THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 646/04

In the matter between :

PIET VAN IMMERZEEL First Appellant

STRAT POHL Second Appellant

and

SANTAM LIMITED Respondent

Before: **ZULMAN, STREICHER, NAVSA, MTHIYANE JJA & CACHALIA AJA**

Heard: **21 NOVEMBER 2005**

Delivered: **5 DECEMBER 2005**

Summary: **Professional negligence insurance – meaning of 'claim first made' – notification of possibility of claim not 'claim made'.**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] This appeal is against a judgment in the High Court, Pretoria in terms of which an action instituted by the appellants against the respondent, which action proceeded by way of a stated case, was dismissed. The issue to be decided is whether an action instituted by Samancor against the appellants constituted 'a claim first made' against the appellants within the meaning of the phrase 'a claim first made against the insured' in an insurance policy issued by Aegis Insurance Company Ltd in respect of the period 1 March 1993 to 28 February 1994 ('the 1993 policy'). Aegis acted as lead insurer on behalf of itself and other following insurers and the respondent assumed the rights and obligations of Aegis in terms of the 1993 policy.

[2] At the relevant time the appellants practised in partnership as consulting engineers. In terms of the 1993 policy the insurer undertook to indemnify the partnership in respect of –

> 'Liability incurred in respect of the Practice which results in a claim first made against the Insured during the Period of Insurance irrespective of when or where such liability arises.'

[3] The 1993 policy provided under the heading 'Limit of Liability' that the liability of the insurer 'for damages and claimant's costs and expenses arising out of any one claim' would not exceed R1 000 000. In addition the insurer undertook to pay the costs and expenses incurred in the conduct of any

claim with the consent of the insurer. The additional liability undertaken by the insurer was subject to the following proviso:

'However, if a payment in excess of the amount of indemnity under this Insurance has to be made to dispose of a claim made against the Insured the Insurers liability in respect of such costs and expenses shall be such proportion of the total costs and expenses incurred as the amount of the indemnity available under this Certificate bears to the total amount to dispose of the claim.'

[4] During November 1993 Samancor instituted action against the partnership in which action it claimed damages on the ground of the partnership's alleged breach of contract in failing to properly supervise the construction of a water pipeline. The partnership, with the consent of the insurer, instructed attorneys to defend the action. The trial court granted judgment in favour of Samancor and a subsequent appeal by the partnership to this court was dismissed.

[5] Aegis, together with other insurers, also issued a certificate of insurance to the partnership in respect of the period 1 March 1991 to 29 February 1992 ('the 1991 policy'). The wording of the 1993 policy is identical to that of the 1991 policy except that, in terms of the 1991 policy, –

(a) the insurers' liability in respect of damages costs and expenses arising out of any one claim as well as costs and expenses incurred in the conduct of any claim was limited to R1 000 000; and

(b) the proviso to the undertaking in respect of costs and expenses quoted above did not apply.

[6] Some time before the action in the trial court was finalised the insurer notified the partnership that it contended that:

'(a) The contract of insurance between the parties governing the partnership's claim to indemnity from the insurer was the 1991 Certificate; and that

(b) In terms of the 1991 Certificate, the limit of indemnity was R1 000 000 inclusive of the costs and expenses incurred in the defence of the Samancor action and any subsequent appeal.'

Whilst persisting in these contentions, the correctness of which the partnership did not accept, the insurer agreed to continue to fund the costs of contesting the Samancor action and the costs of the appeal in order to facilitate the proper conclusion of the litigation between Samancor and the partnership.

[7] Both policies contained a condition 2 which reads as follows:

'The insured shall notify the Insurers via Glenvaal, Griffiths & Armour (Proprietary) Limited in writing as soon as practicable of

(a) any claim or of the receipt of notice from any person of an intention to make a claim against the Insured.

(b) Any occurrence or circumstance of which the Insured shall become aware during the Period of Insurance which may possibly give rise to a claim under Section 1 or Section 2. Such notice having been given any claim to which that occurrence or circumstance has given rise which is subsequently made against the Insured after the expiry of the Period of Insurance shall be regarded for the purposes of this Certificate as having been made during the Period of Insurance in which so notified.'

(Section 1 deals with 'civil liability'.)

[8] During May 1991 the appellants became aware that Samancor contended that the partnership ‘may have breached its obligations towards Samancor'. On 4 June 1991 the appellants, by letter of that date and in terms of condition 2(b), gave notice to Glenvaal of a potential claim by Samancor. Referring to the contract for the construction of the water pipeline the partnership wrote:

‘Die Aannemer, Coccianti Construction, het sy versekeraar genader vir die koste van herstelwerk aan, of vervanging van, die pyplyn, Die eise-bemiddelaar van die versekeringsmaatskappy, Mnr R Beeby van Loss Limit Eise-bemiddelaars, het ons in kennis gestel dat ons firma moontlik deur die versekeraar aangespreek gaan word as party tot die geskil. Volgens hul mening was daar moontlik nalatigheid aan ons kant ten opsigte van gebrekkige toesighouding, aangesien die deklaag filmdikte nie voor installasie van die pyp gemeet is om te verseker dat dit aan die spesifikasie voldoen nie.

Hierdie skrywe dien slegs as `n kennisgewing van `n moontlike eis. Ons sal u op hoogte hou van enige verdere verwikkelinge.’

[9] The appellants agree that they could have claimed indemnity from the insurer in terms of the 1991 policy but contend that they were also entitled to do so in terms of the 1993 policy. The appellants obviously preferred to claim in terms of the 1993 policy because of the more extensive cover provided by it.

[10] The court a quo dismissed the appellants’ claim. It held that ‘once notification had been given on 4 June 1991 the claim was deemed, both in terms of the plain wording of the 1991 and the 1993 certificate and in law, to

have been made'. The claim was therefore not first made during the period of insurance of the 1993 policy.

[11] In terms of the 1993 policy the insurer agreed to indemnify the partnership in respect of liability which 'results in a claim first made'. The question to be decided is, therefore, whether the claim in respect of the partnership's liability to Samancor was first made when action was instituted, which occurred during the period of insurance of the 1993 policy, or whether the claim was first made when written notification of the possibility of such a claim was given during 1991. If the former was the case, as was submitted by the appellants, they should succeed. If the latter was the case, as was submitted by the respondent, the appeal should be dismissed.

[12] The natural meaning of 'claim' is 'a demand for something as due; an assertion of a right to something' (The Shorter Oxford Dictionary).[1] This definition was also accepted, in respect of a 'claims made' policy, by Stocker LJ in *Thorman v New Hampshire Insurance Co. (U.K.) Ltd and Home Insurance Co.* [1988] 1 Lloyd's Rep. 7 (CA) at 15. In the same case Donaldson LJ at 11 agreed 'that a claim within the meaning of the policy was the assertion by a third party against the insured of a right to some relief because of the breach by the insured of the duty referred to in section 1 of the policy, i.e. professional negligence'.

[13] In *Robert Irving & Burns (a firm) v Stone and Others* [1998] Lloyd's Rep IR 258 (CA) at 261 Staughton LJ said that 'in the ordinary meaning of

[1]See also *Boshoff v South British Insurance Company Ltd* 1951 (3) SA 481 (T) at 485B.

the English language the words “claims made” indicate that there has been a communication by the client to the [insured] surveyor of some discontent which will, or may, result in a remedy expected from the surveyor. There must, I say, be communication.’ It was suggested that this statement by Staughton LJ is authority for the proposition that notification of a possibility that a claim may be made constituted a claim. I do not agree. Firstly, it is not clear what Staughton LJ had in mind when he referred to an indication of discontent. Secondly, the nature of the claim was not in issue in the case, the issue was whether the claim had to be communicated in order to constitute a ‘claim made’. Thirdly, Staughton LJ, although he referred extensively to the judgments in *Thorman*, did not express any disagreement with the meaning ascribed to ‘claim’ in that case. In the circumstances I doubt that Staughton LJ intended to ascribe a different meaning to ‘claim’.

[14] In this case no demand was made against the appellants and they did not give the respondent notice of any demand. The appellants were merely notified of a possibility that a demand may be made in the future. No assertion of liability on the part of the appellants was made either. The appellants were merely notified that there was a possibility of negligence on the part of the appellants. In the last paragraph of the letter it was expressly stated that the letter only served as notification of a possible claim i.e. that the letter was not a notification of a claim.

[15] Counsel for the respondent submitted that the phrase ‘claims first made’ in the 1993 policy should not be given its natural meaning but should be interpreted so as to include the communication to the insured of a potential claim. He submitted that support for his submission is to be found in conditions 2(b) and 8 of the 1993 policies. He submitted, furthermore, that ‘claims made’ policies such as the 1991 and 1993 policies would be unworkable if a different interpretation were to be given to the phrase.

[16] Condition 2(b) requires the insured to give notice of any occurrence of which he may become aware during the period of insurance and which may possibly give rise to a claim. The partnership became aware of such an occurrence during the period of insurance of the 1991 certificate and gave the required notice. Having given the notice the Samancor claim eventually made against the partnership is regarded ‘for the purposes of (the 1991 certificate) as having been made during the Period of Insurance’. It is therefore clear that in terms of the 1991 certificate the written notification on 4 June 1991 is to be regarded as the making of a claim for purposes of the 1991 certificate and not for other purposes.

[17] The written notice given by the appellants was not given in respect of an occurrence of which they became aware during the period of insurance of the 1993 policy. Condition 2(b) in the 1993 certificate, therefore, does not apply. In any event the condition does not provide that a notification of an occurrence which may possibly give rise to a claim during a period of

insurance preceding the period of insurance of the 1993 policy is to be regarded, for purposes of the 1993 certificate, as a claim made during the preceding period of insurance.

[18] Counsel for the respondent submitted that an interpretation of 'claim first made' which excludes the notification to the insured of the possibility of a claim would render 'claims made' professional indemnity policies unworkable in that an insured may not be able to secure insurance cover for a subsequent period because of the possible claim which he will have to disclose. However, it is for this very reason that a condition such as 2(b) is included in professional indemnity policies (see *MacGillivray on Insurance Law* 10th ed at para 28-81; Clarke *The Law of Insurance Contracts* 4th ed at para 17-4D4; and Simpson *Professional Negligence and Liability* at para 5.97).

[19] Condition 8 provides as follows:

'The Insurers will not avoid this Certificate on the grounds

(a) of failure on the part of the Insured at any time to disclose to the Insurers facts material to the assessment of the risk.

(b) that the Insured made an incorrect representation of a nature likely to have materially affected the assessment of the risk under this insurance

Provided that

(a) the Insured proves that such alleged non-disclosure or misrepresentation was innocent and free from fraudulent conduct or intent on the part of the Insured

(b) where the Insured could have notified under any preceding insurance circumstances which could give rise to a claim any indemnity in respect thereof to which the Insured may be entitled under Section 1 shall not be greater or wider in scope than the indemnity to which the Insured would have been entitled under such preceding insurance.'

[20] Counsel for the respondent submitted that condition 8 reflects an intention that '(w)here the insured notifies the insurer of circumstances which could give rise to a claim during a period of insurance, then any liability arising from that claim is covered by, and is restricted to, that certificate, irrespective when the summons is served or liability is determined'.

I do not agree.

[21] Condition 8 deals with the avoidance of the policy in the event of a failure to disclose material facts or in the event of a materially incorrect representation. In the present case there is no allegation of such a failure or incorrect representation. The condition, therefore, does not find application in the present case. The condition does not provide that in the event of a disclosure having been made the insured would not be entitled to 'indemnity . . . wider in scope than the indemnity to which the Insured would have been entitled under such preceding insurance'.

[22] In my view there is no reason why the word 'claim' should not be given its natural meaning. The appellants were free to negotiate more extensive cover in respect of periods subsequent to the insurance period in which they had given notice of the potential Samancor claim. They could have negotiated

such cover with the respondent or another insurer. In such negotiations they were of course obliged to disclose the potential claim. Such disclosure was made to the respondent and it was up to the respondent to either refuse to provide extra cover, to provide extra cover at an appropriate premium or to provide extra cover excluding liability in respect of the potential claim. It is common to find a condition in a 'claims made' policy which expressly excludes 'liability arising out of any circumstances or occurrences notified under any other policy attaching prior to the commencement of the policy, or which were known to the assured prior to the commencement of the policy' (see *MacGillivray on Insurance Law* 10th ed at para 28-84). Such a condition is not contained in the 1993 policy. The policy covers claims first made during the insurance period of the 1993 policy. The Samancor claim was first made during that period as the notification of a potential claim did not constitute the making of a claim. The result is that the appellants were entitled to claim under the 1993 policy notwithstanding the fact that they could also claim a lesser amount in terms of the 1991 policy. There is in my view no absurdity in this result as was contended by the respondent to be the case.

[23] The respondent contended in the alternative that it has already discharged its obligations in terms of the 1993 policy i.e. its liability to pay R1 000 000 in respect of the Samancor-claim for damages and costs and its liability to pay the appellants' costs and expenses incurred in the conduct of the Samancor-claim.

[24] As stated above the respondent agreed, whilst persisting in the contention that the appellants were only entitled to indemnification in terms of the 1991 policy, to fund the costs of contesting the Samancor action and the costs of the appeal. The funding so provided amounted to R2 072 292. It is common cause that in terms of the proviso to the undertaking by the insurer to pay the partnership's costs and expenses incurred in the conduct of a claim, which proviso is quoted above, only an amount of R568 366 was payable by the respondent in respect of such costs. The respondent, therefore, overpaid an amount of R1 503 926. The submission of the respondent is that whereas it was in terms of the 1993 policy obliged to pay a total amount of R1 568 366 to the appellants it paid an amount of R2 072 292 to them.

[25] In my view there is no merit in the submission. No portion of the amount paid by the respondent was paid in respect of Samancor's claim for capital and costs. The amount paid was paid in terms of an undertaking to fund the proceedings. Not surprisingly the respondent did not institute a counterclaim for payment of the difference between R1 503 926 and the R1 000 000 which was payable in respect of such capital and costs.

[26] For these reasons the following order is made:

(a) The appeal succeeds with costs.

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

'The respondent is ordered to pay an amount of R1 000 000 together with interest on the sum of R1 000 000 calculated at the rate of 15,5% per annum from 30 June 1998, plus costs.'

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STREICHER JA

CONCUR:

NAVSA JA)
MTHIYANE JA)
CACHALIA AJA)

ZULMAN JA

[27] I have had the privilege of reading the judgment of my colleague Streicher JA. Whilst I agree with his conclusions I prefer to approach the matter on the following basis.

27.1 It is common cause that the appellants are entitled to indemnity from the respondent in terms of a professional indemnity policy issued on 6 March 1991 under a certificate of insurance no 01218/91 covering the period 1 March 1991 to 29 February 1992 (the 1991 policy);

27.2 The issue for determination in this appeal is whether the appellants are entitled to indemnity from the respondent in terms of both the 1991 policy and a policy issued on 4 March 1993 and embodied in certificate of insurance no 01218/93 and covering the period 1 March 1993 to 29 February 1994 (the

1993 policy) and can choose which; and

27.3 If the 1993 policy applies, the appellant's claim for indemnity in an amount of R1 000 000 falls to be reduced.

[28] The court *a quo* (Motata J) held, dismissing the appellant's claim, that it was the 1991 policy that applied. The appeal is brought with the leave of the court *a quo*.

[29] The parties, with the consent of the court *a quo*, proceeded to trial only on the above issue. By agreement they placed their evidence before Motata J by way of a stated case read together with an agreed bundle of documents. The following common cause facts emerge from the stated case:

29.1 The appellants, a partnership of consulting engineers, contracted the two policies with insurers led by the respondent who assumed all the rights and obligations in respect of the policies.

29.2 During May 1991, the appellants became aware that a water pipeline which had been constructed in Steelport had corroded. The appellants had been appointed as Consulting Civil Engineer by Samancor Limited (Samancor) in regard to the construction.

29.3 The pipeline corroded as a result of insufficient thickness in the protective coating lining its pipes. Samancor contended that the appellants 'may' have breached their obligations towards Samancor by failing to detect the defects in the pipeline in the course of supervision of its construction.

29.4 On 4 June 1991, in a letter of that date, the appellant gave notice to

Glenvaal, Griffiths and Armour (Pty) Limited (Glenvaal), acting on behalf of the respondent of the potential claim by Samancor. The first sentence of the concluding paragraph of the letter reads:

'Hierdie skrywe dien slegs as 'n kennisgewing van 'n moontlike eis.'

29.5 During November 1993, Samancor instituted action in the High Court against the appellants and the contractors who constructed the pipeline.

29.6 Immediately after service of the summons on the appellants the appellants handed the summons to Glenvaal.

29.7 In the Samancor action, Samancor claimed damages from the appellants on the ground of their alleged breach of contract in failing to properly supervise the construction of the pipeline.

29.8 On 30 June 1998 the High Court gave judgment in favour of Samancor against the appellants for damages in an amount of R973 544,48 together with costs inclusive of the costs of two counsel and the qualifying fees of two expert witnesses.

29.9 The appellants appealed to this Court. On 13 November 2000 the appeal was dismissed with costs, inclusive of the costs of two counsel, save that the order of the High Court was altered by the substitution of an amount of R910 570,00 for the amount of R973 544,48.

29.10 The liability of the appellants to Samancor totalled R3 646, 000, 58 comprised as follows:

29.10.1 Capital R 910 570,00;

29.10.2 Interest on the aforesaid

	capital at the rate of 15,5% per annum calculated from and including 30 June 1998 to and including date of payment thereof. As at 30 June 2001 such interest totaled	R 423 415,00
29.10.3	Samancor's taxed costs in the High Court action	R 1 113,327,66
29.10.4	Samancor's taxed costs in the appeal	R 1 198 737,87.

29.11 The respondent paid the appellants' costs and expenses of the appellants in the action, counsel and expert witnesses incurred in the conduct of the defence of the action and the subsequent appeal to this Court, which costs and expenses totalled R2 072 292,48. It did not pay the capital amount or interest thereon.

29.12 The respondent whilst contending that the 1991 policy governed the appellants claim to indemnity, the limit of which was R1 000 000 inclusive of the costs and expenses incurred in the defence of the Samancor action and any subsequent appeal, agreed to continue to fund the costs of contesting the said action and the costs of the appeal 'in order to facilitate the proper conclusion of the litigation between Samancor' and the appellants, 'the funds for the purposes of which were not available to the' appellants.

30.1 Conditions 2(a) and 2(b) in both the 1991 and 1993 policies are in identical terms. They provide as follows:

‘2. The Insured shall notify the Insurers via Glenvaal, Griffiths & Armour (Proprietary) Limited in writing as soon as practicable of

(a) any claim or of the receipt of notice from any person of an intention to make a claim against the Insured.

(b) any occurrence or circumstance of which the Insured shall become aware during the Period of Insurance which may possibly give rise to a claim under Section 1 or Section 2. Such notice having been given any claim to which that occurrence or circumstance has given rise which is subsequently made against the insured after the expiry of the Period of Insurance shall be regarded for the purposes of this Certificate as having been made during the Period of Insurance in which so notified.’

30.2 Both the 1991 and 1993 policies provide for a limit of indemnity of R1 000 000,00 and describe the risk insured in identical terms.

30.3 However the two policies differ in their treatment of own costs and expenses. The 1991 policy includes these costs in the limit of indemnity of R1 000 000,00 whilst the 1993 policy adds them to the limit of indemnity.

[31] Not surprisingly the appellants chose to base their claim upon the 1993 policy as the extent of the indemnity provided in it is greater than in the 1991 policy. As I have already indicated, the appellants contend that although they are also entitled to indemnity in respect of the 1991 policy, that they can choose the policy under which to claim.

32.1 The respondent contends that having regard to the nature and purpose of the 1993 policy and the relevant background circumstances which were

probably present to the minds of the parties and which explain 'the genesis and purpose of the contract':

32.1.1 Both the 1991 and 1993 policies are what are termed 'claims-made' policies;

32.1.2 The claim was first made in the period of the 1991 policy;

6.1.3 The 1993 policy covers only' claims first made' during its currency;

32.1.4 The parties could not have intended that a claim which was first made in 1991 was in fact first made in 1993 which it submits is, in effect, what the appellants argue.

32.2 The respondent accordingly contends that the appellants' claim is governed by the 1991 policy, with its lesser cover of R1 000 000,00 inclusive of costs and expenses incurred in the defence of the Samancor action and subsequent appeal, and not the 1993 policy which covers such costs. I do not agree.

32.3 The respondent's counsel has referred to a number of English cases and leading English text books on Insurance Law where the meaning of, and the reasons for so called 'claims first made' in professional indemnity policies such as the policies under consideration are discussed.[2] However in none of these cases or text books are two distinct policies considered in the context of

[2]*Robert Irving & Burns v Stone and Others* [1998] IRLR258 (CA), *Friends Provident Life & Pensions Limited v Sirius International Insurance Corporation* [2005] IRLR 135 (Q) at 141-142 and *Tioxide Europe Limited v CGU International Insurance* PCL [2005] IRLR 114 (Q) pp 121-122 and 126. See for example Clarke *The Law of Insurance Contracts* (supra) pp 17-4D to 17-4E, pp 17-36/5, 17-39, and 17-40 to 17-41, Simpson (Gen Ed) *Professional Negligence and Liability* (LLP loose-leaf edition) paras 5-37 and 5.97, Legh-Jones *et al Mac Gillivray On Insurance Law* (10th edition para 28-81` on p 862

the case before this court where a 'claim first made' under one policy is deemed to be a claim made under a later or another policy.

33.1 The notification of 4 June 1991[3] during the period of the 1991 policy of a 'moontlike eis' or potential or circumstances likely to give rise to a claim constitutes a notice in terms of condition 2(b) of an 'occurrence or circumstance' during the period of insurance which may possibly give rise to a claim under the policy.

(See for example the Canadian case of *Moore v Canadian Lawyers Ins Assn*[4] referred to in Clarke- The Law of Insurance Contracts) This would entitle the appellants to claim under the 1991 policy.

33.2 In November 1993 during the period of the 1993 policy the appellants gave notice to Glenvaal of an actual claim made against them.[5]

33.3 The fact that the appellants are entitled to claim under the 1991 policy does not, in my view, disentitle them from claiming under the 1993 policy should they so choose, as they indeed did. This notwithstanding the deeming provision set out in the second sentence of condition 2(b). The deeming provision, upon a proper construction thereof, applies to a notice given during the period of the 1993 policy and not to a notice given in another period under another policy such as the 1991 policy. The 1991 and 1993 policies are distinct and different policies concluded at different times and for different periods and differing in certain respects more particularly regarding the extent

[3]See para 3.4 above
[4](1992) 95 DLR (4th) 365
th Ed 2002 page 174D4 footnote 5
[5]See para 3.6 above

of the cover afforded. There is no direct reference whatsoever, as there could have been, in the 1993 policy to the 1991 policy. I do not believe that one may legitimately infer or imply such a reference. The insurer had it wished to incorporate such a reference could easily have inserted appropriate wording in the 1993 policy. It did not do so. The 1993 policy does not exclude claims previously made, neither is there a proportional reduced premium in respect of double insurance. It was plainly open to the insurer when the 1993 policy was negotiated, either to refuse to insure the appellants, or to increase the premium payable, or not to change the premium payable because of the notification that the appellants had given during the currency of the 1991 policy of a potential claim which in fact eventuated in the actual claim notified during the period of the 1993 policy. There is no evidence that they increased or changed the premium payable when issuing the 1993 policy. Furthermore it would have been open to the appellants to have sought insurance cover from another insurance company after the expiry of the 1991 policy. Even if they disclosed the fact to the proposed new insurer that they had given notice of a potential claim to their previous insurer and a new policy was issued, this would not have entitled the new insurer, in the absence of appropriate wording, to invoke a condition such as condition 2(b) to contend that the notice given to its previous insurer was to be regarded as a notice of ‘first claim’ under the new policy.

33.4 No notification was given during the period of the 1993 policy in terms of condition 2(b) of an ‘occurrence or circumstance’ of which the appellants were aware. I repeat that the notice which was given in November 1993 was a notice in terms of clause 2(a) of an actual claim.

34.1 The respondent also contends that the proviso contained in General Condition 8(b) which is in identical terms in both the 1991 and 1993 policies is of assistance in the interpretation of condition 2. I again do not agree.

The condition reads:

‘8. The Insurers will not avoid this Certificate on the grounds …

Provided that

(a) …

(b) where the Insured could have notified under any preceeding insurance circumstances which could give rise to a claim any indemnity in respect thereof to which the Insured may be entitled under Section 1 shall not be greater or wider in scope than the indemnity to which the Insured would have been entitled under such preceding insurance.’

34.2 The general condition is there, in my view, to cater for non-disclosure of a claim or potential claim during a prior period of insurance. If there was no disclosure but there was no increase in the cover granted in the new period of insurance the fact of the non-disclosure would be irrelevant. If the cover was increased the non-disclosure would entitle the insurer to limit its liability to the cover provided in the first period.

34.3 I accordingly do not believe that condition 8(b) is of assistance or relevant in interpreting condition 2 and in deciding whether the 1991 or 1993 policy is of application.

35.1 In the alternative the respondent contends that in the event that it is found that the 1993 policy applies to the appellants' claim the reference to 'such costs and expenses' in the 1993 policy is a reference to the costs and expenses of the appellants referred to in paragraph 3.11 above which totaled R2 072 292,48.

35.2 The 1993 policy provides, under the heading 'Costs and Expenses' that:

Costs and Expenses

'The Insurers will pay, in addition to the Limit of Indemnity under Section 1, costs and expenses incurred in the conduct of any claim subject to the Insurers consent (such consent not to be unreasonably withheld) in respect of any occurrence or circumstance that has given rise to or may reasonably be expected to give rise to a claim, which would be indemnifiable in terms of Section 1. However, if a payment in excess of the amount of indemnity under this Insurance has to be made to dispose of a claim made against the Insured the insurers liability in respect of such costs and expenses shall be such proportion of the total costs and expenses incurred as the amount of the indemnity this Certificate bears to the total amount to dispose of the claim.'

The words underlined by me in the above passage indicate the additional wording that appears in the 1993 policy but not in the 1991 policy.

35.3 The aforesaid costs and expenses totaling R2 072 292,48 were costs and expenses incurred by the appellants with the consent of the respondent in

the course of contesting the Samancor action and the appeal consequent thereupon.[6]

35.4 The total payment that had to be made to Samancor to dispose of Samancor's claim against the partnership was R3 646 050,58.[7] The amount of R3 646 050,58 exceeded the limit of the capital indemnity in the 1993 policy of R1 000 000,00 by R2 646 050,58.

35.5 The proportion of the limit of indemnity (R1 000 000,00) to the total amount payable to Samancor to dispose of its claim (R3 646 050,58) according to the respondent was 1: 3,64605058.[8]

35.6 The respondent therefore contends that its liability in respect of the costs and expenses of R2 072 292,48 was the above proportion i.e. R568 366,34, expressed by the following equation:

1 000 000 : 3 646 050,58 (1:3 646 050,58)

568 366,34 : 2 072 292,48 (1 :3 646 050,58)[9].

35.7 The respondent accordingly contends that its obligation to indemnify the appellants in respect of their liability to Samancor is limited to R1 000 000 less the extent by which the total amount actually paid by the respondent in respect of own costs and expenses (R2 072 292,48) exceeds its actual liability in respect thereof of R568 366,34, viz. R1 503 926,14 (i.e. R2 072 292,48 minus R568 366,34). The aforesaid figure of R1 503 926,14

[6]See para 3.11 above
[7]See para 3.10 above
[8]Stated case para 8.6.5
[9]Stated case para 8.6.6

exceeds the limit of indemnity of R1 000 000[10]. In the premises, the respondent argues that it has already indemnified the appellants by an amount R1 503 926,14 in excess of the limit of indemnity, and is not obligated to indemnify the appellants further. The argument is without substance.

35.8 The 1993 policy grants two separate and distinct indemnities to the appellants. An indemnity against liability for damages and claimants costs and expenses arising out of any one claim, in a sum not exceeding R1 000 000. In addition to the aforesaid sum of R1 000 000 an indemnity is granted in respect of 'costs and expenses incurred (by the insured) in the conduct of any claim subject to the insurer's consent'. The *proviso* to this indemnity in respect of the appellants' own costs and expenses is that 'if a payment in excess of the amount of indemnity under this Insurance has to be made to dispose of a claim made against the Insured the Insurer's liability in respect of such costs and expenses shall be such proportion of the total cost and expenses incurred as the amount of the indemnity available under this Certificate bears to the total amount to dispose of the claim.'

35.9 The respondent's calculations set out above appear to be correct. However, the appellants were in terms of the 1993 policy entitled to be indemnified by the insurer in the two respects referred to above and in two amounts:

35.9.1 R1 000 000 in respect of the capital amount of damages, interest and costs which the appellants were ordered to pay to Samancor;

[10]Stated case paras 8.6.7 and 8.6.8

35.9.2 An amount of not less than R568 366,48 in respect of the appellant's own costs and expenses incurred in defending themselves against the claim of Samancor.

35.10 As appears from the stated case,[11] the respondent paid the appellant's costs and expenses of the second defendant in the action [a firm of attorneys who were also sued by the appellants but who play no part in this appeal] incurred in the conduct of the defence of the Samancor action and the subsequent appeal to this court. The appellants were accordingly not entitled to any further indemnity in that regard.

35.11 As the respondent made no payment to or for the benefit of the appellants to indemnify them against the capital amount of damages, interest or their own costs and which amount is in excess of R1 000 000,00 it follows that the respondent was in breach of its obligations arising from the 1993 policy and was obliged to indemnify the appellant by payment to them of a limited sum of R1 000 000.

R H ZULMAN

JUDGE OF APPEAL

[11]Para 5.20 of the stated case