REPORTABLE

CASE NO. 414/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

COMMERCIAL UNION ASSURANCE COMPANY
OF SOUTH AFRICA LIMITED.

APPELLANT

and

KWAZULU FINANCE AND INVESTMENT

CORPORATION FIRST RESPONDENT

A K DUBE SECOND RESPONDENT

CORAM: E M GROSSKOPF, NESTADT, F H GROSSKOPF,

VAN DEN HEEVER et OLIVIER JJA

DATE OF HEARING: 2 MAY 1995

DATE OF JUDGMENT: 30 MAY 1995

JUDGMENT

OLIVIER JA:

This appeal deals with the interpretation of a malicious damage to property extension clause in the fire section

of a so-called Multimark policy.

In terms of the policy the appellant undertook to indemnify the respondents against specified perils as regards the insured immovable property. The insured property is a building complex collectively known as Nkande Trading Store which is situated in a remote rural area in Natal, and in which the respondents had an insurable interest.

There is no dispute as to the fate of the insured buildings. This was summarised by Meskin AJ sitting in the Natal Provincial Division in his judgment in the Court a quo as follows:

> "... during a period of time between the 12th October 1990 and the 25th July, 1991 (the exact duration of such period is not relevant) certain persons ravaged these buildings to such a degree as to reduce them to total ruin. The evidence also establishes beyond any doubt that the object of these persons in perpetrating their acts of devastation of the buildings was the pillage of whatever might be usable in the erection of human habitations. Thus, these persons ensured that, for example, whole window frames with their windows and these with their glass intact, doors, roof trusses and other items were removed. There was, in essence, no destruction of the buildings simply for the sake of the destruction thereof, but for the larger purpose of theft of their parts without destruction or damage of the latter."

It is common cause that all that remained of the insured buildings were

parts of the walls and concrete floors which could not be removed.

The respondents instituted action against the appellant, relying on the

so-called malicious damage extension clause in the fire section of the policy,

which reads as follows:

> "Subject otherwise to the terms, conditions, exclusions, exceptions and warranties contained therein this section is extended to cover loss or damage directly occasioned by or through or in consequence of the deliberate or wilful or wanton act of any person committed with the intention of causing such loss or damage but excluding loss or damage caused by or arising from theft or any attempt thereat."

By agreement between the parties, sanctioned by an order of the Court a quo in terms of Rule 33(4), only

the question of liability was heard and adjudicated upon, the quantification of the claim standing over.

In his judgment Meskin AJ drew a distinction between the loss occasioned by damage to the buildings

and loss resulting from the subsequent theft of the material. He held that the appellant is not liable for the latter. His ruling that part

of the respondent's loss falls within the malicious damage extension clause of the policy but the balance outside of it reflects this

finding.

Consequently his order that the action lie postponed for adjudication on quantum was on the basis that the appellant's liability was limited to the loss suffered by the respondents in respect of the diminution in value of the insured buildings as a consequence only of the acts of destruction upon them. Costs were reserved for decision by the court so determining quantum.

All the parties were dissatisfied with the judgment of Meskin AJ; the appellant, for being held liable at all; the respondents for succeeding only partially. Hence the appeal and cross-appeal.

On behalf of the appellant it was submitted that

(a) the loss or damage does not fall within the cover granted by the malicious damage extension clause because the persons who damaged the buildings did not do so 'with the intention of causing such loss or damage';
and

(b) the loss or damage does not fall under the cover granted by the malicious damage extension clause because it was 'caused by or arising from theft or any attempt thereat', which is specifically excluded from the cover.

The crux of the appellant's argument (in relation to (a)) was that there

is no evidence, nor was it put to any of the witnesses, that any person deliberately, wilfully or wantonly damaged any part of the insured buildings with the sole intention of causing such loss or damage. On the contrary, it was common cause that such damage as was caused to the buildings was caused in the process described by the witnesses, namely by persons who damaged the buildings in the course of stealing such usable parts of the buildings as they could physically separate and carry away.

It was further argued on behalf of the appellant (in relation to (b)) that the test for causation in insurance is the proximate cause test (Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries 1987 (1) SA 842 (A) at 862C - J; R.S. Napier N.O. v Collett and Labuschagne. unreported judgment in this Court on 30 March 1995 in case no. 535/93) The use of the word 'directly' in the malicious damage extension clause also supports the inference that the policy contemplated the proximate cause test. It was submitted that, on the evidence, the proximate cause of the loss or damage was the theft and the attempts thereat, as opposed to mere wanton acts of

malicious damage for the sake of causing damage. The dominant or true intention of the persons who caused the damage was to steal. Thus the true and effective cause of the loss and damage was theft or the attempts thereat. The fact that, in the process of stealing, the thieves also committed the crime of malicious damage to property does not, it was submitted, mean that the proximate cause of the loss is anything other than the theft. Put conversely, if the theft is thought away, there would, on balance of probability, have been no loss or damage at all.

On behalf of the respondents it was argued that the demolition of the buildings involved two separate acts -

(1) the damage to the building in order to remove elements of the structure such as the roof, the floor, windows and doors;

(2) the physical removal of these elements from the property once freed from the structure.

According to the respondents' argument, the loss suffered by the insured did not occur when the components of the buildings were removed

from the property. The buildings were first damaged in the manner described above before the elements of the structure could be or were removed from the properly. The damage to the buildings accordingly falls within the risk contemplated by the policy, the buildings and the fixtures and fittings therein being immovable property through annexation (Theatre Investments (Pty) Ltd and Another v Butcher Brothers Ltd 1978 (3) SA 682 (A) at 688D - 689D; Standard-Vacuum Refining Company of S.A. (Pty)Ltd v Durban City Council 1961 (2) SA 669(A) at 677E - 679E). It was submitted, therefore, that the proximate cause of the respondents' loss was the damage to the buildings which occurred prior to the actual removal of the elements of the structures and that this was done with the intention required by the extension clause. The exclusion clause applies, it was argued, to quite a different situation, viz. damage caused to buildings during the course of, or in an attempt at, the theft of the contents of the buildings. The damage under discussion did not occur in consequence of any theft or attempted theft of their contents.

The soundness or otherwise of these opposing contentions depends on

the proper construction of the malicious damage extension clause.

It was argued on behalf of the appellant that one could designate the phrase "... committed with the intention of causing such loss or damage" in the clause under discussion a qualification phrase, and the phrase "... but excluding loss or damage caused by or arising from theft or any attempt thereat" an exception phrase. It was submitted that the insured bore the onus of proving that he fell within the qualification phrase. If he succeeded in doing that, the onus was then on the insurer to prove that it was exempt from liability by virtue of the exception phrase.

These submissions appear to be consonant with the decision in Eagle Star Insurance Co Ltd v Willey 1956(1) SA 330 (A) at 334B - 335 in fine and I shall approach the matter on that basis.

Dealing first then with the qualification phrase, Mr Marnewick, for the appellant, argued that the word "intention" should be understood to mean "motive". The argument was articulated in this way: the preceding words of the full clause exhaustively deal with the mental element of the act causing the

loss or damage, viz. it must be deliberate, wilful or wanton. These words would all be adequate or sufficient to describe malicious damage to property, because they already included "the intention of causing" loss or damage. The latter words, therefore, if understood in the ordinary legal sense of intention or dolus, would be (autologous and superfluous. Relying on the canon of construction against tautology or superfluity (see Wellworths Bazaars Ltd v Chandler's Ltd and Another 1947(2) SA 37 (A) at 43; Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd and Others 1984(1) SA 61 (A) at 70 A- D) counsel for the appellant submitted that the word "intention" in the clause must bear some other meaning, not covered by "deliberate, wilful or wanton". He submitted that it must be given the meaning of "motive". If this was done, he argued, the respondents were not entitled to compensation, as the motive of those who demolished the buildings was not to cause damage or loss to the buildings, but to steal.

I do not agree with the submissions made by counsel for the appellant on this issue. Even if it is accepted that the qualifying phrase is tautologous -

the "intention of causing ... loss or damage" being implicit in "deliberate or wilful or wanton act" -I see no compelling reason to substitute "motive" in the clause under discussion for "intention". It is by no means unknown for parties to a contract to use terms ex abundante cautela. Bearing in mind Thayer's admonition that there is no "lawyer's paradise" in which all words have a fixed and precisely ascertained meaning (Evidence 428-9; E.L. Jansen Uitleg van kontrakte en die bedoeling van die partye. 1981 TSAR 97 at 102-3 as to the illusion of 'plain meaning') one can hardly criticise draftsmen and contracting parties if they sometimes endeavour to make assurance doubly sure. In the present case, the words "deliberate", "wilful" and "wanton" are words of wide compass and meaning. In the context of the clause under discussion, one can hardly state, without reservation, that these words will, under all circumstances, encompass "the intention of causing loss or damage" to the insured buildings. In drafting the clause under consideration, the draftsman (and eventually the contracting parties) probably had in mind precisely what the qualifying phrase sets out to do: to require above and beyond the words

"deliberate or wilful or wanton", a clear intention on the part of the perpetrator

to cause loss or damage to the insured property as a prerequisite to liability,

so as to emphasise that accidental or negligent loss or damage is excluded.

In Owsianick v African Consolidated Theatres (Pty) Ltd 1967(3) SA 310

(A) Botha JA stated at 324 G

> "As in legislation, so in written documents, tautology is not unknown. A specific provision is not infrequently inserted to provide, exabundante cautela. for a matter already covered by general provisions. In such a case the specific provision is mere surplusage, and care should be exercised that, in an attempt to avoid the tautology, a distorted meaning is not assigned to either the specific or the general provisions." (As regards the analogous position in respect of legislation, see also Sekretarisvan Binnelandse Inkomste v Lourens Erasmus (Edms) Bok 1966(4) SA 434 (A) at 441G - 442D).

Moreover, the interpretation contended for by counsel for the appellant would deprive the malicious damage extension clause of its business efficacy. How will the insured, upon whom the onus on this aspect rests, be able to prove the motive of the perpetrator? Intention can be proved by inference from the external facts and the acts of the perpetrator, but much more is needed

to prove motive. I do not accept that it could have been the intention of the parties to have placed this unusual and difficult burden of proof on the insured.

As it is common cause that the perpetrators of the acts which caused the damage to the insured buildings acted with the intention of causing damage to the buildings as a first step in effecting theft, it follows that the insured has placed himself within the qualifying phrase.

Dealing next with the exception phrase, i.e. the words "... but excluding loss or damage caused by or arising from theft or any attempt thereat", counsel for the appellant argued that it was established on the facts that the dominant intention of the perpetrators was to steal parts of the building after they were separated from the structure, e.g. the windows. Therefore, he submitted, the damage was caused by theft, and thus fell within the exclusion clause.

Mr Wallis, who appeared for the respondents, submitted that the correct interpretation of the exclusion clause was that it excluded damage to the insured buildings occurring during the course of or in an attempt at the theft

of movable property situated in the buildings. Had the insured wished to cover himself against that kind of loss, he could have made the theft section of the policy applicable. In that section, theft cover is granted in respect of the contents of a building. The theft section also contains a "malicious damage theft extension" clause. This clause covers damage to the insured buildings "... caused by the deliberate or wilful or wanton act of any person during the course of any theft accompanied by forcible and violent entry into or exit from such buildings."

Mr Wallis argued that the policy, read as a whole, is clear and consistent: damage to buildings caused in the course of theft or attempted theft of movables in the buildings is excluded in the fire section and its malicious damage extension clause (i.e. the clause in dispute), but is covered by the theft section and its malicious damage theft extension clause. It follows that the exception phrase now under discussion excludes damage to the building caused in consequence of theft or attempted theft of movables inside the buildings. It does not exclude the kind of damage which forms the subject

of the litigation. He submitted that this interpretation also avoids the absurdity that the exception phrase now under discussion relates to the theft of immovable property, which in law is incapable of being stolen.

There is considerable force in the argument presented by Mr Wallis. The only criticism against it is that the theft section of the policy was in fact not made applicable. The policy contains 17 sections, each with its own particular clauses and exemptions. According to the type of insurance he desires, the prospective assured selects those sections to be applicable, which are then listed in a schedule. The non-applicable sections therefore do not afford the cover described therein. In the present instance, only two sections were made applicable, viz. fire and business interruption. The theft section was not made applicable, although the full policy, with the applicable and non-applicable sections, forms one inseparable document.

The legal question then is whether it is permissible to interpret the fire section by having regard to the theft section, which is not operative, although it appears in the body of the policy, as do all the other non-operative sections.

Counsel could not refer us to any authority on this question. An analogy which comes to mind is that of deleted words or clauses in a contract. It has been held that the court cannot take cognisance of the deleted word or clause as an aid in interpreting the rest of the contract (see Pritchard Properties (Pty) Ltd v Koulis 1986(2) SA 1 (A) at 8H - 10A). But in the present instance the non-operative sections have not been deleted. They have simply not been made applicable at this stage, but remain part of the policy, albeit non-operative.

It is now accepted in our law that a contract such as the one under discussion in which ambiguity rears its head, ought to be interpreted against the background of the factual context or 'matrix of facts' in which it was concluded. In Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd and Others 1980(1) SA 796 (A) at 805A - B the following words of Lord Wilberforce in Reardon Smith Line v Hansen - Tangen [1976] 3 All ER 570 (HL) were quoted with approval:

"No contracts are made in a vacuum: there is always a setting in which

> they have to be placed. The nature of what is legitimate to have regard to Is usually described as 'the surrounding circumstances', but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating." (See also List v Jungers 1979(3) SA 106 (A) at 118).

Having regard to the context or the 'matrix of facts' in which the contract was concluded, it is possible to resolve the ambiguity. The context or 'matrix of facts' clearly includes the full policy, and it would seem to me to be permissible to have regard to the non-operative parts of the policy to interpret an operative part. It sheds valuable light on the genesis of the transaction and the full range of choices open to the insured. What he elected not to choose illustrates the meaning and scope of the choices he did make. I am not aware of any considerations of legal policy militating against such a conclusion in the present case. On the contrary, considerations of fairness seem to me to favour such an approach.

Consequently, I am of the view that the loss or damage suffered by the

respondents was not excluded by the exception clause. All such loss falls squarely within the malicious damage extension clause, and must be compensated by the appellant. The proximate cause is not merely the one which was latest in time, but the one which is proximate in efficiency (see Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350 at 369 and also in [1918 -1919] All E R 443 at 453; Wayne Tank and Pump Co Ltd v The Employers' Liability Assurance Corporation Ltd [1973] 3 All E R 825 (CA) at 829 e - h per Lord Denning MR; Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries, supra, at 862 I - 863 B per Galgut AJA). The proximate and effective cause of all the loss suffered by the respondents was the damage to the buildings. Once that had occurred, a chain of further consequences could take place, e.g. damage to the walls and floors by the elements such as rain and wind; damage to the windows, even if left on the premises, by rusting and trampling by grazing animals, and the theft of the parts separated from the buildings. The initial acts causing damage to the buildings were the proximate cause of all the loss suffered by

the respondents. The court a quo should have so ruled. The appeal must fail and the cross-appeal succeed.

The following order is made:

(3) The appeal is dismissed with costs, including the costs of two counsel.

(4) The cross-appeal is allowed with costs, including the costs of two counsel.

(5) The order of the court a quo is set aside and replaced with the following:

"(a) It is declared that defendant is liable to compensate the plaintiffs for all the loss or damage suffered pursuant to the incidents referred to in paragraph 6 of the Particulars of Claim which loss or damage includes the physical damage to the insured buildings as well as the removal and theft of the materials detached from it;

(b) The costs of the action to date hereof are reserved for decision by the Court which finally determines the action".

PJJ OLIVIER JUDGE OF
APPEAL

E M GROSSKOPF JA )

NESTADT JA )

)CONCUR F

H GROSSKOPF JA ) VAN DEN HEEVER

JA )