IN THE HIGH COURT OF SOUHT AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NUMBER:A 1194/06

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
25/9/09 [signature] AJ
DATE SIGNATURE

In the matter between:

D J VAN RHEEDE VAN OUDTSHOORN APPELLANT

AND

VVM CENTURION (EDMS) BPK h/a BROKERS 2000 RESPONDENT

JUDGMENT

TLHAPI, AJ

[1] This is an appeal against the judgment of the magistrate's court sitting in Pretoria. The plaintiff lodged a claim with his insurers through the defendant who was a broker and who represented Compass Insurance Company Ltd ('Compass'). The claim concerned certain items which were insured against theft and which were stolen at the residence of the plaintiff. The initial claim was for R 74 085.00. The respondent was authorized by the insurance company whose policies it had been underwriting to settle and pay an amount of R15 400 to the appellants in lieu of indemnification for their claim. The appellant then sued the respondent for the balance in damages arising from a breach of mandate by the respondent.

It would be convenient at this stage to refer to the parties as they appeared in the court a quo.

[2] In the particulars of claim the plaintiff stated that:

> "3. At all material times there existed between the plaintiff and the defendant the relationship of insured and broker, pursuant to a mandate ('the mandate') concluded between the parties during 1996, in terms of which the defendant was mandated by the plaintiff to act as the insurance broker of the plaintiff in procuring, servicing and maintaining appropriate comprehensive insurance cover for the plaintiff in respect of the premises then owned and occupied by the plaintiff at 131 Annie road, Malanshof Extension 4, Randburg ('the premises')
>
> 4. The following implied, alternatively tacit, terms were included in the mandate the defendant would procure, service and maintain the best and most appropriate insurance cover possible for the plaintiff; the defendant would procure, service and maintain insurance cover appropriate to the plaintiff's insurance needs; the defendant would act with due care and skill in ensuring that the plaintiff enjoyed appropriate and effective comprehensive insurance cover, commensurate with the plaintiff's insurance needs; the defendant would draw to the attention of the plaintiff any endorsements, exclusions, conditions or burdens that were significant and that might affect the extent of cover the plaintiff might reasonably expect to enjoy in relation to the premises, in particular if such endorsements, exclusions, conditions or burdens were contained in a schedule and not in the policy wording; the defendant would act in accordance with paragraphs 4.1 to 4.4 above when accepting alterations and endorsements in the insurance cover procured for the plaintiff on behalf of the plaintiff. "

THE FACTS

[3] It is appropriate to mention first, that no evidence was tendered on behalf of the defendant. During 1996 the plaintiff, represented by his wife, gave instructions to the defendant to obtain a short term comprehensive insurance policy to cover the risk over their residence, outbuildings and contents thereof. The residence consisted of one unit being, the main house and an outside building (the servant's room and the son's room) and a garage. The outside rooms and garage were attached to the main residence by a wall that formed an inner enclosed court yard measuring two and a half meters in width. The plaintiff's son, Gideon, who was a dependant of the plaintiff, had used one of the outside rooms since

1996 when the policy was initially taken out. In the initial application form this room was described as one of three bedrooms, the other two being in the main house. In her evidence the plaintiff's wife stated that she always regarded Gideon's room as forming part of the house even though it was situated in the outbuilding. The plaintiff's mandate to Ina Nel, the defendant's representative was to provide cover also for the contents of the premises which included Gideon's room, hence their inclusion in an inventory compiled by the said representative when the initial insurance policy was taken out during 1996. In the application forms signed by the plaintiff's wife, a cover amounting to R350 000 was applied for in respect of the contents of the entire premises.

[4] Consequently, the defendant, acting as broker, took out an insurance policy, renewable on an annual basis on behalf of the plaintiff.

During August 2001 the said policy came up for review at the instance of the plaintiff's wife who wished to know whether the premiums in the policy would change on the plaintiff's retirement. Again, a representative was sent out to the residence of the plaintiff where a fresh inventory was compiled in the presence of the plaintiff's wife, which included the contents of Gideon's room. Unlike previous years the policy of 2001 carried an endorsement which related to an outside building. In order for full compensation to be considered, it had to be apparent that there was a forced or violent entry to the outbuilding The endorsement read:

> Diefstal vanuit buitegeboue vir 'n bedrag groter as R1000, tensy toegang verkry is op a wesenlike, sigbare en kragdadige wyse"

The plaintiff's wife testified that she had noticed the endorsement, however, she did not think that it affected Gideon's room because the representative did not point out to her that the said room was considered to be an outbuilding, to which different conditions would be applicable. Again no mention was made of any changed circumstances even after the plaintiff's premium was reduced due to his pensioner status. On 16 June 2002 there was a break-in in Gideon's room and certain items were stolen. The plaintiff's attention to the endorsement was drawn only when the insurance claim was considered and when the amount payable, subject to such endorsement was calculated.

[5] According to Mr Smit of PRM (Probatus Risk Managers) there was a contractual relationship between PRM and Compass to underwrite insurance policies. PRM acted on behalf of the insurer and this also included the handling of claims against the said policies. He testified that the values placed on the stolen items were not in dispute but that the claim had been repudiated by the insurer. The insurer relied on the exclusionary clause introduced during 2001. In terms of the policy Gideon's room was an outbuilding and it was found that the sliding door had not been locked during the theft, the alarm had not been activated and there was no visible forced entry into Gideon's room. The issue of whether the said room was an outbuilding or not was referred to arbitration by the insurer. The arbitrator found in favour of the insurer.

SUBMISSIONS

[6] It was submitted on behalf of the plaintiff that:

(i) the learned magistrate erred in failing to consider whether the insurance cover procured was the one requested by the plaintiff;

(ii) the defendant breached its mandate;

(iii) the defendant failed to advise the plaintiff during 2001 that the contents in Gideon's room did not enjoy the same cover as they previously did or as did the contents of the main residence;

It was submitted on behalf of the defendant that:

(i) although an insurance broker was expected to exercise due care, there was no general duty or obligation to explain the contents of the insurance policy, any certificate or endorsement of the said policy;

(ii) however, if the only insurance policy which the insurance broker was able to procure contained 'unusual, limiting or exempting provisions', which provisions could result in the policy not conforming to the needs of the insured, the insurance broker may have the duty to bring such provisions to the attention of the insured;

(iii) because the action was based on the contractual relationship between the parties, the defendant could not be held liable in delict for negligence which arose from a breach of a contractual obligation;

(iv) the insured could institute a delictual claim against the broker for the negligent performance of his duties only where there was an existing legal obligation to perform and which did not arise in the instance of an ordinary brokerage agreement.

(v) that the broker could be held delictually liable against third parties with whom no contractual relationship existed, and that in this instance it was Gideon who could hold the defendant responsible because he suffered the financial loss.

THE LAW

[7] Ordinarily, the relationship between broker and the insured, is subject to the law of agency. Depending on the circumstances of the case, an insurance broker is mandated by the insured to carry out certain instructions. In a brokerage agreement, it is required of the broker to exercise reasonable care and skill in executing the mandate of the insured. **Stander v Raubeheimer 1996 (2) SA 670 (0), Lenaerts v JSN Motors (PTY) LTD and Another 2001 (4) SA 1100 (W),** at **1108 I-J** and **1109 A-G**. In the latter matter, at **1108 G,** this duty was described as ' the fundamental quality of the general duty owed." In certain instances such duty could extend to ensuring whether the policy covers the needs of the insured, **Stander** case *supra*.

[8] The trial magistrate dealt with the aspect of the mandate regarding Gideon's room from the basis that it had been shown on a balance of probabilities that Gidoen's room was an outbuilding. The onus, therefore, rested on the plaintiff to satisfy the court, by giving expert evidence that the broker had a duty to explain and advise the plaintiff that Gideon's room was an outbuilding and that it was not covered by the policy. Furthermore, according to the trial magistrate, there was no prima facie evidence to show that the defendant could have provided the insurance cover required by the plaintiff because the limitations appeared generally in policies where outbuildings were present. I disagree with this view because it

disregarded the long term relationship between the plaintiff and the broker; the mandate and, the nature and content of previous policies. Although Mr Smit testified that it was not unusual for similar policies to carry such limitation clauses, it is not disputed that this was not always the case with the plaintiff's policies.

[9] In this instance, the initial insurance policy of 1996 and subsequent renewals thereof prior to 2001 covered the contents of Gideon's room, the policies were not subject to the limitation clause, which was only introduced into the policy of the plaintiff in 2001. According to Mr Smit Gideon's room was always considered by him to be an outbuilding. This concession is made notwithstanding the fact that the limitation clause was only introduced between February and April of 2001. In August of that year the plaintiff's wife confirmed that the same list of items which were included in previous policies had to be covered by the new insurance policy. The mandate was similar to that communicated to the broker during 1996, that is, regarding the cover for the contents of Gideon's room. This was followed by the compilation of an inventory. This fact was not disputed by the defendant. If the previous policies, in my view, did not contain a limitation clause which excluded the items in Gideon's room and, the new policy contained one, the broker had to exercise reasonable care and skill in executing the true mandate of the plaintiff. Having regard to the mandate, a duty arose to advise the plaintiff on the implications entailed in the new policy in respect of the outbuilding.

[10] It was submitted on behalf of the defendant that the position of the broker was comparable to that of an attorney, a banker or any other professional person and, that in order to

determine negligence, the standard of reasonable care and skill had to be measured against the general or usual standard of care and skill expected. The circumstances in **Durr v Absa Limited and Another 1997 (3) SA 448 (SCA)** were, in my view distinguishable. Expert evidence was tendered by the respondents on how the court should determine the standard of the reasonable care and skill to be exercised by a 'typical broker' who had 'modest accomplishments'. The liability of the respondents was based on the fact that the appellant had relied on certain representations made by the respondents which placed a duty upon them to investigate and establish the true facts about the company they were encouraging their client to invest in. At **460 H – 461 A/B**, it was held that in determining what was reasonable:

> "....the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the *members of the branch of the profession* to which the practitioner belongs.......But the decision of what is reasonable under the circumstances is for the court; it will pay regard to the views of the profession, but it is not bound to adopt them"

In this instance, except for what appears on paper no evidence was tendered on behalf of the defendant regarding what it considered to be the standard of the reasonable care and skill to be exercised in its profession. No evidence was tendered to dispute plaintiff's contention that the defendant failed to exercise reasonable care and skill in carrying out the mandate which was communicated by the plaintiff's wife even after the endorsement came into operation. In my view, during the August 2001 revision of the policy, the defendant should, once more, have drawn the plaintiff's attention to the limitations clause regarding the outbuilding. My understanding is that the revision exercise conducted was different from the other occasions where the policy was renewed without requiring a visit to the premises to reestablish the facts. A revision of the policy would entail the re-visitation of the entire document, more so, because another inventory had been compiled in which the plaintiff's wife listed the items in Gideon's room which she intended to be covered by the policy and, in respect of which she gave fresh mandate. Where it concerned the defendant, in my view, it was not about whether Gideon's room was an outbuilding or not, it was about the mandate to cover those items in his room and, which were included in the inventory. In as far as the defendant, as broker, was representing the insurer he had a responsibility to draw the plaintiff's attention to the limitations on what the insurer considered to be an outbuilding to ensure that he was adequately covered. The plaintiff in this instance discharged the onus in proving that the defendant was in breach of his mandate when he failed to procure cover for the contents of Gideon's room. In **Lappeman diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd and Another 2004 (2) SA 1 (SCA)** at **11A** Lewis JA confirmed the position at law regarding the duty owed by a brokers and as established in **Lenaerts** *supra* :

> " the duty to exercise care and skill in appropriate cases extends to the duty to take reasonable steps to illicit and convey material both from and to the insured. This includes information about terms of the policy which if contravened, might leave the insured without cover. It is part and parcel of a brokers general duty to use reasonable care to see that the insured is covered

[11] The issue of locus standi was not canvassed in the pleadings and no point in limine was argued before commencement of the trial, which if argued successfully by the defendant could have put an end to the matter. Reference to locus standi was made during the cross examination of the witnesses. Relying on the decision in **Manderson v Standard General**

Insurance Co Ltd 1996 (3) SA 434 (D) it was submitted on behalf of the defendant that plaintiff could not be compensated in respect of goods which did not belong to him. The facts in the Manderson case are distinguishable in that the court held that there was a duty to disclose to the insurer that the purpose of the insurance was to benefit a third party and that the insurance so taken out was for that specific purpose. In **Refrigerated Trucking (Pty) Ltd v Zive NO (Aegis Insurance Co Ltd, third party) 1996 (2) SA 361 (T)** at **372 F-G** the following was said:

> "...It seems then that in our law of indemnity insurance an insurable interest is an economic interest which relates to the risk which a person runs in respect of a thing which, if damaged or destroyed, will cause him to suffer an economic loss or, in respect of an event, which if it happens will likewise cause him to suffer an economic loss. It does not matter whether he personally has rights in respect of that article, or whether the event happens to him personally, or whether the rights are those of someone to whom he stands in such a relationship that, despite the fact that he has no personal right in respect of the article, or that the event does not affect him personally, he will nevertheless be worse off if the object is damaged or destroyed or the event happens."
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> **At 373 G**
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> "The rights which accrue, accrue to him but he has no locus standi in judicio to enforce them. He is left in the hands of the insured. If the insured elects to exercise those rights he is fully covered, but if the insured fails to do so there is nothing he can do to enforce the rights"

The fact that Gideon owned the items was not sufficient a reason to refuse the appellant's claim because he was still dependant on his parents since the first insurance policy was taken out during 1996, the goods were on their premises and his father, the plaintiff had been responsible for payment of the monthly premiums. Plaintiff's wife engaged the defendant for the purpose of insuring the contents of her house which included those items which were in Gideon's room. In the circumstances the plaintiff is entitled to payment