THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 898/2024

In the matter between:

AIG SOUTH AFRICA LIMITED	**FIRST APPELLANT**
OLD MUTUAL INSURE LIMITED	**SECOND APPELLANT**
BRYTE INSURANCE COMPANY LIMITED	**THIRD APPELLANT**
GUARDRISK INSURANCE COMPANY LIMITED	**FOURTH APPELLANT**
INSURANCE UNDERWRITING MANAGERS (PTY) LTD	**FIFTH APPELLANT**

and

AZRAPART (PTY) LTD	**FIRST RESPONDENT**
ACCELERATE PROPERTY FUND LIMITED	**SECOND RESPONDENT**

Neutral Citation: *AIG South Africa Limited and Others v Azrapart (Pty) Ltd and Another* (898/2024) [2025] ZASCA 172 (14 November 2025)

Coram: MOTHLE, KGOELE and KOEN JJA and STEYN and HENNEY AJJA

Heard: 4 September 2025

Delivered: 14 November 2025

Summary: Insurance law – antecedent insurance agreements – whether the insurance contract falls to be rectified – whether antecedent agreements were concluded between the appellants and the respondents, and if so, what the terms of those antecedent agreements were – whether the insurance policy ought to have been rectified, by the deletion of the clause providing for Infectious and Contagious Disease cover.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Manoim J sitting as court of first instance):

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

JUDGMENT

Mothle JA (Kgoele and Koen JJA and Steyn and Henney AJJA concurring)

Introduction

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Johannesburg (the high court), delivered on 3 May 2024. The issues in this appeal arise from a dispute over the terms of an insurance contract, concluded by the insurers (the appellants) and the insured (the respondents). It concerns the question whether the contract of insurance stands to be rectified, as pleaded by the insurers.

[2] The insurers, with different percentages of the assumed risk, are the first to fifth appellants, namely, AIG South Africa Limited (AIG) with 70 per cent risk, Old Mutual Insure Limited (OMI) with 14 percent risk, Bryte Insurance Company Limited (Bryte) with 8 percent risk, Guardrisk Insurance Company Limited (Guardrisk) with 3 percent risk and Insurance Underwriting Managers (Pty) Ltd (IUM) with 5 percent risk, respectively. The insured are Azrapart (Pty) Ltd and Accelerate Property Fund Limited, cited as the first and second respondents in this appeal.

In the high court

[3] The respondents (as plaintiffs in the high court) had claimed indemnification under the insurance contract, against the appellants (as defendants), based on the loss suffered consequent to the outbreak of the COVID-19 pandemic. The terms of the insurance contract under the item ‘Business Interruption’, provided for a clause which included cover against Infectious and Contagious Disease (the ICD cover).

The appellants denied liability, claiming rectification in their answering affidavits. The rectification, as pleaded by the appellants, contends for the deletion of the clause providing the ICD cover under business interruption.

[4] On 3 May 2024, the high court dismissed the appellants' plea of rectification of the insurance contract and granted a declaratory order in favour of the respondents, to the effect that, on a proper interpretation, the insurance contract under business interruption includes the ICD cover. On 23 July 2024, on application by the appellants, the high court granted leave to appeal to this Court. On the eve of the hearing of the appeal in this Court, the first to fourth appellants concluded a settlement agreement with the respondents. As a result, the first to fourth appellants delivered a notice to withdraw their appeals. The appeal proceeded only with the fifth appellant against the respondents.

Background facts

[5] The background narrative to the cause of the dispute, stated succinctly, is the following. The respondents were co-owners of Fourways Mall (the mall), a shopping complex located in Fourways, Sandton, Gauteng. They conducted the business of letting out store premises to tenants who traded from the mall. In July 2019, the respondents engaged Marsh (Pty) Ltd (Marsh), a local affiliate of an international firm of insurance brokers, with the same name, to secure insurance for the mall. The respondents needed an insurance policy that, amongst others, would provide cover against factors that would cause business interruption, from which losses would be incurred. The ICD cover was one such factor. Marsh accepted the mandate and appointed its employee, Mr Andrew Stockton (Mr Stockton), the new business development manager in South Africa, to the project.

[6] Mr Stockton, who was the only witness to testify in the high court, stated that he had approached the first appellant because they had the largest capacity to underwrite this type of insurance. As the largest insurer, the first appellant took on the role of lead insurer, conducting negotiations as to the terms of the contract on behalf of other insurers participating in the deal. In order to provide a better context of the genesis of the dispute, it is apposite to explain, in a simplified manner, the procedure through which the negotiations were conducted.

[7] It is common practice in the insurance industry, that the negotiations for an insurance contract of this magnitude are conducted through a set of 'governing rules'. These rules are recorded as 'Drafting Instructions', which entail the agreed base wording for the draft proposal, in this case, the drafting Assets All Risks Policies (POLDRA). Broadly stated, the negotiations commence with the insured requesting a quotation on the terms of insurance it requires. This request is made in the insured broker's standard form or template, named a 'Quoting Slip'. This document contains the standard terms and conditions for that kind of contract. The Quoting Slip would also provide space for the parties to state their preferred subjectivities and conditions.

[8] Of importance is that the system envisages all parties communicating their proposals, subjectivities and conditions, as well as counter-proposals on the same Quoting Slip, exchanged between them. The use of the Quoting Slip is governed by the POLDRA rules, which are binding on all parties to the negotiation. As an example, any subjectivities and conditions, additions and amendments or counter proposals would be stated and highlighted by the author, for the receiving party to easily identify them from the detailed text, as it will be highlighted in the designated area in the Quoting Slip. Anything not highlighted will be taken as accepted. The exchange will continue until the final text is agreed upon by the insurer and the insured. The negotiations end with the insured issuing a 'Placing Slip' for signature by the parties, indicating acceptance of the antecedent agreement from the Quotation Slips. The wording of the signed Placing Slips would be the basis on which the insurance contract or policy would be drafted and provided to the parties. I will later in this judgment, revert to some of the rules that were applicable to this process.

[9] On 23 July 2019, Mr Stockton sent a request for quotation to Ms Valerie Wide (Ms Wide), then employed by the first appellant as the senior underwriter. Mr Stockton and Ms Wide knew each other, having conducted business as representatives of brokers in similar roles before. Ms Wide, as the representative of the first appellant, was the lead broker for the first to fourth appellants, though each appellant had an underwriter to cater for the interests of the insurer on behalf of which they acted. In the case of the fifth appellant, the underwriters comprised a

team which included Mr Ryan Shepherd (Mr Shepherd) and Mr Lekang Motaung (Mr Motaung).

[10] Mr Stockton initiated the request for a quotation, using the Marsh's form of Quoting Slip, for the insurance in respect of the mall. On page 8 of the first Quoting Slip, under the heading 'Business Interruption: specific extensions', he included the phrase 'Infectious/Contagious Disease'. The invitation to quote reflects in a highlighted block on the front page, the following instruction:

'Please quote in accordance with the underwriting information, coverage, terms and conditions as reflected below. Should you require any restrictive/unusual/different terms, conditions or exclusions please indicate this clearly on the document.

Any amendments made by the Insurer to the slip which are not highlighted shall not apply to this quotation.' (My emphasis.)

[11] This Quoting Slip included the ICD cover in the text block, stating the terms of Business Interruptions: specific extensions cover. The fifth appellant entered the negotiations later in the year. I will return to the negotiation with the fifth appellant later in this judgment, since the source of the confusion which led to the dispute in this appeal, arose from the first quotation sent by Ms Wide, before the fifth appellant was invited to participate as one of the insurers.

[12] In response to the Request for Quotation (RFQ), Ms Wide sent a quotation to Mr Stockton on 5 August 2019, using a different Quoting Slip from the one sent by Mr Stockton. This Quoting Slip, sent by Ms Wide, did not include the ICD cover, under the block on Business Interruptions: specific extension cover. Significantly, the omission of the ICD cover was neither specifically highlighted nor signalled by a strike-through on the Quoting Slip, as required by the governing rules. It could thus not be detectable to a reasonable reader unless they painstakingly checked every word against the initial Quoting Slip sent by Mr Stockton. In addition, Mr Stockton sent the Quoting Slip in Word format, but Ms Wide returned hers in PDF format.

[13] It has not been definitively determined why Ms Wide's Quotation Slip excluded the ICD cover. Ms Wide did not testify at the hearing in the high court, though, in her sworn statement presented to the court, she denied having acted

deliberately. Of importance, and contrary to the governing rules, there was no iteration in the document or highlighted portion of the text, to indicate the exclusion of the ICD cover from her Quoting Slip. Consequently, neither Ms Wide nor Mr Stockton appears to have taken notice of this critical error. The consequence was the use of two Quoting Slips, interchangeably including or excluding the ICD cover. This reality, which went undetected, is the factor on which the appellants hung their defence of rectification.

[14] The two Quoting Slips were used interchangeably during the negotiation phase. The negotiations were conducted mainly through the exchange of emails. The focus of the discourse through the emails, was on the determination of the risk capacity percentage for each insurer. The risk capacity was determined on the concept of 'follow the line of the lead insurer'. This meant that the first appellant as the lead insurer, assumed the greater risk capacity percentage. The other appellants had to negotiate theirs in line with the terms negotiated by the first appellant. The risk capacity percentage having been broadly agreed, Marsh sent a Quoting Slip dated 14 November 2019 to each representative of the appellants to confirm, by signature, the final risk capacity percentage. This Quoting Slip, for some inexplicable reason, excluded the ICD cover. The first to fourth appellants signed it, confirming the risk capacity percentage as allocated. The first appellant, as lead insurer, accepted a risk capacity of 70 percent. The second and subsequent other appellants made various proposals or offers to Marsh on capacity percentages, eventually settling their offers at 14 percent, 8 percent, 3 percent and 5 percent respectively. I will return to the latter case of the fifth appellant's 5 percent risk capacity, later in this judgment

[15] On 11 December 2019, Marsh sent the Placing Slip to all parties for signature. The Placing Slip included the ICD cover. The representatives of the first to fourth appellants signed the Placing Slip, with Mr Shepherd signing the Placing Slip for the fifth appellant on 13 January 2020. On 12 March 2020, Marsh sent the final Policy document (insurance contract), which was accepted by the appellants. Like the Placing Slip, the insurance contract included the ICD cover.

[16] On 21 November 2022, two years after the insurance contract was concluded, the respondents instituted an action against the appellants, wherein they claimed

business interruption losses. The claim arose from the outbreak of the 2020 COVID-19 pandemic, which resulted in the promulgation of emergency regulations. The regulations, published by the government in order to curb the spread of this contagious disease, sought to restrict the movement of the population in South Africa, mainly from public places. The restrictions affected, amongst others, the conduct of trade and business overall, including that of the tenants at the mall. The tenants could not trade and consequently, could not afford the payment of rental of the premises. Thus, the loss allegedly suffered by the respondents arose from COVID-19, which was in essence 'an infectious and contagious disease', which caused the business interruption.

[17] The respondents thus raised their claims for indemnity under the clause of the ICD cover. In response, the appellants raised the defence of the rectification of the insurance contract, contending that the contract should be read as excluding the ICD cover.

[18] In the high court, the first to fourth appellants and the respondents agreed to request the court to order a separation of three issues, 'on the basis that if any one of the three was resolved in the [appellants'] favour, that would end the claim'. The high court considered it prudent to grant an order of the separation of issues. The first separated issue was whether the contract of insurance consisted of the policy in its final form or whether it consisted of the final Quoting Slip of 14 November 2019. The second separated issue concerned the rectification defence raised by the appellants. The third separated issue concerned only the first to fourth appellants, who raised the contention that the respondents had not paid their premiums in full, and therefore, were not entitled to an indemnification.

[19] The fifth appellant did not consent to the granting of the order for separation of issues, but nevertheless participated in the second separated issue, rectification, which is the basis of its appeal before this Court. I now turn to deal with the fifth appellant's case as presented in the high court and in this Court.

The Fifth Appellant's case

[20] The defence of rectification raises the question: what was the common and continuing intention of the parties? The intention of the parties is determined on the basis of the facts of each case. The following are the facts of the case in so far as the fifth appellant is concerned. About two months after Mr Stockton sent the first request for quotation to Ms Wide on 23 July 2019, he sent an initial request for a quotation by email to Mr Shepherd, on 13 September 2019, inviting the fifth appellant to participate with a 10 percent risk capacity. In that email, he referred Mr Shepherd to the then 'current terms agreed to' with the first appellant. This could only have meant the first appellant's Quoting Slip dated 19 August 2019, which included the ICD cover. Mr Shepherd responded on the same day by stating: '[t]hat sounds do-able. We will send you our formal quotation by latest COB on Monday'.

[21] On 16 September 2019, Mr Motaung sent an email to Mr Stockton, stating: '[A]attached please find in principle our follow line capacity confirmation'. At that stage, the fifth appellant had been offered 10 percent risk capacity. On 15 November 2019, as with all the appellants, Mr Shepherd received from Mr Stockton the 14 November 2019 Quoting Slip, which required a signature, confirming the participation of the fifth appellant at 5 percent capacity risk. This Quoting Slip did not have the ICD cover. Significantly, the fifth appellant did not sign this last Quoting Slip. In this regard, the fifth appellant, in its heads of argument, quoted from Mr Stockton's oral evidence:

'[The fifth appellant] responded in an email on 21 November 2019 to my correspondence of 15 November 2019 by attaching its correspondence of 16 September 2019 containing the original signed Quoting Slip (which contains the R5 000 000.00 sub-limit and the "infectious/Contagious Disease" wording) and detailed subjectivities. [The fifth appellant] *did not sign the 14 November 2019 Quoting Slip.*' (Own emphasis)

[22] Instead of the fifth appellant signing the 14 November 2019 Quoting Slip, Mr Motaung sent two emails dated 21 and 29 November 2019, to Ms Lesego Lydia Motala (Ms Motala) and Ms Nokwanda Mbilase (Ms Mbilase) respectively of Marsh. In particular, in the email to Ms Mbilase dated 29 November 2019, Mr Motaung confirmed that the fifth appellant would take 5 percent capacity, and there and then,

Mr Motaung also requested a Placing Slip. Nothing was raised in the emails concerning the inclusion or exclusion of the ICD cover.

[23] The first to fourth appellants all signed the 14 November 2019 Quoting Slip, effectively signalling an end to the negotiations. The appellants went on risk from 1 December 2019. On 13 December 2019, the appellants received the Placing Slip, which included the ICD cover. Mr Shepherd was then on leave and indicated to Marsh that he would attend to the Placing Slip sent to the fifth appellant on his return in January 2020, which he in fact did and signed on 13 January 2020. It needs to be noted that it appears that the Placing Slip was the first document of POLDRA, which the fifth appellant signed. There appears to be no evidence of a signed Quoting Slip from the fifth appellant. The fifth appellant was negotiating mainly through exchange of emails.

[24] It was only two years later, after the respondents claimed indemnity, that the first appellant, in its answering affidavit, raised the defence of rectification concerning the inclusion of the ICD cover in the policy wording of the insurance contract. Throughout the negotiation, none of the parties raised the issue concerning the inclusion or exclusion of the ICD cover. This is evidenced by the fact that none of the appellants ever highlighted in any Quotation Slip or raised any objection to the ICD cover in the emails.

[25] The fifth appellant's pleaded case for rectification relies on an 'alleged insurance contract concluded on or about 1 December 2019, consisting of allegedly four documents', which in fact were three. These documents, stated in paragraph 7.3 of its plea, were:

(a) The Final Quoting Slip by AIG dated 14 November 2019 (which excluded the ICD cover and was not signed by the fifth appellant);

(b) The quotation, subjectivities and conditions to cover, sent on 15 November 2019 (the same document as in (a) above);

(c) The Final Placing Slip (which included the ICD cover); and

(d) The Policy Wording (which included the ICD cover).

[26] The fifth appellant contended that these documents are contradictory and wholly irreconcilable with one another, as regards the ICD cover. Therefore, the clause on the ICD cover '. . . was included in the policy wording as a result of a bona fide mutual error in the drafting of the policy wording and it should not have been included in the policy wording at all. The policy wording stands to be rectified accordingly'.

The law

[27] The onus to prove rectification lies with the party seeking it. The fifth appellant must prove the factors required to sustain rectification. This Court, in *Propfokus 49 (Pty) Ltd and Others v Wenhandel 4 (Pty) Ltd*,[1] held that in order to succeed with a defence of rectification, a party must prove the following five factors:

'(a) that an agreement had been concluded between the parties and reduced to writing;

(b) that the written document does not reflect the true intention of the parties – this requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing, be established;

(c) an intention by both parties to reduce the agreement to writing . . .;

(d) a mistake in drafting the document, which mistake could have been the result of an intentional act of the other party or a bona fide common error; and

(e) the actual wording of the true agreement.'

[28] The facts and evidence relied on must, in this case, also be considered within the context of the POLDRA governing rules that applied during the negotiations. The POLDRA governing rules in Realty Assets All Risks are stated as clauses in the Quoting Slip. Clauses 8 and 9, which are applicable and relevant to the issues in this case, will be referred to later in this judgment.

Analysis of the fifth appellant's case

[29] The background facts concerning the communication between the fifth appellant and Marsh, indicates the following:

(a) In the first instance, the first appellant became aware of the intention to include the ICD cover in the request for quotation sent by Mr Stockton on

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[1] *Propfokus 49 (Pty) Ltd and Others v Wenhandel 4 (Pty) Ltd* [2007] ZASCA 15; [2007] SCA 15 (RSA); [2007] 3 All SA 18 (SCA) para 13.

13 September 2019, when the first appellant received its invitation to participate in the deal. By that date, the ICD cover was in the Quoting Slip of 19 August 2019 to which Mr Shepherd was referred. The fifth appellant never raised any issue concerning the inclusion of the ICD cover. It never highlighted an objection or proposed an amendment to the contrary, as invited to do so, if necessary, which appears on page 8 of the request for quotation.

(b) Clause 8 of POLDRA is instructive. It recognises the Placing Slip as the policy wording which must be contained in the insurance contract. Clause 8 provides: 'the policy must be drafted in accordance with the terms, conditions, exclusions, etc reflected in the signed Placing Slip. Do not deviate from the Placing Slip without first renegotiating with Insurers. If changes are negotiated with Insurers, a Placing Slip endorsement reflecting those changes must be issued and signed by the relevant Insurer'. The fifth appellant was the last party to sign the Placing Slip, a month after it was sent. In so signing, the fifth appellant did not signify any changes.

(c) The fifth appellant alleges a contradiction between two (in fact one) Quoting Slips of 14 November 2019 on the one side, and a Placing Slip as well as the ultimate insurance contract, on the other side. First, the Quoting Slips referred to by the fifth appellant under (a) and (b) are one and the same document. The Quoting Slip sent to all the parties, is dated 14 November 2019. The fifth appellant received its copy on 15 November 2019, but unlike the first appellant, it never signed it. It seems to me that, the Quoting Slip, within this context, served as received confirmation of the risk capacity allocations to all the participating insurers. The fifth appellant confirmed this fact by email of 29 November 2019, from Mr Motaung to Ms Mbilase. The obvious fact is that the initial Quoting Slip to reach the fifth appellant, is the one dated 19 August 2019, as an attachment to the September 2019 invite to participate, dated. That Quoting Slip of 19 August 2019, came from the first appellant and had ICD cover included. The fifth appellant accepted the terms contained therein, at 10% risk participation.

(d) Clause 9 provides for measures to ensure that the intentions of the parties are correctly reflected in a Placing Slip. After having received a Placing Slip for a month,

the fifth appellant's brokers should have checked the wording of the Placing Slip before they signed. The email invited them to comment or sign. Clause 9 provides:
'In cases where clauses are not included in this document [a reference to the Placing Slip] but are required on a client specific basis, these clauses should be referred to the Sandton wordings team who will work with you to ensure that they correctly reflect intention and are aligned with the balance of the policy.' (My emphasis.)

(e) The intention of the respondents has always been that under Business Interruptions there is a need for the ICD cover. Ms Wide would attest to this fact, as the very first request for a quotation sent to her on 23 July 2019, included the ICD cover. The 19 August 2019 Quotation Slip, which she sent on behalf of the fifth appellant, and referred to the fifth appellant by Marsh, in the email of invitation to quote dated 13 September 2019, also included the ICD cover. The fifth appellant made no reference to this vital evidence. Apart from seeking to limit its cover liability to R1million, there was no issue relating to the terms of insurance cover on ICD, that was raised by the fifth appellant, that would have affected the intention of the fifth appellant and the respondent to contract.

(f) The respondents' claim was lodged in April 2020. The appellants only raised the alleged rectification concerning the inclusion of the ICD cover for the first time in the answering affidavits in 2022, nearly two years after the claim was lodged. In addition, the fifth appellant failed to call a witness to testify in support of the rectification. The latter would have enabled the high court to be better placed to determine Mr Shepherd's intention when he signed the Placing Slip.

(g) In answering the first question of the separated issues, the high court invoked the Parol evidence rule[2], and concluded that the contract between the parties is the last document, the contract of insurance, distributed and signed for acceptance by all parties in March 2020. The terms and conditions of the contract of insurance reflected those of the Placing Slip, signed by the parties before the contract of

[2] In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at p 47, The parol evidence rule is: 'that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence.'

insurance, the last party being the fifth appellant in January 2020. These last two documents contain the terms and conditions of the agreements concluded during the negotiations between the insured and insurers, and their intention to enter into an insurance contract. It is therefore these last two documents that have to be properly interpreted to consider whether there is a 'mistake common to the parties', that would raise the question of rectification. The fifth appellant has not proved any existence of a mistake between any of the two documents.

[30] Having regard to the conspectus of the evidence and the factors stated above, it is clear that the fifth appellant latched on to a defence which the first to fourth appellants have raised. In *Soil Fumigation Services Lowveld CC v Chemfit Technical Products Pty Ltd*[3] this Court held: 'It is a settled principle that a party who seeks rectification must show facts entitling him to that relief "in the clearest and most satisfactory manner"…In essence, a claimant for rectification must prove that the written agreement does not correctly express what the parties had intended to set out therein.' The fifth appellant's communication with Marsh did not yield any 'mistake' common to it and the respondents. The fifth appellant has not proved, 'in the clearest and most satisfactory manner,' that the written contract of insurance is contrary to the Placing Slip. Further, no evidence was provided that there exists 'a mistake common to the parties' concerning the two documents, such that these documents do not correctly express the intention of the contracting parties.

[31] The fifth appellant was the last party to join the deal and negotiated its part through an exchange of emails. The terms of agreement were negotiated on the basis of the Quotation Slip of 19 August 2019, concluded with the first appellant which included the ICD cover. Apart from the question of risk capacity and monetary limitation of cover, the fifth appellant did not negotiate for anything else. The wording in the Placing Slip and the insurance contract is the same, and indicates that the parties were of the same intent. Therefore, the defence of rectification has no merit, and the appeal must therefore fail. The costs should follow the result.

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[3] *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* [2004] 2 All SA 366; 2004 (6) SA 29 (SCA) para 21.

[32] I make the following order:

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

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S P MOTHLE
JUDGE OF APPEAL

Appearances

For the fifth appellant:	E J Ferreira SC
Instructed by:	Engelbrecht Attorneys Inc., Johannesburg
	McIntyre Van der Post Inc., Bloemfontein
For the respondents:	M C Maritz SC with G Elliot SC
Instructed by:	Thomson Wilks Inc., Cape Town
	Honey Attorneys, Bloemfontein.