THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 437/2009

In the matter between:

DELPHISURE GROUP INSURANCE BROKERS CAPE (PTY) LTD Appellant

and

GYSBERT JOHANNES KOTZé DIPPENAAR First Respondent

GERRIT ANDRIES VISSER Second Respondent

BEXSURE (PTY) LTD Third Respondent

Neutral citation: *Delphisure Group Insurance Brokers Cape v Dippenaar* (437/09) [2010] ZASCA 85 (31 May 2010)

Coram: MPATI P, NUGENT, MALAN and LEACH JJA and SERITI AJA

Heard: **4 May 2010**

Delivered: **31 May 2010**

Summary Delict – negligence – claim for damages for negligent misrepresentation – claim upheld.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Ms Acting Justice Dicker sitting as court of first instance):

1. The appellant's appeal in respect of the claim of the first respondent is dismissed.

The appeal in respect of the claim of the second respondent is upheld, and para 3 of the order of the court a quo is set aside and substituted with the following:

'The second plaintiff's claim against the second defendant is dismissed, and the second plaintiff is to pay 30 per cent of the second defendant's costs.'

2. The appellant is to pay the first and third respondent's costs of appeal, such costs to include the costs of two counsel where so employed.

The second respondent is to pay 30 per cent of the appellant's costs of appeal, such costs to include the costs of two counsel.

JUDGMENT

LEACH JA (MPATI P, NUGENT, MALAN JJA and SERITI AJA concurring):

[1] This case involves a delictual claim for pure economic loss suffered as a result of a misrepresentation of fact. The first and second respondents farm wheat in the Piketburg district of the Western Cape. The appellant ('Delphisure') is an insurance brokerage that devised a crop insurance product known as Farmsure which was marketed by the third respondent ('Bexsure') for the 2004 growing season. Both the first and second respondents applied for Farmsure insurance, but it later transpired that no such product in fact existed as, despite all its efforts, Delphisure had not succeeded in having it underwritten by an insurer. When their crops failed, the first and second respondents instituted action in the High Court, Cape Town against both Delphisure and Bexsure whom they alleged had misrepresented that the Farmsure product was in place, thereby causing them not to take out insurance with another insurer, Mutual and Federal Insurance Company Ltd ('Mutual & Federal'), and claiming as damages the amounts they would have been paid by Mutual & Federal if it had insured their crops. The claim succeeded solely against Delphisure (the court a quo held that Bexsure had not known that Farmsure did not exist at the material time). With leave of the court a quo, it appeals to this court against that decision.

[2] Not only does Delphisure sell insurance on behalf of insurance companies but it acts as an administrator of insurance products sold to third parties and is an accredited agent of the international insurer Lloyds of London ('Lloyds') on whose behalf it has been mandated to market a range of short term insurance policies. Farming in this country is an enterprise often afflicted by natural perils, and many farmers insure their crops against failure. In 2002 and 2003, Delphisure marketed a crop insurance policy in the Northern Cape. Underwritten by Lloyds and issued by the Cape Insurance Company Ltd, this was a policy devised for the benefit of the members of the Griqualand West Co-operative Society. It generated considerable interest and Mr 'Vango' Kolovos, at the time Delphisure's general manager, was approached by a representative of Bester Feed & Grain Exchange (Pty) Ltd, a substantial player in the grain industry in the Western Cape that handled the wheat of several hundred wheat farmers, to ascertain whether it would be possible to arrange a similar crop insurance product for farmers in the Western Cape.

[3] Kolovos recognised crop insurance as being a potentially lucrative product, particularly in the Western Cape where wheat is produced on a large scale, and entered into negotiations involving the third respondent ('Bexsure), a company in the same stable as Bester Feed & Grain, as well of representatives of Lloyds, to see if it would be possible to devise a suitable product. In doing so, Kolovos attempted to devise an insurance model that would satisfy Lloyds' requirements to underwrite the product. Crucial to its acceptance were what Kolovos described as the necessary demographics, which included the geographical situation of the farms to be insured, the likely quantities of wheat to be produced and insured, and the anticipated value of the insured risk. It was of importance to Lloyds for the risk to be spread, and consequently any model in which most of the farmers taking insurance were from the same district was regarded as undesirable as a localised crop failure in that district could hold disastrous consequences for an insurance

underwriter.

[4] In addition, in order to provide a new product likely to sell, Kolovos had to come up with a model that had advantages over the products of competitors already in the market. In this regard, other insurers offered cover for no more than 65 per cent of a farmer's anticipated crop and did not offer so-called 'emergence cover' which insured farmers in the event of their crops not germinating and emerging from the ground. Indeed, the other cover available was conditional upon a certificate of emergence being issued once sufficient germination and emergence had taken place. Kolovos decided to better this in his model by providing for a product allowing a farmer an election to take up to 100 per cent crop cover and also to include emergence cover (the attraction of the latter being that if germination did not take place the farmers would still receive compensation for their production costs in preparing the soil and planting).

[5] All of this required ongoing consultations and negotiations. In a letter addressed to Kolovos on 25 February 2003, the financial director of Bexsure, after providing certain information relevant to a potential insurance product, concluded ' . . . we need to be assured that you will be able to supply us with a product as described with the necessary underwriting and legal requirements being met'. Kolovos responded by expressing the opinion that Bexsure's requirements were achievable but that it would be necessary to provide an extremely detailed presentation to insurers in London to obtain approval.

[6] It soon became clear that it was too late to arrange any insurance for the 2003 season and it was decided to attempt to do so in the following year. Consultations continued, during which Lloyds stated that the policy should use the terms of policies that were tried and tested. This led to the policy wording of Mutual & Federal's crop insurance being used, adapted to provide for both a choice of up to 100 per cent crop cover as well as emergence insurance. In addition, a schedule of premium rates was prepared and the product was given the name 'Farmsure'. The suggestion by Kolovos of a condition that at least half the farmers in each co-operative should take the cover was regarded by Bexsure as impractical, as Kolovos ultimately conceded. But despite all of this, Lloyds did not give Kolovos its unconditional support, and still needed to be persuaded by the demographics before agreeing to underwrite the product.

[7] Rumours about a new crop insurance product to be marketed by Bexsure began to do the rounds in the farming community of the Western Cape as the 2004 growing season approached. As a result, and as it was the intention for Farmsure to be marketed through farmers' co-operatives who would collect the premiums from their members by debiting their accounts, Bexsure arranged a meeting in Stellenbosch on 21 April 2004 to which it invited representatives of a number of co-operatives, including Mr Danie Gouws, an insurance consultant who was at the time employed by the co-operative known as Boland Agri. In addition, a number of private insurance

brokers also attended, including Mr Le Roux van Wyk, who had persuaded Lizelle Scott (a director of Bexsure who was primarily involved in the marketing of Farmsure) to allow him to attend as he had a number of farming clients who were interested in the rumoured new crop insurance product.

[8] The meeting was addressed by Kolovos who, when he later testified, attempted to persuade the court a quo that he had explained that Farmsure was not yet in existence but was conditional upon acceptance by Lloyds, and that such acceptance was in turn conditional upon the demographics of the model being met by the number of sales, the amount of insurance that was taken up, the average percentage of the crops insured and the geographical spread of the farmers who purchased the product. As against this allegation, the weight of the evidence led from the witnesses Scott, Van Wyk and Gouws, was that Kolovos formally announced the Farmsure product, stated that it was fully underwritten by Lloyds and stressed its advantages by providing emergence cover and a choice of insurance for up to 100 per cent of the crop. In the light of the weight of this evidence and the inherent probabilities, the court below correctly found that Kolovos's evidence on this score could not be accepted and that he had indeed created the impression that the Farmsure product was available and was underwritten by Lloyds.

[9] Presumably Kolovos did not make it plain that Lloyds had not yet approved the Farmsure policy as it would have been impossible to market non-existent insurance. However, he did ask the co-operatives to complete questionnaires in order to ascertain how many members in each co-operative were likely to insure their wheat crops during the forthcoming season, what premiums were likely to be generated, and the anticipated quantity of wheat likely to be insured. These completed questionnaires were returned to him within a day. As time was of the essence (farmers were due to begin planting within a few weeks and it had been agreed that the final cut-off date for Farmsure applications would be 10 May 2004) on 26 April 2004, Kolovos telefaxed the following letter to Bexsure:

'This serves to confirm and indicate the parameters of the anticipated insurance.

1. As per the attached, being the minimum figures for crop per each Co-op and the minimum in total to have a successful crop model.

Acceptance by Lloyds of London of the exclusion of the 50% ruling as indicated by

your motivational letter.
Premiums to be paid by the Co-op or the farmers by no later than the end of the month of the effective date of the crop policy.
All policies to be written by no later than 10 May 2004.
Based on the presales figures, a final decision of acceptance will be made by the underwriter.
The crop certificates are in the process of being created and will be available by Wednesday 28 April.'

[10] The schedule attached to this letter contained a synopsis of the information contained in the completed questionnaires, including details of the geographical areas in which the farmers who were likely to purchase Farmsure conducted their farming operations and the anticipated quantity of the crops that would be insured. Scott testified that on receipt of this letter she was both anxious and confused as she wanted urgently to start marketing the product and had understood Kolovos at the Stellenbosch meeting to say that it was in place. She therefore contacted him, and he advised her that everything was in fact in order but that she should not start marketing until he provided the necessary documentation. To that end, a Bexsure logo was e-mailed to Delphisure for incorporation onto application forms. These documents, once so prepared, were generated by Delphisure's computer system and made available to Bexsure.

[11] On 28 April 2004, Kolovos gave Scott the go-ahead to market Farmsure. As part of her marketing strategy, she arranged a meeting on 5 May 2004 at the Winkelshoek building at Piketberg, commonly known as the 'Rietdak'. This meeting was attended by a number of farmers, including the first and second respondents, both of whom had already applied to Mutual & Federal for crop insurance for the season. The application of the first

respondent had already been accepted, although it was conditional upon the issue of an emergence certificate, while that of the second respondent was subject to approval after an inspection of his farm had been conducted (an issue to which I shall return in due course). However, both had been so intrigued by the rumours of the Farmsure product that they had arranged for their insurance broker, Van Wyk, to obtain quotations of the anticipated cost of premiums from Bexsure on their behalf.

[12] At the meeting, Scott gave details of what Farmsure offered, explained that the cut-off date for applications was 10 May 2004 and informed those present that the product was in existence and was fully underwritten by Lloyds. The first and second respondents found the product to be so attractive that, immediately after the meeting, they both contacted their broker, Van Wyk, through whom they had placed their applications for crop insurance for the season with Mutual & Federal, and asked him to see if he could arrange for those applications to be withdrawn or cancelled. Van Wyk went ahead and succeeded in doing so. Meanwhile the first and second respondents applied to Bexsure for Farmsure insurance for the 2004 season.

[13] Unfortunately for all concerned, the sales of Farmsure for various reasons failed to meet the demographic requirements of Lloyds. Despite meetings and negotiations being held with various farmers and other interested parties, and attempts being made to attract underwriting from other quarters, none of which is necessary to detail for purposes of this judgment, it proved impossible to obtain underwriting for Farmsure which therefore never saw the light of day. While this was going on, the crops planted by the first and second respondents germinated but, despite their initial promise, ultimately failed due to adverse weather conditions. As the first and second respondents were left uninsured due to the Farmsure policies for which they had applied having been still-born and their Mutual & Federal applications having been cancelled, they were understandably aggrieved. And so, in due course, they instituted action claiming the amounts they alleged they would have recovered from Mutual & Federal had they not cancelled their applications on the strength of Scott's misrepresentation at the Rietdak meeting that the Farmsure cover was in place and fully underwritten by Lloyds.

[14] It is convenient at this stage to consider Delphisure's contention that Scott knew at the time of the Rietdak meeting that the Farmsure product was not finally in place and was dependent upon the demographics obtained from

the sales of the product being sufficient to persuade Lloyds to accept the model – it being its contention either that it could not be held responsible for Scott's failure to inform the meeting of the true state of affairs, alternatively, that even if it was responsible, Scott was a joint wrongdoer whose actions rendered Bexsure jointly and severally liable with it to the first and second respondents.

[15] Scott denied that she was aware that Farmsure still had to be accepted by Lloyds at the time and testified that Kolovos had brought her under the impression that everything was in order. It was argued by Delphisure that she could not be believed, particularly in the light of the fifth point in the letter of 26 April 2004 in which it was stated that a final decision on acceptance would be made by the underwriter based on the 'pre-sales figures' which, so it contended, were the figures which would be forthcoming after the policy had been marketed. This cannot be so. Not only would it be a contradiction in terms to refer to the figures of actual sales as a 'pre-sales figures' but, bearing in mind that the schedule attached to the letter contained an analysis of anticipated sales derived from the questionnaires which had been completed, the reference therein to pre-sales figures could only have meant those figures set out in the schedule. Accordingly, the letter meant only one thing, namely, that Delphisure was awaiting a final decision by the underwriter (Lloyds) to be taken on strength of the information set out in the schedule. Accordingly, when Kolovos later told Scott everything was in order and subsequently, on 28 April 2004, gave her the green light to go ahead to market Farmsure, she was entitled to think that on the strength of pre-sales figures attached to the schedule to the letter of 2 April, Lloyds had agreed to underwrite the product. In any event, Scott was not likely to go out and market a product which to her knowledge did not exist, and the probabilities are overwhelming that she only did so as she was under the impression that since 26 April Lloyds' requirements had been met and that it had agreed to underwrite the product. The argument that Scott was thus aware at the Rietdak meeting on 5 May that the Farmsure product was not in place cannot be sustained.

[16] This conclusion is relevant to the question of negligence, an issue to which I now turn, the test for which is so well known that it need not be repeated. In considering the question of negligence, it is necessary to consider the foreseeability of harm, an issue which is also relevant to the

question of legal causation as I shall mention in due course.

[17] In regard to foreseeability, a reasonable person in Kolovos' position when he instructed Scott to commence her marketing operations would have appreciated that she would be under the false impression that Lloyds had agreed to underwrite Farmsure and that, in marketing the product, she would represent that it was available and underwritten by Lloyds. Indeed that would be a major marketing tool, and he therefore caused Scott to go out into the farming community to spread false information in order to sell crop insurance in the hope that the sales which were forthcoming would persuade Lloyds to agree to underwrite the product.

[18] In order to avoid the obvious consequences flowing from such conduct, counsel for Delphisure argued that it had not been reasonably foreseeable at the time that any farmer who applied for Farmsure cover would suffer a loss in the event of Lloyds ultimately declining to underwrite the product. This contention was based on the fact that no other crop insurance was available as all other insurers had already closed their applications for the 2004 season. Accordingly, so it was argued, the only farmers who it could be foreseen might apply for Farmsure cover were those who would not have been insured against crop failure in any event, and that a reasonable person would not have foreseen that farmers who had already applied for insurance cover would cancel or withdraw their applications in respect of that cover – or, at the very least, would only have foreseen that those who had already applied for insurance would only cancel such applications once they had applied for and been granted Farmsure insurance. Consequently, so the argument went, the loss suffered by the first and second respondents, who had withdrawn their applications for crop cover from Mutual & Federal and who were left without cover when the Farmsure product was stillborn, was not reasonably foreseeable

[19] These contentions, too, must be rejected. Farmsure's selling point was that it was a product superior to the other crop insurance then available, offering both crop cover of up to 100 per cent and emergence cover – both of which were not elsewhere available. A reasonable person would therefore have realized that farmers who had already applied for crop insurance from competitors such as Mutual & Federal might seek to resile therefrom and apply for Farmsure insurance instead. The likelihood of such action was all the more real in the light of, first, the considerable interest and enthusiasm that Farmsure had generated in the farming community as had become apparent at the meeting at Stellenbosch on 24 April 2004, secondly, that even though the cut–off date for other insurances had passed such applications might not yet have been accepted (as was indeed the case with the application of the second respondent) and, thirdly, that even if such applications for other insurance products had been accepted, the insurance would still be conditional upon the issue of a certificate of emergence after germination of the crop, and that it was only at that stage that farmers who had applied for such insurance would be obliged to pay their premiums. As planting for the 2004 season was still to take place, the issue of emergence

certificates and the obligation to pay premiums were still a long way off and, in these circumstances, a reasonable person in Kolovos's postion would have foreseen that farmers who had already applied for crop insurance for the 2004 season, on hearing of the considerable advantages of the Farmsure product, might well decide to cancel their applications for other insurance before they had to pay their premiums and, instead, apply for a Farmsure policy – and that in doing so they would not necessarily wait to see if their Farmsure applications were successful. After all, they would have no reason to think that those behind a new product would not wish to accommodate as much business as possible and reject their applications. Nor would they wish to run the risk of becoming obliged to pay crop insurance premiums to two different insurers. It was thus clearly foreseeable that farmers might well cancel their applications for crop cover that were still pending and, in that event, they would be left without crop insurance for the 2004 season should Lloyds decline to underwrite Farmsure and would suffer financial loss if their crops were to fail. The loss suffered by the first and second respondents was therefore reasonably foreseeable.

[20] Also relevant to the question of negligence is whether steps could have been taken to guard against the loss. It was a simple matter for Kolovos to have done so. All that was required of him was to tell the truth, something which would in any event have been expected from an honest insurance broker. Had he not misrepresented to Scott that the Farmsure product was fully underwritten by Lloyds when he instructed her to go out to market it, she would not have brought the first and second respondents under the impression that the Farmsure product was available. Although, as Kolovos emphasised, the Farmsure application form proclaimed that the insurance would only become effective upon acceptance of the application, that is a standard term in all applications for insurance. And there is a considerable difference between representing, on the one hand, that an insurance policy

exists but that an application has to be accepted before it becomes effective and, on the other, that an insurance policy does not exist and may only come into existence should the underwriter in the future agree to act as insurer. The standard terms of the policy if anything added to the misrepresentation of the existence of the product.

[21] Kolovos in fact took no steps to guard against the clearly foreseeable harm which might be suffered by persons in the position of the first and second respondents in the event of them being enticed into applying for Farmsure cover. In these circumstances, negligence on the part of Kolovos was clearly established, and the fact that Scott was the person who made the actual misrepresentation to the first and second respondents in marketing the policy on his instructions does not entitle Delphisure to escape responsibility.[1]

[22] At the same time, Delphisure's argument that Scott was also negligent can be rejected. As I have said, there was no reason for her to have suspected that the Farmsure product had not been approved by Lloyds and she was clearly under the impression that the necessary underwriting was in place. That misunderstanding was a reasonable one, and I am not persuaded that the court a quo in any way erred in finding that Scott had not acted negligently in misrepresenting the position to the first and second respondents. Its finding in that regard must stand.

1 *Ruto Flour Mills (Pty) Ltd v Moriates & another* 1957 (3) SA 113 (T) at 115F-116A.

[23] I turn now to consider the question of the wrongfulness of Kolovos's misrepresentation. Where a claim is for pure economic loss,[2] even if the conduct causing such loss is negligent, it will only be regarded as unlawful and therefore actionable if there are public or legal policy considerations which require liability to follow for the damage it caused.[3]

[24] As has been correctly observed, it is something of an understatement to say that liability always depends on the facts of each given case as there are certain categories of cases in which liability will almost indubitably follow.[4] But each case must be considered on its own merits and there is no simple litmus test that can be applied to determine whether in all cases liability should follow. Despite that, in *Fourway Haulage SA (Pty) Ltd v SA National Roads Ltd* [5] Brand JA expressed the view that our law has moved beyond the stage where liability will be dependent upon the 'idiosyncratic views of the individual judge as to what is reasonable and fair', and echoed the words of Nugent JA in *Minister of Safety and Security v Van Duivenboden*[6] that 'what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms'. To that may be added that such a process involving criteria to which recognition has been given in the past as either favouring or operating against the recognition of liability will advance the cause of certainty in judicial decisions,

2 As that concept was explained in *Telematrix (Pty) Ltd t/a Matrix Vehicle Trading v Advertising Standards Authority* 2006 (1) SA 461 (SCA); [2006] 1 All SA 6 (SCA) para 1.

3 See eg *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA): [2008] ZASCA 134 para 12 and the cases there cited.

4 *Telematrix* para 15.

5 Para 21.

6 2002 (6) SA 431 (SCA) para 21.

a result to which it is always necessary to strive.

[25] Bearing that in mind, I turn to considerations of policy which are relevant. One important factor is of course the fear of so called 'boundless liability' and an appreciation that the law will recognise liability more readily where there is not a limitless number of claimants likely to bring a multiplicity of actions.[7] Gleaned from previous decisions, important considerations to which regard may be had are the following (the list is not intended to be exhaustive):

- Whether the plaintiff was vulnerable to the risk (which would favour a finding of liability) or could have avoided it by contractual means such as a disclaimer (which would operate against liability);

Whether the extension of liability would impose an unwarranted burden on a defendant or, conversely, whether it would not unreasonably interfere with the defendant's commercial activities as the defendant was already under a duty to take reasonable care in respect of third parties;
The nature of the relationship between the parties, contractual or otherwise;
Whether the relationship between the parties was one of 'proximity' or closeness;
Whether the statement was made in the course of a business context or in providing a professional service ;
The professional standing of the maker of the statement;
The extent to which the plaintiff was dependant upon the defendant for information and advice;
The reasonableness of the plaintiff relying on the accuracy of the statement.

[26] In considering these factors, it is of considerable importance that this is not a case in which there is likely to be boundless liability involving an unlimited number of claimants. The misrepresentation was made to a limited class, being the farmers to whom Farmsure was offered. Counsel for Delphisure also correctly conceded that this was not a case in which the risk

7 *Fourways* paras 23 and 24.

could have been avoided by contractual means or in which the extension of liability would impose an unwarranted burden upon Delphisure. It is also relevant that Kolovos knew that the representation that Lloyds had underwritten the Farmsure product was of great importance in persuading farmers to purchase it, and his misrepresentation in that regard was made in the course of his business by a man of substantial professional standing to parties who were vulnerable to the risk and were dependant upon him for the accuracy of the information.

[27] In the light of all the features that I have just mentioned, this is a clear case in which considerations of policy should impose liability for the negligent misrepresentation if it caused the loss suffered by the first and second respondents.

[28] Having determined the issue of wrongfulness against Delphisure, it becomes necessary to consider the issue of causation. This involves two distinct enquiries: first, the application of the so-called 'but-for' test in order to determine whether the particular action concerned can be identified as the cause without which the loss in question would not have been suffered;[8] the second being the question of legal causation, sometimes referred to as remoteness of damage,[9] being whether the wrongful act is sufficiently closely linked to the loss to attract legal liability. The latter enquiry is also determined by considerations of policy but, although there may be an overlapping with the factors to be taken into account, wrongfulness should not be confused with

8 Cf *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700F-G.
9 Cf *Fourway Haulage* para 30-31.

legal causation or remoteness: and conduct which may be regarded as wrongful may well also be too remote for liability to follow.[10]

[29] It was common cause on appeal that both factual and legal causation had been established in respect of the claim of the first respondent who, had he not withdrawn his application for insurance with Mutual & Federal after Scott's promotion at the Rietdak meeting on 5 May 2004, would have insured his crop with Mutual & Federal and been paid compensation when it failed. In these circumstances, it was correctly common cause that the loss suffered by the first respondent was a direct result of the misrepresentation and sufficiently closely linked to the misrepresentation to attract legal liability.

[30] On the other hand, the issue of factual causation in respect of the second respondent's claim is not as straight-forward. It was contended that the second respondent had not shown that but for Scott's presentation at the Rietdak meeting his loss would not have been suffered. The argument in this regard was twofold. First, it was argued that even had the misrepresentation relating to Farmsure not been made, the second respondent would in any event have cancelled his application to Mutual & Federal and would thus have been uninsured during the forthcoming growing season. Secondly, it was argued that even if the second respondent had been insured by Mutual & Federal, it would in all probability have refused to pay him compensation under the policy due to misrepresentations he had made in his application form.

[31] Before Mutual & Federal would accept the second respondent's application for insurance cover, it was necessary for his farm to be inspected to verify that it was likely to produce the anticipated yield reflected in the application. Although this was really nothing more than a formality according to the witness Mr E D Rabie, who admired the second respondent as a farmer and in whose hands the decision on acceptance lay, it led to Mr Lou Robertson, an agricultural insurance assessor, being delegated by Janie Louw Brokers to visit the second respondent's farm. This he did on 3 May 2004. Unfortunately for him, he arrived without having made an appointment and incurred the ire of the second respondent for failing to do so. However, the second respondent invited him into his office where they discussed the provisions of Mutual & Federal's policy. It immediately became apparent that the second respondent had a problem with the policy being conditional upon satisfactory emergence of the crop. Robertson telephoned the offices of Janie Louw Brokers and obtained confirmation that the insurance was indeed conditional upon acceptable emergence after germination, that the policy did not include emergence cover and that, consequently, pre-emergence input costs would not be covered. According to Robertson, when the second respondent heard this he said he would not take the cover. Robertson then left the farm without doing the necessary inspection.

10 Cf *Fourway Haulage* para 31-32.

[32] There is no reason not to accept Robertson's evidence in this regard, his testimony having been corroborated by the content of a contemporaneous note he made shortly after the incident. The second respondent's evidence in this regard was most unsatisfactory. He stated that he could not recall the conversation but that emergence cover was of no real consequence to him as germination was never a problem in the district in which he farmed. However, he appears to have attempted to downplay the importance of emergence cover as, shortly after Robertson had left the farm, he telephoned his insurance broker, Van Wyk, who had sent Robertson to inspect the farm. According to Van Wyk, although the second respondent complained about Roberson having arrived at his farm without having arranged to do so, they also discussed the provisions of Mutual & Federal's policy and whether it provided for emergence cover (which provides support for Robertson's version). Their conversation appears to have become heated and, accordingy to Van Wyk, he told the second respondent to keep his Mutual & Federal application 'on the table' – from which it must be inferred that the second respondent had said that he wished to withdraw it – until there was certainty over what Farmsure would offer. It was only on 5 May 2004, after the presentation by Scott at the Rietdak meeting, that the second respondent telephoned and instructed him to cancel his Mutual & Federal application.

[33] There is no reason to reject Robertson and Van Wyk, whose evidence on this issue, supported as it is by Robertson's contemporaneous note, is far more compelling than that of the second respondent. It is clear from this that emergence cover was of importance to the second respondent. Not only did he tell Robertson that he did not want Mutual & Federal's policy as it lacked emergence cover but he refused to allow him to carry out his inspection while knowing it was necessary for his application to be approved. Although this may in part have been due to his anger at Robertson's unannounced arrival, he subsequently told Van Wyk that he did not want to proceed with his application. In these circumstances the fact that Van Wyk persuaded him not to withdraw his application until he had found out more about the Farmsure product so that he could make an informed decision, does not indicate a fixed intention to persist with his application should Farmsure not prove to be more attractive.

[34] In order to succeed, the second respondent must show that even if there had been no talk of the Farmsure product, he would have insured his crop with Mutual & Federal. Van Wyk persuaded the second respondent not to immediately withdraw his application to Mutual & Federal only because he believed the Farmsure product existed. There is nothing to show that he would have persuaded the second respondent not to withdraw his Mutual & Federal application if there had been no talk of Farmsure, and at no stage did the second respondent testify that he would have elected to persist with his application had the Farmsure option not been offered to him. In the light of the evidence of Robertson and Van Wyk, his denial that he had said that he did not want Mutual & Federal's insurance was clearly false. But in the light of his denial, he could hardly have testified that he would have changed his mind

had he known the true state of affairs in regard to the Farmsure product, and there is no acceptable evidence that justifies such a conclusion.

[35] The second respondent has therefore failed to show that but for the misrepresentation that was made by Kolovos he would have been insured by Mutual & Federal. That being so, he failed to establish the necessary element of causation and his claim ought to have been dismissed. The appeal in respect of his claim must be upheld.

[36] Consequently, Delphisure is liable to the first respondent for whatever damages he suffered as a result of Kolovos' negligent misrepresentation that led to him not being able to recover compensation from Mutual & Federal when his crop failed. The quantum of his damages is agreed, being the sum he was awarded in the court a quo, and the appeal in respect of his claim must accordingly fail. However, the appeal in respect of the second respondent's claim must be upheld as he failed to prove that the appellant's misrepresentation caused him to suffer loss. In the light of this conclusion, only paragraph 3 of the order of the court a quo which dealt with the second respondent's claim needs to be altered.

[37] The general rule is for costs to follow the event. The present matter is made more complicated by Delphisure having failed in respect of the claim of one plaintiff but succeeded in respect of the claim of the other. In these circumstances it would be unfair to burden the unsuccessful plaintiff (the second respondent) with all of Delphisure's costs. An examination of the record shows that about 30 per cent of the duration of the trial related solely to the claim of the second respondent. In addition, the second respondent was one of three respondents in the appeal, and the only one that was unsuccessful. In these circumstances I think it is fair to all to order the second respondent to pay 30 per cent of Delphisure's costs in both the trial and the appeal.

[38] Two other issues must be briefly mentioned in regard to costs. First, Delphisure contended in its heads of argument that if it was to be held liable so, too, should Bexsure as a result of Scott's negligence. In response, Bexsure contended in its heads that it could not be held liable at this stage as Delphisure had not served a notice on it under rule 13(8) and there was no lis between them as defendants. This gave rise to Delphisure bringing a conditional application for leave to serve a notice under rule 13(8) should Bexsure's contentions be upheld. There is no merit in Bexsure's argument and its counsel, wisely, abandoned the point during the appeal. In any event, in the light of the finding that Scott had not been negligent, the issue is academic and I mention it only in order to record that we were informed by counsel for the parties that no costs order relating to this application would be sought. Secondly, certain parties employed two counsel, and the costs attendant upon doing so are justifiable.

[40] It is therefore ordered:

1 The appellant's appeal in respect of the claim of the first respondent is dismissed.

The appeal in respect of the claim of the second respondent is upheld, and para 3 of the order of the court a quo is set aside and substituted with the following:

'The second plaintiff's claim against the second defendant is dismissed, and the second plaintiff is to pay 30 per cent of the second defendant's costs.'

2 The appellant is to pay the first and third respondent's costs of appeal, such costs to include the costs of two counsel where so employed.

The second respondent is to pay 30 per cent of the appellant's costs of appeal, such costs to include the costs of two counsel.

_____
L E LEACH

JUDGE OF APPEAL

APPEARANCES

APPELLANT:	D Mitchell SC (with him A Kantor) Instructed by Edward Nathan Sonnenbergs, Cape Town Webbers, Bloemfontein
FIRST AND SECOND: RESPONDENT	N Treurnicht SC (with him H du Toit) Instructed by Werksman, Tyger Valley McIntyre & Van der Post, Bloemfontein
THIRD RESPONDENT:	R S van Riet SC Instructed by Rufus Dercksen & Partners, Stellenbosch

Honey Attorneys Inc, Bloemfontein