



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 249/2002

In the matters between :

CASE NO: CPD 14500/95

**COMMERCIAL UNION INSURANCE
COMPANY OF SA LTD**

Appellant

and

EUGENE BRYAN WALLACE NO

Respondent

CASE NO: CPD 9497/95

SANTAM INSURANCE LTD

Appellant

and

AFRIC ADDRESSING (PTY) LTD

Respondent

Before: STREICHER & NUGENT JJA & MLAMBO AJA
Heard: 25 and 26 AUGUST 2003
Delivered: 19 SEPTEMBER 2003

Summary: Claims under policy of fire insurance – fraudulent claim –
non-disclosure of material facts.

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] On the evening of Sunday 13 November 1994 a fire engulfed a warehouse at Blackheath on the Cape Peninsula and destroyed the contents. Some of the goods that were destroyed belonged to a company known as Press Supplies Limited ('Press Supplies') and some belonged to an associated company known as Afric Addressing (Pty) Ltd, which traded under the name Afric Mail Advertising ('AMA').

[2] Both companies were insured against the risk of fire under separate policies of insurance issued by Commercial Union Insurance Company of South Africa Limited ('Commercial Union') and Santam Insurance Limited ('Santam') respectively. (Press Supplies was insured by Commercial Union and AMA was insured by Santam). Both insurers declined to meet the claims of their respective insured and they were sued in separate actions. (Press Supplies was by then in liquidation and was represented by the liquidator). The actions were tried together in the Cape High Court by Thring J, who upheld the claims of both insured but granted the insurers leave to appeal to this Court. He also granted AMA leave to cross-appeal against part of his order relating to interest.

[3] In the court *a quo* many issues were raised and pursued with indiscriminating vigour but it is necessary to deal with only two of them for

they are decisive of this appeal. Before turning to those issues, however, it is convenient first to set out in some detail the background against which the claims arose.

[4] AMA and Press Supplies were subsidiaries of DZ Investment Holdings Limited (formerly known as Press Supplies Holdings Limited) which was in turn controlled by Mr D. Zandberg. A further subsidiary in the group was a company known as Funny Paper (Pty) Ltd ('Funny Paper').

[5] AMA's business, initially, was the assembling of bulk mail, but its business later expanded to include litho-printing and specialized packaging. Its main business premises were situated at Airport Industria near Cape Town airport. It also leased two 'mini-factories' in an adjacent complex known as Ruco Park. Zandberg's daughter and her husband, Mrs L. Mentz and Mr H. Mentz, were executive directors of AMA. Mr B. Potgieter was its financial manager.

[6] Press Supplies was a supplier of machinery and equipment to the printing industry. It shared the premises of AMA at Airport Industria but its main trading branch was at Selby, Johannesburg. Mrs Mentz was a director of Press Supplies. Its Johannesburg branch manager was Mr S. Rogers and its financial manager (also located in Johannesburg) was Mr M. Thompson. (Thompson had died by the time this matter came to trial).

[7] Funny Paper's business, initially, was the importing in bulk of wrapping paper and related materials, which it would convert into saleable form by cutting and packaging, and the products would then be distributed for sale through retail outlets. (That category of its merchandise will be referred to in this judgment as the converted products or the converted stock, as the case may be). Later it expanded its product range to include a variety of manufactured products like paper serviettes, paper plates, paper cups, stationery, bows and ribbons, which it similarly imported. (That category of merchandise will be referred to in this judgment as the imported products, or the imported stock). The main branch of Funny Paper was at Selby, Johannesburg, where it shared the premises of Press Supplies. It had smaller branches in Durban and Cape Town. In Cape Town it leased a unit in the Ruco Park complex for the storage of its merchandise. Thompson, the financial manager of Press Supplies, was also the financial manager of Funny Paper.

[8] Press Supplies formerly sold both heavy and light machinery but in 1990 it sold its heavy machinery division, leaving it with only its three light machinery divisions. In March 1993 it sold those remaining divisions to High Tech Graphics (Pty) Ltd, a company within the Hoechst group of companies (I will refer to the company as 'Hoechst').

[9] The transaction was dependant upon the fulfilment of various conditions precedent, including the conclusion by Hoechst of contracts of employment with certain key personnel of Press Supplies, and the acquisition by Hoechst of various key agencies that were then held by Press Supplies. Subject to the fulfilment of those conditions Hoechst purchased from Press Supplies the business of its three divisions as a going concern, together with certain assets relating to each division, including specific stock.

[10] The stock that was then being held by Press Supplies (mainly machinery but also associated spares and accessories) was separated into three categories for purposes of the transaction. Machinery and other stock in category A was acquired outright by Hoechst at its cost price as reflected in the accounts of Press Supplies. Machinery and other stock in category B (which was referred to in the agreement as ‘the unsold marketable stock’) was retained by Press Supplies. Press Supplies was entitled to sell those goods for its own account, subject to certain restrictions, but Hoechst undertook not to acquire identical goods from alternative sources if they were still available from Press Supplies. Machinery and stock in category C (which was referred to in the agreement as the ‘redundant machinery and stock’) was altogether excluded from the transaction and remained the property of Press Supplies.

[11] The agreement contemplated that Hoechst would lease from Press Supplies a portion of the Selby premises, and, for reasons that were not explored in the evidence, Press Supplies undertook to transfer to the Selby premises those items of machinery and stock in categories B and C that were then in Cape Town.

[12] Needless to say, the effect of the transaction was to bring the trading activities of Press Supplies to an end – the whole of its trading business had been disposed of as a going concern, its key personnel had been employed by Hoechst, and it had disposed of its key agencies – but it was left with a substantial amount of stock that Hoechst was unwilling to purchase.

[13] The financial position of Press Supplies was already deteriorating at the time the business was sold and this was attributed in the evidence, at least partly, to rumours of the impending sale. Not surprisingly, its financial statements for the following year (upon which its auditors did not express an opinion) reflect that at 30 June 1994 it was insolvent. After writing off moneys that had been advanced to an associated company its accumulated loss was over R5.5 and its current liabilities exceeded its current assets by more than R1.5 million. Bearing in mind that the company was no longer actively trading there was clearly no prospect of a recovery and ultimately it was placed in liquidation.

[14] I turn now to the affairs of AMA and Funny Paper. In about the middle of 1993 (shortly after Press Supplies sold its business to Hoechst) Funny Paper appointed a certain Mr G. Starkowitz, an experienced marketer of paper products, as its sales and marketing director. At that time Funny Paper's business was confined to importing bulk materials (mainly gift-wrap paper) and converting it for resale. Soon after the appointment of Starkowitz it expanded its product range to include the imported products that I have described. Funny Paper was at that time under financial strain. Its audited financial statements at 30 June 1993 reflect an accumulated loss of over R3 million and its net current assets amounted to little more than R650 000.

[15] The appointment of Starkowitz and the extension of its product range failed to reverse the fortunes of the company. On the contrary, although its turnover increased substantially during the following year so did its accumulated loss, which was almost R5 million by 30 June 1994. Its current liabilities at that date exceeded its current assets by more than R2,5 million and it was dependant upon its associated companies, and its bank, to meet its operating expenses. At 30 June 1994 Funny Paper owed its bank about R1 million (a debt for which AMA had bound itself as surety) and it owed AMA R712 402.

[16] In about June 1994 Starkowitz left the employ of Funny Paper. By then a company known as Constantia Greetings (Pty) Ltd ('Constantia') had shown an interest in purchasing Funny Paper in order to acquire its machinery. At about that time AMA decided to take over some of Funny Paper's stock in settlement of the debt that was owing to it. Although the transaction was finalized only in about September 1994 it was treated for accounting purposes as having occurred on 30 June 1994.

[17] Funny Paper's stock at 30 June 1994 had been counted for purposes of the financial statements and was valued at about R1.2 million. Most of the stock was held in Johannesburg (about R1.04 million) with the remainder in Durban (about R141 000) and Cape Town (about R78 000). The stock was reflected in a compendious stock-sheet that was summarized to reflect the stock in various categories at the various branches.

[18] The person who was responsible for implementing the transaction on AMA's behalf was Mrs Mentz. Mr Leisching, the auditor of Funny Paper, said in evidence that the proposed transaction was discussed at a meeting in Johannesburg with Zandberg and that Zandberg then telephoned Mrs Mentz and asked her to visit Johannesburg in order to examine the stock. He said that she did so the following day. The evidence of Mrs Mentz was rather different. She said that she did not see the stock before the transaction was approved and

that she only examined samples of the stock that were sent to her in Cape Town. In my view the evidence of Leisching is to be preferred on this issue. He had a clear and detailed recollection of the visit and the circumstances in which it occurred, he had no reason to misrepresent the facts (he was called to give evidence on behalf of the respondents), and it is unlikely that a transaction of that magnitude would have been decided upon without an examination of the stock.

[19] It was left to Mrs Mentz to select the stock that was to be acquired by AMA. She said that she made the selection from the summary of the Funny Paper stock-sheets. The summary reflected Funny Paper's stock as at 30 June 1994 in various categories, including a category referred to as 'raw materials' (the bulk materials that were awaiting conversion, together with related packaging materials, valued at R316 661) and two minor categories referred to as 'party packs' and 'Woolworths' (the value of these two items together was no more than R7 100).

[20] AMA had no use for the raw materials, nor did it have an interest in the two minor categories. The remainder of the stock comprised converted products (they were described in the summary as 'book covers', 'brown Kraft rolls', 'counter rolls' 'gift-wrap rolls', 'gift-wrap sheets' 'Xmas gift-wrap', 'polythene' and 'tinsel') and the imported products that Funny Paper had

introduced the previous year. Mrs Mentz said that she decided that AMA should take over all the stock in both categories: in other words, all the Funny Paper stock other than the raw materials and the two minor items. (The total value of that stock was reflected in the summary as almost R931 000.)

[21] It seems unlikely, on the face of it, that Mrs Mentz would indeed have chosen to acquire the converted stock, because at that stage, according to Rogers, Funny Paper was building up its stock of those products to enable it to supply its customers in time for Christmas sales. There is no apparent reason why Mrs Mentz should have acquired that stock for sale in Cape Town, where a market had not yet been established by AMA, when Funny Paper already had an established market itself. It is a matter to which I will return later in this judgment.

[22] Rogers, who had remained with the group after the sale to Hoechst, and who was then running the affairs of Funny Paper, certainly did not understand AMA to have acquired both categories of stock, as alleged by Mrs Mentz. He had the task of arranging for the transfer of the stock to AMA in Cape Town and all that he sent was the imported stock: the converted stock remained in Johannesburg. Thompson (Funny Paper's financial manager), on the other hand, appears to have understood the position differently, for he sent a delivery note to AMA which recorded the following: 'Stocks transferred as

per this attached list and display stands.’ The list that was attached to the delivery note was a copy of the Johannesburg and Durban stock summaries, but excluding only the raw materials and the two minor categories. In other words, it recorded that what had been delivered was all the converted stock, and all the imported stock, from Johannesburg and Durban, as well as certain display stands that were used for displaying merchandise in retail outlets. He also caused invoices to be sent to AMA reflecting the sale to AMA of both categories of stock.

[23] One or other of them was mistaken. Either Rogers mistakenly retained the converted stock in Johannesburg, or Thompson mistakenly recorded that the converted stock had been acquired by AMA. Whether it was Rogers or Thompson who made the error, and its significance, is a matter that I will return to later in this judgment. For the moment it is sufficient to say that according to Mrs Mentz it was Rogers who erred, for she said that she selected both categories of stock for acquisition by AMA and that she was initially under the impression that both categories of stock arrived in Cape Town.

[24] Rogers arranged for the imported stock from Johannesburg to be loaded into four containers and they were dispatched to Cape Town during September 1994. Rogers said that he instructed Thompson to prepare an inventory of that stock but that he discovered only after the containers had been despatched that

Thompson had neglected to do so. Rogers also arranged for the Durban stock to be forwarded to Johannesburg, and it was later sent to Cape Town in circumstances that I will come to.

[25] When the four containers arrived in Cape Town they were directed to AMA's premises at Ruco Park where they were unloaded under the supervision of Mrs Mentz. No inventory was taken as the stock was unloaded, Mrs Mentz said that she did not notice that none of the converted stock had arrived.

[26] One of the outlets through which Mrs Mentz intended to dispose of the stock in Cape Town was a shop that was opened specifically for that purpose, under the name Impressions, in premises in Roeland Street that were owned by the group. Soon after the stock had been unloaded at Ruco Park a selection of stock (which might have included some of the Cape Town branch stock) was transferred to the shop in Roeland Street, together with the display stands that had been received from Johannesburg.

[27] On 6 October 1994 AMA, represented by its broker, applied to Santam to increase the sum insured under its policy in respect of stock from R700 000 to R1,7 million, to increase the sum insured in respect of machinery by R200 000 to R7.1 million, and to extend the policy so as to apply to the premises of Impressions in Roeland Street.

[28] Meanwhile Press Supplies had decided that its remaining machinery and other stock, then being stored in Johannesburg, should be transferred to Cape Town. According to the evidence that decision was taken because it was thought that it would offer a better prospect of the machines being sold, using the AMA sales staff. Rogers was given the task of arranging for the machinery to be sent. One machine was sent to Cape Town by truck, and the remaining machinery and other stock, together with the Funny Paper stock from Durban that had by then been received in Johannesburg, was sent to Cape Town in five containers during October 1994.

[29] By the time the five containers arrived in Cape Town AMA had temporarily leased a warehouse at Ricsa Park. The containers were directed to the warehouse where they were unloaded under the supervision of Mr Mentz. Some time later most of the Funny Paper stock that had been in the AMA units at Ruco Park was transferred to the warehouse, allegedly to provide AMA with sufficient space at Ruco Park to execute a large contract.

[30] On 18 October 1994 AMA applied to Santam to further extend its policy so as to cover the warehouse at which the acquired stock was being stored. On 19 October 1994 Press Supplies, acting through its broker, applied to Commerical Union to increase the sum insured in respect of stock under its

policy from R1 million to R2 million and to add the warehouse as an insured location.

[31] Thus at the time of the fire on 13 November 1994 the warehouse at Ricsa Park which had been leased the month before contained, essentially, the Press Supplies machinery and other stock that remained after the sale of its business to Hoechst, and the imported stock that AMA had acquired from Funny Paper. (Some items had been removed and others added but for present purposes it is not necessary to go into those details).

[32] After the fire occurred the insurers appointed a firm of loss adjusters to investigate the claims on their behalf. The loss adjusters in turn appointed Dr Froneman, an expert in that field, to investigate the cause of the fire. On 21 November 1994 Froneman reported that in his opinion the fire had been deliberately set and had been accelerated by paraffin. Not surprisingly, the claims of the insured were thereafter subjected to considerable scrutiny. It is important to bear in mind, however, that if the insurers suspected that either of the insured, or anyone acting on their behalf, had played any part in causing the fire, that suspicion has not been voiced at any stage of these proceedings. The insurers have declined to meet the claims on other grounds entirely. It is not necessary to traverse all the defences that were raised by the insurers for in each case there is one that is decisive.

THE AMA CLAIM

[33] Amongst the General Conditions in the Santam policy was a condition that protected the insurer against fraud in the following terms:

‘If any claim under this policy is in any respect fraudulent or if any fraudulent means or devices are used by the insured or anyone acting on their behalf or with their knowledge or consent to obtain any benefit under this policy ... the benefit afforded under this policy in respect of any such claim shall be forfeited.’

[34] During December 1994 AMA’s financial manager, Potgieter, assisted by Mrs Mentz, prepared a summary of the loss that was alleged to have been sustained by AMA, and it was submitted to Santam under cover of a completed claim form on 16 January 1994. To appreciate what occurred thereafter, and the nature of Santam’s defence, it is necessary to understand how the claim was calculated.

[35] In the absence of an inventory of the stock that was in the warehouse at the time of the fire Potgieter resorted to deductive reasoning in order to determine what stock had been present. Mrs Mentz said that the starting point for the enquiry was the invoice that AMA had received from Thompson (which, it will be recalled, included both the converted stock and the imported stock). Potgieter said that the starting point was the stock summary from which Mrs Mentz had made her selection, but that this was correlated against the invoice. (The difference between the two witnesses on that issue is not

significant – it is likely that both documents were referred to when the claim was prepared.)

[36] Potgieter said that he assumed that the stock summary accurately reflected the stock that Funny Paper had on hand at its three locations when the acquisition by AMA took place. He said that he then excluded the three categories of stock that Mrs Mentz said she had not selected (the raw materials and the two minor items). The remainder, he reasoned, was the stock that was acquired by AMA (which accorded with the invoice that AMA received from Thompson). Accepting, as he did, that all that stock had been received in Cape Town, Potgieter then deducted the stock that had been sent to the shop at Roeland Street (which was reflected in the accounts of Impressions as its opening stock) and the stock that was in storage at Ruco Park after the fire. Reasoning that the stock that remained after all those deductions had been made must all have been in the Ricsa House warehouse at the time of the fire, he then established what it would cost to replace that stock. With the assistance of Rogers he established that the cost of replacing the stock, including VAT, would be R1 220 063 and that amount, together with the book value of the display stands (which were also reflected in the invoice) brought AMA's claim to R1 263 218. (It also claimed R347 700 in respect of two

machines that were alleged to have been destroyed by the fire but that is not material for present purposes).

[37] Leaving aside the manner in which Potgieter valued the stock, his reasoning as to what stock was in the warehouse at the time of the fire was faulty in three respects. First, the display stands were not in the warehouse when the fire occurred – they had been taken to the shop in Roeland Street. Secondly, it seems not to have occurred to Potgieter that Funny Paper had continued trading after the date that the Funny Paper stock-sheets were compiled (30 June 1994) with the result that they did not accurately reflect the stock on hand at the time it was sent to Cape Town. Thirdly, and more important for present purposes, a large part of the Johannesburg stock of Funny Paper (i.e. the converted stock) was never sent to Cape Town, as I have indicated, notwithstanding that it was reflected on the invoice and on the list that was attached to the delivery note.

[38] The converted stock that had remained in Johannesburg constituted a substantial part of the claim. In value it constituted about a third of Funny Paper's marketable stock (it was valued in the stock-sheets at almost R252 000). The cost of sales that had taken place after 30 June 1994 was R128 087 and the value of the display stands was R43 155. The cumulative

effect of the errors was that AMA's true loss in respect of its stock was approximately half of what it was claimed to be.

[39] But the fact that the claim was overstated has a more material significance for Santam alleges that AMA, and in particular Mrs Mentz (who was at all times aware of how the claim had been calculated) caused the claim to be submitted well knowing that it was false. If that is so then clearly it was done with intent to defraud, and constituted a breach of the condition to which I referred, thus relieving Santam of all liability for the claim.

[40] As pointed out by the learned judge in the court *a quo* the case in that regard turned largely upon the credibility of AMA's witnesses and in particular that of Mrs Mentz. Mrs Mentz was well aware that the claim included the converted stock. She said, however, that she was unaware when the claim was submitted that the converted stock had never been received in Cape Town. The learned judge commented favourably on the impression that Mrs Mentz (and the remaining AMA witnesses) made on him. He said, amongst other things, that Mrs Mentz had left him with an excellent impression, that her answers were without exception given forthrightly and without hesitation, that she was open and candid, and that he had no reason to suspect that she was attempting to hide anything. He attributed what he described as minor discrepancies in her evidence to the fact that she was

testifying about events that had taken place six or seven years earlier and he said that he accepted her evidence without reserve.

[41] While it has been said that a trial court is at an advantage when evaluating the credibility of witnesses (a proposition that is not uncontentious – see for example Tom Bingham *The Business of Judging : Selected Essays and Speeches*, p 10 ff) any such advantage ought not to be overemphasized, for ‘the truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities.’ (*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 79). In *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) Harms JA pointed out at 979 I-J, that to decide a case without regard to the wider probabilities is a misdirection that will entitle a court of appeal to reassess the evidence.

[42] In the present case the learned judge in the court *a quo*, perhaps overwhelmed by the quantity of evidence and the number of issues that he was called upon to decide, gave no indication in his judgment that he had analysed the evidence in the detail that was required for the probabilities to be weighed against the impression that he formed of Mrs Mentz. Had he done so I have

little doubt that his confidence in her truthfulness would have been displaced because in my view they all point to the contrary conclusion.

[43] There is one aspect of the evidence that it is convenient to deal with out of its chronological sequence for it is material to the remaining evidence.

[44] The absence from the warehouse of the converted stock first started coming to light on 26 January 1995 when Mr Mentz attended a meeting at the warehouse with the loss adjusters. He was asked to search through the debris and to identify, if possible, remains of the various categories of stock that made up the claim. Mr Mentz was unable to find evidence of fourteen categories of stock (including, not surprisingly, the various categories of converted stock that had been retained in Johannesburg).

[45] Mrs Mentz said that when this was reported to her she thought at first that the explanation lay in Mr Mentz's unfamiliarity with the stock but she was driven to concede that she soon became concerned. According to Potgieter there were numerous discussions between him and Mr and Mrs Mentz and it 'dawned on us that it appeared there was a problem'. One would expect, in those circumstances, that enquiries would have been made in an attempt to establish why there was no evidence of the converted stock and, indeed, Mrs Mentz said that she did just that: she said that she telephoned Johannesburg and spoke to both Rogers and Thompson and learnt for the first

time that the converted stock had never been sent to Cape Town. Her evidence in that regard (most of which emerged during cross-examination) was somewhat vague: she could not say when the telephone call was made, nor precisely what was discussed, nor is it even clear who she first spoke to. In my view much of that evidence was untrue and I will leave it out of account for the moment.

[46] What is clear, however, (independent of her own evidence) is that by 21 February 1994, at the latest, Mrs Mentz must have been fully aware that the converted stock had never been sent to Cape Town, and that the claim was also overstated by the cost of Funny Paper's sales after 30 June 1994. For on that day Mrs Mentz was in Johannesburg to attend to the opening of a new branch of AMA and she met with Thompson to discuss the 'problem' that had arisen in respect of the claim. She telephoned Potgieter and asked him to telefax to Thompson a copy of the claim as he had formulated it, which Potgieter did. Potgieter said that upon her return from Johannesburg she told him, firstly, that 'it would appear that we had not received all the stock from Funny Paper and, secondly, that 'there was the possibility that Funny Paper had in fact sold some of the stock that we thought we had received.'

[47] It is difficult to see why Mrs Mentz would have expressed herself in the cautious terms attributed to her by Potgieter, for there could not have been any

doubt in her mind, after her visit to Johannesburg, that the converted stock had not been received. Nor could there have been any doubt in her mind as to the identity and value of that stock for it was clearly reflected in the summary that she said she had used to make her selection. It is possible that in the course of her discussions with Thompson she discovered for the first time that the claim also inadvertently included stock that had been sold by Funny Paper after 30 June 1994, and it would have required further investigation to identify that stock, but that is another matter. As far as the converted stock was concerned she could have been in no doubt at all.

[48] On 23 February 1995 the loss adjusters wrote to Mr Mentz requesting that they be furnished with packaging in respect of all the items forming the subject of the claim, and samples of the stock that had not yet been identified amongst the debris. Mrs Mentz must have been aware that the samples were requested for purposes of a further search through the debris that was due to take place on 3 March 1995 for she asked the loss adjuster whether the samples 'should be taken to the site meeting, or whether we should deliver same to yourselves.' On 27 February 1995 Mrs Mentz wrote to the loss adjusters enclosing the various samples that had been requested, which included samples of brown Kraft rolls, tinsel, gift-wrap sheets, gift-wrap rolls and counter rolls. With regard to the two gift-wrap samples she added the

following note: ‘We have a concern regarding this Giftwrap Category and we are currently awaiting detailed information from Johannesburg.’

[49] On 28 February Mrs Mentz received from Thompson an analysis of the cost of Funny Paper’s sales from 1 July 1994 to 31 November 1994, which she handed to Potgieter. Potgieter was not satisfied with the adequacy of the analysis and after discussing it with Thompson, he asked Thompson to undertake a further analysis. (That further analysis was received from Thompson only in April 1995.)

[50] The site meeting on 3 March 1995 was attended by Mrs Mentz and Zandberg. At that time Mrs Mentz knew not only that stock that had been sold by Funny Paper after 30 June 1994 had been wrongly included in the claim (and that Thompson was analyzing the records of Funny Paper to identify those sales) but she also knew (she conceded as much) that the converted stock had never been received in Cape Town. She must also have known precisely what that stock was for she had examined it in Johannesburg and it was easily identifiable from the stock summary. Notwithstanding that knowledge she furnished the loss adjusters with samples of that stock, without disclosing that it could not be amongst the debris, and what is more, she participated in what she knew was a fruitless search for evidence of that stock. Once the search was over (it revealed evidence of three further categories of

stock none of which is relevant for present purposes) the debris was loaded into waste containers and weighed to enable estimates to be made of the volume of stock that had been in the warehouse. Still Mrs Mentz failed to disclose that it was pointless to go about making these estimates because a large portion of the stock that formed the basis of the claim had never reached the warehouse.

[51] Mrs Mentz made some suggestion in her evidence that she might have alerted the loss adjusters to what she then knew about the missing stock but her evidence on that issue was vague and non-committal. In her evidence in chief she said that she told Mr Van Dyk (one of the loss adjusters) that ‘we believe that a possible discrepancy can arise because of what was invoiced to us by Funny Paper’ and in cross-examination she said that ‘we pointed out to Mr Van Dyk that there was in fact a problem with the claim’. She sought to take her evidence a step further by saying that when she pointed out that there was a problem with the invoice she was ‘pointing out the fact that the invoice was not in fact correct, that in fact we didn’t agree with what we had received.’ Whether or not she made these guarded utterances is neither here nor there, for what Mrs Mentz did not do was disclose the facts as they were then known to her – that evidence of the converted stock would not be found amongst the debris because it had never arrived in Cape Town, and that the

claim had also wrongly included other stock, the amount of which had not yet been established – nor did she furnish any explanation for her failure to do so. Zandberg also stood by without making these disclosures. Why he did so remains unexplained for he was not called to give evidence.

[52] That the loss adjusters continued to be unaware of the true facts for a considerable time is evident from the events that followed. On 14 March 1995 they wrote to AMA in the following terms:

‘Both Mr and Mrs Mentz are aware of the apparent discrepancies in the items/quantities included in your claim and the debris. Dr Froneman is at present analysing the position and we expect to receive his report within the next two weeks and we then require you, in terms of the policy conditions, to explain the discrepancies.

However, both Mr and Mrs Mentz have indicated that the discrepancies probably arise out of what was invoiced to you by Funny Papers (Pty) Limited.

Because of your allegation that the discrepancy lies in the accounting for these items, our clients have appointed KPMG Aiken & Peat to establish from the accounting records what the true position is ...’

[53] On 24 March 1995 Froneman reported to the loss adjusters in the following terms, after weighing the paper debris that had been removed from the warehouse, and calculating the volume of the stock reflected on the stock summary:

‘From the above results I can only conclude that the Warehouse was not large enough to store all the items listed in the stock list, and not all the items were in the

warehouse at the time of the fire. This is supported by the fact that Mrs Mentz and myself could not find any Giftwrap Rolls, Sheets or Xmas in the warehouse on 3 March 1995.’

[54] Clearly the deception could no longer be sustained. On 24 March 1995 Potgieter and Mrs Mentz met with representatives of KPMG at AMA’s offices at Airport Industria where the background to the problem was discussed. Mrs Mentz said that she told the KPMG representatives that the claim was inaccurate in two respects – it included the converted stock that had not been received, and it included stock that had been sold by Funny Paper after 30 June 1994 – and that Thompson was working on a revision of the claim. Thompson’s revision, which became available on about 13 April 1994, was later verified by KPMG.

[55] It was submitted in argument that the reason that Mrs Mentz failed to disclose the true facts at the outset was that she was awaiting the outcome of Thompson’s investigation and did not want to deal with the matter piecemeal. Mrs Mentz did not proffer that explanation and in any event it is most unlikely that Mrs Mentz would have stood by and said nothing while a search took place amongst the debris and the debris was weighed for the purpose of analysis merely because she preferred not to deal with the matter piecemeal. In my view the inference is inescapable that she deliberately withheld the true facts relating to the converted stock because she hoped that those facts might

remain undiscovered and the conclusion is inevitable that she intended by doing so to defraud the insurer.

[56] Her withholding of the true facts was itself a breach of the condition in the policy but the matter goes further than that. For if Mrs Mentz was deliberately concealing the truth on 3 March 1995 (and in my view she was) one asks when she first formed that intention to conceal. Her evidence would have it that she could only have formed that intention after 26 January 1995, because until then, she said, she was unaware of the true facts. It is most unlikely, however, that Mrs Mentz would have decided for the first time after 26 January 1995 to set about concealing the truth, for by then it was already apparent that the loss adjusters required proper proof of what was in the warehouse. To have attempted at that stage to introduce a fraudulent claim would have been foolhardy indeed. For that reason alone, it is probable that Mrs Mentz was aware long before 26 January 1995, and probably from the outset, that the converted stock was not received in Cape Town and indeed, when the remaining facts are examined, the probabilities all point to Mrs Mentz never having selected the converted stock for acquisition in the first place.

[57] I have already said that it is improbable that Mrs Mentz would have acquired the converted stock for AMA while Funny Paper still had an active

market for that stock. It is also improbable that Mrs Mentz would not have noticed that the converted stock did not arrive in Cape Town. Its volume was substantial (the evidence suggests that an additional four containers might have been required to transport it) and it could not easily have been overlooked. Mrs Mentz suggested that she had overlooked the non-arrival of the converted stock because she was not familiar with the stock. Bearing in mind that she had viewed the stock in Johannesburg before it was acquired, and the distinctive nature and volume of the stock, that explanation is improbable.

[58] After AMA acquired the Funny Paper stock Rogers wrote letters to various customers advising them that Funny Paper would henceforth concentrate on its core business, which he described as the conversion and marketing of quality gift-wrap paper, and informing them that the other stock in which Funny Paper had formerly traded (serviettes and stationery were mentioned in particular) had been taken over by AMA. Those letters correctly reflected Rogers' understanding of the transaction, which is that only the imported stock was acquired by AMA, but were inconsistent with Mrs Mentz's version of the transaction. Copies of the letters were sent to Mrs Mentz but evoked no reaction from her. Moreover, on 31 October 1994 Rogers sent a telefax to Mrs Mentz recording that on 27th October 'the

Christmas gift-wrap orders for the Cape Hyperamas' had been despatched from Johannesburg by road and requesting her assistance to ensure that the products were effectively displayed on the shop floor. If her evidence is true Mrs Mentz must surely have asked why AMA should assist Funny Paper to sell gift-wrap in Cape Town when AMA was intending to establish a market for the identical goods. Her failure to react to any of that correspondence, and in particular to the later telefax, is inconsistent with her version of the transaction, and consistent with knowledge on her part that AMA had not acquired Funny Paper's converted stocks and would not be competing with it for sales of those products.

[59] Only the invoices and the delivery note that was prepared by Thompson are consistent with Mrs Mentz's evidence concerning the nature of the transaction: the probabilities all point to AMA not having acquired the converted stock. In my view it was not Rogers who erred when he withheld the converted stock, but it was Thompson who did so when he included that stock in the invoice and the delivery note. Mrs Mentz, who had selected the stock to be acquired, must have been aware when the claim was compiled that the converted stock had not been acquired, but sought to capitalize upon the erroneous invoice when submitting the claim. By submitting the claim in that

knowledge AMA clearly breached the condition to which I have referred and Santam is entitled to avoid the claim entirely.

[60] Santam's counsel submitted that a special costs order is warranted in the circumstances and I agree.

THE PRESS SUPPLIES CLAIM

[61] It is well established that an insured has a duty to disclose to the insurer, prior to the conclusion of the contract of insurance, every fact of which the insured has actual or constructive knowledge that is relative and material to the risk or the assessment of the premium, and that a breach of that duty entitles the insurer to avoid the contract of insurance (*Mutual and Federal Insurance Co. Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 432E-F).

[62] The financial circumstances of Press Supplies at the time it applied for the extension of its policy of insurance on 19 October 1994, the characteristics of the stock that was insured, and the circumstances in which the stock came to be stored in the warehouse, have been outlined earlier in this judgment. In its plea Commercial Union relied upon those and other facts in support of an allegation that Press Supplies failed to make proper disclosure when it applied to extend the insurance cover. In argument before us two matters in particular

came to the fore: the financial position of Press Supplies at the time the policy was extended, and the saleability of the stock that was insured.

[63] The learned judge in the court *a quo* dealt with each of those issues (and other facts that were alleged to have been material) separately and found in each case that the relevant facts did not fall to be disclosed. He expressed the view that the deteriorating financial position of the company was material only if the deterioration was of such a nature and extent that it took on the proportions of what the learned judge said had been called a ‘moral risk or hazard’. He said that there was no clear evidence that in October 1994 the company faced liquidity problems, or was unable to meet its daily commitments, nor that the directors were even aware that its current liabilities exceeded its current assets. (The financial statements reflecting that fact were signed only on 22 February 1995). Thus his finding, implicitly, was that the financial circumstances of the company were not such as to constitute a moral risk. As to the saleability of the stock, he pointed out that there was uncontroverted evidence that it was in good condition and that there was a market for such machinery. In consequence there was nothing untoward that fell to be disclosed.

[64] I am not sure that the reference to ‘moral risk’ was apposite in the circumstances of this case. The term generally describes circumstances

personal to the insured that raise questions as to his integrity (cf. E.R. Hardy Ivamy: *General Principles of Insurance Law* 6th ed 151-153; *MacGillivray on Insurance Law* 10th ed para 17-55). The question that the learned judge seems instead to have had in mind was whether the financial circumstances of Press Supplies were such that even an otherwise honest person might have been tempted to commit fraud. But leaving aside the nomenclature in my view the learned judge's approach to the matter was rather too narrow.

[65] In *Oudtshoorn Municipality*, supra, at 435F-I, it was held by this Court that the test of materiality is an objective one, to be determined by asking, upon a consideration of the relevant facts of the particular case, 'whether or not the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums'. What is meant by that was expanded upon by Van Heerden JA in *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk* 1989 (1) SA 208 (A) when he said the following at 216E-G:

'[D]ie vraag (is) dus nie of na die oordeel van 'n redelike man die betrokke inligting wel die risiko beïnvloed nie, maar of dit redelikerwyse 'n effek mag hê op 'n voornemende versekeraar se besluit om al of nie die risiko te aanvaar of 'n hoër premie as die normale te verg. Anders gestel, is die toets of die redelike man sou geoordeel het dat die inligting oorgedra moes word sodat die voornemende versekeraar self tot 'n besluit kan kom. En so 'n oordeel sou hy bereik het indien die inligting na sy mening die voornemende versekeraar redelikerwyse kon beïnvloed het.'

[66] I do not think it is appropriate to view the financial circumstances of Press Supplies and the characteristics of its stock as if the bearing that each had upon the risk was divorced from that of the other. What the insurer was called upon to insure was stock that was in the custody of the insured: clearly the characteristics of the goods themselves, and the characteristics of their custodian, would be inexorably interwoven in assessing the nature and extent of the risk. Moreover, I do not think that the financial circumstances of the insured necessarily fall to be disclosed only where they are such as to suggest the potential for fraud for those are not the only circumstances in which there is an increased risk of loss.

[67] In the present case the stock that was sought to be insured constituted the remnants after the sale of the business to Hoechst. There was indeed uncontroverted evidence that the machinery was in good condition, and that buyers existed for machinery of that kind, but in my view that presents only part of the picture. The stock in question was in the possession of a business that had ceased active trading: it had no dedicated sales force to sell the machinery; it had no established market; it had no infrastructure to provide service to the purchasers; it was not the agent of the various manufacturers; and it was not even certain that it would not soon be in liquidation. The question is not merely whether there was a market for the machinery itself

(and I accept for present purposes that there was) but also, and more important, whether the machinery was saleable while it was in the hands of Press Supplies. Bearing in mind the circumstances that I have outlined in my view it is unlikely that the machinery was capable of being sold by Press Supplies in the ordinary course and without considerable difficulty if it was capable of being sold at all. Indeed, the fact that the machinery was still unsold some eighteen months after the business had been sold to Hoechst is testimony to that fact.

[68] As for the financial position of Press Supplies I am not sure that the insolvency of an insured, by itself, is necessarily a fact that calls for disclosure: it seems to me that much will depend upon the particular circumstances (cf *Grusd v Norwich Union Fire Insurance Society Ltd* 1922 WLD 146 at 152). But what was significant in the present case was not merely that Press Supplies was insolvent – it was also virtually dormant and there was no real prospect that its fortunes would recover: it was bound to end up in liquidation.

[69] What was insured by Commercial Union when it issued the policy of insurance on 1 February 1994 was, amongst other things, the stock in trade of a business that was described in the schedule to the policy as follows:

‘Suppliers to the printing and packing industries, manufacturers of stationery, installation, maintenance, repairing and reconditioning of machinery & equipment, importers & exporters & property owners’

[70] Whether that was a true reflection of the circumstances of Press Supplies at the time the policy was issued is not necessary to consider because it certainly was not a true picture at the time the extension was sought in October of that year. What Commercial Union was asked to insure was the stock in trade of an active trading concern (for that is how the business was described in the schedule). In truth it was insuring the remnants of the stock of a business that had ceased to exist, and which for that reason were saleable only with difficulty, if they were saleable at all.

[71] In my view there is a clear and material distinction between the risk in each case. In the former case it can generally be expected that the insured will have a positive interest in avoiding the occurrence of the event that has been insured against, not only because its occurrence will deprive the insurer of the opportunity to turn the stock to account (unless the loss of that opportunity has been insured against as well) but also because of the disruption that will be caused to the ordinary conduct of the business. The insurance, in other words, is taken as a precaution against the occurrence of an unwelcome event. In the case before us, however, Press Supplies had no such vested interest in avoiding the occurrence of the insured event. On the contrary, its occurrence

was likely to be welcomed, for it would have the effect of relieving Press Supplies of stock that was in any event unwanted, without any trouble at all (provided, of course, that Press Supplies recovered under its policy). In such a case the insurance is not merely a precaution against the occurrence of an unwelcome event and the insured will generally have little incentive to avoid the event occurring. While there might well be circumstances in which the insured will not lack that incentive, no such circumstances exist in this case. In my view the risk that presented itself in this case was materially different to the risk that would have attached to the stock in trade of a going concern.

[72] In my view Press Supplies was obliged to disclose to Commercial Union that its trading activities had ceased (contrary to what was reflected in the schedule to the policy) and that the stock that it wished to insure constituted the remnants of its former business, which were of doubtful saleability in its hands. That would have presented a true picture of the risk that Commercial Union was asked to insure. There is no dispute that those facts were not disclosed to Commercial Union. In the circumstances it was entitled to avoid the claim and its defence ought to have succeeded.

COSTS

[73] There is one further issue that has a bearing on the costs. Commercial Union and Santam gave notice before the trial that they intended to lead the

expert evidence of Mr Glasby and Mr Lindstrom respectively. It appears from the summaries that accompanied those notices that the witnesses would have expressed the opinion that the facts relied upon by the respective insurers were material to the respective risks that they were asked to underwrite. Their summaries contained no reasons for their respective conclusions. When Commercial Union sought to call Mr Glasby an objection was taken on the grounds that his evidence was inadmissible and the objection was upheld. The ruling that the evidence was inadmissible was extended to the evidence of Mr Lindstrom. In ruling on the issue the learned judge said the following:

‘[T]he test for materiality is objective and is that of the reasonable man’s reaction to a given set of factual circumstances. There is no room in applying that test for evidence regarding how a reasonable insurer or a reasonable insured might or might not act or react. And how a reasonable man would or would not act or react is a question which the Court must decide without the benefit of evidence, of how certain persons might or might not behave in the circumstances postulated’.

[74] I do not think the learned judge can be faulted for having excluded the particular evidence that was sought to be introduced by the appellants for it constituted no more than an expression of opinion on the very issue that the court was called upon to decide. In those circumstances the appellants are not entitled to the qualifying fees of their respective witnesses. I hasten to add, however, that it does not follow that evidence that might assist a court to

arrive at an independent conclusion on the particular issue will similarly be inadmissible (cf *Hardy Ivamy, op cit*, 166-169; *MacGillivray on Insurance Law, op cit*, paras 17-40 – 17-44; *Gordon and Getz, op cit*, 130-1).

[75] In their heads of argument the appellants asked for the qualifying fees of Dr Froneman. Both appellants gave notice of their intention to call Dr Froneman and his evidence was equally relevant to both claims. Liability for those costs should thus be shared between the two appellants and I intend providing for their recovery accordingly.

[76] I indicated earlier that in my view Santam is entitled to a punitive costs order against AMA. Because it is not possible to separate the issues that were dealt with on appeal I intend confining that order to the costs of the action.

CONCLUSION

1. In both cases the appeals are upheld with costs, including the costs occasioned by the employment of two counsel, and the orders made by the court *a quo* are set aside.
2. In the case of *Commercial Union Insurance Co of SA Ltd v Eugene Bryan Wallace NO* the following order is substituted for that of the court a quo:

‘The plaintiff’s claims are dismissed with costs, which are to include the costs occasioned by the employment of two counsel, and half of the qualifying fees of Dr Froneman.’

3. In the case of *Santam Insurance Limited v Africa Addressing (Pty) Ltd* the following order is substituted for that of the court *a quo*:

‘The plaintiff’s claims are dismissed with costs. The costs of the defendant are to include the costs occasioned by the employment of two counsel, and half of the qualifying fees of Dr Froneman, and are to be taxed on the attorney and client scale.’

NUGENT JA

STREICHER JA)
MLAMBO AJA)

CONCUR