

**IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)**

**REPORTABLE
Case No. 1614/2002**

In the matter between

ENAZ (PTY) LTD

Plaintiff

And

**MUTUAL & FEDERAL INSURANCE CO. LTD
SKY MARKET FINANCIAL SERVICES (PTY) LTD**

**First Defendant
Second Defendant**

JUDGMENT DELIVERED ON 4 NOVEMBER 2003.

DAVIS J

Introduction.

On 5 March 2002 plaintiff instituted action against defendants, claiming payment of the sum of R100 000 in respect of damages against first defendant and alternatively second defendant. Plaintiff's claim against first defendant was based on the latter's failure to indemnify plaintiff against the loss occasioned by theft of money from plaintiff's premises in Port Nolloth. The alternative claim was lodged against second defendant which was its insurance broker at all material times and which, it alleged, breached the terms of a mandate agreement between the parties.

Both defendants defended the action.

Shortly before the trial date, on 25 August 2003, plaintiff withdrew its action against first defendant, giving notice that, by agreement, plaintiff and first defendant were each to bear their own costs. Plaintiff did not amend its claim against second defendant and in respect of this action against second defendant, the matter proceeded to trial on 9 September 2003.

The parties did however reach agreement on the material facts of the case. Briefly stated these facts are the following: Plaintiff carries on business as a retailer in Springbok, Northern Cape and Port Nolloth. Second defendant was incorporated in 1998 and at that time subsumed the business of Sky Insurance Brokers which had acted as plaintiff's insurance broker from about May 1992.

In terms of an agreement between plaintiff and second defendant, the latter had to take all reasonable steps to procure such insurance cover as plaintiff instructed from time to time, and, in doing so, was under a duty to exercise reasonable care, skill and diligence.

In June 2002 plaintiff, represented by second defendant, and First Central Insurance Ltd ('First Central') which carried on business as a registered insurer concluded a written Multimark III contract of commercial insurance. On 19 January 2001 second defendant cancelled this agreement with First Central. On the same day, again representing plaintiff, second defendant entered into an agreement with Mutual and Federal Insurance Company Ltd ('Mutual and Federal') in terms of which a written Multimark III contract of commercial insurance with policy No. 3368270 and reference No. ENAZP01/002 was concluded.

It was not disputed by either of the parties that, with effect from 1989, the short term insurance industry introduced standardised insurance policies under the name and style 'Multimark'. This series of contracts for commercial insurance introduced a safe grading system which was incorporated in the second and subsequent versions of the Multimark contracts, including the Multimark III series, of which plaintiff's policy number 3368270 was an example.

The limits of indemnity afforded to an insured in the event of money being stolen from its business premises outside business hours appeared from the policy schedules to the contract. It was also agreed that the agreement with Mutual and Federal was concluded on the same terms and conditions as the earlier agreement with First Central. From time to time second defendant furnished plaintiff with updated policy schedules similar to the original policy schedule. Up until 28 June 2001 the indemnity offered to plaintiff

by Mutual and Federal was limited to a maximum of R100 000 in the event of money being stolen from plaintiff's business premises at the Spar Supermarket in Port Nolloth during normal business hours and, in the event of the theft occurring outside of business hours, the indemnity provided was linked, **inter alio** the category of safe utilised by plaintiff at the time.

The safe category limits were set out in the policy as follows:

- SABS no grading..... R 2 500
- SABS category I grading..... R 5 000
- SABS category II grading..... R12 500
- SABS category II HAD grading..... R25 000
- SABS category II ADM grading R50 000
- SABS category II ADM grading D3..... R75 000
- SABS category III grading..... R100 000
- SABS category IV grading..... R200 000

The limits of the indemnity was set out thus:

Springbok R250 000;
Port Nolloth R100 000;
Vleismark R15 000.

On 28 June 2002 Mutual and Federal represented by Mr M Williams advised second defendant, represented by Mr P Williams, in writing about certain requirements pertaining to plaintiff's policy of insurance. This letter read as follows:

'Following a recent survey conducted at both Springbok Spar and Port Nolloth Spar it has been recommended by our Surveyor that the following survey requirements be implemented within 30 days of this letter.

SPRINGBOK SPAR.

1. A wiring certificate has to be obtained in the light of the recent fires that have taken place.
2. The gas bottles are not stored according to Municipal regulations. The bottles are at present being stored inside the building next to the restaurant area. They have

to be stored in a steal cage that has to be installed outside the building so that the gases can escape freely.

PORT NOLLOTH SPAR

1. As is the case with the Springbok Spar, the owners of this branch have to obtain a wiring certificate too.
2. The safe being used at present is not an SABS approved safe and we require that a KAT4ADM safe be installed at the premises.

Would you be so kind as to inform us once the above requirements have been implemented as failure to do so in the prescribed period will result in termination of cover from the date of this letter.'

Subsequent to the receipt of this letter of 28 June 2001 and prior to the theft of money, Mr P Williams, on behalf of second defendant, telephoned Mr B Burger, representing plaintiff, and informed him that Mutual and Federal had extended plaintiff's policy of insurance upon certain conditions, including the following:

- 1 Plaintiff was to be indemnified in respect of loss of money through theft from the safe at plaintiff's Port Nolloth business premises outside business hours for a period of thirty days from 28 June 2001 and for a maximum amount of R100 000;
- 2 Plaintiff should replace its existing safe with a KAT4ADM safe within a period of thirty days from 28 June 2001 failing which plaintiff's cover would terminate from 28 June 2001.

Plaintiff, again represented by Mr B Burger, accepted the conditions as conveyed to him by Mr P Williams, although it should be noted that there is some disagreement between the parties as to the exact meaning of the letter of 28 June 2001.

On 15 July 2001 and before the period of thirty days as stipulated in the letter of 28 June 2001 had expired, a sum of R100 260.71 in cash was stolen from the safe at plaintiff's

Port Nolloth business premises. The theft occurred outside of normal business hours. The safe in use at the time of the theft was a model OQ4 commercial safe which had no SABS grading.

Prior to the perusal of the letter of 28 June 2001, it is common cause that second defendant had no knowledge of the quality and/or grading of the safe in use at plaintiff's Port Nolloth business premises.

Plaintiff lodged a claim for R100 000 against Mutual and Federal in terms of the policy of insurance. Mutual and Federal repudiated the claim on the grounds that the safe in use at the time of the theft had no SABS grading. It tendered payment of the sum of R2 500 which tender was refused. It is also common cause that plaintiff complied with all the other obligations rested upon it in terms of the policy schedule.

Plaintiff's Case.

Plaintiff called one witness, being Mr Barend Burger, a shareholder and director of plaintiff, who had been authorised to bring the action on behalf of plaintiff and who managed plaintiff's Spar retail store at Springbok. Mr Burger testified that he received a letter on 1 February 2001 from Mr Peter Williams on behalf of second defendant to the effect that the second defendant 'had become a little uneasy with regard to the stability of First Central Insurance Limited... In light of the above we invoked the cancellation clause in your policy with effect from 19 January 2001 and immediately arranged replacement cover with Mutual and Federal. The replacement cover is on precisely the same terms and conditions and at the same premiums. New policies are currently being issued and will be forwarded to you shortly'

He testified that on approximately 1 June, which was the renewal date for the relevant insurance, he obtained an insurance schedule for the previous year's insurance which was evaluated with his broker, Mr Williams. He described himself as a shopkeeper and testified that, in the evaluation of the appropriate insurance cover, he was dependent upon his insurance broker who had the necessary expertise, unlike himself.

He testified that he only saw the letter of 28 June 2001 in the chambers of his counsel during the preparation for trial. However he had first heard of the necessity of the

requirement for a SABS graded safe when he received a telephone call from Mr Williams on 13 July 2001. He confirmed the veracity of the contents of the facsimile dated 28 June 2001 which referred to a survey which was undertaken by Mutual and Federal of plaintiff's premises. Mr Burger explained that this survey was necessary because plaintiff had become a client of Mutual and Federal.

Mr Burger confirmed that the necessary graded safe had been installed on 8 August 2001 and that during 13 July 2001 to 8 August 2001 he had been under the impression that plaintiff was covered in the amount of R100 000 in the event of a theft of cash after business hours. He testified further that he would never have been prepared to pay a premium of R14 875.00 for cover which amounted to no more than R2500. He confirmed that Mr Williams had never raised the issue of a SABS graded safe until 13 July 2001.

Under cross-examination, Mr Burger confirmed that he had ordered the SABS approved safe on 30 July 2001. The safe was delivered on 8 August 2001. He also conceded that he had never adequately read the policy document.

The second defendant called Mr Peter Williams, a former shareholder and director of second defendant who was responsible for handling plaintiff's commercial insurance portfolio during his tenure and who, somewhat ironically given the nature of this dispute, continued to act in this capacity until the present time although he was employed by a different brokerage. Mr Williams testified that he had written to Mutual and Federal on 28 June 2001 to express his concern at the time taken to renew the policies of plaintiff particularly as a result of the survey which had been undertaken. Given this delay, he had requested Mutual and Federal to 'hold us covered' in the amount of the last previous sum assured plus 15%.

He testified further that, when the letter of 28 June 2001 of Mutual and Federal had been written, he had been on leave. He was somewhat uncertain as to when he had received the letter and estimated that it was approximately on 2 July 2001. Upon return from leave he phoned Mr Burger and informed him that there was a problem with regard to the safe and that plaintiff needed a SABS category 4 grading safe.

Mr Williams insisted that, when he read the letter of Mutual and Federal dated 28 June 2001, he considered that plaintiff had thirty days to rectify the position. As he told the court, under normal circumstances Mutual and Federal would not have issued the fire policy with the existing system of wiring. It had however undertaken to cover plaintiff for thirty days until the wiring faults had been rectified. Once the period of thirty days had terminated and there was a fire because of the faulty wiring, then as far as Mr Williams was concerned, the letter clearly indicated that plaintiff would not be covered. In his view, this approach was reflective of standard industry practice.

He arrived at a similar conclusion with regard to the safe. In the ordinary course, failure to have a KAT4ADM safe installed on the premises would have meant that cover would

have been limited to R2500. However in terms of the letter of 28 June 2001, Mr Williams had taken the view that Mutual and Federal were prepared to continue with the existing level of cover for thirty days. For this reason he considered that the Port Nolloth premises had cover of R100 000 for a theft of cash during the thirty day period.

Under cross-examination, Mr Williams informed the court that he 'inherited' plaintiff as a client when he joined second defendant. The issue of the safe grading system had been in place since 1988 and he had made the assumption that plaintiff had already been informed of these requirements. He did concede that he was aware of the specifications with regard to the safe category limits as contained in the policy schedule to which I have already made reference.

Williams did not dispute that plaintiff would have immediately replaced the existing safe had Mr Burger known about the relevant safe grading requirements at an earlier stage. Mr Williams also appeared to concede that his advice had been based upon his interpretation of the letter of 28 June 2001. Further he confirmed that he would have informed Burger that, if the Mutual and Federal interpretation of the letter was proved to be correct, then he had incorrectly advised Burger of the correct position.

The duty of an insurance broker.

The duty of an insurance broker, in the performance of the mandate on behalf of the insured, is to exercise reasonable care and skill in the execution of his or her mandate.

Lenaerts v J S N Motors (Pty) Ltd and Another 2001 (4) SA 1100 (W) at 1108 F.

In **Harvest Trucking Company Ltd v P.B. Davis Insurance Services** [1991] 2 Lloyd's Report 638 (QB) at 643, the court acknowledged the difficulty in defining with any precision the exact scope of the duty. It went on to say 'The precise extent of the insurance intermediary's duties must depend in the last resort on the circumstances of the particular case, including the particular instructions which he has received from his client. In many cases those duties will include advising his client on the type of insurance best suited to his requirements and, subject to his client's instructions, exercising reasonable care to obtain insurance which will best meet those requirements. It is normally not an ordinary part of a broker's or intermediary's duty to construe or interpret the policy to his client, but this again is not of course a universal rule. If a broker or intermediary is asked to explain the terms of a policy to his client and does so, then he must exercise due care in giving an accurate explanation. Again if the only insurance which the intermediary is able to obtain contains unusual, limiting or exempting provisions which, if they are not brought to the notice of the assured may result in the policy not conforming to the client's reasonable and known requirements, the duty falling on the agent, namely to exercise reasonable care in the duties which he has undertaken, may in those circumstances, entail that the intermediary should bring the existence of the limiting or exempting provisions to the express notice of the client, discuss the nature of the problem with him and take reasonable steps either to obtain alternative insurance, if any is available, or alternatively to advise the client as to the best way of acting so that his business procedures conform to any requirements laid down by the policy.'

See also Robert Merkin 'The legal position of insurance brokers' 1994(11) South African

Mercantile Law Journal 78.

More recently in **Lapperman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd and another** (unreported decision of the Supreme Court of Appeal: Case No. 312/2002) **Lewis JA** this **dictum Harvest Trucking Co**, supra with approval. An issue was a provision in the policy that the insured shall keep 'detailed records of all sales, purchases and other transactions and that such records shall be available for inspection by the Underwriters or their representatives in case of a claim being made under this Insurance Certificate'. Claims were made by the insured in respect of diamonds stolen from its premises. It transpired that because the diamond trade is one with a tradition of confidentiality 'deals are done informally, and records are not retained. A contract for the sale of a diamond may take place on the handshake, or may be recorded on a slip of paper that is subsequently discarded or destroyed. Such transactions are referred to as being 'off-the-book' (at para 11).

The essence of the insured's case in **Lapperman** that the brokers, as experts in the field of diamond insurance, would have known of the practice of doing 'off-the-book' transactions and should therefore have drawn the insured's attention to the key clause and alerted the insured to the fact that it would be in breach of a promissory warranty and hence would lose indemnity, should it not keep full records of all transactions.

Much of the decision turned on the legal duty of an expert broker, it being common cause that the defendant was an expert in the field of diamond insurance. The following conclusion reached by **Lewis JA**, on behalf of a unanimous court, is of relevance to the law applicable in the present case: "The second difficulty with the appellant's argument relates to a broker's duty in principle. Even if the representatives of the MIB Group had had knowledge of the practice in the diamond trade, was it then incumbent upon them to ask Lapperman whether the appellant did off-the-book transactions? I consider not. The authorities on which the appellant relies, and the evidence of the experts on insurance broking, suggest that once the

insured is apprised of the duty to keep full records of all transactions, there is no need for the broker to go further and ask whether the insured does in fact keep records...A broker does not, and cannot be expected to control the business of the insured. Even a specialist broker's duty does not encompass the duty to ensure that the insured complies with his obligations under the policy. He is not the insured's keeper. This duty, as a specialist broker, is discharged when he has done everything reasonably necessary to draw the attention of the insured to obligations imposed by the policy. It is the insured's responsibility to ensure compliance'. (at paras 43-45).

Plaintiffs case.

Mr Botha contended on behalf of plaintiff that, provided that plaintiff can prove that the breach of the defendant was a cause of the loss (as opposed to the cause), he or she should succeed even if there was another contributing cause for the loss, be it an innocent one, the actions of a third party or the carelessness of the plaintiff in failing to take reasonable precautions to avoid it.

In this connection Mr Botha referred to a passage from the judgment of **Nienaber JA** **Thoroughbred Breeder's Association** **Price Waterhouse** (4) SA 551(SCA) at paras 66-67: 'The defence of a preponderance of fault on the part of the plaintiff, on which the Court **a quo** appears to rely is incongruent within the field of contract. Where a plaintiff can prove that the breach of the defendant was a (as opposed to **the** thereof) he should succeed even if there was another contributing cause for the loss, be it an innocent one, the actions of a third party.....or logically, the carelessness of the plaintiff himself in failing to take reasonable precautions to avoid it. The defendant who commits a breach of contract does so independently of any of the extraneous factors mentioned above. All the requirements for his liability will have been fulfilled. In the absence of a contrary term in the agreement itself or of legislative intervention excluding or reducing his claim, he should therefore be held fully liable, regardless of whether the plaintiff's **culpa**

the dominant or pre-eminent cause of the loss...A plaintiff who sues for damages for breach of contract for a loss allegedly sustained through the negligence of defendant but who was himself careless in relation to the non-avoidance of such loss, may therefore be non suited: (a) if there was a term in the contract to that effect; (b) if the plaintiff's own carelessness is held to be the sole cause of the loss, either in its totality or, to that extent, in relation to a particular segment thereof; or (c) if the defendant's negligence was, comparatively speaking, so negligible or minimal as to be discountable and a significant cause of the loss, which, strictly speaking, is simply an instance of (b)'.

Mr Botha submitted that by virtue of Williams' own admission, second defendant had not acted reasonably in the circumstances and was clearly in breach of the agreement. Had a simple question about the SABS grading been raised with Mr Burger, the position would have been rectified and the expected indemnity would have been safeguarded. Mr Botha submitted that, whatever Mr Williams' interpretation of the letter from Mutual and Federal of 28 June 2001, there was a breach of the policy of insurance upon the conclusion of the agreement with Mutual and Federal in January 2001 in that a SABS graded safe had not been installed. Clearly had R100 000 been left in a safe with a SABS category 3 grading, the insurer would not have repudiated the policy.

Mr Botha also attacked Mr Williams' interpretation of the letter of 28 June, When Mutual and Federal employed the word 'cover' in the letter, it could only have meant a reference to existing cover which could not be extended beyond the limit of the existing cover of R2500 (in the case of a cash loss) to R100 000 once no SABS graded safe had been installed.

For these reasons, Mr Botha submitted that a reasonable or prudent broker would, at the very least, have made enquiries about the exact meaning of the letter in question and acted accordingly to safeguard the interests of his client, in this case plaintiff.

Second defendant's case.

Miss Gordon-Turner, who appeared on behalf of second defendant, focused a considerable amount of her argument on the business record and testimony of Mr Burger, a director of plaintiff. She described him as an experienced bilingual businessman with a tertiary education. He was accustomed to dealing with relatively complex commercial negotiations and conceded that he did make his own assessments of the advice given by

the broker in order to come to an independent decision. This submission was supported by certain entries in Mr Burger's diary which formed part of the evidence presented to the court. Furthermore, Mr Burger was in receipt of a complete policy document including the relevant schedules and had conceded that there was a note in an annual insurance summary which warned him to read it together with the policy for which it was not a substitute.

Mr Williams had testified that second defendant had not been plaintiff's broker in 1989, when the safe grading was introduced by the insurance industry. This system was a notorious fact amongst brokers at the time and Williams assumed that any broker would then have advised his or her clients concerning its introduction and import. Ms Gordon-Turner submitted that this piece of Mr Williams' evidence had not been challenged or contradicted.

She also noted that Mr Burger had been conscious of the distinction between different qualities of safe for, as early as 1988, he had caused a Category 4 safe to be installed at plaintiff's Springbok retail premises, pursuant to a money loss which had occurred at these premises. Furthermore, she contended that the construction placed upon the letter of 28 July 2001 by Mr Williams had been a reasonable one. In her view, it was clear that the cause of plaintiff's loss had been the repudiation of the policy by the insurer and not any conduct on the part of second defendant. The omissions on the part of second defendant, to the extent that they were admitted, were not material in that they occurred in the previous period of insurance in relation to a different contract of insurance, and did not cause the loss. The damages suffered were too remote for the loss to fall upon second defendant. In addition, she alluded to plaintiff's own negligence as being a key factor in the loss suffered.

Evaluation.

To return to Mr Burger's evidence which both counsel debated at length: He testified that he first became aware that an SABS approved safe was required at his Port Nolloth premises on 13 July 2001 pursuant to a telephone conversation with Mr Williams. According to the pleadings, plaintiff alleges that during the period June 1999 to July 2001, the second defendant failed to advise plaintiff that the cover provided in terms of

the policies of insurance with first defendant for theft of money outside of business hours was limited to R2500 by virtue of the plaintiff using a non SABS approved safe at its Port Nolloth premises. In terms of clause 15.2 of the pleadings, plaintiff avers:

‘During the same period, the Second Defendant failed to advise the plaintiff that it should replace the safe at its Port Nolloth premises with a SABS approved safe in order to maximise the cover applicable in terms of the policy of insurance with the First Defendant.

15.3 During the same period the Second Defendant (whether directly or by omission) led the Plaintiff to believe that it enjoyed maximum insurance cover against the risk of loss arising from the theft of money from its Port Nolloth premises howsoever occurring.

15.4 During or about June and July 2001, the Second Defendant failed to inform the plaintiff that, unless the safe at its Port Nolloth premises was replaced with a SABS approved safe within thirty days, all cover would terminate and that, in the event that a theft occurred outside of normal business hours and within the period of thirty days, the cover provided by the first defendant would be limited to R2500’.

Much of the debate between counsel centered on the period in 1992 when Mr Williams joined second defendant. Williams’ explanation as to the installation of an SABS approved safe was that a safe grading system was a notorious fact among all brokers at the time and for this reason he had assumed that plaintiff had been advised accordingly. Ms Gordon-Turner also contended that Mr Burger had been conscious of the difference between the qualities of safes since as early as 1988 when he had caused a Category 4 safe to be installed at plaintiff’s Springbok retail premises pursuant to a money loss. Furthermore, the policy details which was hardly a complicated document specified expressly that the limits of cover for money loss was dependent on the nature of the safe installed at the premises.

Plaintiff’s conduct may well be relevant legally to the dispute. Mr Botha sought to counter this with reference to the **Thoroughbred Breeders Association**, supra and the consequent argument that, so long as the plaintiff can prove that the breach of the defendant was a cause of the loss, plaintiff should succeed.

However, as Ms Gordon-Turner correctly observed, the critical event took place once Mutual and Federal had taken over as plaintiff’s short term insurer, and conducted a survey of the premises. Upon receipt of the letter of 28 June 2001, it is common cause that, at the very latest on 13 July, Mr Williams conveyed to Mr Burger that there was a pressing need for the installation of a KAT4ADM safe to be installed at the Port Nolloth premises. Assuming that Mr Williams’ construction of the letter was correct, plaintiff would have had thirty days from 28 June 2001 to install the requisite safe.

Mr Botha contended however that the construction of the letter from Mr Williams was completely unreasonable. I disagree. The letter clearly indicates in the last paragraph that failure to implement the above requirements (including the installation of a KAT4ADM safe at the Port Nolloth premises) ‘will result in termination of cover from the date of this letter 28 June 2001. The very first paragraph of the letter urges that ‘the following survey requirements be implemented within thirty days of this letter’. Clearly this was intended to define a prescribed period of thirty days from 28 June. The argument that the reference to cover, insofar as a money loss was concerned, could only have meant R2500, cannot be correct in that, absent an SABS grading safe, cover of R2500 would have always been available to plaintiff. Indeed pursuant to its repudiation of the policy, Mutual and Federal offered second defendant R2500. In my view, Mr Williams was correct to assume on the basis of this letter that his client had thirty days to rectify the situation. It was never suggested that the delay between 28 June 2001 and 13 July 2001 was sufficient in itself to justify a conclusion that Mr Williams had been negligent.

To all intents and purposes this reasonable interpretation of the letter by Mr Williams and his subsequent conduct puts an end to this dispute.

To the extent that it was contended that between 1999 and 28 June 2001 second defendant had negligently failed to inform plaintiff of the need to have a SABS approved safe, the clear and simple statement in the insurance policy which was available to Mr Burger as well as his own knowledge about the importance of a SABS approved safe (being evidenced by the installation of a similar safe in Springbok) serves to support a similar conclusion to that reached by **Lewis JA in Lapperman Diamond Cutting Works, supra** which I have already cited namely ‘A broker does not and cannot be expected to control the business of the insured. Even a specialist broker’s duties (in this case there was no allegation that Mr Williams was such a specialist broker) does not encompass a duty to ensure that the insured complies with his obligations under the policy. He is not the insured’s keeper. His duty, as a specialist broker is discharged when he has done everything reasonably necessary to draw the attention of the insured to obligations imposed by the policy. It is the insured’s responsibility to ensure compliance (at para 44). Mr Burger may well be classified as being in the same position as the insured referred to in this **dictum**.

Mr Williams contended that he had reasonably assumed that the attention of plaintiff had been drawn to the safe grading system at the inception of the policy and that this perception had been supported by the acquisition of the necessary safe for the Springbok

premises.

There is however no need to make a definitive finding in this regard, for, to the extent that it is incorrect, Williams did everything reasonably necessary to draw the attention of the insured to the obligation imposed by the policy pursuant to the letter of 28 June 2001. It was the action of Mutual and Federal, contrary to the contents of this letter, that lies at the legal heart of plaintiff's failure to recover its loss.

For these reasons the action is dismissed with costs.

DAVIS J