REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO.: 5902/2008

In the matter between:

G & C SHELF 103 (PTY) LTD **PLAINTIFF**

and

CHEMICAL SPECIALITIES (PTY) LTD **DEFENDANT**

JUDGMENT

RALL AJ

[1] The plaintiff has sued the defendant for damages for breach of contract.

[2] This is the background to the claim and it is not in dispute:

(a) In July 2006 the defendant bought two industrial properties (to which, together with the improvements on them, I shall refer jointly as the property) from a company called Swiftprops (Pty) Ltd;

(b) On the following day the defendant sold the properties to the plaintiff, which took transfer of them in July 2007;

(c) In September 2006 the parties concluded a written lease agreement in terms of which the defendant leased the properties from the plaintiff;

(d) On 30 August 2007, during the subsistence of the lease agreement a fire occurred on the property, causing damages to the plaintiff of R9,702,876.80;

(e) At the time of the fire the buildings on the property were insured in terms of a policy in the name of the plaintiff;

(f) A claim was submitted to the insurer and the plaintiff was paid out the abovementioned amount;

(g) The plaintiff then sued the defendant for that amount, alleging that that sum represented the damages it had suffered as a result of the defendant's breach of the lease agreement.

[3] The plaintiff alleges that the defendant breached clauses 14.3, 14.4 and 14.5 of the lease agreement. Clause 14 reads as follows:-

'14.1 Should the property be damaged or destroyed, (either wholly or in part), this lease shall not be cancelled and all risks in the destruction (either wholly or in part) or the damage of the property or the premises shall pass to the lessee on the commencement date, save for negligent or wilful act (sic) or omissions of the lessor, its agents or employees acting in the course of their employment.

14.2 In particular and without limiting the generality of the foregoing, all risks and damage to the property and the premises causes (sic) by mining under or in the vicinity of the property and civil unrest shall during the currency of the lease, be the sole risk of the lessee and any damage to the property or the premises shall be made good by the lessee.

14.3 The lessee shall be obliged:-

14.3.1 to insure the property and the premises against damage or loss from any cause whatsoever including subsidence with a reputable insurance company and upon terms, reasonably approved by the lessor for the full replacement value thereof as the lessor may reasonably stipulate;

14.3.2 to punctually pay all premiums payable on the insurance policy;

14.4 Subject to the provisions of 14.5, should the property or the premises be destroyed (either in whole or in part) or be damaged, the lessee shall be obliged to procure that the property and the building be reinstated as quickly as possible to (sic) the circumstances, provided that nothing in this clause contained will detract from the obligation of the lessee to make proper and timeous payment of all rentals due in terms of this agreement.

14.5 The lessee shall ensure that the proceeds of the relevant insurance policy, plus all interest accruing in respect thereof, be paid to the lessor directly by the insurer and shall be made available by the lessor for the cost expended by the lessee for the reinstatement of the premises or the property as the case may be.

14.6 The lessee shall procure that the interest of the lessor in and to the insurance policies referred to in this clause 14 be noted.'

[4] The plaintiff's particulars of claim allege that the defendant's breaches consisted of the following:-

'[8] The Defendant has breached the Lease Agreement, by failing timeously or at all:

(a) to make good the damage to the property;

(b) to procure that the property was reinstated;

(c) to insure against damage or loss from any cause whatsoever for the full replacement value thereof, or at all;

(d) to ensure that the proceeds of the relevant insurance policy that it ought to have obtained (plus all interest that ought to have accrued in respect thereof) was paid to the Plaintiff directly by the insurer to enable the Plaintiff to make available those proceeds for the cost that ought to have been expended by the Defendant for the reinstatement of the property.'

[5] The particulars of claim also allege that the Plaintiff suffered damages in the following way:

'[9] The Defendant caused the Plaintiff damages in the sum of R9,702,876.80 by its said breaches, which represents the amount:

(a) of the fair, reasonable and necessary costs of:

(i) making good the said damage;

(ii) reinstating the property as quickly as possible.

(b) that would have been obtained as the proceeds of the said insurance policy that ought to have been obtained by the Defendant and which ought to have been paid to the Plaintiff directly by the insurer, and made available for the cost expended for the reinstatement of the property;

(c) necessary to place the Plaintiff in the position it would have occupied had the Defendant fulfilled its obligations under the Lease Agreement;

(d) which flowed directly and naturally from the Defendant's said breach alternatively, the amount that was within the contemplation of the Plaintiff and the Defendant at the time of the conclusion of the Lease Agreement.'

[6] From the defendant's plea it is not clear what the basis of its defence is. Whilst it denies the allegations in paragraph 8 of the particulars of claim, it does not make it clear what the basis of the denial is. One of the allegations is that the defendant failed to insure the premises. The defendant does not allege that it in fact insured the premises. Instead it alleges that:-

(a) In terms of clause 21.8.2 of the lease agreement the operating costs included insurance in respect of the property;
(b) In terms of clause 10.1 of the lease agreement the defendant was obliged to pay the operating costs;
(c) At the time of the fire an insurance policy was in place in terms of which the insurer was Regent Insurance Company Limited, the plaintiff was the insured and the leased premises were insured;
(d) The defendant paid the premiums in terms of the policy;
(e) The plaintiff was fully compensated for the damages to the property by the insurer in terms of the above policy.

[7] However, in reply to a request for further particulars, the defendant alleged that it had caused the property to be insured in terms of clause 14.3.1 of the lease agreement. The defendant also stated that at the time of the fire, no other insurance policy in respect of the premises was in existence.

[8] The defendant denied the allegations in paragraph 9 of the particulars of claim on the basis that the plaintiff had been fully compensated in terms of the insurance policy referred to above.

[9] The plaintiff did not replicate. However, in response to a request for further particulars, it admitted that it had received the sum of R9,702,876.80 as the proceeds of the insurance policy and that the cost of the repairs to the property had been paid out of those proceeds. The plaintiff alleged however that the fact that it had received the proceeds of the insurance policy was *res inter alios acta*.

[10] In response to a request for further particulars in terms of rule 37 the plaintiff revealed its attitude to the payment by the defendant of the insurance premiums. It admitted payment but alleged that the payments were made in terms of clauses 2.1.8.2, 2.1.8.12 and 10.1 of the lease agreement as part of the operational expenses (as opposed to the defendant's averment that the payments were made in terms of clause 14.3.1). The plaintiff pleaded that the payments were accordingly made by and on behalf of the plaintiff.

[11] The plaintiff formally admitted that:

(a) fire cover over the premises in terms of the policy commenced in December 2001, with Shiftprops as the insured;
(b) the cover was obtained by the defendant, represented by its insurance broker, Deon Schoeman and Associates;
(c) with effect from 1 January 2007 the insured in terms of the policy included the plaintiff;
(d) the claim form submitted after the fire, was apparently signed by a representative of the defendant, on behalf of the plaintiff.

[12] The terms of the lease agreement are not in dispute. However, the defendant's breach and the damages flowing from it are. The plaintiff is required to allege and prove the breach[1] and the damages allegedly suffered by it[2].

[13] On the first issue, the alleged breach, it is necessary for me to decide what was required of the defendant in terms of the lease agreement, and whether the plaintiff has proved that the defendant did not fulfil its contractual obligations. The onus on the plaintiff on the issue encompasses proving that the defendant did not 'insure the property' and did not insure the property in the way required by the lease agreement.

[14] However, there is an additional factor relevant in this case. The lease agreement does not state by when the defendant was required to perform its obligations in terms of clauses 14.3 to 14.5. This gives rise to the question whether it was necessary for the plaintiff to put the defendant *in mora* before it could be said that the defendant was in breach of its obligations. *Interpellatio* was not raised at all in the pleadings, was not dealt with during argument and was raised for the first time by me after I had reserved judgment. Counsel submitted supplementary heads of argument on the issue.

[15] Before deciding whether the plaintiff has proved that the defendant did not do what was required of it in terms of the agreement, it is necessary to decide whether *interpellatio* was necessary in this case.

[16] Counsel for the plaintiff, Mr Harpur S.C. argued firstly that it was for the defendant to plead the plaintiff's failure to give notice, and secondly that the plaintiff had in any event given such notice. It is convenient to dispose of the latter argument first. The notice relied on by counsel was the letter of demand which preceded the institution of the action. This was plainly not a notice calling upon the defendant to perform its

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[1] Kriegler v Minitzer 1949 (4) SA 821 (A) at 827; Resisto Dairy v Auto Protection Insurance 1963 (1) SA 632 (A) at 644 H; WD Russell v Witwatersrand Gold Mining Co 1981 (2) SA 216 (T) at 218 H
[2] Dominion Earthworks v MJ Greef Electrical 1970 (1) SA 228 (A) at 235

contractual obligations. It was a demand to pay the damages which the plaintiff alleged it had suffered as a result of the defendant's breach of the agreement.

[17] As already mentioned, it is incumbent on a party relying on a breach to allege that the breach has taken place. There is authority to the effect that a party claiming interest must plead the cause of action on which interest is claimed, which involves, in cases where there has been no express or implied stipulation for interest, pleading that the other party has been placed in *mora*. By parity of reasoning, it would follow that where a party relies on a breach where prior demand was necessary, it is necessary for that party to plead that demand. I am inclined to that view. However, I shall assume in favour of the plaintiff that all that was required for it to plead was the fact of the breach, carrying as it does the implied averment that the defaulting party was place *in mora* by notice. I shall accordingly assume that paragraph 8 of plaintiff's particulars of claim is sufficiently wide for the plaintiff to rely on a breach of clauses 14.3 to 14.5 of the agreement, if *interpellatio* was necessary.

[18] I agree with Mr Harpur that the defendant's primary obligation in terms of clause 14 of the lease agreement was to reinstate the property and the buildings as quickly as possible. Clause 14's purpose is to cater for the eventuality that the property or the premises be destroyed in whole or in part or be damaged. It then goes on to place various obligations on the defendant, all of which are aimed at ensuring that the property is reinstated and hence that the plaintiff suffers no damages. The obligation to insure is aimed at providing a funding mechanism for the primary or principal obligation and the obligation to pay over the proceeds is a mechanism designed to ensure that the proceeds are used for their intended purpose.

[19] The first obligation imposed on the defendant by the clause is to insure the property. The second is to reinstate it and the third is to ensure payment of the proceeds of the insurance policy to the plaintiff. Chronologically the obligation to insure would be the first, the obligation to ensure payment of the proceeds the second and the obligation to reinstate the third. I say this in respect of the last two obligations because

reinstatement would probably only occur once the insurance proceeds become available.

[20] The obligation to reinstate is the primary obligation firstly in the sense that if it is met, the other two become irrelevant. If the defendant reinstates the property, then the plaintiff suffers no damages and so a breach of either of the other two obligations does not cause any damages to the Plaintiff.

[21] Secondly, it is only a breach of that obligation which can give rise to a damages claim by the plaintiff. Clause 14 does not contemplate reinstatement by the lessor, but by the lessee, and the obligation to insure is merely to ensure that funds are available to pay for reinstatement. The obligation to pay the insurance proceeds to the plaintiff is merely a mechanism to ensure that the proceeds are available for and are used only for their intended purpose. The failure to insure or to pay over the proceeds could therefore not result in the plaintiff suffering damages because even if the obligations were met, the plaintiff would be in no better position financially. This is because of the obligation placed on the plaintiff by clause 14.5 to pay the proceeds back to the defendant. It would have been different had the agreement provided that the insurance proceeds were to be paid to and also retained by the plaintiff.

[22] It does not follow that if the obligation to reinstate is breached, the plaintiff will necessarily suffer damages. It will not do so if the defendant compensates the plaintiff for the cost of reinstatement.

[23] As already mentioned, the lease agreement does not stipulate a time by which the defendant is obliged to reinstate the property. Instead clause 14.4 obliges the defendant to do so ‘as quickly as possible to (sic) the circumstances’. From this clause it is also clear that the parties did not contemplate immediate performance of this obligation, which would in any event have been impossible.

[24] The legal position was summarized as follows by Trengove J (as he then was) in the well known case of *Alfred McAlpine and Son v Transvaal Provincial Administration*[3]:

'In the light of the authorities referred to above, I have come to the conclusion that, in our law, the general principle is that, in the case of a contract in which no time for performance has been fixed, the debtor must be placed *in mora* by *interpellatio* before damages can be claimed on the grounds of such debtor's non-timeous performance. A mere failure to perform or mere non-performance in the absence of a fixed time for a performance, although it may constitute a ground for a defence of *exceptio non adimpleti contractus*, cannot give rise to a claim for damages because it can never be a breach.'

[25] In my view the principles laid down in that case are applicable to the present one, and I accordingly find that it was incumbent on the plaintiff to have placed the defendant *in mora* before it could claim damages for breach of the lease agreement.

[28] Because the party relying on a breach is required to allege and prove the breach, it follows that the opposing party need only deny the breach, even in cases where *interpellatio* is necessary. In my view therefore it was not required of the defendant to plead absence of *interpellatio*.

[29] The only demand which Mr Harpur could point to was the one already mentioned. This he was constrained to rely on because the only witness called by the plaintiff, the claims manager of Regent Insurance, did not touch on the matter, the defendant closed its case without calling any witnesses, and none of the other documents handed in as exhibits assisted the plaintiff.

[30] I find therefore that the plaintiff failed to prove that the defendant breached clause 14.4 of the lease agreement. In the light of my finding that of the breaches relied on by the plaintiff, only a breach of clause 14.4 could have resulted in any damages, it follows that the plaintiff cannot succeed with its claim against the defendant.

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[3] 1977 (4) SA 310 (T) at 348 D – F

[31] In addition to denying any breach of the agreement, the defendant alleged that it had in fact complied with clauses 14.3 and 14.5. This it alleges was done by securing the insurance with Regent and the fact that the proceeds were paid to the plaintiff. As a result the defendant alleges that the plaintiff suffered no damages. This defence, if valid, would be a complete defence to the plaintiff’s claim even if the defendant did in fact breach clause 14.4 by failing to reinstate the property.

[32] A curious feature of this case is that there is no express allegation in the pleadings as to who had caused the property to be reinstated and there was no evidence on this issue. The plaintiff alleged that the defendant had failed to do so, which allegation the defendant denied. However, from the further particulars, one can infer that it was the plaintiff who had caused the property to be reinstated, utilizing the proceeds of the insurance policy.

[33] The closest the only witness came to dealing with the matter was a statement he made in cross-examination. He was asked who had instructed the contractor to reinstate the property, to which he replied that he assumed that it was the plaintiff. This statement went unchallenged by counsel for the defendant, Mr Salmon S.C. Amongst the documents put up as exhibits were ones proving that the plaintiff had offered to accept payment of R9 702 876,80 in full and final settlement of the claim made or the policy and that amount had been paid to the plaintiff by Regent. However, at the trial the matter was approached by both parties on the basis that the plaintiff had caused the property to be reinstated and I shall do likewise.

[34] As I have mentioned, the plaintiff called only one witness, the claims manager of the insurer Regent Insurance. He shed no light on the circumstances under which the insurance policy came into existence. The defendant closed its case without calling any witnesses. However, a bundle of documents was handed in as part of the record by consent. The parties agreed the following at the pre-trial conference in relation to the discovered documents (which included the trial bundle):

‘(i) copies of documents may be used instead of originals;

(ii) the documents are what they purport to be;

(iii) there is no admission that what is contained in the documents is true;

(iv) correspondence is admitted to have been sent by the addressor and received by the addressee on or about the date reflected on such correspondence;

(v) notwithstanding the aforegoing the status of any particular document or documents may be challenged by either party by not later than ten court days before the trial and thereafter by agreement between the parties or failing that, with the leave of the court on good cause shown.’

I was not made aware of any challenges to the status of the documents in the bundle.

[35] The defendant relied on a number of documents in the trial bundle to show that the defendant was responsible for ensuring that the property was insured as required by clause 14.3.1 of the lease agreement. The plaintiff did not rely on any documents. From the documents relied on by the defendant it is not clear precisely how it came about that the plaintiff was substituted as one of the insured in terms of the policy. All that is clear is that the broker, Deon Schoeman and Associates, arranged for this change and for the premiums to be paid by debit order by the defendant. It is not clear on whose behalf the broker were acting in doing this. It is apparent that the defendant co-operated at least in relation to signing the debit order authorization. Which of the parties instructed the brokers to make the changes is not clear.

[36] On the evidence before me I am unable to find that it was not the defendant who ensured that the plaintiff became one of the insured in terms of the policy. I must accept therefore in favour of the defendant it was responsible for doing this.

[37] In case I am wrong about whether breaches of clauses 14.3 and 14.5 could have caused the plaintiff to suffer damages, it is necessary to decide whether the defendant breached those clauses. Once again, this question turns firstly on whether notice was required before the defendant was *in mora*. Once again, there is no allegation of *interpellatio* and no evidence thereof.

[38] However, was *interpellatio* necessary? Neither clause prescribes a time for performance. Mr Salmon fairly conceded that if clause 14.3.1 simply stated that the defendant was required to insure the property against the mentioned risks, the obligation would have arisen on the assumption of all risks in the damage or destruction of the property, namely the commencement date of the lease. This concession is in accordance with the principle that time for performance need not be expressly provided for, but may be stipulated by necessary implication[4].

[39] However, Mr Salmon argued that certain of the provisions of clause 14.3 and clause 16.1.2 have the effect that demand was necessary to place the defendant *in mora*. Firstly, clause 14.3.1 provides that the terms of the insurance have to be approved by the plaintiff and that the plaintiff is entitled to stipulate the replacement value. These provisions make it clear that the plaintiff had to be involved in insuring the property and so the defendant could not do so unilaterally. It follows that the defendant was not required to have effected the insurance by the commencement date of the lease. The plaintiff's involvement was first required. Accordingly, no fixed time for performance of the obligation was stipulated, either expressly or by implication, and so demand was necessary.

[40] Secondly, Mr Salmon relied on clause 14.3.3. However in my view this clause does not assist him because it deals with proving that insurance was effected and not the act of effecting it.

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[4] Louw v Trust Administrators 1971 (1) SA 896 (W) at 903 a

[41] Mr Salmon also relied on clause 16.1.2 of the agreement. Clause 16 is headed "BREACH" but deals not only with breaches of the agreement but also matters such as offers of compromise, judgment being taken against the defendant and the insolvency of the defendant. It then goes on to provide what the consequences of these events are. The provisions of clause 16 which deal with breaches and their consequences read as follows:-

> "16. Breach
>
> 16.1 Should the lessee-
>
> 16.1.1 fail to pay any amount due by the lessee in terms of this lease within 7 (seven) days after the receipt of a written notice to do so by the lessor; or
>
> 16.1.2 commit any material breach of any other provision of this lease and fail to remedy such breach within 7 (seven) days after the receipt of notice to that effect by the lessor (provided that, should that breach be one which is not reasonably capable of being remedied within the said 7 (seven) days, then the lessee shall be allowed such additional period as is reasonably required therefore to remedy such breach. Notwithstanding the above, the lessee shall be allowed 30 (thirty) days to remedy the breach contemplated in 16.1.6.
>
> 16.1.8 or be placed under provisional or final liquidation or under judicial management then and in any such events the lessor shall be entitled –
>
> 16.1.8.1 to sue for immediate specific performance of the lessee's obligation under the lease; or
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> 16.1.8.2 to forthwith cancel the lease, subject to the provisions set out below, provided that the lessor shall not be entitled to cancel this lease if the breach is capable of being rectified by the payment of money"

[42] It is immediately apparent that clauses 16.1.8 and 16.1.8.2 have been incorrectly numbered because they qualify the whole of the clause and that the words after 'judicial management' in clause 16.1.8 should not form part of that sub-paragraph but be part of the words qualifying the whole of the clause.

[43] It is clear that in terms of clause 16.1.2 the plaintiff was only entitled to cancel the agreement or claim specific performance after it had given the required notice to the defendant. The clause does not provide that before damages could be claimed for an alleged breach, notice in terms of the clause had to be given. However, in my view the effect of the clause is to provide for placing the defendant *in mora*, irrespective of whether the *mora* leads to cancellation. It is what was described in *Kabinet Van SWA v Supervision Food Services*[5] as an '*in-mora* kennisgewing'.

[44] Clause 14.1.5 also does not stipulate a time for performance. The same considerations apply to this clause as to clause 14.1.4.

[45] I accordingly conclude that even if a breach of clauses 14.1.3 and 14.1.5 could have caused the plaintiff any damages, the plaintiff has not proved that these clauses were breached.

[46] If this conclusion is wrong, the next question is whether the substitution of the plaintiff as the insured in terms of the policy, which, as I have said, I assume was as a result of the efforts of the defendant, constituted compliance with the defendant's obligations in terms of clause 14.3. I agree with Mr Harpur that what was contemplated by that clause was a policy in the name of the defendant. What the defendant was therefore not in compliance with its obligations. It did however pay the insurance premiums.

[47] In my view the policy which the defendant caused to come into existence exceeded what was required of it. The policy was in the plaintiff's name, making it even more certain that the plaintiff would receive the proceeds and hence that clause 14.5 was complied with.

[5] 1989 (1) SA 967 (SWA) at 972 A

[48] I do not agree with Mr Harpur's argument that the premiums paid by the defendant were paid in discharge of its obligations in terms of clauses 2.1.8.2, 2.1.8.12 and 10.1 of the lease agreement. Clause 10.1 makes it clear that the plaintiff was not obliged to expend any money whatsoever on the premises and that the defendant was obliged to pay the so-called operating costs. Clause 2 is the definition clause and in clause 2.1.8 operating costs are defined. The definition is extremely wide, covering every conceivable cost which could be incurred in respect of industrial or commercial premises. It is so wide that there is repetition. Clause 2.1.8.2 includes 'insurance in respect of the property' and clause 2.1.87.12 'provisions payable for public liability and property damage insurance'. In my view the purpose of clause 10.1 and the wide definition of 'operating costs' is to make it clear that the defendant and not the plaintiff must bear all the costs associated with the premises during the currency of the lease. It is a general provision and does not deal with the detail of how the individual operating costs are to be paid. In the case of insurance, the only clause which deals with specifics in clause 14. I do not agree that the agreement contemplated two insurance policies, one in the name of the plaintiff in terms of clause 10.1 and one in the name of the defendant in terms of clause 14. Whilst I agree that that was legally possible, with each party insuring its own interest, the agreement does not expressly provide for it and it does not make commercial sense. If for no other reason it would have been a pointless waste of money.

[49] The proceeds were in fact paid to the plaintiff, and it is common cause that these were sufficient to pay for the cost of reinstatement. Accordingly even if the defendant did not comply with its obligations in terms of clause 14.3, the plaintiff suffered no damages unless the payment was *res inter alios acta*.

[50] However, I agree with Mr Salmon that the payment by the insurer to the plaintiff was not *res inter alios acta* in relation to the defendant. The rule is based on equity,

fairness and the interests of society[6]. As was stated in *Standard General Insurance v Dugmore NO* 1997 (1) SA 33 (A) at 42A:

'Boberg J (The Law of Delict vol 1 at 479) succinctly states:
'The existence of the collateral source rule can therefore not be doubted; to what benefits it applies is determined casuistically: where the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit.'
It now seems to be generally accepted that there is no single test to determine which benefits are collateral and which are deductible. Both in our country (Santam Versekeringsmaatskappy Bpk v Byleveldt (supra at 150F)) and in England (Parry v Cleaver [1969] 1 All ER 555 (HL) ([1970] AC 1) at 14 and 31) it is acknowledged that policy considerations of fairness ultimately play a determinative role.
Perceptions of fairness may differ from country to country and from time to time; the task of Courts is to articulate the contemporary perceptions of fairness in their respective areas of jurisdiction.'

[51] Although there is no single test to determine which benefits are collateral, it has been stated by the Supreme Court of Appeal (in *Santam v Byleveldt*[7]) that:-

'The cross-appeal raises an interesting issue relating to the 'collateral source rule', i.e., the rule that generally any compensation for bodily injuries that the injured party receives from a collateral source, wholly independent of the wrongdoer or his insurer, does not operate to reduce the damages recoverable by him.'

[52] In this case the defendant caused the plaintiff to be insured, it did so in discharge of its obligations in terms of a contract between the parties, the defendant paid the premiums and once again this was done in terms of its contractual obligations to the plaintiff. It can accordingly not be said that the plaintiff's entitlement to the compensation in terms of the policy were, in the words of Lord Parmoor in *Hill and Sons v E Stowell and Sons*[8]*:*

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[6] Botha v Rondalia Versekeringskorporasie 1978 (1) SA 996 (T) at 1000C

[7] 1973 (2) SA 146 (A) at 168 E-F

[8] 87 LJR 1160 at 1115, citedwith approval in Hunter v Shapiro 1955 (3) SA 28 (D) at 30 G – H. See also Thornton v Thomson 2002 (5) SA 541 (W) at 546 F – 574 D

' … a contract or work wholly independent of the relations created between the plaintiff and the defendant by the particular contract, any profit from such contract or work cannot be pleaded in mitigation of damages.'

[53] In *Zysset v Santam*[9], Scott J (as he then was) dealt with collateral benefits in the context of a delictual claim. The learned judge stated[10] that the inquiry into collateral benefits involves considerations of public policy, reasonableness and justice, and that it involves a weighing up of mainly two conflicting considerations. The first is that a plaintiff should not receive double compensation and the second is that a wrongdoer should not be relieved of a liability because of some fortuitous event. In my view these considerations apply to cases such as the present one, where instead of a delictual wrongdoer one is dealing with a defendant in breach of contract.

[54] I accordingly find that even if the plaintiff proved that the defendant was *in mora* in respect of its obligations in terms of clause 14 of the lease agreement, the plaintiff suffered no damages as a result of the defendant's breach.

[55] It follows therefore that the plaintiff's claim falls to be dismissed.

[56] I see no reason why the costs should not follow the results and indeed none was suggested to me.

[57] I therefore make the following order:

The plaintiff's claim is dismissed with costs.

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[9] 1996 (1) SA 273(C)
[10] At 279 A - C

RALL AJ

DATE OF ARGUMENT: 26 May 2011

DATE OF JUDGMENT: 24 August 2011

APPEARANCES:

For Plaintiff:	GD Harpur S.C. Instructed by Dlamini Van Onselen O'Connell
For Defendant:	RJ Salmon S.C. Instructed by Garlicke & Bousfield Inc.