REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 049359/2022

(1) REPORTABLE: ~~YE~~S/NO
(2) OF INTEREST TO OTHER JUDGES: Y~~E~~S/NO
(3) REVISED: Y~~E~~S/NO

…… [redacted]
SIGNATURE

…03/05/2024……
DATE

In the matter between:

AZRAPART (PTY) LTD	**First Plaintiff**
ACCELERATE PROPERTY FUND LIMITED	**Second Plaintiff**

and

AIG SOUTH AFRICA LIMITED	**First Defendant**
OLD MUTUAL INSURE LIMITED	**Second Defendant**
BRYTE INSURANCE COMPANY LIMITED	**Third Defendant**
GUARDRISK INSURANCE COMPANY LIMITED	**Fourth Defendant**
INSURANCE UNDERWRITING MANAGERS (PTY) LTD	**Fifth Defendant**

JUDGMENT- SEPARATED ISSUES

MANOIM J:

[1] The plaintiffs in this matter have instituted a claim of over one billion Rand against the five defendants, all of whom are insurance companies who had insured the plaintiffs in respect of various events.

[2] The first plaintiff is Azrapart (Pty) Ltd. The second plaintiff is Accelerate Property Fund Limited. The plaintiffs each own 50% of a shopping mall known as Fourways Mall, located in Fourways, Sandton. The plaintiffs earn their income from letting out stores to tenants who trade from the Mall. The relationship between the plaintiffs and the tenants is more complex than I have described here but that detail is not relevant for present purposes.

[3] In 2020, like many businesses, the lockdown caused by advent of the Covid 19 pandemic disrupted their business. It also disrupted the businesses of tenants of the Mall. For reasons not relevant at present, the plaintiffs suffered a major loss in rental income as a result.

[4] In November 2022, the plaintiffs instituted the present action against the defendants, claiming what is termed business interruption insurance. According to the plaintiffs the defendants had all indemnified them (in various amounts) against business interruption which included inter alia loss caused by infectious and contagious diseases. (“ICD”) for loss of rental income from their tenants. This case does not concern whether Covid constitutes an ICD for which the

plaintiffs could claim in terms of their policies. Rather the question is whether the plaintiffs were covered at all for ICD, something the defendants all contend that they weren't, whilst the plaintiffs contend to the contrary.

[5] The reason five defendants are being sued is that they all assumed liability to indemnify the plaintiffs for loss in various proportions. These are:

a. AIG South Africa Limited, the first defendant.
b. Old Mutual Insure Limited, the second defendant.
c. Bryte Insurance Company Limited, the third defendant.
d. Guardrisk Insurance Company Limited the fourth defendant.
e. Insurance Underwriting Managers (Pty) Limited, the fifth defendant.

[6] The five defendants all assumed part of the risk but in different proportions. According to the particulars of claim these are broken down as follows:

a. The first defendant: 70% of the risk;
b. The second defendant: 14% of the risk;
c. The third defendant: 8% of the risk; and
d. The fourth defendant: 8% of the risk:
e. Alternatively;
    i. fourth defendant: 3% of the risk; and
    ii. fifth defendant: 5% of the risk.

[7] However, the principal negotiations were pursued between the plaintiffs' agent, an international firm of insurance brokers called Marsh, though its local subsidiary, and AIG, with the second to fourth defendants 'following on', but with

some differences in the limits on their liability. All were represented by the same legal team. The fifth defendant, IUM presented a slightly different defence, and was represented by a separate legal team.

[8] As the case involved a number of issues, the plaintiffs, and first to fourth defendants, approached me to order a separation of three issues, on the basis that if any one of the three was resolved in the defendants' favour, that would end the claim. Although the fifth defendant opposed the separation, I considered it prudent to nevertheless do so, and made the order on 24 May 2023.

[9] Before I deal with what the separated issues are, it is necessary to explain the history of the matter. Whilst the matter has yet to be fully litigated, I heard evidence on the limited issue and thereafter argument. Most of the factual background thus far is common cause and the disputes of fact are limited. Primarily it is a question of what legal conclusions should be drawn from these facts.

The hearing

[10] The hearing consisted of the evidence of a single witness Andrew Stockton, an erstwhile employee of Marsh, who testified for the plaintiffs. Discovery was limited to emails exchanged by the parties during the relevant period and copies of the insurance documents. The parties agreed that the documents could be admitted without having to be proved but subject to the right of any party to challenge their authenticity. No such challenge was made.

What is the issue?

[11] This case turns on a series of mishaps. The key issue was whether ICD insurance, on which this claim is now premised, formed part of the agreement between the parties. Extraordinary as this might seem it turns on the legal implications of oversights in reading documents by employees of the parties.

[12] Between the time that the first request for a quotation was made by Marsh on 23 July 2019, and the time a final policy was signed in March 2020, there had been 10 iterations of the contract, with the term ICD, variously in or out. But on not one occasion were these modifications noticed by the party to whom the document been sent.

[13] There is a simple explanation for this. Insurance contracts are filled with dense type most of which is unchanging. What the professionals keep a look out for are the highlighted changes, and then, the exclusions, the premiums, and the limits. But where a term is not highlighted and is buried in a long list of densely typed terms, infrequently modified, they remain imperceptible to the quick look scrutiny that these professionals typically exercise. Such is what happened in this case.

[14] In the various exchanges of documents between the plaintiffs' broker, Marsh and the defendants, two candidates for which is the proper contract have emerged, which form the subject matter of the present dispute. Was it a version that the plaintiffs' broker had sent to all the defendants with ICD out (he says inadvertently), and which they all signed, after which he told them that they were now on risk. Or was it the penultimate version called a placement slip, with ICD

back, in which the defendants had later all signed, or was it the policy, a still later and final version, which still has ICD in, and which only AIG, the lead insurer had signed, apparently without the inclusion being noticed by that company's representative. Insofar as the other defendants are concerned are they liable because AIG as the commonly accepted lead insurer had signed off on the policy – the final document in the saga although none of them had – or are they liable because they had signed off on the placing slip (the penultimate document) with ICD in.

[15] There is no dispute about what the term ICD means. This is not a dispute over interpretation. It is a dispute over which is the correct contract. If the plaintiffs are correct, they have cover. If they are not, they have no cover, and it is the end of their claim against the defendants.

Background

[16] The plaintiff companies own a newly built shopping centre known as Fourways Mall. The ultimate controllers are a group known as the Georgiou Group. They own other centres which had previously been insured by AIG brokered by Marsh. The plaintiffs rely on this fact as I discuss later.

[17] In July 2019 the plaintiffs engaged Marsh Pty Ltd ("Marsh"), the local affiliate of an international firm of insurance brokers of the same name, to secure insurance for the Mall. The employee instructed with this task was Andrew Stockton who was then employed by Marsh as a new business development

manager.[1] The Georgiou's approached him to get quotes for insurance cover for the Mall. He says they wanted standard cover including business interruption insurance although he is candid in his witness statement when he says the client did not specify ICD cover in particular.

[18] Duly briefed Stockton sent an email to two people at AIG on 23 July 2019. He chose AIG he says, because he wanted them as the lead insurer as they had the biggest capacity to take on this type of insurance. Only one replied as he had got the wrong email address for the other. Whether the case may have had a different outcome if the first person from AIG had dealt with the issue we will never know.[2] The person who responded was Valerie Wide. Wide was then employed by AIG as a senior underwriter. Like Stockton, Wide has had many years in the business. Thus, both parties relied on experienced insurance professionals as the central figures in this dispute. Moreover, Stockton states he had several years of dealing with Wide, so this was not their first interaction.

[19] Being a large broker Marsh has its own standard form draft terms for an insurance contract. It is referred to as POLDRA. It is about fifteen pages and contains a bespoke policy. What Stockton did was to send out a request for quotation to Wide. Enclosed with the email is what Marsh termed its Realty Assets all Risk Quoting slip 2019". This quoting slip contains the standard terms that Marsh makes use of for its clients. On the front of the quoting document in a block with a grey highlight the following is stated:

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[1] He has since been employed by another firm.
[2] His first email was sent to a Brian Willougby. Seven minutes later on the same day he forwarded the same email to Wide saying "I *can't seem to push it to Brian."*

> *"Any amendments made by the Insurer to this slip which are not highlighted shall not apply to this quotation."*

[20] This sentence is a crucial leg in the plaintiffs' case. A similar instruction is given by Marsh to its own staff in an internal document. In it, Marsh tells its' staff that it has agreements with all the major insurance companies (which would include AIG) and that if they (Marsh staff) change the wording on the bespoke policy, as set out in the quoting slip, then they must do so *"… by noting the required amendment on the quoting slip".*

[21] The quoting slip that Stockton sent to Wide on 23 July 2019, was Marsh's standard form document. On page 8 of the document, under the heading "*Business Interruption: specific extensions*", is a paragraph, ten lines long, containing a list of items. On the seventh line, wedged between the terms *"port blockage"* and "*miscellaneous events"* is the phrase central to the issue of liability to this case, "*Infectious/Contagious Disease"* or as it has been shortened in this case, 'ICD cover'.

[22] Wide duly sent a quotation back to Stockton on 5 August. It seems on the prompting of Stockton that same day who said he needed it urgently. Wide sent it under cover of an email. She enclosed it without comment other than apologising for the delay. But the quotation sent back by Wide had omitted the phrase, "*Infectious/Contagious Disease"* from the block on Business Interruption specific extensions cover. The omission is not highlighted nor is it signalled by a strike through. It is thus not obviously detectable to a reader unless they painstakingly checked every word against the standard policy.

Notable as well is that Stockton had sent the quotation in a Word document (and thus easily editable by the recipient including the ability to highlight changes using colour or strike outs) whilst Wide sent the quote back in PDF form, and hence not easily editable. But that is not the plaintiffs' main point. It is common cause that in making the ICD omission Wide did not highlight this omission in any form or refer to this fact in a covering email. It thus according to Stockton's evidence an omission that went unnoticed by him.

[23] What Wide did fill in more visibly, is the back end of the quote, which deals with a schedule of sub-limits, special conditions, and premiums. It is more than likely it is this back-end information, which contains the financial detail that Stockton looked at, not the rest of the base wording on the quote, since it had not been highlighted. He wrote back on the 7 August 2019 asking for Wide to requote on some aspects and indicating to her that the client was part of the Georgiou Group, presumably to remind her that the latter were an existing client of both Marsh and AIG.

[24] On 16 August 2019, Stockton sent out a new quoting slip to Wide asking for an improved quote. The covering email indicates that he has made changes highlighted in yellow. But in this version ICD cover is back in and not highlighted. Stockton was working off his standard document and unaware of the previous omission of ICD, had not highlighted that it was now back in and included in this draft. His changes highlighted in yellow are relevant to dates and the schedule of sub-limits. On 19 August 2019 Wide sent back her new quote. This time no doubt because she worked off Stockton's last draft, ICD cover was back in.

[25] At the same time Stockton was following up with other insurers to see if they will follow AIG's lead and insure a proportion of the insured value. The second to fourth defendants (who I shall refer to now as the "AIG" defendants) each received a quote with ICD in. It appears that all were happy to follow what OMI's David Julius referred to as AIG's lead terms. One can reasonably infer from this and the industry practice that these follow-on insurers follow the terms agreed between the broker and the lead insurer but differ only on the extent of their risk exposure, specified exclusions and the premiums. From this the plaintiffs argue that one can infer that these three insurers were indifferent to whether ICD was in or out; they were agreeable to any terms the lead insurer, whose identity they knew, had concluded with the broker on behalf of its client.

[26] The same went for IUM which received an RFQ from Stockton in September 2019, with ICD in, and agreed to in industry jargon to follow their line capacity.

[27] But on 17 September 2019 there was a break in the continuum; AIG sent back a quoting slip, but this time ICD was <u>out</u>. Again, there was a covering letter from Wide which makes no mention of this omission. It is not clear whether Wide had worked off her prior document, sent in August (with ICD out), or whether she applied her mind to what had been sent to her by Marsh, and deleted it again. Since she did not testify, we do not know.

[28] On 1 October 2019 Wide wrote to another Marsh staffer, Lydia Motala, to offer cover, broken up into a one-month segment (October 209) to be followed by one year's cover, from 1 November 2019, to coincide with cover for the rest of the Georgiou Group.

[29] Motala responded only on 8 October to say that the client had not yet made a decision. But she says:

> *"We trust the terms offered on the whole Fourways Mall building will remain valid past 15 November 2019, at which time a firm order should be provided by client."*

[30] Motala did not testify so any interpretation of this email must be made without her assistance. The AIG defendants suggest this meant a break in the continuum of the prior emails between Wide and Stockton. On this interpretation any reference to terms offered, must therefore mean the terms last offered by AIG, which would be the September quote, where ICD is excluded.

[31] On 14 November 2019 Stockton again wrote to Wide and requested her to provide *"the updated quoting slip asap"* as he indicated the client wanted to go on risk from 16 November 2019. Wide replied that same day and sent the quote as requested. In the covering email she says:

> *"Please note I put out our best terms after your note below. Please find attached the updated quote as of today based on R 5 billion lost limit, our 70% capacity and BI deposit."*

[32] Crucially to the case of the defendants, ICD was <u>out</u> in this quote. Because of its significance in this case, I will refer to it from now on as the November quotation slip. Stockton then circulated the same quotation slip to the other four defendants i.e. the one with ICD <u>out</u>. What happened next in the chronology is

that on 29 November 2019, Stockton sent an email addressed to Wide and the other four defendants in which he says:

> *"Please note client is going on risk from 1 December 2019. Period of insurance from 1 December 2019 to 30 November 2020."*

[33] This email, say the defendants, constitutes an acceptance of Wide's and the other defendants offer of 14 November, based on Wide as the lead insurer's quote which excluded ICD cover. This is why they contend this is the contract between them. Stockton's evidence is that this conclusion is incorrect as he was unaware of the omission – just as he was earlier in July. The difference now was that he had circulated the document with ICD out.

[34] Later events however add to the confusing picture and hence this dispute. The practice in the industry is that once a quote has been accepted by the broker on behalf of the client (the plaintiffs), the broker prepares a placing slip, which is then circulated to the insurance companies who have submitted the quotes. The placing slip is meant to follow the terms of the quote which was accepted. But when the placing slip was circulated to the defendants ICD cover was back in. But the circulation of the placing slip had taken place after the defendants were on risk – i.e. the indemnity was operative as from December 1.

[35] The practice is then for the insurers to sign the placing slip. All the defendants did so sometime between 12 December (AIG) and 21 January (OMI). However, in the case of AIG, it amended the placing slip on 12 December. These changes are highlighted in yellow. They are not restricted to what I term the 'back-end' of the placement document but include some changes to the first section.

However, the inclusion of ICD cover remains in. Wide eventually signed off on this version. To recap, she had signed the placement policy, with ICD cover included, by 13 December 2019.

[36] In the following year, on 10 March 2020, Lydia Motala, a senior account executive from Marsh, sent Wide the policy for final signature. Wide emailed Motala back, requesting time to review the document. She wrote:

> *"Although I can appreciate that the client expects their wording this morning, this will take most of the day to go through and will therefore probably only have the wording sorted before 2pm this afternoon but will try and manage the clients' expectation. Bear in mind this was a November inception and we've only had sight of the wording this morning."*

[37] From the email trail there was a time lapse of approximately six hours between the email Wide sent back to Motala, requesting time to review the document, and the later email Wide sent back to Motala in which she indicates her acceptance. She also signed the policy document. This suggests that Wide knew that the policy was the final agreement and hence her apparent care (at least as it appears from the emails) to read it carefully.

[38] The significance of this is that the final policy contains ICD cover in. It mirrors the placement document that Wide had signed on 13 December. However, the policy document is some 64 page as compared to the quoting slips which are 15 pages.

[39] With this background in mind, I now consider the first separated issue which is limited to the plaintiffs and the first to fourth defendants. The fifth defendant did not agree to this separation.

Issues

First separated issue: Which is the contract?

[40] In the separation agreement the salient terms are formulated as follows*:*

> *"Whether the contract of insurance consists of the policy in its final form as pleaded by the plaintiffs or whether it consists of the offer of the first defendant in its quoting slip dated 14 November 2019 and the offers of the second to fourth defendants dated 15 November 2019, 19 November 2019 and 15 November 2019 respectively ("the offers") and the subsequent acceptance of the offers on 29 November 2019, as pleaded by the first to fourth defendants, and the plaintiffs response thereto as pleaded in their replication to the plea of the first to fourth defendants."*

[41] To summarise the position. The plaintiffs contend that the reason the policy is the contract between the parties is because it is the final version of the contract between the parties and thus on application of the parol evidence rule, specifically the integration rule, this constitutes their contract, not the prior November quotation slip.

[42] The first to fourth defendants reject the application of the parol evidence rule. Their argument is that recent developments in contract law have limited its

application from what it might have been historically. Rather they argue that the contract is the November quotation slip, as this is the one that came into existence when Stockton accepted it, by informing the defendants that they were now on risk as of 1 December. Put differently, the argument is that whatever the negotiations were before that date, because the contract became operative on that date, it must be the one governing the relationship between the parties.

[43] The fifth defendant's case on this issue is confusing. First, it is not included in the first separated issue. Second it has pleaded the existence of both contracts and is thus on this point adopting a wholly contradictory stance. On one version, the November contract is the candidate, on the other it is the March policy. In short on the essential question is ICD cover in or out, the fifth respondent's plea is that it is both. This may well be an error although the fifth respondent has not conceded this point. I will therefore not consider its position further in this section but only those of the first to fourth defendants who here make common cause in their position.

Parol evidence rule

[44] As classically formulated by Watermeyer, J.A., in *Union Government v Vianini Ferro-Concrete Pipes (Pty.) Ltd* the 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 parol evidence".*[3]

[45] A further formulation of the rule is contained in this passage from Wigmore which is also frequently quoted in our case law:

> *"This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act, i.e. its formation from scattered parts into an integral documentary unity. The practical consequences of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act."*[4]

[46] The plaintiffs argue that the policy is the final embodiment of the agreement between them and all the defendants. The inclusion of ICD in the policy contradicts earlier versions such as the November quotation where it is not included. Therefore, on the ordinary application of the integration rule the earlier evidence is irrelevant. The policy is the final document it includes ICD cover therefore the first issue is answered – ICD is <u>in</u>.

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[3] 1941 AD 43 at p. 47.

[4] Wigmore, *Evidence*, 3rd ed., vol. 9, sec. 2425, quoted in *National Board (Pretoria) (Pty) Ltd and another v Estate Swanepoel* 1975 (3) SA 16 (A) at page 26.

[47] In the policy although ICD is in, it is drafted in a different form to that in the placement slip. In the policy the single mention of the term is replaced by the following paragraph, which is 7(f) of the policy.[5]

"7. EXTENDED DAMAGE

> *"The Defined Event extends to include:*
>
> *……*
>
> *f) outbreak of Infectious or Contagious disease within a radius of 25 kilometres of the Premises Infectious or Contagious Disease shall mean any human infectious or human contagious illness or disease which a competent authority has stipulated shall be notified to them or has caused a competent authority to declare a notifiable medical condition to exist or impose quarantine regulations or restrict access to any place."*

[48] The AIG defendants argue that the parol evidence rule has been given a narrower scope following a line of cases most recently in *Capitec*.[6] In *Capitec* the court first referred to the most recent Constitutional Court decision on the parol evidence rule in this way:

> *"The Constitutional Court in University of Johannesburg also recognised the parol evidence rule in our law. It sought to reconcile the generous admissibility of extrinsic evidence of*

[5] Page 49 of the policy under the heading Extended Damage.
[6] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022* (1) SA 100 (SCA).

context and purpose with the strictures of the parol evidence rule in the following way:

"The integration facet of the parol evidence rule relied on by the Supreme Court of Appeal is relevant when a court is concerned with an attempted amendment of a contract. It does not prevent contextual evidence from being adduced. The rule is concerned with cases where the evidence in question seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement. . . ."[7]

[49] But in *Capitec* the court went on to remark that:

"The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."[8]

[50] But argue the plaintiffs, whether ICD is in or out, is not an issue of interpretation, where admittedly, context may assist in the elucidation of the text. The facts in this case remain a standard case for the application of the parol evidence rule. Nevertheless, because the case also concerned an alternative plea of rectification evidence of context was considered.

[51] This is because as in *Hutchison et al,* the authors note:

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[7] *Capitec*, supra, paragraph 41.
[8] *Capitec*, supra, paragraph 51

> *"Once a claim for rectification is made, all evidence that is relevant to demonstrate that the parties included a wrong term or intended (but neglected) to include a certain term is admissible."*[9]

[52] But this evidence did not assist. What is quite clear is that while with hindsight the presence or absence of ICD cover has become crucial, it was not seen that way at the time. Stockton concedes this point. But there is nothing to suggest that Wide saw it as crucial either.

[53] Because she was not called to testify, we do not have direct evidence on this point from her. But there is no evidence from her many emails in the record that she gave the issue any consideration. Certainly, Wide appears to have been a most fastidious reader of the documents. Even when she received the final placement from Marsh in mid-December, she noted further changes, such as a reference to a boat of 20 metres being changed to one of six. But despite this eye for detail, the inclusion or re-inclusion of ICD cover, passed her by. It also went unnoticed when she perused the policy for several hours on 10 March 2024. It is more probable that a reader of a document sent back by the other party would, if they were scrutinising it, confirm that their deletion had been retained (i.e. Wide) than a reader who had not ever been alerted to it would notice its omission (i.e. Stockton).

[54] Thus, on the facts of this case there is no reason not to apply the traditional approach and apply the integration rule. The policy is the longer document incorporating in the words of Wigmore *"the scattered parts*" of the earlier

[9] Hutchison et al, *The Law of Contract in South Africa*, Third Edition, paragraph 11.5.2.2, pages 277-8.

documents into an integrated whole. It is relevant that it is the complete document as opposed to the quotation documents which are not. Moreover, the ICD cover sentence is transformed from one that is cryptic phrase in the base POLDRA wording, to two sentences that explain its application. Stockton's' '*go live'* email in November, is, on his evidence, based on a mistaken assumption that in respect of the ICD cover, the quote of 14 November still remained true to the Marsh POLDRA standard form draft i.e. with ICD cover in.

[55] The defendants had argued that the placing slip of 11 December (with ICD back in) and the policy documents were not of any jural significance. They amounted to no more than Marsh performing administrative functions.

[56] But this is belied by the actions of Wide. She made amendments to the placing slip although she did not remove ICD cover. She also took time to scrutinise the policy in March 2020 before she signed it.

[57] Were the November quotation understood to be the final agreement, and the placement and the policy document, simply one signed for the sake of bureaucratic form, no doubt she would not have needed to correct the placement slip and then subject the policy to careful scrutiny. This is a reasonable inference from the facts. Wide could have testified to the contrary but the AIG defendants, all represented by the same legal team, chose not to call her. The defendants sought to make much of the fact that evidence in such cases involved the fallibility of human memory and that recall of past beliefs may be revised to make them consistent with current beliefs. Hence because of this fallibility of memory a judge should place greater reliance on

documentary evidence than on what witnesses might say.[10] I have no difficulty with this observation. But Wide has not come at all to explain any difficulty in memorising the events. Nor was she available to be asked at all if she may still be aware of why she made the omission, whether she passed on the omission in the contracts of reinsurance that followed the placing, or how she dealt with the issue in past dealings with ICD insurance for the Georgiou Group.

[58] I find, applying the integration rule, that the policy is the contract for the purpose of the first separated issue. That being the case the contract contained ICD cover.

Second separated issue rectification.

[59] The salient part of the second separated issue is framed as follows:

> "*Whether the contract of insurance stands to be rectified as pleaded by the first to fifth defendants and the plaintiffs' pleaded response thereto in their replications,"*

[60] The AIG defendants argue that the first and second rectification issues are joined at the hip, in the sense that they both raise the same issue – was ICD coverage in or out. In that respect I agree. Certain of the facts that I referred to earlier also apply the rectification issue. The question is whether a case for rectification is made out on the facts.

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[10] See in this regard the remarks of Leggat J in an English decision *Gestmin SGPS SA v Credit Suisse Securities UK Limited et al* [2013] EWHC 3560 (Comm) paragraphs 15-23.

[61] This aspect of the defence must be considered because rectification overrides the parol evidence rule.[11] The law on rectification is not controversial. The party seeking rectification must establish that the document does not reflect the common intention of the parties.[12]

[62] This was more recently set out in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products Pty Ltd* where Brand JA 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."*[13]

[63] A more specific view on insurance contracts is expressed by *Hemsworth et al* in their work on Insurance contracts:[14]

[64] In this regard the authors emphasise:

> *"For rectification to be ordered, there must have been a prior common agreement in terms different from those recorded in the policy ... Further the prior common agreement in accordance with which rectification is sought must have been unchanged between*

[11] See Harms, *Amlers Precedent of pleadings,* Ninth Edition, page 310, and *Tesven CC v South African Bank of Athens SA 2000(1) 268 (SCA).*
[12] Van Huysteen et al Contract General Principles, Sixth Edition, page 196, paragraph 5.52.
[13] 2004(6) SA 29(SCA) at paragraph 21.
[14] The Law of Insurance Contracts by Hemsworth and Others, 2023, London at p14-1 to 14-2.

> *the time of the agreement and the issue of the policy."* (emphasis provided).

[65] Although the onus to establish rectification lay with the defendants none of them led any witness. The only witness was Stockton who testified for the plaintiffs. His evidence was that there was no such common intention. Whilst this evidence may be subject to caution given that with hindsight and what was at stake for both the plaintiffs and his erstwhile employer Marsh, he could be said to be subject to powerful incentives to contend for this position. Nevertheless, his evidence on this point held up under cross-examination. Nor was there any document in the record to gainsay what he testified to. Nor is it likely, given that ICD was part of the standard POLDRA draft, that Marsh would have given up this cover without clearly communicating this to their client the plaintiffs, or negotiating this with their insurance company counterparts. But there is no evidence of this.

[66] The AIG defendants got a witness statement from Wide. She was clearly available to be called. The failure to call her on this crucial point justifies an adverse inference being drawn.

[67] In the English case of *Herrington* Lord Diplock remarked:

> *"The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is*

> *a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold."*[15]

[68] The adverse inference to be drawn here is that Wide's deletion of ICD cover, without it being highlighted, or in other respects signified, was either unintended or deliberately done to avoid being noticed. It is not possible on the evidence to determine which of these inferences is the one to be drawn. But for the plaintiff's case, if it is either, it negates the possibility of any common intention between the plaintiffs and AIG.

[69] As for the other defendants, none of them called a witness to testify. This means they must stand and fall by the failure to call any of their own or AIG's choice not to call Wide. The evidence is that as AIG was the lead insurer the others followed it on the core terms of the agreement. The inclusion or exclusion of ICD was not material to them at the time. What was material was their degree of participation in the indemnity, and the respective premiums as the correspondence indicates. None of them addressed the issue of ICD.

[70] Nor can it be suggested that by sending the draft with ICD out in November 2019 (the fact the defendants must clutch on to) that Stockton and or Marsh signified an ongoing common intent separate from what happened earlier. The omission of ICD by Wide was done in a paragraph of dense type where the

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[15] *Herrington v British Railways Board* [1972] AC 877 at 930F.

deletion was not visible. Moreover, it was done in a paragraph where there are no sentences – it is just a list of nouns. Thus, had it been a change in sentence or meaning this might have been more detectable to the reader. But it was not. Wide did not come to explain why she had made this deletion without signifying it.

[71] The plaintiffs make much of the fact that for two years after the summons was issued this fact was not brought to light. While this fact is not decisive on its own it is at least consistent with their version. If there had been an ongoing intent to have ICD deleted why was this not picked up earlier? The AIG defendants argued that the delay was caused by the ongoing litigation over Covid 19, and its consequences for business interruption, in the *Café Chameleon* case that was being litigated at the time, with one of the defendant's Guardrisk, as the insurance party. That may be so but surely any uncertainty at the time over what such a clause meant could have been obviated if the defendants' case was that there was no such clause in their contract with the plaintiffs.[16] That may not be the only inference to be drawn but without a witness testifying for the defendants it's not an unreasonable one to draw.

[72] What remains a mystery is why Wide deleted the cover when she sent back her quotation on 1 August 2019, in PDF form, without signifying the deletion.

[73] The plaintiffs have succeeded in establishing that it was at least an industry practice that changes of this nature get signalled. Moreover, this practice makes perfect business sense. It applies to the broker as well, as a Marsh internal

[16] *Guardrisk Insurance Company Limited v Cafe Chameleon CC* 2021 (2) SA 323 (SCA).

drafting instructions note to its staff indicates. In its note Marsh tells its brokers that if they must not amend any clause in the base POLDRA wording *"unless such options have been specifically endorsed under the Special Endorsements in the Specification."*

[74] But the instructions go on to remark:

> *"Insurers cannot be expected to read every word of the policy to check we have not made changes to the base policy "*

[75] But although this is an internal document and does not bind AIG or the other defendants, it is evidence of a business practice that is both rational and pragmatic. If each returned document, be it a quote, a subsequent counter offer or a placement, had to be re-read line by line, the expenses of both parties would increase, and no doubt be passed on to the insured party. Nor is there any guarantee that human error would not still prevail, and some unspecified change in otherwise standard wording, would pass unnoticed. If Wide had some other reason for the deletion and explanation for why it should have been detected by Stockton, she has not testified to the enlighten this court.

[76] There is no evidence of any common understanding. This requirement for rectification on which the defendants have the onus has not been met and the second separated issue must also be decided in favour of the plaintiffs. I now go on to consider whether any of the other defendants – the second to the fifth have put up any unique facts which must justify rectification on their part. I deal first with the second to fourth defendants whom I have termed the other AIG

defendants largely because on all issues they have made common cause with AIG and were represented by the same legal team.

The other Defendants

[77] No witnesses testified for any of the other defendants. An exception was made in respect of Paul Goodal on behalf of the fourth defendant. Goodall had passed away before this trial commenced, but the parties agreed that an affidavit that he had made in a related proceeding between these parties could be admitted as his witness statement in this matter.[17]

[78] Goodall explains briefly how the fourth defendant, Guardrisk Insurance Company Limited, came to be the fourth defendant in the matter taking up 3% of the risk, leading the plaintiffs to withdraw against another firm previously cited, IIA. This is not a material issue for the present matter. He then explains that Stockton had approached him to see if Guardrisk would take up some of the risk. Stockton then sent him the November quote (i.e. the one with ICD out). On 15 November 2019, Goodall replied that Guardrisk had agreed to take up the 3% or as he expressed a 3% line. He then also received the Stockton 'going on risk' email.

[79] At the end of the Stockton 'going on risk' email he remarks: *"Closing to follow in due course*." Goodall says he understood the term closing to be a reference to the POLDRA base wording, which he understood to mean that once a quotation had been accepted the placing slip had to reflect what was recorded

[17] This was an earlier application where the plaintiffs in this matter had sought a declaratory order. That matter was withdrawn by consent with costs reserved due to the commencement of the present matter.

in the quoting slip, and thereafter similarly the policy. He explains that when Mbilase from Marsh had sent him the placing slip on 13 December 2019, with IDC now in he did not check it, acting on the assumption that it was the same wording as in the quoting slip, and he therefore signed it and sent it back. When he was sent the policy on 13 March 2020, he simply noted that it was signed by AIG on 10 March. He does not state whether he noticed this inclusion of ICD cover, but one can assume, like the other AIG defendants, he did not.

[80] What Goodall's affidavit amounts to is a recognition that insurers understood the POLDRA drafting statement as reflective of their relationship with Marsh and by extension Marsh's clients the plaintiffs. Goodall does not make this point himself although it was argued more forcefully by IUM the fifth respondent and independently represented. Their point is one of timing. Whatever had happened between Wide and Stockton previously they were not involved. They only enter negotiations on the basis of the POLDRA wording sent to them in the November quoting slip – the one with ICD out- and on this basis they accept, and based on the POLDRA understanding, assume without checking, that the placement and the policy will follow this language. As it happened, they were wrong.

[81] What Goodall and the fifth defendant are contending, which differs from the approach taken by AIG in these proceedings, is that the POLRDA drafting rules regulated the relationship between the insurer and Marsh, and by extension Marsh's clients, and hence in terms of these rules, once the quotation had been accepted, the insurance company was entitled to expect that the placement and the policy had to follow its terms. Since they had accepted a quote in which

ICD was out, they were entitled to expect, without having to verify this, that ICD was also out in the placement document and the policy.

OIM and Bryte

[82] OMI put up one witness statement from David Julius but did not call him to testify. Therefore, I must confine myself to the evidence on interactions between him and Stockton from the emails they exchanged. When Stockton first interacted with Julius, he sent him a quoting slip dated 19 August 2019, which had ICD cover in. On 21 August Julius confirmed it would be able to offer a 12.5% *"following capacity behind AIG's lead terms."* Later in the email he says: *"I will send you a copy of "our standard terms and conditions."* There is some ambiguity here. Is Julius accepting the quote based on AIG's lead terms i.e. ICD in - or on OMI's standard terms which he does not set out. There are further emails between the two dealing with a survey on fire risk which OMI wanted to see. The next interaction relevant to the separated issues is the one dealt with earlier. Stockton sends the November quotation (ICD out) to Julius. On 15 November Julius confirmed that *"see attached our confirmation of our 10% follow capacity behind AIG's terms*." He mentions increasing this capacity, if possible, from the reinsurance market once he had their feedback. The only specific mention he makes is about a deductible for a sprinkler management system. Thereafter the chronology is the same. OMI get the placement slip with ICD now in and it is signed on 21 January 2020 by Julius. OMI was circulated the policy on 10 March 2020 that had been signed by AIG. There is no evidence that OMI queried the fact that ICD was included in the policy.

Bryte (Third Defendant)

[83] Bryte prepared a witness statement from Kenneth Prentice but did not call him or anyone else as a witness. On the facts, Bryte is a similar position to Guardrisk in respect of the separate issues. It is a latecomer, in that its first interaction in writing was when it received the November quoting slip (ICD out); which it then agreed to. Like the others it then got the placement slip (ICD in) which it signed. It then received the policy as signed by Wide, as did all the others. It gives no indication in the correspondence on any view on ICD cover being in or out. The only issue that Prentice signals is the *"… clients strategy regarding ... risk improvements*" This latter remark does not have anything to do with ICD cover.

Fifth Defendant (IUM)

[84] The firth defendant presented a witness statement for one witness, Ryan Shephard. Shepard was previously employed by IUM at the relevant time. He was not called as a witness. However, Stockton in cross examination conceded that he did not disagree with what was stated in Shepherd's witness statement. Stockton had also not put up a rebuttal statement in respect of Shepherd's witness statement, unlike he had with the others.[18] Given this concession IUM did not call Shepherd and hence argued that this places it in a different position to those defendants who chose not to call anyone.

[18] This was a commercial court case. This meant that all the parties were required to put up witness statements of the witnesses they were to call. Effectively their evidence in chief. The plaintiffs' filed their statements first, and the defendants filed theirs in response. As agreed, the plaintiffs were entitled to fill rebuttal statements which Stockton and Motala did.

[85] Shepherd received the quoting slip from Stockton on 14 September 2019. In this quotation slip ICD is in. IUM then offered ICD cover but says this subject to a limit of R 1 million. This was further limited by its share of the risk which was 5%, resulting in a risk limit of R 50 000. Stockton appears to concede that this was correct. However, whatever the merits of this argument by IUM, it was not made part of the separated issues. Nor can it be read into the rectification issue as it has been framed. This issue must therefore wait for the trial or if I am requested to consider doing so, a further separation.

[86] As regards ICD cover Shepherd states that his offer to Marsh was subject to a time limit that expired on 30 October. Stockton then approached him for a new quote with the November quotation – i.e. the one with ICD out.IUM then responded to this quote but subject to the same limitations mentioned earlier. The same chronology then follows. IUM accepts the quote without ICD cover, receives the placement slip with ICD back in but does not notice this. IUM similarly received the policy without noticing ICD was in. Shepherd's assumption was that the placement slip, and policy would follow the wording of the November placing slip. He says: "*It was commonly accepted that the placing slip and/or the policy wording would be consistent with the 14 November placing slip".*

Second to Fifth Defendants

[87] The second to fifth defendants are for the purposes of the rectification plea in a similar position. Whatever the past history with Wide's omission of ICD when they received the November quoting slip, they quoted when it was omitted, and

Stockton then informed them all in the same email that they were now on risk. None noticed the inclusion of ICD cover in the placement slip which all signed, or the inclusion in the policy which all received, but did not sign, unlike Wide.

[88] The plaintiffs argue that notwithstanding that this may be the case, they have not established a common ongoing intent. They have not established that Stockton ever intended to exclude ICD cover when he asked them to quote. Nor, since none of them testified, have they stated that they were aware that ICD had been omitted in the November quote and thus departed in that way from the standard POLDRA base wording. It is unlikely that they were aware of this omission – its presence or absence is not mentioned in any of the contemporaneous correspondence which are detailed on many other issues - so even their subjective intentions are not established, as the plaintiffs have argued.

[89] Thus, none of them can rely on this crucial leg of the claim for rectification. Like AIG, and indeed Marsh, it is clear that ICD was not an issue at the time. The second to fifth defendants were focused as follow on insurers with limits or subjectivities, premiums and in respect of some, fire safety measures. They were confident that the lead insurer AIG had adopted terms they would be willing to accept. This was not an unreasonable approach. AIG was responsible for a 70% indemnity and so had the most to lose. Its stands to reason that others would accept that they could follow on the terms it had accepted. None of them have made out a case for rectification that is distinctive from that of AIG. The second separated issue must be decided in favour of the plaintiffs in respect of the second to fifth respondents.

Third separated issue

[90] The third separated issue is only raised by the AIG defendants (first to fourth). They contend that the plaintiffs had not made payment of the full premium and hence are not entitled to be indemnified.

[91] The business interruption insurance was to be calculated in this way. An estimate of the amount to be insured was made at the outset of the policy. The amount was based on the Mall's annual turnover. Since this could only be ascertained at the end of the year for which the Mall was insured, an estimate was made, and the plaintiffs were then to pay 65% of this amount at the commencement of the policy. It is common cause that they did so paying an amount of R4 384 806.25. What the plaintiff then had to do was to make a declaration at the end of the insurance period, of what the actual amount was and then pay the additional insurance that was due.

[92] The AIG defendants claim that on the expiry of the insurance period this declaration was never made nor was the additional premium that was due paid.

[93] They rely on the following clause:

> *"in consideration of payment of the premium by or on behalf of the Insured, the Insurer agrees to indemnify"*

[94] There is no dispute that the declaration was never made, nor if there was an amount due, that there was no further premium paid. However, the plaintiffs argue:

a. Firstly, that there was no penalty provided for in the policy if the declaration was not made;
b. The insured event had occurred prior to the balance of payment being due;
c. It was practice for the insurer to call for the declaration and AIG did not:
d. Even if there had been a declaration made there was no additional premium owing indeed more likely a repayment of the deposit was due to the plaintiffs;
e. The insurance policy was renewed without the insurer making any claim for a top up from the plaintiffs; and
f. To the extent that any top up was due (which the plaintiffs deny) they tendered payment to the AIG defendants.

[95] The defendants they rely on the following passage in the judgment of the SCA in *Parsons Transport (Pty) Ltd v Global insurance Co Ltd*[19]:

> *"...was merely to recite the corresponding obligation of the appellant, which the respondent might have been entitled to insist on, i.e. that the premium be paid, before compensating the appellant in the event of a claim for an occurrence before the premium was due."*

[96] But this paragraph does not have anything to do with the premium dispute in this matter nor are the clauses relied on comparable. As noted by the plaintiffs,

[19] (1) SA 488 SA.

the general clause in the policy does not provide for a penalty for non-payment of the penalty. In any event there is no evidence before me that there was a top-up premium due. Without it, this point is a non-starter.

[97] The third disputed point is decided in favour of the plaintiffs.

Costs

[98] Both the AIG defendants and the plaintiffs made use of two counsel. In the case of the plaintiffs, they made use of two senior counsel, whist the fifth defendant made use of one counsel. I consider that given the complexity of the case and that the case was defended by two separate legal teams, the cost of two counsel is justified, although not two senior counsel.

ORDER:-

[99] In the result the following order is made:

IT IS ORDERED THAT the issues separated for prior determination by this Court in terms of the directive issued on 24 May 2023 are determined as follows:

1. The contract of insurance consists of the policy in its final form as pleaded by the plaintiffs.

2. The contract of insurance does not stand to be rectified as pleaded by the first to fifth defendants.

3. The dispute regarding the premium is decided in favour of the plaintiffs and the defence pleaded by the first to fourth defendants in paragraph 31.4 of their plea, fails.

4. All costs associated with the determination of the separated issues are to be paid by the first to fifth defendants, jointly and severally, the one paying the other to be absolved, which costs include the costs of two counsel.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHANNESBURG

Date of hearing: 20 November 2023 – 22 November 2023

Date of Arguments: 18 January 2024 – 19 January 2024

Submission of Draft Order: Plaintiff - 22 January 2024

First to Fourth Defendant - 23 January 2024

Fifth Defendant - 24 January 2024

Date of Judgment: 03 May 2024

Appearances:

Counsel for the Plaintiff:	MC Maritz SC
	G Elliott SC
Instructed by.	Thomson Wilks Inc
Counsel for the First to Fourth Defendants:	IP Green SC
	R Ismail
Instructed by:	Webber Wentzel
Counsel for the Fifth Defendant:	EJ Ferreira SC
Instructed by:	Engelbrecht Attorneys Inc.