CASE NO.: (P) I 3211/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THOMAS IGNATIUS POTGIETER **PLAINTIFF**

and

PROSPERITY INSURANCE LIMITED **DEFENDANT**

CORAM: **HEATHCOTE, A.J**

Heard on: **22, 23 and 24 JULY 2011**

Delivered on: **02 AUGUST 2011**

JUDGMENT

HEATHCOTE, A.J: .

[1] During the evening of 27 March 2009, the plaintiff was driving a Nissan motor vehicle on the outskirts of Windhoek. According to him, the vehicle caught fire and was demolished. The ambulance arrived and took him to hospital. After he left the scene, unknown persons stripped and vandalized the burnt out vehicle. By the next morning at 09h00 clock, a bare wreck, without any parts or engine was left. Subsequently (i.e. after 09h00 on 28 March 2009), the wreck was also stolen. No one knows exactly when the act of stealing occurred. As a result of this incident the plaintiff instituted action against the defendant, a short term insurance company, for the damages he suffered.

THE PLEADINGS

[2] It was alleged in the plaintiff's particulars of claim that, after the vehicle caught fire,

> **"Unknown persons stripped, vandalized and stole the burnt out wreck of plaintiff's vehicle from the scene, making it impossible for plaintiff to produce the vehicle to defendant for scrutiny."**

[3] These allegations were responded to as follows;

> **"Save to deny that it was impossible for the plaintiff to produce the vehicle to the defendant for scrutiny, the defendant has no**

knowledge of the allegations contained in plaintiff's particulars of claim, to the effect that the vehicle caught fire and was demolished."

[4] After the pre-trial conference hearing held on 21 July 2011, the disputes between the parties were crystallized. The pre-trial court order recorded;

"3. The following are common cause between the parties;

a) The citation of the parties;

b) That the defendant is a short term insurer;

c) That the insurance policy exists and that it relates to the plaintiff's 2008 Nissan motor vehicle;

d) That, in terms of the insurance policy, the aforesaid vehicle is insured against risk, inter alia, fire;

e) That the insurance cover in respect of the aforesaid vehicle is limited to N$ 91 500.00;

f) That the defendant was notified by the plaintiff of his insurance claim;

g) That defendant informed plaintiff that his claim was repudiated;

h) That demand for payment was made by plaintiff to defendant and defendant refused to pay.

4. The main issues of fact to be resolved during the upcoming trial are the following:

4.1 What were the relevant terms and conditions of the insurance policy?

4.2 Whether the relevant terms and conditions of the insurance policy were adhered to by the plaintiff?

4.3 Besure Insurance Brokers (Pty) Ltd represented defendant (sic).

5. The main issue of law to be resolved during the upcoming trial is the following:

5.1 Whether, based on the issues of fact established during the trial, defendant was liable to accept plaintiff's claim?

5.2 The quantum of the plaintiff's claim – in this respect the plaintiff will obtain a valuation certificate relating to the market value of the

vehicle, which will be included in the plaintiff's discovery – thereafter and upon due consideration thereof by the defendant, the defendant will indicate its attitude towards quantum.

6. The defendant has no knowledge of the following:

6.1 Plaintiff's vehicle caught fire on or about 27 March 2009 at approximately 23:00 whilst plaintiff drove it on the Daan Viljoen Road and it was demolished;

6.2 Subsequently, unknown persons stripped, vandalized and stole the burnt-out wreck of plaintiff's vehicle.

7. Quantum is separated from the merits and at the trial, only matters pertaining to the merits will be addressed and tried."

[5] Given the crystallization of the issues in dispute, it remains necessary to refer to the specific provisions of the insurance contract, on which the defendant relies to repudiate the plaintiff's claim. They are;

"(2) Claims Procedure

If You want to claim You must do the following:

2.1 …

2.7 <u>take or keep possession of your damaged property. You are not entitled to abandon any property to us whether we take possession or not.</u>

8. Proof of Ownership

You need to:

8.1 make damaged items which you are claiming for available for inspection in order to substantiate the <u>extent and nature of the damage</u> (my emphasis).

10. Prevention of Loss, Damage or Liability

You must exercise all reasonable care and take all reasonable precautions to prevent or minimize loss, damage, death, injury or liability.

23. Non-Compliance

We do not compensate you for any claim unless you comply with all the terms, conditions, endorsements and warranties in this Policy."

[6] These terms and conditions should be read subject to the introductory paragraph of the section (A) of the insurance contract with stipulates;

"subject to the terms, exceptions and conditions (precedent or otherwise) and in consideration of, and conditional upon, the prior payment of the premium by and/or on behalf of the insured and receipt thereof by and/or on behalf of the company, the company specified in the schedule agrees to indemnify or compensate the insured by payment, or, at the option of the company, by replacement, reinstatement or repair in respect of the defined events occurring during the period of insurance and as otherwise provided under the written sections up to the sums insured, limit of indemnity, compensation and other amounts specified."

[7] The above mentioned sections, read with the introductory paragraph, and clause 23, lie at the heart of the dispute between the parties.

DID THE LOSS OCCUR?

[8] As I have indicated, the defendant has no knowledge of the event itself; (i.e. the fact that it was the insured vehicle that caught fire, and was subsequently demolished by vandalism, and indeed, that the wreck was stolen by unknown persons). As defendant has no knowledge of these events, it could not, correctly so, deny these allegations. It could of course, test the plaintiff's version under cross examination. I do not think that this issue should detain me for too long. It is indeed so that the defendant could have asked certain questions as to the plaintiff's conduct that evening, and was entitled to become suspicious.

[9] However, on the evidence led on this aspect, I come to the conclusion that the plaintiff has shown on a balance of probabilities, that the vehicle which caught fire that evening was indeed the insured vehicle.

[10] The plaintiff testified that, while on his way to Goriangab dam, the vehicle caught fire; (and it must be pointed out here that it was subsequently established, and also confirmed during the trial, that although the plaintiff knew where the Goriangab dam was, and knew the road towards the dam, he was not actually on his way to that dam when the vehicle caught fire. Nevertheless, the plaintiff identified the insured vehicle with reference to photos, and testified that he saw smoke coming from underneath the dash board. Subsequently, flames also appeared. He jumped out of the vehicle while driving at a low speed, whereafter the vehicle came to a stand still next to the road. He endeavoured to put the fire

out by throwing a mixture of gravel and sand into the burning vehicle, but soon realized that he was fighting a losing battle. In the mean time, bystanders called the City Police and the Fire Brigade.

[11] It was testified on behalf of the plaintiff, by Mr. Damian Magone, (who was in charged of the fire engine (of the fire brigade in Windhoek) that evening) that they were indeed called out to the scene where they extinguished the fire. It was also confirmed that the plaintiff was then taken to hospital by the ambulance which arrived at the scene. Later that evening, the City Police took the plaintiff to his mother's home where he slept. He only woke up at approximately 09h00 the next morning, when he was informed by his mother, who was in turn informed by his cousin (Johan Van Zyl) that he visited the scene. Mr. van Zyl took photos of the wreck. It was common cause that this wreck was indeed the kind of motor vehicle that was insured by the defendant. It is further apparent from the photographs handed in at the trial, that all the parts were stolen and/or removed from that vehicle by 09h00 the next morning. These allegations and testimony on behalf of the plaintiff could not be gainsaid by the defendant.

[12] Accordingly, at the end of the trial, I had this evidence before me;

[12.1] the plaintiff drove the insured vehicle that evening;

[12.2] the vehicle indeed caught fire, which fire was extinguished by the Fire Brigade;

[12.3] the plaintiff was subsequently taken to hospital by the ambulance, and thereafter, during the early morning hours of the next day, was taken to his mothers house by the City Police;

[12.4] by 09h00 the next morning, the vehicle was stripped, and only a bare wreck remained.

[13] Given plaintiff's testimony, and given the fact that the defendant presented no evidence whatsoever to contradict the evidence presented by the plaintiff, I come to the conclusion that a loss was indeed suffered as envisaged in the insurance contract. Mrs. Van der Merwe, who appeared for the defendant, criticized the plaintiff's evidence on various aspects, and submitted that I should, even in the absence of knowledge on behalf of the defendant, or contrary evidence presented by it, come to the conclusion that the plaintiff did not prove, that a loss was incurred in respect of a vehicle insured by the defendant. Mrs. Van der Merwe is indeed correct that portions of the plaintiff's evidence can be validly criticized (with which I deal below), but as far the material portions of the evidence are concerned, i.e. that a loss occurred in respect of a vehicle insured; I cannot but find that the plaintiff did prove on a balance of probabilities that the

loss occurred. I accordingly conclude that a loss, as defined and insured, has indeed occurred.

THE ONUS AND THE TERMS AND CONDITIONS OF THE INSURANCE CONTRACT

[14] In Channel Life Namibia (Pty) Ltd v Otto 2008(2) NR 432 SC, Strydom C.J, said the following at paragraph 61;

> **"The issues which have crystalised from the pleadings were therefore as follows:**
>
> **(a) The defendant admitted the agreement of insurance between the parties and therefore also its validity.**
>
> **(b) The onus was therefore on the plaintiff to prove on a balance of probabilities her entitlement to claim and in order to succeed she had to bring her claim within the four corners of the agreement.**
>
> **(c) If the plaintiff succeeds the onus would shift to the defendant to prove on a balance of probabilities its entitlement to repudiate the claim."**

[15] As I have already found, the plaintiff did bring himself within the four corners of the insurance agreement.

[16] In Sprangers v FGI Namibia Ltd 2002 NR 128, Maritz, J (as he then was) said the following in relation to terms and conditions contained in a written insurance contract, as well as the onus. (At page 131 at paragraph F-H);

"<u>Did the plaintiff comply with his other obligations?</u>

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 JA 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 225; Gangat v Licences and General Insurance Co Ltd 1933 NPD 261 at 269; Kliptown Clothing and Industries (Pty) Ltd v Marine and trade Insurance Co of SA Ltd 1961 (1) SA 103 (A) at 106; Pretorius v Aetna Insurance Co Ltd 1960(4) SA 74 (W) at 75; Merchandise Exchange (Pty) Ltd v Eagle Star Insurance Co Ltd 1962 (3) SA 113 (C) at 114."**

[17] It is accordingly clear, and I understood counsel for plaintiff (Mr. Erasmus) and defendant (Mrs. Van der Merwe), to have made common cause on this aspect, (i.e. that the onus was on the plaintiff to bring his claim within the four corners of the insurance contract, and that, if the defendant wanted to repudiate the claim on the basis of the relevant clauses I have referred to above, the onus

is on it (defendant) to prove that it was, on a balance of probabilities, entitled to repudiate the claim).

COMMON CAUSE FACTS AND ISSUES IN DISPUTE

[18] The evidence, on a balance of probabilities, show that it was the insured vehicle which burnt out that evening. Between the time the plaintiff was taken to hospital by ambulance, and 09h00 the next morning, (when the defendant's cousin visited the scene and took the photographs), the vehicle was stripped from all its components. By 09h00 the next morning only a bare wreck remained. The plaintiff was informed of this situation.

[19] It is also common cause that by 09h00 o'clock, on the Monday morning (i.e. 30 March 2009) the plaintiff visited the offices of the defendant where he completed an insurance claim form. There is a dispute between the parties as to exactly what happened on that morning when plaintiff visited the offices of the defendant (in which offices the broker appointed by the defendant was also situated).

[20] It is also common cause that on that Monday of 30 March 2009, the plaintiff (together with his fiancé), completed a claim form, in which a number of questions were asked. In this form, the following question was asked;

"Location were can (sic) the vehicle be inspected"

To this, the plaintiff answered;

“Otjimuse road.”

[21] It is further common cause that the vehicle was in fact not in Otjimuse road at the time of the incident, but a short distance from there, (in a road which runs diagonally to Otjimuse road). In the sketch plan provided by the plaintiff in the claim form, it is clear that Otjimuse road meets this other road at a T-junction, at which point the plaintiff turned right, and after a short distance, the vehicle burnt out. In my view, and despite the protestations of the defendant on this aspect, the plaintiff sufficiently indicated in his claim form where the vehicle could be inspected.

[22] On other aspects however, there is a sharp distinction between the evidence of the plaintiff and the evidence of the defendant’s Mr. Moolman, as to what was said on the Monday morning when the plaintiff visited the offices of the defendant. According to the plaintiff, Mr. Moolman (of the defendant) informed him that the responsibility to secure the wreck was on the plaintiff, and that plaintiff was in control of the wreck until such time as the claim was completed. This is admitted by the plaintiff. However, plaintiff goes one step further and says that the defendant’s Mr. Moolman said that he (and therefore the defendant) will make a plan for the vehicle to be secured. At some stage, so plaintiff testified,

Moolman said; **"we must act quickly"**; from which the plaintiff understood that Moolman undertook the responsibility to secure the vehicle.

[23] If I have to resolve this factual dispute between the plaintiff and the defendant, I would have no hesitation in accepting the word of Mr. Moolman. The plaintiff's was not only unreliable in a number of respects, (as to what happened that Monday morning), but was also repudiated by his own witness on a number of aspects as to what happened during the evening the vehicle burnt out.

[24] In my view however, it is not necessary to resolve this dispute, as the alleged statements made at the meeting between the plaintiff and the defendant's Mr. Moolman at 09h00 on that Monday morning, are not relevant. The defendant did not plead (and it is not an issue to be resolved at the hearing of this matter) that an agreement was reached between the parties on that Monday morning, in terms of which agreement plaintiff would secure and produce the vehicle, and indeed arrange for a tow-in truck to take the vehicle to a scrap yard. This would have been possible, and it appears, permissible, in terms of the insurance contract which stipulates in its introductory paragraphs as follows;

> **"This document, together with your schedule, terms and conditions, and any correspondence sent to you as well as <u>any verbal agreement we make</u> form the policy of insurance between you and us."**

[25] It is arguable, in terms of the clause just quoted, that the parties could have agreed that the plaintiff had the obligation to arrange for the tow-in of the vehicle in order for the vehicle to be taken to a scrap yard where the defendant could, at a later stage, and at its leisure, inspect the vehicle. However, as I have pointed out, no such agreement was pleaded and the dispute between the parties, as to whether the defendant could legitimately repudiate the plaintiff's claim, must be resolved with reference to the relevant contractual terms as pleaded by defendant. I have already referred to them and will deal with it shortly.

THE CONTRACTUAL TERMS ON WHICH DEFENDANT BASES IT'S REPUDIATION

[26] As I have pointed out, clause 2.9 of the insurance agreement determines that, if the plaintiff wants to claim, he must **"take or keep possession of your damaged property. You are not entitled to abandon any property to us whether we take possession or not."**

[27] In turn, clause 8.2 provides that the defendant must make the damaged item, in respect of which the claim is lodged, available for inspection in order to substantiate the extent and nature of the damages.

[28] It is the defendant's case that the defendant breached both of these clauses. I have already held that the onus is on the defendant to prove that such a breach occurred, and that such alleged breaches entitled the defendant to repudiate the claim.

[29] I agree with Mr. Erasmus, counsel for the plaintiff, that in interpreting the relevant clauses, it would be necessary to keep in mind a number of interpretation principles applicable when insurance contracts are interpreted. They are;

> [29.1] The *contra proferentem* rule applies to the interpretation of insurance contracts. See: Price v IGI Ltd 1983 (1) SA 311 (A). Forfeiture clauses, aimed at excluding liability, are restrictively interpreted. See: Ferreira v Marine and Trade Insurance Company Ltd 1975 (4) SA 745 (A).
>
> [29.2] So-called conditions precedent that are normally contained in insurance policies are usually not suspensive conditions at all, but merely ordinary terms of the policy. It is not for the insured to alleged compliance or fulfillment of these "conditions": but it is for the insurer to allege and prove a breach of such conditions and a cancellation as a result of the breach. See: Marine and Trade Insurance Company Ltd v Van Heerden N.O. 1977 (3) SA 553 (A); Penderis and Gutman NNO v Liquidators, Short Term Business, AA Mutual Assurance Association Ltd 1992 (4) SA 835

(A). See: Van Zyl N.O. v Kiln Non-Marine Syndicate No. 510 of Lloyds of London 2003 (2) SA 400 (SCA).

[29.3] Terms in an insurance contract, purporting to place limitations on a clearly expressed obligations, (i.e. to indemnify an insured), should be restrictively interpreted, as insurers has a duty to make clear what particular risks they wish to exclude.

[30] Taking the aforementioned interpretational principles into consideration, I now turn to the relevant clauses relied upon by the defendant. It is apparent that clause 2.9 obliges the plaintiff to take or keep possession of the damaged property. It is further apparent, that clause 2.9, will not find application in each and every case. Amongst others, when the vehicle is stolen, and cannot be found, it would of course be impossible for the plaintiff to take or keep possession of the property. Moreover, in such circumstances, the property is not necessarily damaged.

[31] As from the moment the wreck was stolen, it was impossible for the plaintiff to keep possession of the damaged property.

[32] The question which arises is, whether or not the plaintiff lost possession of the vehicle (during the time he was taken to hospital by ambulance until such time as the wreck had been stolen). He of course, lost possession of the wreck

when it was stolen. But, as I have pointed out, no evidence could be presented by defendant (who bears the onus) when exactly the wreck was stolen. Mrs. van der Merwe for the defendant quite rightly pointed out that, in our law, possession can be lost either by losing physical possession or by seizing to have the intention to possess. As a general rule, such a principle can not be faulted. In some circumstances, a valuable diamond ring might be physically lost. By losing physical possession thereof, and despite the owner's intention or even strong desire to remain in possession, possession is still lost by mere physical loss. On the other hand, it is also so that possession of property can be lost by intention only.

[33] It is also trite law that possession can be retained ***"solo et animo"***. To my mind, the defendant did not prove that plaintiff lost possession of the burnt out vehicle when he was taken to hospital by the ambulance. He also did not lose possession of the burnt out vehicle by 09h00 the next morning, when he was shown the photographs taken by his cousin, indicating to him that the burnt out vehicle has now been rendered an empty wreck. To determine whether defendant has proven whether plaintiff lost possession (in other words, abandoned the wreck) it is necessary to ask this question; would the reasonable man have foreseen that a burnt out wreck, without engine, gearbox or other parts of any value whatsoever, may be stolen?

[34] This is an important question to answer in order to determine whether the plaintiff abandoned the wreck (which may be an indication that he also lost possession through intention only).

[35] A reasonable person would not have foreseen that a wreck, of virtually no value whatsoever, would be stolen. This is evident from the fact that, along our roads, on many occasions, burnt out wrecks can be seen for months on end at the same place. Their value is little, and their use almost insignificant.

[36] The burden is, of course, on the defendant to show that the plaintiff abandoned the wreck, thereby losing possession. That has not been shown by the defendant. Accordingly, plaintiff did keep the required possession. One must of course look at this clause, (to take and keep possession), with reference to the purpose it was inserted into the insurance contract. Keeping possession would have enabled the plaintiff to make the wreck available to the defendant for inspection as envisaged in clause 8.2. Much score was placed on this aspect by defendant's Mr. Jacobs. He bitterly complained that the defendant did not have the opportunity to inspect the wreck to determine what the cause of the fire was. It is clear from the evidence that the defendant suspected the plaintiff of possibly setting the vehicle alight. However, none of the clauses relied upon by the defendant compels the plaintiff to take such steps, for the vehicle (or the wreck) never to be stolen. Indeed, theft is one of the possible events against which the

vehicle is insured. But the plaintiff only has to comply with his obligations in terms of the contract.

[37] As I have found, plaintiff did keep possession of the wreck, or put differently and legally more accurate, defendant did not prove that plaintiff lost possession. In turn, plaintiff did make the wreck available to defendant. The purpose of clause 8.2 is for defendant to inspect the nature and extent of the damages. That is not the same as inspecting the cause of the fire. I do not, for a moment, suggest that defendant does not have the right (i.e. other than a contractual right) to inspect a wreck to determine the cause of the fire. However, there is no contractual obligation on the plaintiff, (i.e. in the contract) to take such steps to secure the vehicle until such time as defendant has had the opportunity to investigate the cause of the fire. Plaintiff must only keep possession and make the wreck available to defendant.

[38] Mrs. van der Merwe submitted that plaintiff came to court, alleging that it was impossible for him to produce the wreck to defendant. She further submitted that, that was the case the plaintiff came to meet, and that the plaintiff indeed conceded during cross-examination that it was possible for him to phone a tow-in service during the Saturday or Sunday, but that he indeed did not do so. At first blush, it appeared to me that there was indeed merit in these submissions.

[39] However, after careful consideration, I have come to the conclusion that her submissions cannot be sustained for a number of reasons; firstly, it is indeed correct that, after the wreck was stolen, plaintiff could not produce it anymore. That, I think, is what plaintiff intended to say in his pleadings. But, what has been stated in the pleadings did not alter the legal onus; secondly, the contract does not place an obligation on plaintiff to phone a tow-in service. He must only keep possession of the vehicle and make same available. As I have found, defendant did not prove that plaintiff, did not comply with those obligations; thirdly, it is correct that defendant could not produce the vehicle after it was stolen; but again, as I have pointed out, plaintiff has no obligation to secure the wreck against theft. Such an obligation would defeat the whole purpose of the insurance contract; and lastly, the crucial period is the period since the vehicle burnt out, until the wreck was stolen. Again defendant did not prove when the wreck was stolen. In other words, defendant did not prove that, when plaintiff made the wreck available for inspection to defendant on Monday morning, 30 March 2009, plaintiff was not in possession thereof anymore. It is in this context which Mrs. van der Merwe's submission cannot be upheld. Although the plaintiff himself alleged that it was impossible to produce the wreck, it could only mean **"after the wreck was stolen"**, but it remained for defendant to prove, that plaintiff was not in possession of the wreck at the time he made the wreck **"available"** to defendant. Moreover, even if the wreck was already stolen at the time the plaintiff made it available to defendant, it would not have assisted defendant, as it can, in terms of the contract, never be expected of plaintiff to

take such steps as to secure the wreck from never being stolen. He must just keep possession, and that he did, even if only until such time as the wreck was stolen.

[40] During his evidence the managing director of the defendant, Mr. Jacobs, conceded that completion of the claim form by the plaintiff (on the Monday morning at 09h00), and indicating where the vehicle could be inspected, would have been sufficient for purposes of making the wreck available for inspection as envisaged in clause 8.2. I agree with this, and would have come to the same conclusion, whether or not Mr. Jacobs conceded this point.

[41] The problem is, of course, that the court does not know whether or not, at the moment the wreck was made available for inspection, it was already stolen. Again, the onus in this regard is decisive. It is for the defendant to show that, at that moment the plaintiff made the wreck available to the defendant, it was not at the site as indicated, and clearly, the defendant was incapable of presenting such evidence.

[42] I must accordingly conclude that the defendant did not show on a balance of probabilities that the plaintiff breached his obligations as envisaged in clauses 2.9 and 8.2 of the agreement.

[43] With reference clause 10, on which the defendant also relied, which states that the plaintiff had to **"exercise reasonable care and take all reasonable precautions to prevent or minimize loss, damage, death, injury or liability"**, I am also of the view that the defendant did not prove that the plaintiff breached his obligations in this regard.

[44] As Mrs. Van der Merwe pointed out during argument, there were actually two losses. The first loss was caused by the fire, and thereafter, a further loss was caused by the vandalizing of the wreck and subsequent removal of the wreck. But the plaintiff did not institute an action or a claim against the defendant in respect of any loss he allegedly suffered subsequent to the fire being extinguished. This issue, in my view, is merely a matter of quantification of the claim. *Prima facie* at least, the plaintiff would only be entitled to his damages (subject to the terms and conditions of the agreement), minus the value of actual burnt out wreck, (as calculated prior to the further stealing and/or removal of spare parts from the wreck). In my view, a reasonable person would have acted in exactly the same manner as the plaintiff did immediately before the wreck burnt out and after he was taken to hospital. That much was conceded by the plaintiff's managing director when he testified, and said that he (and I presume a reasonable person) would have acted exactly in the same way as the plaintiff did, at least until 09h00 the next morning, (when he was shown the photographs of the burnt out wreck (by then already stripped and vandalized)).

[45] Clause 10 should be seen in context with what has been stated in the Spranger-case supra at page 141 paragraphs A-G;

> **"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 A.1 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 'to exercise all due care and precaution' and 'do all things reasonable, necessary and/or required' mean,**
>
> **'between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognize 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'."

[46] In all the aforementioned circumstances I am of the view that the defendant did not show that the plaintiff breached the clauses on which it relied for purposes of repudiating of the claim.

[47] As the quantum stood over, it should now be settled, and if not possible, be referred to trial for purposes of determining that issue.

[48] In the result I make the following order.

[48.1] It is declared that the defendant is liable to pay an amount (still to be determined) to the plaintiff in respect of the plaintiff's insurance claim he submitted on 30 March 2009.

[48.2] The defendant is ordered to pay the plaintiff's costs of this proceedings.

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HEATHCOTE, A.J

ON BEHALF OF THE PLAINTIFF:
Francois Erasmus & Partners

ON BEHALF OF THE DEFENDANT:
Van Der Merwe-Greeff Incorporated