large part of the benefit of the insurance, which any employers would obviously wish to get, and which is at the outset given in wide terms, is going to be eliminated by a thing called a 'condition' tucked away at the end of the policy in the context in which this condition is found."

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The learned Master of the Rolls went on to say that it was up to underwriters to make their intentions plain by using appropriate language. He continued at 309D:

"On the facts of the present case, it would appear that the insured, a limited company, employed a foreman who was obviously a competent and skilled man, and who was reasonably and rightly relied upon by his employers. They employed him, not merely to see that the company was provided with appropriate scaffolding material, but also to select from the stock in hand at any moment material which would be suitable for any particular job. It is conceded by counsel for the appellants – and quite rightly conceded in my view – that, in entrusting to this foreman the task of providing suitable and safe material for scaffolding and selecting suitable material for a particular job, the employers were taking a reasonable precaution within the meaning of condition 5. No doubt, *vis-à-vis* a workman injured through the negligence of the foreman, that would not be a sufficient answer to a claim. However, this seems to me to be irrelevant, because the question we have to answer is: "What is meant by a 'reasonable precaution' in this particular document and as between these two parties?" Counsel for the appellants, having conceded what I have mentioned, then wished to construe the condition as importing the element of what, for shortness, I have called vicarious responsibility. He says that, notwithstanding that the selection of a competent foreman for the purposes stated is the taking of reasonable precautions, the employers are in breach of the condition if that foreman is in fact negligent in carrying out the task entrusted to him, or, in other words, that the condition has the effect, so to speak, of imposing upon the assured the burden of a guarantee of the diligence of the foreman in the performance of the task which they have reasonably entrusted to him. That seems to me to be completely inadmissible. If the delegation was reasonable, and, if, in selecting that particular foreman to perform the task, the respondents took reasonable precautions, their obligation under this condition was, in my opinion, at an end. It is inconsistent to say that the delegation is reasonable and at the same time to say that negligence on the part of the delegate deprives the employer of the benefit of the policy under this condition. Counsel for the appellants says that, unless that construction is put upon the condition, it is wholly valueless. I must confess that I entirely disagree. It seems to me that there is ample scope for the operation of the condition construed in the way in which I would construe it, and what is more, a scope which gives every reasonable business protection. The fallacy (if, with respect to counsel for the appellants, I may use that expression) seems to me to lie in importing into this condition all the matters which are relevant in considering liability based on negligence towards the workman. As between employer and workman, of course, particularly in cases which fall under the Employers' Liability Act, 1880, the employer can be liable for negligence in law, not only by a personal default of his own, but also by the negligence of a fellow-employee. I see no reason at all, however, for importing that conception into the obligation which the insured undertakes towards the underwriters by this condition. It seems to me that the language is perfectly satisfied by the taking of such reasonable precautions as, on any given set of facts, would satisfy a test of reasonableness as between the insured and the underwriters. As I have said, it is eminently reasonable for employers to entrust the tasks to which I have referred to a skilled and trusted foreman on whose competence they have every reason to rely."

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Goddard LJ agreed. He pointed out at 311D:

"... we are here construing words in a contract between an underwriter and an insured, and not words in a contract between an employer and employed ... I think that, as soon as one remembers that what has to be construed is a contract between the insurers and the insured, things become reasonably clear. It is a condition which is put in for the protection of the underwriter, or perhaps one might say to limit the field of the underwriter's liability to the extent that he is saying: "I will insure you against the consequences of your negligence, but understand that I am insuring you on the footing that you are not to regard yourself, because you are insured, as free to carry on your business in a reckless manner. You are to take those reasonable precautions to prevent accidents which ordinary business people take. That is to say, you are to run your business in the ordinary way, and not in a way which invites accidents."

I have set out these extracts at length in order to emphasise the distinction which was drawn, namely that the taking of reasonable precautions as between insured and insurer is not necessarily the same thing as an absence of negligence in the delictual sense. Goddard LJ's reference to a "reckless manner" will be noted.

The second English decision is *Fraser v BN Furman (Productions) Ltd* [1967] 3 All ER 57 (CA), which also concerned an employer's liability to its employees. The relevant condition read: "The insured shall take reasonable precautions to prevent accidents and disease". Diplock LJ said at 60I:

"(iii) The third word to be construed in this context is 'reasonable'. 'The insured shall take reasonable precautions to prevent accidents.' 'Reasonable' does not mean reasonable as between the employer and the employee. It means reasonable as between the insured and the insurer having regard to the commercial purpose of the contract, which is *inter alia* to indemnify the insured against liability for his (the insured's) personal negligence. That, too, is established by the case that I have cited. Obviously the condition cannot mean that the insured must take measures to avert

> dangers which he does not himself foresee, although the hypothetical reasonably careful employer would have foreseen them. That would be repugnant to the commercial purpose of the contract, for failure to foresee dangers is one of the commonest grounds of liability in negligence. What in my view is 'reasonable' as between the insured and the insurer, without being repugnant to the commercial object of the contract, is that the insured should not deliberately court a danger, the existence of which he recognised, by refraining from taking any measures to avert it. Equally the condition cannot mean that, where the insured recognises that there is a danger, the measures which he takes to avert it must be such as the hypothetical reasonable employer, exercising due care and observing all the relevant provisions of the Factories Act, 1961, would have taken. That, too, would be repugnant to the commercial purpose of the contract, for failure to take such measures is another ground of liability in negligence for breach of statutory duty.
>
> What in my judgment is reasonable as between 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 employer'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 it 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."

The trial Judge in that case had found serious "common law negligence" on the part of insured's managing director but not recklessness. It was accordingly held by the Court of Appeal that the condition would not have excluded the insurer's liability.

The third English decision is *W & J Lane v Spratt* [1970] 1 All ER 162 (QBD). The plaintiff was a firm of haulage contractors which employed a dishonest driver without checking his references. He disappeared with a lorry (which was later recovered) and its valuable contents (which were not). The plaintiff claimed in respect of the contents under its goods in transit policy. It was subject to a "due diligence clause" which *inter alia* obliged the insured to "take all reasonable precautions for the protection and safeguarding of the goods and/or merchandise ...". Roskill J held that those words, construed in conjunction with the rest of the clause, did not extend to taking reasonable precautions in the selection of staff. Alternatively, if it did so extend, the learned Judge referred extensively to *Woolfall & Rimmer*, *supra*, and *Fraser v Furman*, *supra*, which were binding on him, and held, applying the test enunciated by Diplock LJ, that it had not been shown that the plaintiff was reckless in the way it acted even though it neglected to take reasonable precautions.

Every policy must of course be interpreted according to its own provisions. It 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. It seems to me, however, that this trilogy of cases is not inconsistent with any judgment binding on this Court, and provides a persuasive construction of condition 5 of the policy which is the subject of the present appeal. 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.

Counsel for the appellant, Mr *Van der Walt*, sought to draw a distinction between loss resulting from physical damage arising from the driving of the insured vehicle and loss occurring without such driving and damage. In the former case (e.g. a motor accident) he submitted that there was no contractual obligation on the insured to exercise due care, and that the insured would be entitled to an indemnity although he drove negligently. In the latter case (e.g. if ignition keys are left in an unlocked vehicle, which is then stolen), counsel submitted that the insured, assuming him to be negligent, would forego his indemnity. It was submitted that in this way the condition could be given a meaning which was reconcilable with the purpose and ambit of the policy. Counsel stressed that condition 5 refers to "ongevalle en verlies", whereas the definition of the risk refers to "verlies van of skade aan" the insured vehicle. I do not regard this as a material difference. An accident usually results in damage.

If there is no damage there will be no claim. The suggested interpretation is, moreover, not easily reconciled with the language of condition 5 itself which, aside from the marginal note, obliges the insured to take all reasonable steps and precautions to avoid accidents *and* losses. Furthermore, it would not cater for the case where the insured recklessly fails to have a defect in the brakes or steering repaired, leading to an accident (unless one adds in an implied term for such an eventuality). The construction which I favour, albeit restrictive, excludes liability for reckless conduct whether in the driving of the vehicle, its maintenance or its safekeeping. This reminds to record that my construction does not purport to deal with an express obligation to maintain the insured vehicle in an efficient or roadworthy condition, such as arose in the *Hanmer-Strudwick* case, *supra*.

I revert to the evidence, keeping in mind that the true enquiry, in my judgment, is not whether Cloete was negligent in the delictual or "common law" sense, but whether he acted in a reckless manner with regard to the sale of the Mercedes. It is as well to remember that the question is predominantly one of fact: not what Cloete should reasonably have foreseen or how he ought prudently to have acted; but what he actually foresaw, how he in fact reacted, and his state of mind in conducting himself as he did. Although the trial in the court below concentrated on the presence or absence of negligence, that was by no means a waste of time. It at least afforded

a useful yardstick by which to test Cloete's credibility. Furthermore, Cloete was asked some penetrating questions by counsel on both sides which were directly relevant to what I have called the true enquiry. The trial court appears to have accepted Cloete's evidence in all material respects. Sitting as a court of appeal, I do not consider that there are grounds which warrant our taking a different view of the credibility of the sole witness, save possibly with regard to what happened on the Tuesday following delivery.

The events which gave rise to the claim occurred in late March and early April 1996. Cloete was an experienced businessman, in his early forties at the time, and used to dealing with banks. He did not ascertain Solly's surname or a precise address for him. That occasions no great surprise initially, since in the ordinary course such information was of little or no importance to Cloete until the registration documents came to be completed (and the surplus R10 000 came to be repaid). That stage was never reached, as things did not follow their ordinary course. Cloete's resolve to sell for cash was a sensible precaution since in the nature of things he had had no previous dealings with Solly. The readiness of Solly to spend R150 000 on a motor car "sight unseen" does raise an eyebrow or two. It was not suggested to Cloete that the asking price was in any way exorbitant. He testified that Solly asked him about the condition of the vehicle, and the kilometres travelled, and that Solly appeared to accept his verbal assurances. Perhaps this should have sounded an alarm bell in Cloete's mind: in fact it did not do so. It can be accepted from the whole way in which the transaction developed, that Solly was a smooth and skilful operator. His failure to examine the vehicle may well not have appeared abnormal to Cloete.

Solly's first approach to Cloete occurred over a weekend. Delivery was suggested for the following day against payment of cash in banknotes. That idea was abandoned. There were further communications during the week. It was on the following Saturday afternoon (and thus out of banking hours) that events took their crucial turn. Solly telephoned Cloete to say that he had deposited the cash and that he had faxed a copy of the deposit slip to Cloete's business. Cloete fetched the fax and was wise enough to check with his bank that the deposit

had been made, and received at George. So far as I can make out from the evidence, Solly was unaware that Cloete was a personal friend of the bank manager and was thus unaware that Cloete could verify the deposit out of banking hours. Cloete was informed by Wolmarans that the money had been received in George, but Wolmarans could not say whether the deposit (in Pretoria) was in cash or by cheque. The confirmation of the receipt of the money boosted Cloete's trust in Solly, who up to then had been at the other end of a telephone, a cellular phone, and a fax, and who had done what he had promised. Wolmarans' confirmation, in my view, worked in Solly's favour, and materially influenced Cloete's decision to accept Solly's statement that the Pretoria deposit had been made in cash.

The overpayment by R10 000 certainly appears most odd, and perhaps it should have been another warning sign to Cloete. According to Cloete, Solly explained over the telephone that he had made a mistake. Cloete accepted this explanation without further enquiry into the details. In retrospect, one can see the clever purpose behind the overpayment: it was intended to reassure Cloete that his purchaser would not simply disappear with the car, since R10 000 would still be owing to him. Cloete did not claim in evidence that he was reassured in this manner, but as a matter of probability I think it would have had a subconscious effect.

As I have said, Wolmarans could not tell Cloete whether the deposit was by cheque or in cash. As an experienced businessman, accustomed to the practice of banks, Cloete was aware of the danger posed by a cheque deposit. He knew that it would take time for the cheque to be cleared, and that the credit would be reversed in the event of dishonour. He nonetheless chose to run that risk, and to accept the word of a man whom he had never met, for whom he had no independent references as to character or credit, and for whom he had no surname and no apparent address. However, the deposit slip which had been faxed through to Cloete, appeared to corroborate Solly's word. The deposit slip was subjected to close scrutiny at the trial by the appellant's then counsel; it was a scrutiny far more intense, I fear, than Cloete actually gave it on that fateful Saturday afternoon. A significant feature of this document, exh B9, was that the amount of R160 000 appeared three times: first in the space designated for cash deposits; second in the space opposite the section designated for cheque deposits; and third in the space designated for the total. The three amounts were in a downward row, but they did not add up, since the total was R160 000 and not R320 000. That was understandable because (on the faxed copy, but not on the original) the section designated for cheque deposits was blank. Exh B9 thus appeared, on a cursory perusal, to contain an unnecessary sub-total opposite the section set aside for details of cheque deposits. Through the amount of R160 000, written in the space set aside for cash, a double line appeared, almost but not quite parallel. Cloete testified that he thought that was a bank teller's mark or superscription. It was probably just that, not to confirm the cash deposit, but to close off the space provided therefor. What Solly appears to have done was the following: he deposited the false cheque at Pretoria in the name of SA Meubelmark, which name was duly entered as drawer on the deposit slip; opposite those particulars he entered the face value of the cheque, viz. R160 000, which amount he also entered as the total. Somebody, probably the teller (the writing appears thinner) added a 'zig-zag' or "Z" mark in the space designated for cash. Once the deposit was completed, Solly erased the particulars of the drawer (perhaps using Tipp-Ex) on his copy of the deposit slip, and filled in the sum of R160 000 in the space set aside for cash. It was this altered

copy which was faxed through to Cloete (exh B9). The questionable features, as I have mentioned, were the duplication of the amounts, and the lines through the cash amount.

Cloete testified that exhibit B9 did not disturb him. The overpayment was explained by Solly in advance. The duplication of the amounts did not worry Cloete, because the final total (but for the overpayment) was correct. The

lines through the cash amount he regarded as the work of the bank teller. From the beginning Cloete had insisted on cash. Solly had kept his word up to then, and had further furnished "proof" of the deposit by fax. Wolmarans had confirmed the receipt of the funds in George, thus verifying the fact of the deposit. Solly had informed him that the deposit was in cash, which he reaffirmed after Wolmarans' report. Cloete believed Solly. So far from alerting Cloete to danger, it is plain that the faxed deposit slip deceived Cloete, thereby achieving its mischievous purpose.

Mr *Van der Walt* invited us to find that although Cloete might *prima facie* have accepted Solly's word that the deposit was in cash, Cloete must in point of fact have entertained substantial doubts on the point. It suited Cloete to make delivery at Bloemfontein over the weekend rather than during the working week. All Cloete had to do, was to wait until Monday when he could have ascertained, through the bank, the true status of the deposit. Objectively speaking, it was submitted, there was no reasonable justification for Cloete to have believed Solly, at any rate without a serious mental reservation. As counsel put it, Cloete "took a chance" and reconciled himself subjectively to the possibility that the deposit may not have been in cash. We were referred: to De Wet & Swanepoel: *Strafreg* (3 ed) at 137 on *dolus eventualis*; to *S v Van As* 1976 (2) SA 921 (A) at 928 on foreseeability; and especially to *S v Beukes en 'n ander* 1988 (1) SA 511 (A). The passage in the judgment of Van Heerden JA upon which counsel particularly relied is at 522B:

> "Suid-Afrikaanse skrywers verskil van mekaar oor die vraag of naas die voorsienbaarheidselement daar in *dolus eventualis* nog 'n verdere element opgesluit lê. Diegene wat die negatiewe leer, vereis egter dat die dader die moontlikheid as 'reëel' of 'konkreet' of op 'n ander wyse byvoeglik gekwalifiseer, moes voorsien het. Hulle teenstanders vereis 'n voluntatiewe element maar gee nie inhoud daaraan nie.
>
> Daar is, sover ek kon nagaan, geen gewysde waarin pertinent beslis is dat 'n dader 'n gevolg voorsien het maar nie onverskillig teenoor die intrede daarvan gestaan het nie. Die rede is voor die hand liggend. Die kanse dat 'n beskuldigde sal erken, of dit uit ander direkte getuienis sal blyk, dat hy inderdaad 'n verwyderde gevolg voorsien het, is bitter skraal. 'n Hof maak dus 'n afleiding aangaande 'n beskuldigde se gemoed uit die feite wat daarop dui dat dit, objektief gesien, redelik moontlik was dat die gevolg sou intree. Indien so 'n moontlikheid nie bestaan nie, word eenvoudig aanvaar dat die dader nie die gevolg in sy bewussyn opgeneem het nie. Indien wel, word in die reël uit die blote feit dat hy handelend opgetree het, afgelei dat hy die gevolg op die koop toe geneem het."

This was the cornerstone of Mr *Van der Walt's* argument on the facts, as I understood him. He pointed out that Cloete did not accept Solly's first intimation over the telephone that the deposit had been made and in cash. As invited, Cloete fetched the fax message containing a supposedly true copy of the deposit slip. Further, Cloete did not accept the deposit slip at face value. He sought and

obtained verification of the deposit through his bank. As I read the evidence Cloete first wanted to know whether the money had reached George. When Wolmarans confirmed that to be so, Cloete asked whether the deposit was in cash or by cheque. Wolmarans could not answer that question. So Cloete put the question to Solly again during their second telephone call on that Saturday afternoon. Solly reaffirmed that it was a cash deposit.

I do not think that Van Heerden JA in *S v Beukes*, *supra*, intended to change the law in the way which counsel seemed to suggest. The case arose out of a robbery at a fast food café, in the course of which a policeman, who had been summoned to the scene, was shot and killed by one of the robbers. An issue which arose on appeal in relation to convictions for murder, was whether the other robbers had foreseen the possibility that someone might be killed in the course of the robbery. It was in this context that the learned Judge of Appeal discussed foreseeability. The law remains that the prosecution must prove a *subjective* appreciation or foresight on the part of an accused that death may result from certain conduct. But in deciding that question it is proper to have regard to the objective facts, which may be so compelling that an accused's denial of the relevant foresight can safely be rejected. That in my view is the true import of Van Heerden JA's remarks. Applying this approach to Cloete, the objective facts do not persuade me, as a matter of probability, that he took the chance suggested by counsel for the appellant. It is so that Cloete throughout intended this to be a cash transaction. On the Saturday afternoon he foresaw the possibility, as I have said earlier, that the deposit was not in cash. Hence his questions to Solly and to Wolmarans. When Wolmarans could not confirm that it was a cash deposit, Cloete had to make up his mind on the strength of what Solly told him, reinforced by Solly's previous conduct, by the faxed deposit slip, and by the partial confirmation emanating from Wolmarans. Cloete chose to believe Solly and the transaction proceeded accordingly. It is evident that Cloete did not foresee that Solly might be a confidence trickster bent on fraud and theft, and that Cloete did not foresee that exh B9 might in part have been falsified. Had Cloete in fact entertained such suspicions, I have no doubt that he would have acted very differently; in particular, he would not have handed over the Mercedes without some further reassurance.

Before reaching a final conclusion on this aspect of the case, it is necessary to have regard to what happened on the following Tuesday. Cloete issued a cheque for about R95 000 in order to pay off the balance owing on hire purchase. He then requested the payee not to deposit the cheque until he had confirmed that there were adequate funds in the account. Upon enquiring at the bank, Cloete received the disturbing news that Solly's deposit had been by cheque. Moreover, Solly had not kept his promise to telephone him. Cloete's explanation for checking with his bank on the Tuesday was that he wanted to make dead certain that all was right in his account, and that this was his invariable practice before writing any large cheque. The trial Judge dealt with this as follows:

> "It was also submitted that the fact that Mr Cloete, before paying out the finance company some days later checked with plaintiff's bank whether the money was in fact there was indicative of negligence. It could at best be indicative of the fact that Cloete is not telling the truth because it is indeed a valid question to ask him why, if he had already checked on Saturday afternoon that the money was there, he saw fit to check again later. His answer, however, was to the effect that it is his inevitable business practice before

issuing large cheques just to confirm that there will be money in the bank. And whilst that could be described as somewhat quirky behaviour, it does not on its own justify a finding that Mr Cloete is lying about the evidence he has given."

It seems to me that Solly's failure to telephone Cloete on the Tuesday, may have caused Cloete to have second thoughts, and that this may have been one of the reasons why Cloete checked with his bank, especially if it was his usual practice to do so. In any event, two days had elapsed since he parted with possession of the Mercedes, which was enough time for at least a doubt to have entered Cloete's mind. While Cloete's explanation was not particularly convincing, I agree with the trial Judge to this extent: it does not warrant a finding that Cloete lied about events or his state of mind on the preceding Saturday and Sunday. Whatever one may think of the Tuesday, therefore, I am of the view that Cloete's evidence in other respects was rightly accepted by the court *a quo* as being truthful.

It follows that I reject the appellant's contention that Cloete, when he delivered the Mercedes, must have harboured a serious doubt about the authenticity of the cash deposit, and that, indifferent to the danger posed thereby, he proceeded with the transaction. On the contrary, I accept that by the end of the Saturday afternoon, and on the Sunday, Cloete was satisfied in his own mind not only that the deposit had been made but also that it was in cash. It accordingly cannot be said that Cloete acted recklessly.

For the aforegoing reasons I would dismiss the appeal with costs.

(Desai and Fagan JJ concurred in the judgment of Comrie J.)

For the appellant:

DJ van der Walt instructed by *Jan S de Villiers & Seun,*Cape Town

For the respondent:

PB Fourie instructed by *Millers Incorporated*, Cape Town