CASE NO 335/92

/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SOUTH AFRICAN EAGLE INSURANCE

COMPANY LIMITED APPELLANT

and

NORMAN WELTHAGEN INVESTMENTS

(PROPRIETARY) LIMITED RESPONDENT

CORAM: JOUBERT, HOEXTER, SMALBERGER, NESTADT et VIVIER JJA

DATE HEARD: 12 NOVEMBER 1993

DATE DELIVERED: 30 NOVEMBER 1993

J U D G M E N T

NESTADT, JA:

Pursuant to a so-called multi-peril policy, the appellant insured the respondent against inter alia

loss arising from the theft of any of the respondent's vehicles "left in the open" on its premises. During the currency of the policy one of such vehicles was stolen.

The respondent claimed its value. The appellant repudiated liability on the ground that there had been a breach of what is termed memo 2 (the memo) in the "Theft" section of the contract. In terms of this provision the respondent "warranted that all vehicles left in the open must be locked at all times out of business hours and all keys must be removed and kept in a locked safe". Though the vehicle in question (which was stolen out of business hours) was locked, its keys were not kept in a safe. Instead they were retained in a cupboard in the respondent's (locked) premises. It is clear therefore that the clause was not complied with.

This notwithstanding, HARTZENBERG J, in an action

brought by the respondent in the Witwatersrand Local Division, granted judgment (in the sum of R42 588) against the appellant for the value of the stolen vehicle. In doing so the learned judge applied sec 63(3) of the Insurance Act, 27 of 1943 (the Act) . The issue in this appeal is whether he was correct in doing so.

The material part of sec 63(3) reads:

> "Notwithstanding anything to the contrary contained in any domestic policy... such policy...shall not be invalidated and the obligation of an insurer thereunder shall not be excluded or limited...on account of any representation made to the insurer which is not true, whether or not such representation has been warranted to be true, unless the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said policy at the time of issue or any reinstatement or renewal thereof."

The sub-section was added to sec 63 by sec 19 of the Insurance Amendment Act, 39 of 1969. The amendment

must be seen against the background of the common law rule that a warranty, being an essential or material term, must be strictly complied with; that if it is breached, the insurer is entitled to repudiate the claim whether or not the undertaking is material to the risk and even if non-compliance has no bearing on the actual loss that takes place (Gordon and Getz, The South African Law of Insurance, 4th ed, 218). This principle, however, often resulted in hardship to insured persons (as in, for example, Jordan v New Zealand Insurance Co Ltd 1968(2) SA 238 (ECD)). The aim of sec 63(3) was to remedy this by protecting claimants under insurance contracts against repudiations based (in the words of KRIEGLER AJA in Qilingele v South African Mutual Life Assurance Society 1993(1) SA 69(A) at 74 B) "on inconsequential inaccuracies or trivial misstatements

in insurance proposals". This is achieved by limiting the insured's right to avoid liability to the case where the breach of warranty probably would (to repeat the words of the enactment) have "materially affected the assessment of the risk under the...policy at the time of issue...thereof". But the warranty must relate to an underlying representation (made to the insurer). This requirement is central to the operation of the section. Hence the enjoinder in it that the policy is not to be invalidated "on account of any representation made to the insurer which is not true" (whether or not such representation has been warranted to be true). In other words, and as LAWSA, Vol 12, para 168 states, "the section focuses on representations and deals with warranties...rather obliquely". Where, therefore, the warranty is not founded on a

representation, it will retain its full common law effect (Kahn: Contract and Mercantile Law Through The Cases 743).

I have said that the matter for decision is whether sec 63(3) applies. That this is so appears from an agreed statement of facts forming part of a special case which, in terms of Supreme Court Rule 33, was placed before the trial court for its adjudication. Such statement raises neither the issue whether the memo, although warranted, was nevertheless not material, nor whether if it was breached, the appellant was entitled to repudiate the claim (rather than cancel the policy). Furthermore, these points were not broached in the court below. Accordingly, the argument of Mr van der Linde, who appeared for the respondent, that it was open to him to raise them, must be rejected. The

consequence of this is to be considered in conjunction with the appellant's concession that the fact that the keys of the vehicle were kept in a cupboard (where they were found after the theft) rather than in a locked safe, did not at any time materially affect the assessment of the risk. So this element of the section does not feature either. In these circumstances, and since it was common cause that the policy under consideration is a domestic one (as defined in sec 1 of the Act), the narrow question that arises, and on which the appeal (in the main) turns, is whether the memo, though warranted, is a representation within the meaning of sec 63(3). If it is, the section would operate to save the respondent from the consequences of the warranty having been breached. In this event its claim was rightly allowed and the appeal must fail. On

the other hand, if, as the appellant contends, the memo was simply a term of the policy, sec 63(3) would not apply, the respondent should therefore have been nonsuited and the appeal must succeed. This is because seeing, as I have said, there is no dispute that the memo was made material, its breach would in the ordinary course have entitled the appellant to repudiate liability under the policy.

It is necessary in the first place to ascertain the meaning of "representation" ("voor-stelling" in the Afrikaans text) as used in sec 63(3). Representation in the present context is a well-established, indeed, basic juristic concept. It is a statement made to induce another to enter into a contract. In relation to insurance, American Jurisprudence, vol 43, 2nd ed, para 734 gives the

following useful definition:

> "A 'representation,' in the law of insurance, is an oral or written statement by the insured or his authorized agent to the insurer or its authorized agent, made prior to the completion of the contract, giving information as to some fact or state of facts with respect to the subject of the insurance, which is intended or necessary for the purpose of enabling the insurer to determine whether it will accept the risk, and at what premium. Stated differently, a representation is not, strictly speaking, part of the insurance contract, but is collateral thereto. It is a statement made to the insurer before or at the time of making the contract, presenting the elements upon which the risk is either accepted or rejected."

Whether the statement may relate to the representor's future intentions, ie whether what has been called a promissory representation is included, is subject to controversy (see Gordon and Getz op cit, 230-1 and in particular the writers referred to in note 138 as also MacGillivray and Parkington on Insurance Law, 8th ed,

para 612). It may be that the requirement of "not true" and "incorrectness" in the section militates against such a statement qualifying as a representation. In the view I take of the matter, however, it is unnecessary to decide the point. What is clear (and important for our purposes) is that a representation is a pre-contractual statement and, unlike a term, does not become part of the contract. This is the ordinary meaning of a representation and this is the sense in which it is unambiguously used in the section. Accordingly, there is no room for the application of the rule that in the case of remedial legislation (which sec 63(3) undoubtedly is) a construction which extends the remedy will if possible be adopted (Slims (Pty) Ltd and Another v Morris NO 1988(1) SA 715(A) at 734 D-F). In any event, such an approach would be contrary to the

principle that statutory invasion of the common law is restrictively interpreted (Stadsraad van Pretoria v Van Wyk 1973(2) SA 779(A) at 784 F-H) and that the legislature is presumed to have used a word in its ordinary, popular sense (Steyn: Die Uitleg van Wette, 5th ed, 6-7). Perhaps parliament should have gone further in protecting insured persons (as has been done in some jurisdictions in the United States of America; see American Jurisprudence, op cit, para 758 and Gordon and Getz, op cit, 227). But it has not done so.

Normally a representation is contained in a proposal form signed by the person seeking insurance and addressed to the insurer for its acceptance. There are, however, other forms that a representation could take; it may be oral and it may be implied (inter alia from conduct) . It may even be inserted in the policy, but

this does not prevent it from being construed as a representation (Ivamy: General Principles of Insurance Law, 5th ed, p 307; see also Prima Toy Holdings (Pty) Ltd v Rosenberg 1974(2) SA 477(C) at 484). Has there, in casu, in any manner been a representation to the appellant relating to where the keys of the vehicles would be kept? In my opinion there has not. To begin with, the memo (on which, as I have said, the respondent's case rests) does not, so it seems to me, contain either a statement of fact or even a representation as to future conduct. Its language ("all keys must be...kept in a locked safe") is unequivocally that of a contractual undertaking. The use of "It is warranted" and "must" fortifies this conclusion. "Warranty" speaks for itself. The word "must" is primarily of mandatory effect (Black's Law Dictionary,

5th ed, 919); it connotes that which is imperative (Berman v Cape Society of Accountants 1928(2) PH M 47(C)). So no question of the memo being true or untrue (compare the wording of sec 63(3)) arises. Also of significance is that the appellant "at all times intended that memo 2...should constitute a term of the policy." (I quote from the stated case.) This too tends to show that it is not a representation.

Regarding a fire policy which provided that the insured "warranted that (it) keeps a complete set of books...and that same are locked in a fireproof safe", INNES CJ in Lewis Ltd v Norwich Union Fire Insurance Co Ltd 1916 AD 509 at 515 said:

> "That the clause above is a warranty and not am ordinary representation is clear. Nor only is it expressly so styled, but the nature of its provisions and the absence of any indication to the contrary in the context leave no doubt that it was meant to be exactly what it was called. And the language is plain; a complete set of books in

> connection with the business must be kept, and they must be locked in a fireproof safe or otherwise guarded as directed."

I can see no difference in principle between that case and this one.

There is, however, a more basic reason for concluding that the respondent made no representation and that sec 63(3) cannot therefore avail it. One must consider how the memo was introduced into the policy. This appears from the agreed statement of facts. There was no proposal form. What happened was that details of the insurance required by the respondent were set out in a written application for insurance which was submitted on its behalf by a broker to the appellant. The appellant was prepared to insure the respondent. But it required certain terms, including the memo, to be part of the contract. In the result,

the policy which was then issued (and accepted by the respondent) included the clause in question. Clearly, therefore, it emanated from the appellant. It was the appellant who, in advance, stipulated on what terms it was prepared to insure the respondent. All the respondent did was to accept what amounted to an offer by the appellant. The respondent itself made no prior statement which induced the appellant to contract. Indeed the stated case records that "no relevant representations were made" by or on behalf of the respondent "prior to the issue of" the policy. Counsel, however, whilst not disputing this, submitted (on the strength of what is stated in LAWSA, op cit, at p 165) that by agreeing to the policy in the terms laid down by the appellant, the respondent impliedly represented that it would comply with the memo. I am unable to accede

to the argument. It is not one which is raised in the stated case. In any event, it is flawed. I have difficulty in seeing how the acceptance of an offer can be construed as a representation (in the sense under consideration) that the offeree will perform his contractual obligations. By the time the policy was issued to the respondent, the appellant had assessed the risk and fixed the premium. The respondent's acceptance can in no way be said to have induced the appellant to contract. Certainly there was no evidence before us to this effect.

The result is that, contrary to what the court a quo held, sec 63(3) was not applicable and the memo having been breached, the respondent's claim was bound to fail.

The following order is made:

(1) The appeal succeeds with costs.

(2) The order of the court a quo is set aside. The following order is substituted: "The plaintiff's claim is dismissed with costs".

NESTADT, JA

JOUBERT, JA )
HOEXTER, JA ) CONCUR
SMALBERGER, JA )
VIVIER, JA )