THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no 216/2001

REPORTABLE

In the matter between

Anna Maria Magdalena van Zyl NO — Appellant

and

Kiln Non-Marine Syndicate No 510 of Lloyds of London — Respondent

Before: Nienaber, Schutz, Cameron, Brand JJA and Heher AJA

Heard: 30 August 2002

Delivered: 26 September 2002

Insurance – accidental bodily injury or death policy – ‘accident’ – ‘wilful exposure to danger’.

JUDGMENT

SCHUTZ JA

[1] The issue is whether in terms of an accidental death and disability policy the deceased died in an ‘accident’ and whether, if so, the insurer is nevertheless exempted from liability because the deceased was guilty of ‘wilful exposure to danger’.

[2] The appellant (applicant below) is Mrs van Zyl, who brought an application for payment in terms of the policy as the executrix in the estate of her husband Mr Jacob van Zyl (‘the deceased’) who received fatal injuries in his car on 28 May 1997. (I refrain from saying that he was killed in a car accident, as that would be to pre-judge one of the issues in the case.) He was insured under the policy mentioned, by the respondent, Kiln Non-Marine Syndicate No 510 of Lloyds of London (‘the insurer’). Mrs van Zyl’s application was dismissed by Mynhardt J in the Transvaal Provincial Division, the judge finding against her on both of the points in issue. She appeals with his leave.

[3] The deceased was a bank manager at Klerksdorp. On the night of his death he attended a party at Wolmaransstad, 110 kilometers away. He had made no arrangements to sleep over or to take a lift back. He arrived at the party at about 8 pm. and left after midnight, in his car. He was on his own.

Whilst at the party he drank brandy. The concentration of alcohol in his bloodstream at the time of his death was 0.19 gram per 100 ml of blood. (The legal limit for driving is 0.05.) Before leaving he ate a meal. He was described as appearing to be normal when he left for home.

[4] Early the next morning the wreck of his car was seen in the veld beside the road to Klerksdorp. The car had rolled and the deceased was found dead some 25 meters away. The road was tarred and was dry at the time. For all practical purposes it was straight. Skidmarks were visible. All four wheels were on the wrong side of the road where the marks commenced. They then veered off the road to the right. There was no sign of anything extraneous having caused the car to leave the road. More particularly there were no potholes or visible obstructions. As it was the opinion of the forensic pathologist who deposed for the insurer, dr Klepp, that the deceased could not have survived his brain injuries for long, it may be taken that when he crashed the blood alcohol percentage was about 0.19. Although the cause of the crash may have been, say an animal straying onto the road or a car approaching on the wrong side, the facts suggest that the most natural, or plausible inference to be drawn (see *Aswanestaal CC v South African Eagle Insurance Co Ltd* 1992 (1) SA 662(C) at 667J-668A) is that the deceased dozed off at the wheel as a result of his alcohol consumption and the late hour.

[5] The policy provides cover in cases of 'accidental bodily injury resulting in death or disablement'. The term '*accident*' is defined to mean 'a sudden and fortuitous event occasioned by visible, violent and external means which occurs at an identifiable time and resulting in bodily injury as defined, and accidental shall have a corresponding meaning'. 'Bodily injury' means 'death or injury caused by accidental means and independent of any other specified in the policy schedule'. Listed among the exceptions to liability under the policy is '*Wilful exposure to danger* (except in an attempt to save human life). Intentional self-inflicted injury, suicide or such an attempt'. (The emphases in this paragraph have been supplied by me.)

Interpretation

[6] The main principles of interpretation of the policy applicable in this case are to be found in *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33(A) at 38B-E:

> 'The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464-5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (*Auto Protection Insurance Co Ltd v Hanmer-Strudwick* 1964 (1) SA 349(A) at 354C-D); for it is the insurer's duty to make clear what particular risks it

> wishes to exclude (*French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd* 1931 AD 60 at 65; *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* (*supra* at 354D-E). A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy (*Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103(A) at 108C.'

See also the dictum quoted by King J in *Barnard v Protea Assurance Co Ltd t/a Protea Assurance* 1998 (3) SA 1063(C) at 1068B-C:

> 'Now it is an accepted principle in interpreting insurance contracts that it is the duty of the insurer to make it clear what particular risks he wishes to exclude. The principle is stated by *May* in the following terms: "No rule in the interpretation of a policy is more fully established, or more imperative or controlling, than that which declares that, in all cases, it must be liberally construed in favour of the insured so as not to defeat without a plain necessity his claim to an indemnity which in making the insurance it was his object to secure."'

King J proceeded (at 1068D):

> 'From this it would follow that if a term in a policy ('term' in the sense of designation) is capable of both a broader and narrower meaning it is that which is favourable to the insured, in other words to the upholding of the policy, which must be employed.'

Onus

[7] There is a dispute as to the onus in regard to the exception (wilful exposure). The ordinary rule is that the insured must prove himself to fall within the primary risk insured against, whilst the onus is on the insurer to prove the application of an exception: *Eagle Star Insurance Co Ltd v Willey* 1956 (1) SA 330(A) at 334A-335F. But the insurer seeks to escape the incidence of the ordinary rule by reliance on *Aegis Insurance Co Ltd v Consani NO* 1996 (4) SA 1(A) at 6A-9A and 14H-I. It is argued that the concepts 'accident' and 'wilful exposure to danger' are mutually exclusive, so that an accident cannot be established without at the same time excluding wilful conduct on the insured's part. The claimant in discharging his onus has to negate a wilful cause, thereby attracting the insurer's onus onto himself. However, I think that the resort to *Consani* as an analogous case is misplaced. The issue there was whether the insured had died by accident or by suicide. The two concepts are indeed mutually exclusive. Death cannot be accidental (in the sense of an accident policy) if it comes by the insured's own hand. The case before us is different. The exception is not 'wilful death' or 'wilful crashing', which would be antitheses of 'accident'. The adjective 'wilful' does not qualify death or crashing, but disregard of danger, which disregard might increase the chance of an accident happening but in no wise operates to exclude the possibility of there being an accident.

[8] For those reasons I am of the view that the ordinary rule does apply, so that the onus of proving the exception rests on the insurer.

Authority

[9] The expressions ‘accident’ and ‘wilful exposure to danger’, and like expressions, are not newly subject to judicial scrutiny. The heads of argument are replete with cases, drawn from many jurisdictions, explaining them. These cases are helpful, but, mindful of my readers, I shall not use them all. I heed the rebuke by Corinna, a poetess of Thebes, addressed to Pindar, for his overabundance of instances, ‘Pindar, one should sow with the hand, not with the whole sack’. We may now proceed to the issues.

Has Mrs van Zyl proved an accident?

[10] Before answering this question it is necessary in order to understand the insurer’s argument to have regard to the uncontroverted evidence of dr Klepp. Speaking out of her expertise she describes the effects of alcohol on a driver. Alcohol is a central nervous system depressant. The brain controls the various faculties which are required when driving a car. These faculties are adversely affected by the depression of the nervous system in various ways, including the following: Visual function is degraded, especially at night, causing tunnel vision. Information processing is impaired and slowed down, seriously decreasing reaction times. Judgement is impaired and false confidence results. Behaviour becomes impulsive. Muscular responses are impaired and steering

errors manifest themselves. Detailed studies which are regarded by the scientific community as accurate and reliable have shown that the degree of impairment is very great. Driving while having a blood alcohol concentration of 0.19 gram/100ml has been statistically and medically proven to be 50 times more likely to lead to an accident when compared with driving by a sober person.

[11] Dr Klepp then proceeds to express an opinion. It is that an 'accident' while driving with such a blood alcohol concentration cannot be said to be *fortuitous*; an 'accident' is indeed the *probable* consequence of driving in that condition. Whilst giving respectful weight to what dr Klepp says, I think that in expressing this opinion she trespasses onto the field of the judge. Whether there was an 'accident' in terms of the policy is a matter of law, not of medical opinion.

[12] In any event, if dr Klepp does indeed intend that the happening of an accident is probable in the sense that it is more probable to occur than not, I do not think that the data given by dr Klepp supports her conclusion. The reason is that no conclusion as to probability can be drawn if the multiplicand is 1 and one knows further only the multiplier (50) but not also the incidence of accidents with sober drivers. Suppose that every time that such a driver drives there is a 1 in a 1 000 chance of his having an accident, then the chances of his being involved in one with his blood alcohol at 0.19 is 50, which is far below

a just over 50 % chance, which would be represented by 501 chances out of a 1 000. In any event, to express the opinion without adverting to the facts of a particular case is unrealistic. The chance of a drunken driver having an accident over 110 km is obviously far greater than when a driver similarly drunk travels 5 km. Accordingly I consider that there is no factual basis for the argument grounded on probability of occurrence.

[13] The legal argument for the insurer, based on the alleged probability, proceeds along these lines. The definition of 'accident' identifies it with a 'fortuitous' event. This accords with the meaning generally attributed to the word accident – see eg *Agiakatsikas NO v Rotterdam Insurance Co Ltd* 1959 (4) SA 726(C) at 729C. 'Fortuitous' is rendered by the SOED as 'That happens or is produced by fortune or chance: accidental …' If, in the circumstances, the happening of an accident was 'probable', as dr Klepp says it was, the argument goes, then there is more than a 50 % chance of its occurring, so that it would be the natural or ordinary result of driving with an alcohol concentration of 0.19 and could not properly be called a fortuitous happening. The process of reasoning may be faultless, but, as I have sought to explain, the premiss is lacking. Also, logic may be overmastered by the colloquial, as I shall seek to explain.

[14] *Marcell Beller Ltd v Hayden* [1978] QB 694 was also concerned with a drunken driver who was insured against 'accidental injury'. Judge Fay QC said (at 701B-C, 701F, 703E-H):

> 'Having considered this evidence I have no doubt that the deceased's consumption of alcohol played a causative part in the catastrophe. The deceased's strange loss of control of his car when it was proceeding in ordinary conditions on an ordinary road becomes readily explicable in the light of his blood alcohol content. His excessive speed and his inability to correct the situation into which it led him are in my view clearly associated with the loss of judgment induced by alcohol. If the immediate cause of the crash was the deceased's negligence, its predisposing cause was the drink he had taken. In the light of these findings of fact I turn to the legal issues.'
>
> ……..
>
> 'In dealing with this argument I think it is important to keep distinct the two causative elements, namely the immediate cause which is the deceased's manner of driving and the predisposing cause which is his drinking. If the first alone is regarded the crash was accidental. It has long been established and was accepted by counsel that the assured's negligence does not deprive a happening of the character of accidental.'
>
> ……..
>
> 'It seems to me important that in a document such as an insurance policy which ought to be understandable by laymen, not to depart if possible from the ordinary meaning of English words. This was also the view of Phillimore LJ when he cited the workmen's compensation case of *Trim Joint District School Board of Management v Kelly* [1914] AC 667 and said [1971] 2 QB 554, 585:
>
> > 'All their Lordships agreed that the word "accident" must be given its ordinary meaning in the context – they differed four to three as to what that ordinary meaning was.'
>
> I may be risking misinterpreting the ordinary meaning of 'accident', but I am firmly of the view that the word covers the happening with which I am

> dealing. In drafting the narrative part of this judgment I have avoided pre-empting the decision by using the word 'accident', but I have been conscious that wherever I have used the neutral term 'crash' or 'what happened' or 'catastrophe' it would have been better English usage to call it an accident. I am convinced that the man in the street would say that the deceased died in a motor accident. A further reason for adopting this view is that had some other person been killed by the deceased's driving this would have been an accident within the meaning of his own motor policy (see *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327). If the same offence killed both a driver and a bystander, it is the kind of decision that brings the law into disrepute, to call one an accident and the other not an accident.'

[15] I agree with the approach of the learned acting judge (as we would call him) and consider that it is applicable to this case. Like him, when preparing this judgment I have constantly had consciously to draw back from using the word accident as the short colloquial way of describing the accident with which we are concerned (the restraint is now gone). Especially should this approach be followed when one applies the rules of interpretation quoted from the *Fedgen* and *Barnard* cases. The Court should not 'defeat without a plain necessity his claim to an indemnity, which in making the insurance it was his object to secure' (the words of Wessels JA as quoted in the *Barnard* case). (The facts in this case happen to be such that it is her claim not his claim.) Even the trial judge, whilst holding that an accident had not been proved, several times fell into the trap of describing it as such – 'het daar 'n ongeluk gebeur', 'breinbloeding weens 'n motortuigongeluk' and 'om een of ander

rede in ‘n motorongeluk betrokke was’. The pull of the colloquial is strong. In the words of Lord Macnaghten in *Fenton v J Thorley and Co Ltd* [1903] AC 443 at 448 the popular and ordinary sense of the word ‘accident’ denotes ‘an unlooked-for mishap or an untoward event which is not expected or designed’. Immediately after referring to this passage *The Law of South Africa* Vol 12 para 291 proceeds:

> ‘An accident is therefore an occurrence or event of a fortuitous nature. The very essence of an accident is that its occurrence is not intended by its victim.’

[16] I would add that it is our law too that the fact that the insured was negligent (as the deceased undoubtedly was) does not in itself prevent the Court from holding the circumstance to constitute an accident: *Griessel NO v SA Myn en Algemene Assuransie Edms Bpk* 1952 (4) SA 473(T) at 477F-G.

[17] My conclusion is that Mrs van Zyl has proved that her husband was killed in an accident in terms of the policy.

Has the insurer proved wilful disregard of danger?

[18] In the forefront of the argument for Mrs van Zyl is put the consideration that there is no express provision in the policy concerning alcohol. Such an exclusion is not uncommonly found in accident policies. But I do not think that, standing on its own, this argument can succeed, even though it is a factor to be weighed in the balance. The question still remains whether, when he

drove as he did, the deceased wilfully courted danger. One has only to take the case of a driver, whose policy does not expressly deal with alcohol, being warned by a doctor that he is in no fit state to drive, yet proceeds to do so. Clearly he does wilfully court danger.

[19] In their context what do the words 'wilful exposure to danger' mean? There are two senses of the word 'wilful' contained in the SOED which could have application. The first is 'Asserting or disposed to assert one's own will against persuasion, instruction, or command; governed by will without regard to reason; obstinately self-willed or perverse'. The second is 'Done on purpose or wittingly; purposed, deliberate, intentional (Chiefly, now always, in bad sense, of a blameworthy action; freq. implying "perverse, obstinate".)'.

[20] At best for the insured the second sense applies. What the insurer would have to show is that, subjectively speaking, the insured acted intentionally in disregarding the danger. Negligence would not be enough. Nor would be the consideration that, objectively speaking, there was an exposure to danger. But even this second meaning tends strongly to be shaded by its being used in a 'bad' sense.

[21] If the first meaning is intended it would strengthen the insurer's case. It would extend itself to the man who has heard all the warnings of the risks of drunken driving, but who knows better than the experts, who is in his own

mind immune to accidents, who can ‘hold his liquor’, who is in short perverse and not apt to heed due warning.

[22] I am of the view that the first meaning was intended, whilst being mindful of the rule quoted above, that a policy should be interpreted in favour of the insured. The first reason for my view is linguistic. There is a marked contrast in the course of three lines between the word ‘wilful’ on the one hand and ‘intentional’ and ‘suicide’ (which is an intentional act) on the other. This suggests that something different is intended. What the difference would then be, is clear enough. It would be, broadly speaking, that not only intentional action but also refusal to heed warnings or the experience of others would be included. My second reason supplements the textual one. It is that it is quite to be expected that an insurer would not intend to extend cover to one who, out of perversity, would not hear. Nor, I suppose, would an insured at the time of contracting be likely to be heard to say that he was to be insured against his own perversity.

[23] But on the facts of this case, I am of the opinion that, even if the second narrower sense is the appropriate one, the conduct of the deceased was ‘wilful’. I do not find any of the cases to which we have been referred determinative of this one and we are thrown back on the evidence before us.

[24] According to dr Klepp, in a man of the deceased’s size and weight a concentration of 0.19 translates into an intake of at least 400 ml of brandy.

400 ml is more than half a bottle. But there is more to the case than that a lot was drunk. The deceased went to the party knowing that he was going to drive back for 110 km alone and in the dark at the end of a long day and after drinking alcohol. I find it impossible to believe that he did not have these facts in mind as he took successive drinks. When one reaches the point in the record where are included photographs of a wreck and a body in the veld one's reaction is one almost of inevitability. Nor do I find it possible to believe that the deceased was not consciously aware that driving after taking many drinks poses real dangers. No doubt he was not acquainted with all the detail which dr Klepp has so clearly set out. Her evidence establishes objective standards and cannot in itself reveal what the deceased knew, foresaw and intended. But I cannot accept that a man with experience of life did not have a broad appreciation of the risk he was taking, however unrefined his knowledge was. Even if he was a man who could 'hold his drink' (and there was evidence that he could) he must have known that he was taking a risk by drinking so much and then driving, particularly after the extended publicity that has been given to the perils of drinking and driving in the last few decades (if I may not take judicial knowledge of this, dr Klepp has said it in evidence). In consequence I fail to see how even the most benevolent of interpretations of the exception, including an acceptance of the second sense of 'wilful', can avoid the facts and the inference to be drawn from them as by far the most probable. Nor am

I deterred by the consideration that in the *Marcell Beller* case (above) the judge held that the exception equivalent to the one here in issue had not been established. Although there the alcohol concentration was as high as 0.26, the finding was that there was no evidence to show that subjectively the insured appreciated the risk that he was taking. In any event the case was decided 24 years ago. Since then times have moved on.

[25] In drawing an inference on the probabilities, among the things I have taken into account are the following two. Unlike many of the knocks in life, motor accidents often have catastrophic consequences. We all know this – and it is something that any sensible man will have before his eyes. The second factor is that the incidence of accidents due to drunken driving is not minimal. The occurrence of such an accident is not a remote possibility. It frequently happens. When expressing these views I do not do so in order to deliver a moralistic lecture about drunken driving, but simply to state what in my opinion ordinary people know. The presence of both these factors, one adding force to the other, is important in this case, and may distinguish it from a type that was raised in argument, exemplified by the parachute that fails to open. Although the consequence in that case is also catastrophic, the chances of it happening may be so small that it cannot be said that there is a wilful exposure to risk by the jumper. I express no opinion on such a case.

[26] I revert to the first, broader, sense of ‘wilful’. If it applies, as I think it does, then even if the deceased had talked himself into believing that he was not like other people, he was being perverse and consequently acted wilfully. Of course, in some people, liquor causes or increases perversity, and if perversity is the issue, I do not see that the manner in which it came about is relevant, short that is, of a person being so drunk, contrary to his design, that he does not know what he is doing. This observation, clearly relevant to the first sense, may, in accordance with the note to the definition of the second sense, ‘freq. implying “perverse, obstinate”’ have application to the second sense also.

[27] I have so far approached the matter on the basis of the deceased’s anticipations on arrival at and during the course of the party. What was his condition when he got into his car? It may be that he was so befuddled that he could not appreciate the riskiness of what he was about to do. If so he may not have been capable of wilful exposure. But the evidence is against that. One of the witnesses says that he appeared to be normal. That might mean that he was capable of rational decision. However, as this is uncertain, I would rather base my decision on his conduct prior to this moment.

[28] I find that the deceased did wilfully expose himself to risk, so that the insurer has established the exception. Accordingly the claim was rightly dismissed.

[29] The appeal is dismissed with costs.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR

CAMERON JA
HEHER AJA

BRAND JA

[30] I have read the judgment of my brother Schutz. Broadly speaking I agree with what is said in paras [1] to [18] thereof but I respectfully disagree with his statement of the law, his interpretation of the facts and his ultimate conclusion, as contained in paras [19] to [29]. In my view the insurer failed to prove that the deceased had 'wilfully exposed himself to danger' within the meaning of the exception upon which the insurer sought to rely.

[31] The exception to be considered, reads as follows:

> 'Underwriters shall not be liable in respect of death or disablement ... due to:

> ...
> Wilful exposure to danger (except in an attempt to save human life). Intentional self-inflicted injury, suicide or any such attempt.'

The case turns in the main on the proper connotation of wilful. 'Wilful' must not be viewed in isolation. It must be read in context and in its relation to 'exposure' and to 'danger'. Each of these three words takes colour from its juxtaposition to the others. 'Exposure' refers to some form of conduct whereby the insured places himself at risk or lays himself open to the realisation of a particular 'danger'. 'Danger', I think, cannot simply mean any danger or the risk of any danger. In that wide sense the policy would lose much of its force. As was stated by Neill LJ in *Morley and Morley v United Friendly Insurance plc* [1993] 1 Lloyds LR 490 (CA) at 492-3 with reference to an exclusion clause in the accident insurance policy under consideration which referred to 'wilful expose to needless peril':

> 'It is common ground that the "peril" referred to in the exclusion clause means a risk of suffering one or more of the injuries which the policy of insurance was designed to cover'

and at 493 (column 1) *in fine*:

> 'It is clear ... that the words cannot be construed too strictly. Thus they cannot be construed so as to remove insurance cover from an insured who engages in contact sports such as football'

'Danger' in the context in which the phrase is used in the policy therefore refers to the 'danger' insured against, that is to say, an accident resulting in death or bodily injury.

[32] The required wilfulness, it seems to me, has to be directed to the 'exposure to danger' and not to the activity which causes the danger. Within this context Schutz JA holds the view that 'wilful' can have one of two possible meanings. According to what he refers to as the first meaning ‘wilful’ includes the concept of perversity, obstinacy or stubbornness while in its second meaning the term would be synonymous with 'deliberate or intentional'. Schutz JA then expresses his preference for the first meaning. This leads to our first area of disagreement. I accept that in accordance with

one of its dictionary meanings, 'wilful' can convey the meaning of perverse, obstinate or stubborn in the sense of 'wicked' or morally depraved. I do not believe, however, that this was the meaning the parties to the insurance policy had in mind. Purely as a matter of language, 'wilful' does not bear substitution for 'perverse' or 'obstinate' in the phrase to be construed. To speak of a perverse or obstinate exposure to danger strikes me as contrived. Furthermore, the words in parentheses seem to contradict this meaning. The situation therein described is specifically excepted. If it had not been excepted it would of course have been included and as such would have typified the sort of conduct the word 'wilful' was meant to describe. In my view it goes without saying that the situation described, that is, an attempt to save a human life, can never be characterised as ‘obstinate’, ‘stubborn’ of 'perverse'. Schutz JA finds support for his interpretation of ‘wilful’ in what he describes as 'the marked contrast in the course of three line between "wilful"

on the one hand and "intentional" and "suicide" (which is an intentional act) on the other.' With respect, I do not believe that the references to suicide and intentional self-inflicted injury in the same clause of the policy lend support to the meaning of 'wilful' that Schutz JA prefers. In my view these references may just as well be used in support of the argument that 'suicide', 'intentional self-inflicted injury' and 'wilful exposure to danger' all belong to the same genus in that they all have the common element of deliberate 'intent'.

[33] In my view, the most natural meaning to be ascribed to the term 'wilful' within the context of the phrase under consideration is that of 'intentional' or 'deliberate'. Linguistically these synonyms can quite comfortably be used as substitutes for 'wilful', as in the expression 'deliberate or intentional exposure to danger'. Moreover, counsel for the insurer accepted that the meaning to be ascribed to ‘wilful’ in the present context is 'deliberate' or 'intentional'. His very argument was that the deceased 'deliberately exposed himself to danger',

ie to an occurrence which was potentially harmful and which, as a probability, he must have foreseen

[34] My conclusion that 'wilful' must in the present context be construed as synonymous with 'deliberate' or 'intentional', is not the end of the enquiry into the meaning of wilful. The question remains whether a person can be said to expose himself to a particular danger 'wilfully' – or for that matter, 'deliberately' or 'intentionally' - purely because he contemplates the realisation of that danger as a notionally possible consequence of the activity that he is about to embark upon. I think not. The unfortunate reality is that by living in a modern society one knowingly exposes oneself to the notional danger of being killed or maimed through sometimes the most mundane of activities, such as driving in a motor car from Johannesburg to Cape Town. It cannot be thought that participation in these mundane activities would render the insurer not liable under the policy. To refer to another example, can it be said that a

parachutist is wilfully exposing himself to the danger of his parachute not opening within the meaning of the policy because he contemplates this eventuality as a remote possibility? I think not. The question is then, what more is required than contemplation of the consequences as a possibility in order to constitute wilfulness?

[35] In my view 'wilful', when read in conjunction with 'exposed to danger', requires:

(a) a contemplation and appreciation of the possibility of the occurrence of a particular eventuality (in this instance bodily injury or death due to an accident);

(b) the realisation that the eventuality is not merely a remote contingency but a real possibility;

(c) a reconciliation with its occurrence in the sense of a conscious decision to proceed notwithstanding (a) and (b) ie with indifference to the appreciated consequences of his act.

This is analogous to the concept of *dolus eventualis* in the criminal law (see eg *S v Ngubane* 1985 (3) SA 677(A) at 685; *S v Beukes* 1988 (1) SA 511(A) 522 and *S v Maritz* 1996 (1) SACR 405 (A) at 416E-G) which has also been extended to insurance law (see *Nicolaisen v Permanente Lewensversekeringsmaatskappy Bpk* 1976 (3) SA 705 (C) at 709E-H).

[36] The viewpoint that the requirement of 'wilfulness', when read in conjunction with 'exposure to danger', comprises more than merely an appreciation of the particular eventuality as a theoretical or a hypothetical possibility is, moreover, in line with current English authority, as appears, eg from the following statement in Halsbury’s Laws of England, 4 ed (reissue) vol 25 par 583:

> 'A more modern form of accident policy may exclude liability consequent upon the assured's deliberate exposure to "exceptional danger" or wilfully exposing himself to "needless peril". In the former case the word "deliberate" imports a subjective test and the exception does not apply where he drives a car knowing that he has consumed an excessive amount of alcohol unless there is evidence that he thought about the risk he was taking and deliberately chose to ignore it. In a case where injury caused by "wilful exposure to needless peril" was excluded from cover, it was not enough to show an intentional act which caused the peril; rather there had to be a conscious act of volition (including recklessness) directed to the running of the risk.'

As authority for this statement of the law the learned author refers, first, to the decision in *Marcel Beller Ltd v Hayden* [1978] QB 694 at 705 C-G that the deceased in that matter could not be said to have 'deliberately exposed himself to exceptional danger' by driving his motor car while having a blood alcohol concentration of 0,26 gram per 100ml. Secondly, reference is made to the case of *Morley and Morley v United Friendly Insurance plc (supra)*. In the latter case the Court of Appeal (per Beldam LJ) *inter alia* said the following about the meaning of 'wilful' at 496:

> 'Thus the meaning to be given to "wilful exposure to needless peril" in the clause excluding liability under the policy requires that the conduct relied on

> must go beyond negligent exposure to needless peril. It must be shown that at the time of his actions the insured was mindful of a real risk of the kind of injury for which benefit was provided by the policy and that he either intended to run that risk or exposed himself to it not caring whether he sustained such injury or not.'

[37] Finally, the meaning that I ascribe to ‘wilful’ seems to accord with how our courts understood the term 'wilful' in a not dissimilar context in the past. In *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd and Another* 1977 (2) SA 709 (W), for example, the Court had to interpret a so-called 'owners risk clause' in the contract of a shipping and forwarding agent which limited the agent's liability to damage to the goods which was 'due to the wilful act or default of the company or its servants'. Within this context Franklin J stated (at 713 D-E):

> 'Wilfulness imports the notion of a deliberate act by the perpetrator who knows what he is doing, intends what he is doing and is willing that the consequences of his act or default should follow.'

(See also, eg *Citrus Board v South African Railways and Harbours* 1957 (1) SA 198 (A))

[38] The legitimacy of the comparison in the present context with how 'wilful' is understood in cases such as *Micor Shipping* and *Citrus Board* seems to find some support in the following statement by Beldam LJ in *Morley and Morley v United Friendly Insurance (supra)* 495:

> The word "wilful" used in similar contexts has been the subject of judicial interpretation for over 100 years. In conjunction with the word "misconduct" it was construed in contracts of carriage by rail where, for example, the company had excluded liability except for wilful misconduct of its servants.

[39] Counsel for the insurer, as I understood his argument, did not contend that the test was any different from the one that I propose. His premise was that it was established on the facts that as a result of the deceased's intoxication an accident was a probability ie more likely to happen than not. On that basis it could well be said that the deceased's decision to drive his motor car knowing that an accident was imminent, would have been 'wilful' within the meaning of the exclusion clause under consideration. But for the reasons stated by Schutz JA, that premise was not a valid one.

[40] With the above meaning of 'wilful' in mind, it is necessary to determine whether it can be inferred from the uncontroverted evidence that the deceased not only appreciated the danger of an accident in which he could be maimed or killed as a theoretical possibility, but as a real possibility and that he reconciled himself with such an occurrence. According to the evidence of those who last saw the deceased when he left the party at Wolmaranstad, he appeared to be quite 'normal' and in control of his faculties. He said goodbye to them and behaved in a manner which was in no way untoward. They had no reason to doubt his ability to drive his motor vehicle home. Then there is also the evidence of the deceased's wife and his friend to the effect that he was a man could 'take his liquor' and who regularly drove his car perfectly competently after consuming alcohol. From this evidence I infer that the deceased's attitude was most likely that although he appreciated that the danger of an accident may have been increased by his consumption of alcohol,

it was not likely to happen; and that, as in the past, he had a more than even chance of finding his way home safely, despite his condition. Schutz JA believes that his attitude may be described as 'perverse' or 'stubborn'. That may or may not be so. What is decisive, however, is that in these circumstances the inference is not justified that the deceased had reconciled himself with the occurrence of the accident as a real possibility.

[41] I consequently find that the insurer had failed to establish the exemption from liability upon which it relied and that the appellant is therefore entitled to the benefits provided far in of the policy. On the papers in the motion proceedings the insurer conceded that, in the event of it being held liable in terms of the policy, the appellant would be entitled to payment in a sum of at least R366 191,05. During argument in this Court the further concession was made on behalf of the insurer that the amount of any judgment in the

appellant's favour would bear interest at the rate of 15,5% per annum from 7 March 2001.

[42] For these reasons I would order that:

(1) The appeal be allowed with costs.

(2) The order of the Court *a quo* be set aside and that the following order be substituted for it:

'(a) Judgment is granted in favour of the applicant in the sum of R366 191,05.

(b) The respondent is ordered to pay interest on the said amount at the rate of 15,5% per annum from 7 March 2001 to date of payment.

(c) The respondent is ordered to pay the applicant's costs of suit.'

FDJ BRAND

JUDGE OF APPEAL

CONCUR:

NIENABER JA

HEHER AJA

HEHER AJA:

I have read the judgments of Schutz JA and Brand JA and agree with the judgment of Schutz JA.

[43] I think it is necessary to give a meaning to the phrase 'wilful exposure to danger' that is businesslike having regard to the context in which it is found, by which I intend a meaning that both the prospective insured and the insurer must have regarded as meeting their aims in concluding the policy. It is in this context that I agree with Schutz JA that the meaning to be attributed to 'wilful' introduces a pejorative element in relation to exposures to danger that are not

covered. Indeed, though the suggestion regarding the extended meaning of 'wilful' came from the Bench, counsel for the insurer adopted it, rightly in my view.

[44] As I shall attempt to demonstrate, it is not possible to give the words 'exposure to danger' an unqualified meaning. To do so would be, if not absurd, at least in obvious conflict with a businesslike interpretation. This is implicitly recognised by Brand JA in para [31] of his judgment but he does not follow this through by applying it to the 'danger' to which the exception refers. Instead he tries to meet the problem later by limiting the concept of wilfulness to eventualities which are 'real possibilities'. For the reasons that follow this seems to me a flawed solution.

[45] According to common experience I may expose myself to a greater or lesser degree to danger of death or disablement in a multiplicity of ways every day: driving a motor vehicle, crossing a street, entering a lift, undergoing

radiotherapy. Each is a question of degree: one may drive slowly or fast; the street may be silent or a hive of activity; the lift may be new or antiquated; the radiography may happen once or be repeated several times. On each occasion I venture deliberately with my eyes open to the hazards. But no one would suggest that such conduct is, in the pejorative sense, 'wilful', and neither party to the insurance contract would have supposed that such venturing would bring the exception into operation. (For the same reason, conduct in an effort to save human life would never be stigmatised as 'unlawful'.) This is not because the risks are not real and the potential consequences are not catastrophic, but because they would require that the policy be interpreted reasonably.

[46] So understood, the exposure must be to a danger that is not one faced by the insured going about the day to day business of life in a reasonable manner. A man who drives his vehicle at a high speed on a busy road exposes himself

to danger; so does one who crosses such a road against the traffic lights. Both act unreasonably.

[47] But the exposure to danger must be wilful before the cover is excluded. I have no doubt that what the parties intended is that the insured must enter upon the relevant act or omission appreciating that his conduct (i) is unreasonable, and (ii) will lay him open to the risk of death or disablement. On this interpretation it is artificial to say, as Brand JA does, that the required wilfulness is not directed to the activity that causes the danger. In my view the activity and the danger are inseparable. The enquiry is about the insured's subjective state of mind but like all such enquiries his own utterances can be tested against the objective facts or, in the absence of such utterances, the objective facts alone can be analysed to arrive at the most probable inference as to what passed through the insured's mind before and during the conduct

that is in question. The passage from Halsbury cited by Brand JA in para [7] of his judgment must be read with this qualification in mind.

[48] Does it matter that the chance of death or disablement is present to his mind as a probability or is a mere possibility (with the whole range that that implies)? I think not. First, the controlling factor is the reasonableness of his conduct, a standard that builds in all relevant considerations and excludes the need for raising one (such as the degree of likelihood of harm) to the level of decisiveness. Secondly, the plain words 'wilful exposure to danger' give no indication that the degree of likelihood of the risk eventuating is to be the determining factor. Commonsense demonstrates that it cannot be so. A simple example will suffice. I plan to drive my powerful new car at speeds of up to 250 km per hour over a straight stretch of 12 kilometres of national highway through the Karoo. I am an experienced and competent driver. I know that there is likely to be other traffic in both directions on the road and

that other drivers may not be as predictable or controlled as I believe myself to be. I am also conscious of the reality that tyres, even when new, can burst for reasons beyond my control, and that game and sheep do stray unexpectedly through gates and fences. Despite all these not insubstantial risks, the probability (judged both subjectively and objectively) is that I will manage to come through unscathed. Nevertheless it cannot be seriously suggested that when I embark on my joyride I do not wilfully expose myself to danger within the meaning of the policy. I knowingly behave in a manner which is wholly unreasonable having regard to the seriousness of the potential consequences, the absence of any compulsion to travel in the contemplated manner, my complete inability to control the actions of others, my uncertainty about the reliability of my own vehicle, and, no doubt, other reasons also. In the overall evaluation the degree of risk is unimportant. The fact is that while some risk exists (and it can never be excluded) no reasonable person would embark on

such a venture. In my view if the insurer and insured had been asked whether this hypothetical case falls within the terms of the exception both would unhesitatingly have replied 'yes'. Deliberately overtaking on a blind rise over a solid barrier line on a quiet road affords another example. It cannot be said in any given instance that there is a probability or even always 'a real possibility' of a collision, but commonsense tells one that a driver who does that wilfully exposes himself (and others) to danger. These examples show that conduct that falls within the exception will always be 'governed by will without regard to reason' (ie the first sense conveying an element of perverseness).

[49] When Brand JA (in para [6]) draws an analogy between the requisites of 'wilfulness' as propounded by him and *dolus eventualis* I think, with respect, that he errs. There is a long line of authority that makes it clear that if an accused foresees a consequence of his actions as a possibility he can be held

liable according to the doctrine of *dolus eventualis*. The cases are discussed in Snyman, *Strafreg* 4 uitg 179 - 81. It is unnecessary to list them. In *Nicolaisen v Permanente Lewensversekeringsmaatskappy* 1976(3) SA 705 (C) at 709 F, Van Winsen J applied the doctrine to the facts before him with the following introductory words:

"Dit is deur mnr. *Olivier*, wat namens eiser opgetree het, aangevoer dat die versekerde, alhoewel bewus van die feit dat die rewolwer gelaai is, kon gemeen het dat toe hy die trekker vir die derde maal getrek het die patroon nie onder die hamer sou kom nie. Was dit sy houding sou dit na my mening bewys lewer van die bestaan by hom van ten minste *dolus eventualis*. Dit sou bewys wees van 'n roekelose volharding aan sy kant in 'n gedragspatroon wat hy voorsien het by die derde trek van die trekker moontlik tot sy dood aanleiding kon gee."

There is however great divergence as to the strength of the possibility which is sufficient: Snyman *op cit* at 180 fn 155. In *S v Beukes en 'n Ander* 1988(1) SA 511 (A), upon which Brand JA relies, Van Heerden JA expressed a clear preference for a reasonable possibility (at 522 C - I). The expression 'real possibility' is in itself confusing and I would not wish to associate myself with

it. In any event, given the particular wording of the contract with which we are concerned I think that the analogy with *dolus eventualis* is unnecessary and, probably, of doubtful value.

[50] Schutz JA has set out the facts which are relevant to the night in question and the inferences as to the state of the deceased's mind before and when he made the fatal decision to make a start for home rather than deferring the journey until the morning. I agree entirely with his inferential assessment of what must have occurred to the deceased. On those facts the deceased appreciated the unreasonableness of driving as he then proceeded to do and the perils attendant on so doing but despite that he was not deterred.

[51] I agree that the appeal should be dismissed.

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J A HEHER
ACTING JUDGE OF APPEAL

SCHUTZ JA)Concur
CAMERON JA)