IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 30226/2014

Date: 9 September 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED ✓

9/9/16 .....
DATE

.....
SIGNATURE

In the matter between:

TARRING CORPORATION CC **PLAINTIFF**

and

NEW NATIONAL ASSURANCE COMPANY LIMITED **DEFENDANT**

JUDGEMENT

DU PLESSIS, AJ

1.

The Defendant is an Insurance Company. Under a written policy, it insured a new 2013 Model Case Uni-Loader, also known as a Skid Steer. It may be described as a smaller version of a front-loader, belonging to the Defendant.

2.

The principle risk underwritten was defined as:

> *".....the items (or any part thereof) entered in the schedule, whilst at the location or in the geographical area mentioned therein, suffer any unforeseen and sudden physical loss or damage from any cause not specifically excluded in a manner necessitating repair or replacement."*

See Exhibit "A", page 59 (Contractor's Plant and Equipment Insurance Police).

3.

There are certain exclusions included in the policy document, where it appears in Exhibit "A", page 60 to page 62. The relevant exclusions are the following:

> "*12.* *Loss or damage directly or indirectly caused by, or arising out of, or aggravated by the willful act or willful negligence of the insured or its representatives;*
>
> *17.* *Loss of damage due to absconsion.*"

4.

In addition hereto, certain conditions appear in the policy document on page 61 of Exhibit "A", namely:

> "*3.* *The insured shall, at his own expense, take all reasonable precautions and will maintain and service the insured property to prevent loss of damage and comply with statutory requirements and manufacturer's recommendations and*

maintain suitable service records.";

On page 70 of Exhibit "A" and under the heading 'GENERAL EXCEPTIONS': Special Extensions To The Above General Exception' in paragraph 6, the following special extension of the general exceptions to the Defendant's liability appear:

> 6. *This exception does not cover any liability whatsoever arising out of any claim hereunder as a result of any dishonest, malicious or illegal acts of any party to the insured.*"

THE FACTS:

5.

The Plaintiff is in the business of performing smaller civil contractual work. The Plaintiff acquired the Case Uni-Loader referred to above in order to assist with his work. On 24 November 2013, this Uni-Loader was stolen from a building site located in Pretoria-Glen, close to Soweto, Gauteng. The detail of the circumstances leading the theft will be dealt with hereunder. The Plaintiff duly lodged a claim with the Defendant on or about 27 November 2013. The Defendant disputes that the Plaintiff actually lodged the claim with the Defendant and alleges that the claim was lodged with the Insurance Broker. The Defendant nevertheless rejected the Plaintiff's claim in writing on 17 January 2014, citing three reasons for the rejection namely:

> "*1.* *The loss is excluded in terms of exclusion 17, which states that:*
>
> *'The insurers shall not be liable for loss or damage due to absconsion';*

2. *The insured had failed to perform the necessary checks to confirm the legitimacy of the hirer. The insured had thus failed to adhere to condition 3 of the policy, which requires that:*

> *'The insured, shall at his own expense, take all reasonable precautions and will maintain and service the insured' property to prevent loss or damage....';*

3. *The insured had informed insurers that the nature of their business as being civil contractors. Insurers were not advised that the insured' machinery would be hired out, which is vital, as certain underwriting considerations would have to be taken into account when granting cover."*

6.

Page 2 of the rejection letter of the Defendant records:

> "*Our policy requires you to institute legal action within three months after receiving this notice. If you do not institute legal proceedings within that time, you will no longer be entitled to claim the benefit under the policy.*";

7.

7.1. The Plaintiff called one witness, a certain Mr Nick Deen, the owner of the Plaintiff. Some time (this witness is not sure, it could be two to three weeks) prior to the 24th of November 2013, Deen of the Plaintiff, was contacted by a certain Mr Ndlovu with a request from Ndlovu, to hire certain equipment for use at a construction facility. Mr Deen, however, informed Mr Ndlovu, that the Plaintiff does not hire, rent or let equipment, but that the Plaintiff' company could

perform the work requested. No further communication from Mr Ndlovu was received for the moment.

7.2. In the week prior to the 24th of November 2013, Mr Ndlovu again contacted Mr Deen of the Plaintiff and requested the services of the Plaintiff from Monday the 25th of November 2013. Mr Deen is adamant that this services was for the Plaintiff' company to perform certain work for Mr Ndlovu and that it was not the hiring of the front-loader by Mr Ndlovu. Deen was challenged by Counsel for the Defendant about the nature of the arrangement with Ndlovu. The Defendant suggested that the arrangement was for the hiring of the Uni-Loader. This was vehemently denied by Deen, whose evidence was that his company does not perform the hiring and letting of his equipment. The reason for the suggestion as to the hiring and letting of the Uni-Loader when it got stolen, was of course that the Defendant would be entitled to repudiate the claim, had the Uni-Loader been hired by Ndlovu.

7.3. Deen required telephonically of Ndlovu, to provide him with:

7.3.1. a copy of his ID document, a copy of his business on a letterhead, including the address where the front-loader would be utilised and where the front-loader had to be established;

7.3.2. payment of R 5,198.40, such amount representing the establishment costs according to Mr Deen.

7.4. In the absence of these documents, Deen was not prepared to do

business with Ndlovu. The three requested documents, namely the Ndlovu Construction letterhead with the address where the Plant was established, a copy of Ndlovu's ID Document and the proof of payment were provided by Ndlovu to Deen and were dealt with in evidence. They all subsequently proved to be fraudulent documents.

7.5. The proof of payment purporting to be a cash deposit, is dated 22 November 2013 at 13:08 at FNB Southdale Bank. On face value, the document appears legitimate and certainly does not create suspicion. Deen's evidence was also that he had no reason to be suspicious of the deposit slip. On close scrutiny in Court, the deposit slip appeared legitimate. Counsel for the Defendant criticised Deen for not ensuring the legitimacy of the deposit. Deen explained he was provided with the documents after close of business and given his discussions with the fraudster Ndlovu, had no reason at that stage to doubt the deposit. The deposit was for a relatively small amount of R 5,198.40, such amount representing the establishment costs of the Uni-Loader on the building site.

7.6. The letterhead of Ndlovu Construction CC contains its physical address, the company registration number , his VAT number an e-mail address and two telephone numbers. Mr Deen's evidence was that prior to the theft, he never had any difficulty contacting Ndlovu on any of the telephone numbers that appear on the letterhead. On scrutiny, the letterhead is certainly no corporate letterhead, but I cannot agree with Mr Berlowitz' (Counsel for the Defendant) remark,

that the letterhead is an amateurish letterhead. The letterhead appeared to be printed with different letter fonts and sizes and all the required information of a letterhead appears on the document.

7.7. The next day, on Sunday morning, Mr Deen and his employee, the operator of the front-loader, a certain Mr Mucheri, took the front-loader to the address that appears on the Ndlovu Construction letterhead. On their arrival at the indicated address, they found the following:

7.7.1. A construction yard fenced in with a steel palisade. I was referred to a photograph of the site which photograph was taken by the assessor appointed by the Defendant. According to Mr Deen, the only access to the fenced-in construction site, was via a gate, which was locked with a padlock. The Palisade was in a good condition. A certain Mr Gardner, an Assessor appointed by the Defendant and who also visited the building site two to three days after the theft of the Uni-Loader occurred, described the building site as in a good area of Soweto and that no reason existed to regard the area and/or the site as high risk. This was also the evidence of Deen.

7.7.2. On his way to the particular address, or as Mr Deen conceded in cross-examination, it might even be as he arrived at the address of the construction site, he telephonically confirmed with Mr Ndlovu that the front-loader would be accepted at the site and that he would

be able to establish the front-loader on the indicated site.

7.7.3. Mr Ndlovu confirmed that the front-loader may be established at the site and that Mr Deen would be met by a certain "*Mike*" (his foreman) on the site.

7.7.4. The arrangement was that his employee Mr Mucheri, the operator of the front-loader, would remain at the site with the front-loader and assist with the loading of sand onto a lorry during the Sunday. This sand would then be transported to a building site, where after the operator (Mr Mucheri) would be excused and may leave the premises, to return on Monday morning to continue the intended work. According to Mr Deen, Mr Mucheri would at all times remain in possession of the key of the front- loader.

7.7.5. On the site Mr Deen was indeed met by a certain "*Mike*" who introduced himself as Mr Ndlovu's foreman, he was wearing a shirt with the company logo on the front of the shirt. On the outside of the premises (on the gate) there were company branding of Ndlovu Construction CC, there was a bakkie on the inside of the site, also branded with the Ndlovu Construction CC logo, as well as a big container on the site branding the Ndlovu Construction CC logo. Mr Gardner, the Assessor referred to above, in his evidence, confirmed that this Ndlovu Construction and its *modus operandi* was known to Mr Gardner, as he had been confronted with two similar incidents of Ndlovu

Construction where the same *modus operandi* was followed. Gardner, however, said that this was the first time that it was alleged that Ndlovu Construction displayed a company logo and/or any company branding. Because of this, Mr Berlowitz urged me to find that Deen's evidence regarding the logos and the company branding, is a fabrication. The reason advanced, was that Gardner has never found this to be present at his previous encounters with Ndlovu and also because this evidence about the logos and the company branding, does not appear in the statement that Deen made to the Police. I do not agree that Deen's evidence in this regard appeared to be fabricated. He was to a large extent not challenged on the remainder of his observations. This included proper fencing, a locked gate, sand that was fenced in by proper danger tape. I also do not agree with the Defendant, that Deen, in his attempt to justify the absence of his version on the logos and company branding, from the Police statement: "*eventually fell back on an alternative version that his son was ill and that he was not focused on this regard.*" Deen was not challenged on the fact that he was upset at that stage and that his son was in actual fact ill. Similarly, Gardner's evidence was never that he consulted and asked Deen as to the circumstances and his observations on the

building site. I accept Deen's evidence in this regard to be probable.

7.7.6. On the inside of the site, there was a fairly substantial pile of sand that had to be loaded onto a lorry. According to Mr Deen, the sand was cordoned off with prescribed health and safety ribbons. Mr Deen got the impression that the entirety of the site where he was to leave the front-loader, complied with the health and safety regulations. This evidence remains unchallenged. Deen's evidence that he particularly looked around on the site to establish how safe his front-loader would be on the site, remains unchallenged. Deen's evidence that he observed two security guards on the site and even spoke to one of the guards, similarly remains unchallenged.

7.7.7. The sand was never loaded onto the lorry, as the lorry-driver was drunk, but this Mr Deen only learned the next morning on the 25th of November 2013.

7.7.8. On Mr Deen's version, his operator (Mr Mucheri) then left the premises on 24 November 2013 with the key of the front-loader. Although Mucheri never gave evidence (he returned to Zimbabwe) Deen insisted this was the instruction (a standing instruction) to all operators that work for the Plaintiff. Mr Deen had no reason to believe that Mr Mucheri did not take the key with him, nor was it alleged. It was alleged by Counsel for the Defendant in

Cross-examination that it is not possible to move the loader without a key but this was denied by Mr Deen and it later appeared during the evidence of Mr Gardner, the Assessor of the Defendant , that he determined from the Manufacturers of the front loader that it is possible to "*hot-wire*" the loader and that would enable the loader to be moved. The Plaintiff was criticised by Mr Berlowitz for not calling Mucheri as a witness. Deen explained that Mucheri returned to Zimbabwe and that they could not locate him. The criticism from the Defendant that Plaintiff should have known that Mucheri was a necessary witness and that they should have made the necessary precautions to call him as a witness, is not totally unjustified, but the failure is by no means fatal for the Plaintiff's case. The Defendant introduced the evidence of Mucheri to a large extent through the evidence of Gardner to Court. It was never alleged that Mucheri ever knew the circumstances of the arrangement between Deen and Ndlovu and also under what circumstances he operated the Uni-Loader. The fact that Mucheri told Gardner that he did not know what happened to the key to the machine, is neither here nor there. Deen's evidence was that Mucheri would have taken the key back to the work and Gardner certainly presented no evidence suggesting that the key could not be located at

Deen's work.

7.7.9. The next morning, Mr Deen of the Plaintiff, received a telephone call from the operator (Mr Mucheri) who informed him that the front-loader had been stolen from the particular site where they left the front-loader the previous day. This evidence remains unchallenged.

7.7.10. When Mr Deen arrived at the site at 08:00 on the Monday morning of 25 November 2013, he found only one person (a black women that he had not seen before) on the site. She informed him that during Sunday 24 November 2013 the person known as "*Mike*" and some other person, loaded the front-loader onto a truck and left the premises

7.8. Unsurprisingly, during that week it emerged that nothing had been deposited in the FNB account as represented by the deposit slip, that the ID document of Ndlovu is false and that the address of Ndlovu Construction, does not exist. Despite Mr Deen's best efforts, he could no longer make telephonic contact with Mr Ndlovu. Mr Deen reported the matter to the Police on the same day and to the Defendant. The Police, to date hereof, never found the front-loader.

8.

The loss of the front-loader is not in dispute and Mr Gardner (the assessor that investigated the loss of the front-loader on behalf of the Defendant) confirmed in his evidence that the *modus operandi* of Ndlovu, was known to him and that

this particular incident is in fact the third that he had to investigate on behalf of insurers and that the modus operandi has been exactly the same in each incident, except that the company logos of Ndlovu Construction are a new addition.

9.

The Defendant allege that Mr Deen, was in breach of exclusion 17, in that the Plaintiff suffered the loss of the front-loader due to absconsion, and that the Plaintiff was in breach of condition 3 of the policy i.e. he failed to take all reasonable precautions to prevent the loss of the front-loader.

10.

The Defendant bears the onus of proving a breach of the conditions. Ogilvy Thomson JA, in Autoprotection Insurance Company Limited v Hanmer-Strudwick 1964 (1) SA 349 (A) at 354 A – F:

> *"As was pointed out, in relation to this very same condition number 6, now invoked by Appellant, in Resisto Diary (Pty) Ltd v Autoprotection Insurance Company Limited 1963 (1) SA 632 (A) at 643 – 5, the so-called conditions of the policy are in truth terms of the contract, and the onus rests upon the insurer invoking a condition to prove the breach upon which it relies."*

11.

Both exclusions 17 (loss or damage due to absconsion) and the risk insured namely a failure to take reasonable precautions are wide enough to include loss or damage caused by the negligence of the Plaintiff or someone acting on

its behalf.

12.

Mr Berlowitz referred me to the test for negligence as set out in Kruger v Coetzee 1966 (2) SA 428 (N) at 430 E – F. Although condition 3 obliges the Plaintiff to take all reasonable steps and precautions to avoid a loss of the Uni-Loader, I do not agree that this condition can be construed as an exclusion of liability where loss or damage is caused by the insured's negligence, in the delictual sense of Kruger v Coetzee, as this would negate a primary component of the cover afforded by the definition of the risks. Smalberger JA, in Fedgen Insurance Limited v Leyds 1995 (3) SA 33 (A) at 38 B – E, remarked:

> *"The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A Court must therefore endeavor to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (Scottish Union and National Insurance Company Limited v Native Recruiting Corporation 1934 AD 458 at 464 – 5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (Autoprotection Insurance Company Limited v Hanmer-Strudwick 1964 (1) SA 349 (A) at 354 C – D); for it is the insurer's duty to make clear what particular risks it wishes to exclude (French Hairdressing Saloon Limited v National Employer's Mutual General Insurance Association Limited 1931 (AD) 60 at 65; Autoprotection Insurance Company Limited v Hanmer-Strudwick supra at 354 D – E). A*

policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity, the contra-proferentum rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy (Kliptown Clothing Industries (Pty) Ltd v Marine Trade Insurance Company of South Africa Limited 1961 (1) SA 103 (A) at 108)."

13.

Comrie J referred to various authorities in SANTAM Limited v CC Designing CC 1999 (4) SA 199 (C) in his judgement dealing with the interpretation of a condition in an insurance policy similar to condition 3 as referred to above, regarding the so-called all reasonable precautions clause at 204 – 210. With reference to Paterson v Aegus Insurance Company Limited 1989 (3) SA 478 (C), Comrie J referred to the remark of King J, where the latter said on 483 F:

"*The condition here is not clear, certainly insofar as it purports to apply to the all-risk section, it should not be construed so as to entitle the insurer to avoid liability where the insured been negligent, for that would be to render the cover for the accidental loss nugatory and manifestly this was not the intention of the parties; the object of the insurance must not be defeated or rendered practically illusory as it would indeed be if an accidental loss occurred and the insurer was able to avoid liability by the application of the reasonable precautions provision in such a way as to abrogate its obligation to make good the loss merely on the basis of the negligence of the insured.*"

14.

The loss or damage referred to above, are however, more pertinently described in the exclusions and in particular item 12, describing that loss or damage directly or indirectly caused by, or arising out of, or aggravated by the willful act or willful negligence of the insured or his representatives, and the loss or damage due to absconsion, would be excluded. This should be read with condition 3 that determines:

> "*3.* *The insured shall, at his own expense, take all reasonable precautions and will maintain and will maintain and service the insured property to prevent loss of damage and comply with statutory requirements and manufacturer's recommendations and maintain suitable service records.*"

15.

The exclusions "*loss or damage due to absconsion*" and "*reasonable precautions*", does not specifically refer to negligence. At best does the exclusion in item 12 describe loss or damage as - "*directly or indirectly caused by ....the willful act or willful negligence of the insured or his representatives.....*". To construe the exclusion as an exclusion of liability where the absconsion is caused by the Plaintiff's negligence and only his negligence, would deprive the Plaintiff of virtually the entirety of the cover afforded him by the description of the risks within the policy document.

16.

In Scottish Union and National Insurance Company Limited v Native Recruiting Corporation Limited 1934 AD 458 at 464, it was said that:

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

See also a reference hereto in Santam Limited v CC Designing CC 1999 (4) SA 199 (CPD) at 4A – B.

17.

It is an accepted principle in interpreting insurance contracts, that it is the duty of the insurer to make it clear what particular risks he wishes to exclude. (See Kliptown Clothing Industries (Pty) Ltd v Marine & Trade Company of South Africa Limited 1961 (1) SA 103 (A)). To this end and purpose, the exclusion in paragraph 17 for loss of damage due to absconsion, is perfectly clear, not vague or open to interpretation, but for the definition of absconsion.

18.

The term absconsion must be interpreted in the context of the contract of insurance as a whole and with due regard to the nature and object of the contract. See Swart & Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) at 202 C.

19.

Clearly "*absconsion*" cannot be read in isolation without taking cognisance of the exception clause appearing under the heading 'general exceptions' at page 70, paragraph 6, that reads:

> "*6.* *This insurance does not cover any liability arising out of any claim hereunder as a result of any dishonest, malicious or illegal acts of any party to the insured.*"

20.

Corbett JA, (as he then was) in Arus Enterprises (Finance) (Pty) Ltd v Protea Assurance Company (Pty) Ltd 1981 (3) SA 274 (A) at 289 – 290, remarked as follows:

> "*The term 'absconsion' as used in the memorandum, might have caused some difficulty (the only meanings given in the Oxford Dictionary are hiding, 'concealment') were it not, common cause – and also clear from the evidence, that it refers to the theft of items of insured property by a lessee and/or their employees. It is clear, too, reading the memorandum in the context of the policy as a whole, that the words 'the lessee's and their employees' referred to the lessee's with whom lease agreements falling under memoranda 3 and 4 of the policy are concluded by the Appellant and the employees of such lessee's.*"

When the absconsion clause is read with the "*dishonest, malicious or illegal acts of any party to the insured*" clause, it appears to attempt to exclude all forms of theft. All forms of theft entails an element of dishonesty, maliciousness and illegality towards the insured. Such an interpretation would render the policy unworkable and deprive the Plaintiff of the entirety of the cover afforded

him by the description of the risks within the policy document.

21.

Mr Berlowitz, on behalf of the Defendant, submitted that I should interpret these two clauses on a more limited basis, in order to prevent an injustice to the insured event clause. He suggested – so the argument goes – that the dishonest, malicious or illegal acts are those acts that are to be associated with a party associated with the insured, either as employee or contractually or sociably. I was referred to the example where an employee would steal the machine, then in that event in the absence of employee theft cover, the loss would not be recoverable and the insurer would be excused from liability. In that sense – so the argument continues – must Ndlovu Construction, the fraudulent party, be regarded as a party to the insured based on an oral subcontract. As a result, Mr Berlowitz argues the Plaintiff's claim is excluded under this clause.

22.

I do not agree with this approach. Had the insurer wish to avoid the unworkable understanding of clause 6 above, the language used had to be clear that theft simpliciter would be covered by the insurance policy, but theft through a fraudster "*attaching itself*" to the insurance policy and by implication the insured, would not be covered and would result in the insurer being excused from liability. Such an approach would negate the intention of the parties. Such intention is gathered from the language used in the policy and in particular the

principle risk underwritten as defined on page 1 of the contractor's plant and equipment insurance policy, where it is stated as:

> *"The insurers hereby agree with the insured that if at any time during the period of insurance stated in the schedule or during any subsequent period....the items (or any part thereof) entered in the schedule, whilst at the location or in the geographical area mentioned therein, suffer any unforeseen and sudden physical loss or damage from any cause not specifically excluded in a manner necessitating repair or replacement."*

23.

Absconsion that occurs during the willful act or willful negligence of the insured, would surely assist the Defendant. Once it is accepted that willful or willful negligence is nothing more than reckless conduct by the insured. Absconsion, that is nothing more than a particular manner of theft, that comes about as a result of dishonest, malicious or illegal acts of "*any party to the insured*" is a provision that purports to place a limitation on the clearly expressed obligation to indemnify. I therefore interpret the absconsion clause as read with the dishonest, malicious or illegal acts of any party to the insured clause restrictively. Even should I accept that these clauses are ambiguous in its meaning, then the *contra proferentum* rule applies, which requires a written document to be construed against the person that drew it up and this would then operate against the Defendant as drafter of the policy. See in this regard, Kliptown Clothing Industries (Pty) ltd v Marine and Trade Insurance Company of South Africa Limited 1961 (1) SA 103 (A) at 108 C and Autoprotection Insurance Company Limited v Hanmer-Strudwick 1964 (1) SA 349 (A) at 354

C – D for the restrictive interpretation.

24.

To determine whether the absconsion clause as read with the reasonable precautions clause assists the Defendant, one would need to consider the conduct of Deen.

25.

I hold that the Plaintiff had not breached exclusion 17 and that the theft of the front-loader cannot be viewed as absconsion and the Defendant's reliance on exclusion 17, accordingly fails.

26.

Condition 3 of the policy reads that the Plaintiff shall take all "*reasonable precautions....to prevent loss or damage*". This must be read with exclusion 12, which describes "*loss or damage directly or indirectly caused by the willful act or willful negligence of the insured or its representatives*".

27.

The condition referred to above exclude liability if there was a willful act or willful negligence on the part of the insured Plaintiff, or if the insured Plaintiff did not take reasonable precautions to prevent the loss.

28.

In Paterson v Aegus Insurance Company Limited 1989 (3) SA 478 (C), all risks cover was subject to a condition which read:

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

King J held on the facts that the Plaintiff insured was not negligent. At 483 (F), King J concluded:

> "*The condition here in not clear, certainly insofar as it purports to apply to the all-risks section; it should not be construed so as to entitle the insurer to avoid liability where insured has been negligent for that would be to render the cover for the accidental loss nugatory and manifestly this was not the intention of the parties; the object of the insurance must not be defeated or rendered practically illusory as it would indeed be if an accidental loss occurred and the insurer was able to avoid liability by the application of the 'reasonable precautions' provision in such a way as to abrogate its obligation to make good the loss merely on the basis of the negligence of the insured.*"

29.

In the Hanmer-Strudwick case *supra*, the policy oblige the insured to maintain the insured vehicle in an efficient condition, coupled with an obligation to take

all reasonable steps to safeguard it from loss or damage. Referring to the duty to maintain Ogilvie Thompson JA, expressed an opinion at 355 H:

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

30.

James J commented on "*reasonable precautions*" requirement in an insurance policy in Aetna Insurance Company v Dormer Estates (Pty) Ltd 1965 (4) SA 656 (N) at 659 H – 660 A, as follows:

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

31.

In this regard, Isando Foods (Pty) Ltd v Fedgen Insurance Company Ltd 2001

(3) SA 1278 (SCA), finds application. Here the question arose as to whether a plant that had been specified in the insurance policy, taken out by the Plaintiff with the Defendant and then destroyed by fire, was property "*for which they (the insured) are responsible*", the Plaintiff (by reason of dispute with the seller) at the time of the fire not yet having taken transfer thereof i.e. not yet been the owner thereof. Nugent AJA (with whom Heifer ACJ and Howie JA, concurred) held as follows at 1284 – 1285:

> "*Upon taking occupation of the property in anticipation of becoming the owner, it must follow, in my view, that the Appellant assumed the risk of damage to the property caused by its own fault....for that was not a risk that the seller took upon itself..... In my view, that would indeed be a loss for which the Appellant would be responsible "for purposes of the policy".*
>
> *Mr Burger SC for the Respondent, submitted that the policy could not have been intended to insure against the risk of loss of that nature, because that would be in conflict with general condition 3, which provides that the insured shall take all reasonable steps and precautions to prevent accidents or losses.*"

The effect of construing the insuring clauses to include loss caused by negligence, it was submitted, would at the same time negate the insurance because it would conflict with that condition. That seems to me to beg the question what is meant by the insuring clause. If, properly construed, it insures against negligence (and in my view, it does for I can see no other meaning), then the condition must necessarily be construed in another way for otherwise, as pointed out by Lord Gadad in Woolfall and Rimmer Limited v Moyle and Another (1941) 3 ALL ER 304 (CA) at 311:

> *"....it would follow that the underwriters were saying, 'I will insure you against your liability for negligence on condition that you are not negligent'"*

He went on to say of such a clause that:

> *It is a condition that is put in for the protection of the underwriter, or perhaps one might say to limit the field of the underwriter's liability to the extent that he is saying: 'I will insure you against the consequence of your negligence, but understand that I am insuring you on the footing that you are not to regard yourself, because you are insured, as free to carry on your business in a reckless manner. You are to take those reasonable precautions to prevent accidents which ordinary business people take. That is to say, you are to run your business in the ordinary way, and not in a way which invites accidents.'"*

32.

In Roos v SA Eagle Insurance Company Limited and Another 2002 (2) ALL SA 315 (T), a purchaser agreed a purchase price with the Plaintiff for his bakkie, and undertook to pay a bank-guaranteed cheque into the Plaintiff's account. The "purchaser" was a fraud. The cheque was stolen and fraudulently altered. When the purchaser phoned the Plaintiff to tell him that he had paid a bank-guaranteed cheque into the Plaintiff's account, the latter telephoned his bank and asked whether the amount had indeed been paid in. He did not ask whether the cheque was guaranteed, what the particular effect of a bank-guaranteed cheque was, etc. He merely received the assurance that an amount had been paid in and on the strength of that assurance, handed the

bakkie to the purchaser, never to see it again, and of course, never to see any money.

The First Defendant raised general condition 5. On the strength of CC Designing above and subsequent unreported judgment of Van Dijkhorst J in van der Westhuizen v Santam (BPK) TPD 22 May 1997, Case Number 16800/96, de Villiers J accepted that the issue was (at 328 E – F) whether the Plaintiff was aware of the risks to which he was exposing himself and if so, whether he nevertheless knowingly exposed himself to those risks, appreciating that he was taking insufficient precautions. He concluded that:

> *"Eiser het, na my oordeel, eenvoudig nie omgegee of die maatreëls wat hy geneem het, voldoende was of nie en aldus roekeloos opgetree".*

Professor JP Van Niekerk commented on the Roos matter at 53 – 54 of (2002) (5) Outas Insurance Law Bulletin 53 as follows:

> *"The decision is certainly correct. It has now firmly been established that a term in an insurance contract which simply requires the insured to take reasonable steps to avoid loss or damage, will not allow the insurer to escape liability if the insured was merely negligent. He must at least have acted recklessly, something the insurer will have to prove on a balance of probabilities. Recklessness, being a form of intent (dolus eventualis), involves a subjective test and investigation. The question is not whether a reasonable person would have acted where the insured did not, but whether the insured had acted or failed to act knowing or not caring what the consequences would be."*

33.

The question to be answered, is whether Deen had taken reasonable precautions to prevent the theft of the Uni-Loader. "*Reasonable*" means reasonable as between the insured and the insurer, having regard to the commercial purpose of the contract, which is *inter alia* to indemnify the insured against the liability for his "*the insured's*" personal negligence.

In an English decision, Fraser v BN Furman (Productions) Limited (Miller Smith and Partners, Third Parties) [1967] 3 All ER 57 (CA), Diplock LJ, said at 60 I:

> *"What in my judgement is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, i.e. made with actual recognition by the insured himself that a danger exists, not caring whether or not it is averted."*

Deen had several discussions with the fraudulent Ndlovu and was subjectively impressed with the manner in which Ndlovu displayed his knowledge about the construction industry. Ndlovu provided him with the deposit slip that, on face value, cannot be said to be a fraudulent deposit slip. He also provided him with, on face value, a legitimate letterhead. Subsequent to receiving the letterhead, Deen succeeded on several occasions to contact Ndlovu on the telephone numbers provided on the letterhead. The building site where Deen established the Uni-Loader was not in an apparent dangerous or suspicious

location and was properly prepared, fenced in and had the appearance of a legitimate building site. Although the Defendant doubted Deen's observations about the logos and the company brand being displayed on the building site, the mere say-so of the Insurance Assessor that he had not previously encountered the presence of logos in his investigation to similar incidents where Ndlovu was involved, is not enough to reject Deen's evidence in this regard as untruthful. Deen was observant enough to ensure that the premises where he left his Uni-Loader was locked when he arrived at the building site, that the building site appeared to comply with the safety regulations applicable to building sites and that he was met by the employee Ndlovu said will meet him on the premises. There was no evidence whatsoever that the building site appeared to be a temporary building site. Deen's evidence that there were two security guards on the premises was never seriously challenged, if at all. Deen's evidence that he personally elected to establish the Uni-Loader on the building site together with his employee, who he left in attendance and with the key to the Uni-Loader at the building site, cannot be said to be reckless conduct with this regard of the dangers of the realities of the commercial environment, within which Deen operated.

It is well to remember that the question is predominantly one of fact. It is not what Deen should reasonably have foreseen or how he ought prudently to have acted, but what he actually foresaw, how he in fact reacted, and his state of mind in conducting himself as he did.

Although Deen was asked penetrating questions by Counsel for the Defendant, and although Deen could not provide entirely satisfactory answers, especially with regard to the presence and the whereabouts of the keys to the Uni-Loader, the clarity of his answers and his demeanor in Court does not warrant a finding that Deen was not a credible witness.

Deen was criticised by Counsel for the Defendant and confronted with the fact that the Uni-Loader was hired by Ndlovu and that he (Deen) in actual fact rented out the Uni-Loader in contravention of the conditions of the insurance contract.

35.

The failure by Deen to check whether the money was actually paid into his bank account, might be an omission by Deen and he might even be blamed for it and in retrospect should have checked, but his explanation that it was only the establishment costs of approximately R 5,000 and that it was paid in cash, and that he subjectively had no reason at that stage to doubt the legality of Ndlovu, although not entirely satisfactory, certainly does not warrant a finding that Deen lied about events or his state of mind on the preceding Saturday and Sunday. I am of the view that Deen's evidence in other respects can be accepted as being truthful.

36.

It follows that the Mr Berlowitz' contention that Deen, when he established the Uni-Loader on the site, must have had a serious doubt about the authenticity

of not only the deposit, but also the site and the transaction as a whole and that indifferent to the danger posed thereby, he proceeded with the transaction, can't be accepted. I accept that on the discussions of Deen with Ndlovu, the receipt of the deposit slip, the company letterhead and the process of establishment of the Uni-Loader on the site on Sunday, Deen's satisfaction in his own mind that the transaction was a legitimate transaction and that he is not exposing himself and/or his equipment to an undue risk, was subjectively reasonable. It cannot be said that Deen acted recklessly.

37.

A further matter to be determined is the defense of the Defendant that the summons was not properly served on the Defendant and that this Court does not have jurisdiction to entertain the action and even if the Court does have jurisdiction, that the Plaintiff's action had prescribed in regard to the statutory requirements to file such claim, within a period of six months from the date of the Defendant's repudiation of the claim.

38.

The Defendant repudiated the claim on 17 January 2014, but it is common cause that the Plaintiff only received the letter on 30 January 2014. Service of the summons was effected at the offices of AC & E on 24 April 2014 and again on 2 May 2014.

39.

The insurance contract at paragraph 9, determines that any action must be commenced with within three months after the disclaimer of liability:

> "*9(b)* *In the event of the insurer's disclaiming liability in respect of any claim and if an action or suit is not commenced within three months after such disclaimer or (in the case of arbitration taking place in pursuance of condition 7 of the policy) within three months after the arbitration or the umpire have made their award, all benefit under the policy in respect of such claim, shall be forfeited."*

40.

The letter of repudiation dated 17 January 2014 states that the "*policy requires you to institute action within three months after receiving this notice.*"

41.

Paragraph 9(b) of the insurance contract, refers to "*commenced*" whilst the letter of repudiation requires the action to be "*instituted*". In both instances, the time limitation is three months.

42.

I was referred to a variation of the Policy Holder Protection Rules (short-term insurance) 2004 in terms of Section 55 of the Short-Term Insurance Act, Act nr. 53 of 1998, that amended Rule 7.4 of the Rules relating to "*decisions relating to claims and time limitations provisions for the institution of legal*

claims." The relevant Rule provides as follows:

> "*7.4(c)(ii) If the insurer reject or disputes a claim or the quantum of a claim, the notice referred to in paragraph b, must inform the policy holder –*
>
> *(ii) That the policy holder may, within a period of not less than ninety days after the date of receipt of the notice, make representations to the relevant insurer in respect of the decision;*
>
> *(iii) .....*
>
> *(iv) In the event that the relevant policy contains a time limitation provision for the institution of legal action, of that provision and the implications of that provision for the policy holder in an easily understood manner;"*

This requirement is then qualified by Rule 7.4(h)(i) and (ii) and 7.4(i) that provides as follows:

> "*7.4(h) Any time limitation provision for the institution of legal action that may be provided for in a policy entered into on or after 1 January 2011 -*
>
> *(i) May not include the period referred to in (c)(ii) in the calculation of the time limitation period; and*
>
> *(ii) Must provide for a period of not less than six months after the expiry of the period referred to in paragraph (c)(ii) for the institution of legal action.*
>
> " *7.4(i) Despite the expiry of the period allowed for the institution of legal action in a time limitation clause provided for in a policy*

entered into before or after 1 January 2011, a policy holder may request the Court to condone non-compliance with the clause if the Court is satisfied, among other things, that good cause exists for the failure to institute legal proceedings and that the clause is unfair to the policy holder."

43.

The Defendant submits that the Plaintiff's summons was served at the offices of their duly authorised underwriters AC & E, on 24 April 2014 and 2 May 2014, but that as the address of AC & E Engineering Underwriting Managers, is not the address of the Defendant, this Court will not have jurisdiction as the Court derives its jurisdiction where a summons is served on a Defendant.

44.

The Applicant obtained default judgement against the Respondent on 14 July 2014. This was however rescinded by this Court on 12 October 2014. In the supporting affidavit filed on behalf of the Defendant, the Deponent declared in paragraph 3 thereof that:

"3. *On 3 September 2014, under cover of a letter from the Respondent's attorneys, the Applicant learned for the first time that a default judgement had been entered against it in favour of the Respondent.....*

Upon receipt of the said letter, I immediately requested a copy of the Respondent's summons and particulars of claim as well as the Sheriff's return of service.

4. *On 5 September 2014, the said documentation requested by me from the Respondent's attorney, was forwarded under his letter bearing such date."*

45.

It is then after this date that the Defendant drafted and served their plea to the Plaintiff's particulars of claim on 6 November 2014. I am satisfied that the summons and the particulars of claim came to the attention of the Defendant, well within the time limitations prescribed by Rule 7.4 as referred to already. In terms hereof, the Plaintiff had until at least 30 October 2014 to institute legal action.

46.

The Defendant furthermore submits that should this Court accept that the summons and particulars of claim came to the attention of the Defendant on 5 September 2014, it does not save the day for the Plaintiff, as the term "*service*" as meant in Rule 4(1)(a) of the Uniform Rules of Court means that service had to be by the Sheriff. I was referred to the fact that, provided a summons has been properly issued, that there is no objection from a purely procedural point of view to a re-service thereof, where, by reason of a defect in the original service, the Plaintiff's claim cannot be enforced by those proceedings. I was referred to various authority in this regard, including Evins v Shield Insurance Company Limited 1980 (2) SA 814 (A) at 832 C.

47.

In addition hereto, the Defendant referred this Court to Dada v Dada 1977 (2) SA 287 (T) at 288 C – E, where it was found that if proceedings have begun without due notice to the Defendant, the subsequent proceedings are null and void, i.e. any judgement is of no effect and may be disregarded without the necessity of a formal order setting it aside.

48.

The Plaintiff did serve summons reflecting the correct Defendant, but served same on the Underwriter at the Underwriter's address. Due to no reaction from the Defendant, default judgement was obtained. When the current Defendant learned of the default judgement, and when the Plaintiff learned of the improper service, the Plaintiff agreed to the rescission of the judgement and as a consequence, such an order was made on 14 October 2014. Subsequent thereto, the Defendant pleaded, discovered its documents and took part in the trial in its entirety. The reference in Dada v Dada 1977 (2) SA 287 (T) *supra*, is no authority to regard a subsequent trial in which the Defendant participated, as null and void. Had the Defendant wish to rely on the non-service of the summons and the particulars of claim on the Defendant, the Defendant should not have pleaded to the particulars of claim, but should have regarded the summons and the particulars of claim as an irregular step and should have approached the Court to have the particulars and summons set aside in terms of Rule 30. The Defendant was not prejudiced by the late receipt of the summons and particulars of claim whatsoever.

49.

I find that the initial failure to serve the summons properly on the Defendant, is in this particular matter, of no consequence.

50.

As far as jurisdiction of this Court is concerned, the Defendant submitted that this Court's jurisdiction is ousted due to the lack of proper service of the summons. This has already been dealt with above and is no authority to oust this Court's jurisdiction.

51.

The Defendant also submits that Section 21(1) of The Superior Court's Act 10 of 2013, that "*a division has jurisdiction over all persons residing in or living in and relation to all causes arising....within its area of jurisdiction....*" do not assist the Plaintiff and then relies on the absence of a proper service of its summons. It is common cause that the incident occurred in an area known as Protea Glen, in the area of Johannesburg, within the area of jurisdiction of this Court. It is furthermore common cause that the contract of insurance was entered into Johannesburg, where the questionnaire was completed, where the insurance quotation was issued and where the policy schedule was sent from to the Plaintiff.

52.

Mr Snyman, Counsel for the Plaintiff, referred me to Bison Board Limited v Braun Woodworking Machinery (Pty) Ltd 1991 (1) SA 482 (A) at 487 A – C:

> *"In regard to the connecting factors or rationes jurisdictionis recognised by our common law, a convenient starting point is the classic statement of de Villiers CJ in Einwald v The German West African Company (1887) 5 SC 86 at 91: 'what then are the grounds upon which the jurisdiction of this Court can be exercised, in respect of any contract over any Defendant without his consent, express or implied?' The grounds are threefold; Viz by virtue of the Defendant's domicile been there, by virtue of the contract being entered into here or having to be performed here, and by virtue of the subject matter in the action in rem being situated in this colony."*

As a result, the argument of the Defendant, that the lack of service of the summons on the Defendant, ousted this Court's jurisdiction, must fail.

53.

The Defendant also raised the defense that the Plaintiff did not, in terms of condition 5(a) of the insurance contract "*immediately notify the insurers by telephone, telegram, fax, e-mail or in writing, giving an indication as to the nature and extent of the loss or damage.*" and "*the insurers shall on no account be liable for loss or damage of which no notice has been received by the insurers within fourteen days of its occurrence....*".

54.

The theft occurred on the 24th of November 2013 on the Sunday and the Plaintiff was informed hereof on the Monday, the 25th of November 2013. It is common cause that he reported this to the Police Station on the 25th of November 2013, that he requested a claim form from the Insurance Broker and completed this claim form on the 27th of November 2013. It is furthermore common cause that immediately after completing the claim form, the Plaintiff sent the completed claim form under cover of an e-mail to the Insurance Brokers on 27 November 2013. On the same day, he conveyed the particulars of the Police docket and the Police Investigation Number to the Insurance Brokers.

55.

It is of course important that insurers be either immediately or within a reasonable time be informed of the potential claim for obvious reasons. This would enable the Insurance Companies to investigate and limit their losses in the most effective manner. Jones J, in Snodgrass v Hart (Santam Limited, Third Party) 2002 (1) SA 851 (SE) said:

> *"The object of requiring notice of an event which may give rise to a claim whilst to overcome the disadvantage of an insurer in relation to the facts and circumstances which gave rise to its liability to indemnify. Notice of the accident enables the insurer to investigate the circumstances of the event and so to assess the nature and extent of its liability to pay an indemnity. An insurer that failed to follow up such a notice, had itself to blame if it subsequently found itself at a disadvantage for not investigating the accident and any claims that could arise from it."*

56.

Mr Tyrone Gardner, the witness called by the Defendant, is an Assessor appointed by the Defendant to investigate the circumstances of the incident. His evidence was that he was appointed by a certain Mr Lught to investigate the theft and visit the building site where the Uni-Loader was stolen from. He took photographs of the site and this was provided to Court. On his evidence, he visited the site within a day after he got instructions. Although he never told this Court as to the exact date that he started his investigation, this appears to have been within days from the 27th of November 2014, after the theft was reported to the Insurance Broker. The purpose of an immediate or timeous report of the incident to a Defendant is to prevent prejudice. The Assessor had opportunity to not only visit the site literally within days of the theft occurring, but also had opportunity to consult with Mr Deen (the Plaintiff) as well as Mr Ferrai Mucheri (the employee of the Plaintiff) that remained with the Uni-Loader on this site from where the Uni-Loader was stolen from. This witness never suggested that he was prejudiced in his appointment, his mandate or the manner in which he conducted his investigation due to any late appointment or instruction. The Defendant similarly did not suggest such prejudice. It follows that this defense must fail.

57.

The further defense of the Defendant, that notice was not given within fourteen days of the occurrence of the theft to the Defendant, must similarly fail. It has

never been disputed that Mr Gardner investigated the loss of the front-loader on behalf of the Defendant. It has never been suggested that Mr Gardner performed his investigation subsequent to fourteen days from the date of the occurrence. It was similarly his evidence that he was instructed by a certain Mr Lught of the Defendant. This has never been disputed by the Defendant.

58.

Finally, the Defendant relies on a submission that the Plaintiff hired out the machine and as a consequence, is not covered by the policy. For this the Defendant relies on a Police statement of the Plaintiff, Mr Deen, wherein he purportedly informed the Police that Ndlovu wanted to hire a Case Skid Steer Machine. Mr Deen denied that he referred to hiring a machine, he also explained that he is aware of the additional requirements in the policy should he want to rent and/or hire out his machines. He explained that he simply does not hire out machines, but work on a contract basis.

59.

Gardner, the Assessor appointed by the Defendant, also gave evidence that Deen telephonically informed him, after the incident, that he hired out the machine. This was denied by Deen and he advanced the same reasons. Gardner could not provide his contemporary notes in this regard, as he averred that his computer was stolen and that the contemporary notes are no longer available. Deen explained the inconsistency between his prior Police statement and his evidence in chief, relating to the hire agreement. He

explained that, when his business is busy, he would rent-in equipment to assist with contracts, but that he would not hire out his own machines. Be that as it may, the Court has no reason to reject Deen's evidence as false. He was throughout the trial confronted with the insurance contract and he appeared to be conversant with the contents thereof. He was especially aware of the fact that he is not covered by a clause should he hire out any of his equipment and he was aware of the fact that, should he want coverage from the Defendant for the hiring out of equipment, it would have cost him more in terms of his monthly premium. Gardner had a copy of Deen's Police statement prior to speaking to Deen. Mr Deen emphatically denied that he ever told the Police that he hired out machines. The statement of which the Police was the author, was referred to but never formally proven. I accept that Deen, on the probabilities, did not hire out the machine relevant to this claim.

60.

At the commencement of the trial, the parties requested a separation in terms of Rule 33(4) of the determination of the liability issue from the determination of the quantum. Such separation was ordered.

61.

61.1. For the above reasons, I find that the Defendant is liable to compensate the Plaintiff for its loss occasioned by the theft of a new 2013 Model Case Uni-Loader SR 200 Skid Steer on 24 November 2013.

61.2. Costs to be paid by the Defendant.

DU PLESSIS AJ

Case number : 30226/2014

Matter heard on : 20 April 2016

For the Plaintiff : Adv M Snyman

Instructed by : Albert Hibbert Attorneys

For the Defendant : Adv JK Berlowitz

Instructed by : Shapiro-Aarons Inc

c/o Corne Nel Incorporated Attorneys.

Date of Judgment : 9 September 2016