THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 250/09

In the matter between:

THE REPRESENTATIVE OF LLOYDS **First Appellant**

THEBE RISK SERVICES (PTY) LTD **Second Appellant**

DEVEREUX MARINE CC **Third Appellant**

and

CLASSIC SAILING ADVENTURES (PTY) LTD **Respondent**

Neutral citation: Lloyds & others v Classic Sailing (250/09) [2010] ZASCA 89 (31 May 2010)

Coram: **Harms, Lewis, Cachalia and Malan JJA and Griesel AJA**

Heard: **20, 21 May 2010**
Delivered: **31 May 2010**

Corrected: **7 June 2010**

Summary: Marine Insurance: parties cannot exclude mandatory provisions of South African statute by choice of other legal system: validity of policy affected by non-disclosure, misrepresentation or illegality determined by reference to ss 53 and 54 of Short-Term Insurance Act 53 of 1998: vessel sinking as a result of latent defect in hull: Lloyds held liable. Second and third appellants, joined as defendants, not liable: entitled to full costs of trial.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Cleaver J sitting as court of first instance):

1 The first appellant's appeal is dismissed with costs, including those occasioned by the employment of two counsel.

2 The appeals by the second and third appellants are upheld with costs, including those occasioned by the employment of two counsel.

3 Paragraph 1.4 of the order of the high court is replaced with the following:
'The first defendant is ordered to pay the costs of the second and third defendants including the costs occasioned by the employment of two counsel and the preparation expenses of Mr Child.'

4 The respondent's conditional cross-appeal is dismissed.

JUDGMENT

LEWIS JA (HARMS DP, CACHALIA and MALAN JJA and GRIESEL AJA concurring)

[1] The vessel *Mieke* was built as a motorized yacht for fishing in 1997 at the instance of Mr A Viljoen, the director and shareholder in various companies which had fishing vessels, and Mr W Hennop, the skipper over a number of years of several of the Viljoen vessels. Hennop was the skipper of the *Mieke* from inception. The vessel was originally designed and built for fishing in the southern oceans. The fishing venture proved to be unprofitable and Viljoen and Hennop decided to convert the *Mieke* into a luxury charter yacht in 2003. It was transferred to Classic Sailing Adventures (Pty) Ltd, the respondent. Viljoen is the director of and controlling shareholder in Classic Sailing. Once converted the *Mieke* could accommodate 12 passengers who would fish and indulge in various other activities from it.

[2] On 15 September 2005 the *Mieke* sailed from Vilanculos off the Mozambican coast. Only the crew were onboard. Three days later, on 18 September, the *Mieke* sank approximately 58 nautical miles south east of Angoshe off the coast of Mozambique. The crew, with Hennop as skipper, reached shore on a rubber duck (a tender).

[3] The first appellant is the representative (cited as such in terms of the Short-Term Insurance Act 53 of 1998) of a Lloyds' syndicate which had insured the *Mieke*. I shall refer to the first appellant simply as Lloyds. The second appellant, Thebe Risk Services (Pty) Ltd (Thebe), is the insurance broker that placed the insurance. The third appellant is Devereux Marine CC (Devereux CC), also an insurance broker which specializes in hull insurance in the Lloyds market. Classic Sailing claimed from Lloyds the sum insured – R10m. Lloyds declined to pay. Classic Sailing instituted action for payment in the Western Cape High Court, exercising its admiralty jurisdiction.

[4] In its plea to Classic Sailing's particulars of claim Lloyds alleged that it was not liable because the sinking was caused by a risk not insured against, and also because of other special defences. It alleged that Classic Sailing had not disclosed to it that Hennop was not certified to serve as the skipper; it had also not disclosed that the stability information on board was inaccurate, not in the prescribed form and not approved by the South African Maritime Safety Authority (SAMSA). In the alternative Classic Sailing, alleged Lloyds, had misrepresented the nature of a dispute between it and SAMSA as to the certification of Hennop, and that Lloyds was thus entitled to avoid the policy; and lastly, that the 'adventure insured' had been carried out in an unlawful manner in breach of the implied warranty of legality in s 41 of the English Marine Insurance Act of 1906. The insurance policy expressly stated that the contract was governed by English law.

[5] If there were any non-disclosures or misrepresentations made by

Classic Sailing these would have been effected through its insurance broker since Classic Sailing did not deal directly with Lloyds. Viljoen had placed all the insurance of his vessels, owned by different corporate entities, with Thebe, represented by Mr M Brown. Brown in turn had instructed Devereux, of Devereux CC, which specializes in hull insurance on the Lloyds market. And Devereux had asked Arthur J Gallagher (UK) Ltd (Gallagher), accredited Lloyds brokers, to find an underwriter for the *Mieke*, which it had done. Accordingly, after action was instituted and on receipt of the plea, Classic Sailing joined Thebe as the second defendant and Devereux CC as the third defendant, the claims against them being conditional on the claim against Lloyds failing. Classic Sailing's claim against Thebe was premised on it having failed to obtain valid insurance for the *Mieke* in breach of the contract between Thebe and Classic Sailing. The claim against Devereux CC was premised also on breach of contract and in the alternative on breach of a duty of care in delict.

[6] Cleaver J found that there were no material non-disclosures; no misrepresentation made, and that the *Mieke* had not embarked on an unlawful voyage. He also held that the sinking of the *Mieke* was due to a latent defect, which was covered by the insurance policy. He accordingly ordered Lloyds to pay the sum insured, less the value of the tender which had not sunk – a sum of R9 940 000 – and the costs of two counsel and various experts.

[7] Thebe and Devereux CC were therefore not liable, but they were awarded only the costs incurred for half of the hearing since they took no active part in the trial in respect of the cause of the sinking. Lloyds applied for leave to appeal to this court and Thebe and Devereux CC applied for leave to appeal against the costs orders made in respect of them. Leave to all three appellants was granted by Cleaver J. Classic Sailing was also given leave to cross-appeal, conditional on the appeal by Lloyds succeeding.

[8] I shall discuss each of the special defences separately. If there is merit in any then the insurance policy may be avoided and the question whether the sinking of the *Mieke* was covered by the terms of the policy falls away. The court below held that Classic Sailing bore the onus of proving that the risk was insured against, but that Lloyds had to prove the special defences. The parties on appeal do not take issue with this. They also do not dispute that the policy is governed by English law, but subject to South African jurisdiction: but they differ as to the applicability of South African legislation – the Short Term Insurance Act.

The history in brief

The conversion of the Mieke

[9] Before turning to the special defences some background is required, both as to the structure of the *Mieke* and the conclusion of the insurance policy. The vessel, described as a grand bank schooner, was first built in 1997. A schooner is a small sea-going fore-and-aft rigged vessel. Originally, schooners had only two masts, but now often have three or four, and carry one or more topsails. Grand Bank schooners are those that plied the oceans off the Grand Banks alongside the coast of Canada and Newfoundland.

[10] The *Mieke* was conceived of and designed by Hennop and Mr J Liverick, both of whom had worked for Viljoen on other vessels. It had both sails (two masts) and Caterpillar turbo-charged marine diesel engines. It was 31 metres long and its beam was 7.68 metres. The vessel, with Hennop as skipper, was used for long-line fishing for some five years. As I have said, the fishing venture was not profitable and Hennop and Viljoen decided to convert it to a charter yacht which could carry 12 passengers. Liverick, Hennop and Viljoen were involved in the redesign, and Hennop acted as project manager for the conversion and rebuilding, which commenced in 2003. The vessel was transferred to Classic Sailing, in which Hennop had some shares but Viljoen had the majority shareholding.

The conclusion of the insurance policy

[11] In November 2004 Brown, of Thebe, who had long been the broker for Viljoen's insurance and that of his various companies, visited Viljoen in his office in St Francis Bay to discuss insurance for Viljoen's businesses generally and for the various vessels owned by them. One of the issues discussed was the difficulty Classic Sailing was having in obtaining certain certificates from SAMSA for Hennop.

[12] Viljoen believed that Hennop had all the necessary certificates – although in respect of three parts of the syllabus set by SAMSA to qualify as a skipper of a vessel like *Mieke*, Hennop had received his certificates from bodies other than SAMSA. Viljoen and Brown considered that SAMSA was acting unreasonably in refusing to recognize Hennop's certification. But they decided that any insurer should be apprised of this. Accordingly, following the meeting, Brown wrote to Devereux on 23 November 2003, saying that Classic Sailing had 'ongoing difficulty' with SAMSA with regard to Hennop's qualifications as skipper. I shall set out the terms of the letter more fully when dealing with the issue of misrepresentation. He attached numerous documents reflecting the courses completed by Hennop.

[13] Devereux in turn wrote to Mr N Paice of Gallagher (the Lloyds broker). Paice, it is common cause, gave Devereux's letter to Mr J S James, the lead underwriter for the corporate member of the Lloyds syndicate, who was authorized to determine the terms of any insurance policy. James, who testified for Lloyds, said that he had no independent recollection of any conversation with Paice, but acknowledged that he had noted the word 'seen' on Devereux's letter, and said that he would not have done so unless he had read the contents of the letter and the attachments. He dated Devereux's letter 24 November 2004.

[14] I shall revert to the allegation of misrepresentation as to Hennop's

qualifications when dealing with the second special defence raised by Lloyds. Although in its plea Lloyds had alleged that there was a non-disclosure of Hennop's lack of certification, this defence is not pursued on appeal, given the concession of James under cross-examination that he had seen the documents that revealed that Hennop did not have all the SAMSA certificates required. Lloyds relied instead, on appeal, on misrepresentation as to the nature and extent of the disputes between Classic Sailing and SAMSA as to Hennop's certification to avoid liability.

The terms of the policy

[15] The written terms of the contract are set out in a cover note (Number M041209D). The period covered was 12 months with effect from 1 December 2004. The 'interest' was stated to be 'Hull Materials Etc, Machinery Outfit Etc, and everything connected therewith nothing excluded'. The sum insured was R10m, which also covered the two tenders, insured for R80 000 each. The *Mieke* was allowed to 'trade' 'not North of the Equator, not West of 20° West, not South of 45° South and not East of 70° East.' Choice of law and jurisdiction were stated to be 'English Law and South African Jurisdiction'. The terms of the policy were stated to include the Institute (of London Underwriters) Fishing Vessel clauses, clause 6 of which deals with the perils insured against. Clause 6.2 provides that the insurance covers loss or damage to the vessel caused, inter alia, by any latent defect in the machinery or hull, provided that the loss or damage is not the result of 'want of due diligence by the Assured, Owners or Managers'.

The stability book

[16] Section 226 of the Merchant Shipping Act 57 of 1951 requires the owner of a vessel in the class of the *Mieke* (Class XI) to keep on board the ship 'such information in writing about the stability of the ship as is necessary for the guidance of the master in loading and ballasting the ship'. Regulation 7(1) of the Safety of Navigation Regulations repeats this wording.[1] Regulation

[1] Safety of Navigation Regulations 1968, as amended.

7(3) states that the stability information shall be based on 'the determination of the stability . . . by means of an inclining test'. Regulation 8 sets out the form of the stability information and the requirements for drawings and measurements. Lloyds contended that the stability book on board the *Mieke* at the time when the insurance policy was concluded had not been approved by SAMSA. But there is no requirement in the Act or regulations for SAMSA approval.

[17] When the *Mieke* was first constructed as a fishing vessel in 1997 a stability book, as required by the regulations, was compiled and approved by SAMSA. On its conversion to a charter yacht SAMSA required that a new stability book be prepared. To this end Liverick was asked to carry out an inclining test, which he did, and he requested Mr M Stewart, who was in Durban, to compile a new stability book. In doing so, Stewart relied on the results of the inclining test conducted by Liverick, as well as on the latter's general plan and the former stability book. The new book was placed on board, but when the converted *Mieke* sailed to Cape Town early in 2004 she was detained there by SAMSA on the basis that the stability book had not been approved by SAMSA.

[18] Stewart advised that 19.3 tons of additional ballast (heavy material to balance a vessel) be placed in the *Mieke*. Accordingly Hennop and a crew member, Mr E S Awad, attended to the pouring of concrete into the *Mieke*'s sewage tank during one night when she was still detained. There is a dispute as to how much concrete was added and how many walls were constructed to retain it, but this is not relevant for the reasons that follow. SAMSA granted interim approval of the stability book on 15 March 2004 after the addition of ballast. The approval was valid only until 15 April. The *Mieke* was released from detention and sailed to Mozambique, where, but for one trip to Port Elizabeth, she remained until September 2004.

[19] In September 2004 the *Mieke* returned to Port Elizabeth. She was placed in dry dock and surveyed by SAMSA. The principal officer of SAMSA in the Port Elizabeth office, Captain Colenutt, did a hull survey and, on 18 October, issued a survey report. In it he described the condition of the hull and ship side valves as 'satisfactory'. Colenutt also issued a survey report: he stated that 'the required SAMSA approved stability book is aboard.' The following day a Local General Safety Certificate was issued for the *Mieke*. This stated that she was a class XI sailing vessel undertaking charter excursions or unlimited voyages in the Indian Ocean, carrying 12 or fewer passengers. The certificate stated further that the vessel had been inspected in accordance with the requirements of applicable regulations. On 21 October 2004 the *Mieke* again sailed for Mozambique.

Application of the English Marine Insurance Act of 1906 and the provisions of the Short-Term Insurance Act 53 of 1998

[20] As I have said, the parties to the policy agreed that the applicable law was English, though South African courts would have jurisdiction. Lloyds relies on sections of the English Act in support of its special defences. To the extent that there is inconsistency or a conflict between these and the provisions of the Short-Term Insurance Act, which law governs? This question is pertinent to all the special defences raised by Lloyds.

[21] The general rule is that the choice by parties to a contract of the governing law – the proper law of the contract – is valid.[2] However, legality is a question to be determined by the lex fori.[3] The ius cogens (peremptory law) of the forum cannot be excluded. Our case law is sparse on this issue, but it is the general view of writers on the subject. And it must be that peremptory (mandatory) rules of the forum – especially legislative provisions – apply. Complete party autonomy cannot prevail over the premptory provisions of a

[2] 2 (2) *Lawsa* (2 ed) 'Conflict of Laws' paras 328ff; Christopher Forsythe *Private International Law* (4 ed) p 294ff and John Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) p 143.
[3] *Lawsa* op cit para 329.

statute, especially where the action is brought in terms of the statute (as in this case). The Short-Term Insurance Act is applicable to marine insurance by virtue of the definitions of a 'short-term policy' and 'transportation policy' which expressly include insurance of a vessel.

[22] Professor Forsythe,[4] in discussing the question whether the lex fori applies even where the parties have chosen another system of law to govern their contract, refers to *Voet*[5] who drew a distinction between prohibitory statutes, which cannot be renounced, and dispositive statutes which can. Sections 53 and 54 of the Short-Term Insurance Act on which Classic Sailing relies are not prohibitory: they deal with the effect of misrepresentation, non-disclosure and illegality – issues to which I shall revert. But as Forsythe states, the distinction between prohibitory provisions and others is not easy to draw. He suggests that where the lex fori is designed to protect the weaker party in contractual negotiations the chosen law, if it is inconsistent, should not prevail.[6] In international trade, on the other hand, parties tend to be on an equal footing and may in effect contract out of the lex fori.

[23] Rather than asking whether statutory provisions are prohibitory or dispositive, a better approach to determining whether parties may exclude the operation of statutory provisions by choice of another system of law might be to question whether they can waive the application of the provisions. This question was addressed in *SA Co-Op Citrus Exchange v Director-General: Trade & Industry*[7] where Harms JA, dealing with procedural statutory provisions, held that they may be renounced by a party (in that case the State) for whose benefit they are enacted. But where public policy and interest would be prejudiced by a waiver, such provisions cannot be escaped. Waiver is not possible, said this court, if it affects public policy or interest or a right.[8]

[4] Op cit p 299, fn 33.
[5] J Voet *Commentarius ad Pandectas* Appendix to 1.4 18-22.
[6] Op cit p 301 and *Lawsa* op cit para 329 fn 12 and 13.
[7] 1997 (3) SA 236 (SCA).
[8] At 244D-245D.

This principle was affirmed in *De Jager en andere v Absa Bank Bpk*,[9] where this court held that the application of the provisions of the Prescription Act 68 of 1969 may be waived by a debtor under a contract after the prescriptive period has run because renunciation did not substantially or materially impact on the public interest.

[24] Sections 53 and 54 of the Short-Term Insurance Act are at issue in this matter. Section 53 deals with the effect of non-disclosures and misrepresentations on an insurance policy, and s 54 with the effect of a contravention of a law on a policy. Section 53 is designed to protect insured parties who are ignorant, careless or uneducated from unscrupulous insurers who attempt to escape liability on the basis of the common law that has evolved in relation to misrepresentation or non-disclosure.[10] And s 54 ensures that a policy is not avoided only because the insured has contravened a law. I shall deal with both sections in due course. Given their effect, it should not be open to the parties to contract out of the application of the provisions of that statute by choosing another system of law to govern their contract.[11] If an insured cannot waive the benefits of ss 53 and 54 – as would be the case because waiver would be contrary to public policy and interest – then equally contracting out of the benefits afforded by the sections cannot be permitted.

[25] This view is supported by Professor Michael Martinek,[12] who, referring to Von Savigny,[13] states that a distinction must be drawn between general rules of private law, which may be governed by a system other than the lex

[9] 2001 (3) SA 537 (SCA) para 17.

[10] On s 53 see *Joubert v Absa Life Ltd* 2001 (2) SA 322 (W) at 328F-H. As to the effect of s 53, and the reasons for its amendment in 2003, see *Mahadeo v Dial Direct Insurance Ltd* 2008 (4) SA 80 (W) at 86B-87D.

[11] See also *Dicey Morris and Collins The Conflict of Laws* (general editor Sir Lawrence Collins) 14 ed (2006) Vol 2, p 1649, paras 33-033 and 33-034 dealing with the proposition that in certain circumstances parties cannot, with reference to another system of law, contract out of the English Unfair Contract Terms Act 1977.

[12] 'Codification of private international law – a comparative analysis of the German and Swiss experience' 2002 *TSAR* p 234, pp 248ff.

[13] *The System of Modern Roman Law* Vol VIII (1849).

fori, and law of strictly positive imperative nature – those that bear a 'political, police-related or economic character' (Martinek's translation). In modern Swiss and German private international law these are what Martinek refers to as 'mandatory interventions' – 'norms employed by the state to regulate private relationships in the public common interest while pursuing socio-economic tasks, thereby restricting the individual freedom of private persons'.[14] These norms are of direct application, much as the values of the Constitution are. Counsel for Lloyds was constrained to concede that parties cannot contract out of provisions – and thus the norms and values – of the Constitution. The protection afforded to insured persons by the Short-Term Insurance Act, on this basis, can likewise not be avoided.

[26] There are other strong indications that the Short-Term Insurance Act, to the extent that it is inconsistent with the English Marine Insurance Act, must apply. The action was instituted under the former Act. Lloyds is regulated by that Act (Part VIII). Moreover, Lloyds relied extensively on other South African statutes such as the Merchant Shipping Act and Safe Manning Regulations. It is difficult to discern why Classic Sailing should be bound by the provisions of those Acts and not entitled to the benefits conferred by those of the Short-Term Insurance Act.

[27] But the definitive answer, in my view, is to be found in the Admiralty Jurisdiction Regulation Act 105 of 1983. The Admiralty Act governs not only jurisdiction but also the substantive law to be enforced in South African high courts, all of which are given jurisdiction for the hearing of any admiralty action for the enforcement of a maritime claim. Section 1(u) of the Admiralty Act defines a maritime claim to include one relating to 'marine insurance or any policy of marine insurance'. Section 3 provides that any maritime claim may be enforced by an action in personam and may be instituted against a person in respect of whom a court has jurisdiction in terms of Chapter IV of

[14] Martinek op cit p 249.

the Insurance Act 27 of 1943. Chapter IV governed insurance by members of Lloyds. That Act has been repealed by the Short-Term Insurance Act. But the latter Act still governs Lloyds (Part VIII). The reference to the former Act must be read now as a reference to the current Act.

[28] Section 6 of the Admiralty Act reads:

‘ Law to be applied and rules of evidence
(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall-

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.
(2) The provisions of subsection (1) *shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection* (my emphasis).

. . . .

(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.’

[29] Subsection 5 thus does allow parties to make a choice as to the legal system they wish to govern their contract. But this cannot mean that they can contract out of legislative provisions that amount to ius cogens. One cannot read subsections 2 and 5 in isolation. Subsection 5 must be subject to subsection 2. Read together, as they must be, the subsections mean that while the parties may choose a non-South African system of law to govern their contract, they may not do so where the provisions of the other system are inconsistent with peremptory South African law. The effect of subsection 2 is that ss 53 and 54 of the Short-Term Insurance Act apply to the contract. And to the extent that the English Marine Insurance Act is inconsistent with

peremptory statutory provisions it is not applicable.[15]

The first defence: Non-disclosures about the stability book

[30] Lloyds relied on s 18 of the English Marine Insurance Act 1906 in contending that the non-disclosure of the facts that the stability book on board the *Mieke* at the time when the insurance policy was issued was not approved by SAMSA, and was inaccurate. Section 18 reads:

'(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such a disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.'

[31] Cleaver J in the high court, assuming that s 18 was applicable, considered the English cases and writers in respect of this section and held that it was not necessary to show that 'the circumstances will have a decisive influence on the judgment of [a] prudent insurer'. All that the latter need show is that the circumstances would have had an effect on the insurer in weighing up the risk, and in determining whether to insure, at what premiums and subject to which conditions. Moreover an insurer must show that the non-disclosure induced it to enter into the contract (even if it was not the sole inducing cause).

[32] Lloyds argued on appeal that it relied on two factors that should have been disclosed to it. First, the stability information on board was inaccurate and Viljoen either was or ought to have been aware of this. Second, at the time when the insurance contract was concluded the stability book was not stamped as approved by SAMSA, a material fact that should have been brought to the attention of Lloyds. As to the second basis, there is no requirement in the regulations or elsewhere that SAMSA approval be

[15] 'Law' in subsection 2 is statutory: *R v Detody* 1926 AD 198 at 201 where Innes CJ said 'The word "laws" means statutes.'

indicated through stamping. And in fact SAMSA had approved the book prior to the conclusion of the contract of insurance. That disposes of this ground for avoiding the contract on the basis of non-disclosure.

[33] The first basis – inaccuracy – of the defence based on non-disclosure is argued by Classic Sailing to be one it did not have to meet at the trial. In its plea Lloyds stated that the particulars of the vessel were inaccurate. On appeal Lloyds has argued that the position and quantity of the ballast was inaccurately described in the stability book. This proposition was not put to Hennop when he testified as to the loading of the ballast. Nor was it put to Viljoen, who had no first-hand experience of where the ballast had been placed, but who represented Classic Sailing as its owner. In fact the high court found that Classic Sailing had had to meet a defence only as to inaccurate calculations. This is what the plea and responses to requests for further particulars referred to, and this is what Stewart testified about in giving evidence as to the design of the *Mieke* and his recommendation as to the quantity of ballast to be placed in the sewage tank. He testified also that SAMSA's naval architect, Ms E Dzinic, had been satisfied with line plans for the *Mieke* drawn by Stewart and with the recalculated tonnage, although she had had queries that required explanation. Changes to figures reflecting size and weight made by him subsequently were of no consequence, he said, and this was not challenged. Moreover, one of the expert witnesses for Classic Sailing, Dr J Zietsman, testified that such differences did not affect the calculations reflected in the stability book. Dzinic herself, in April 2004, had concluded that the 2004 stability book was mathematically correct and acceptable 'in essence'. And importantly, James was not asked how he would have responded had he been advised, through the brokers, that there were insignificant differences in measurements reflected in the stability book.

[34] As I have indicated, s 53 of the Short-Term Insurance Act applies to the alleged non-disclosure. It sets the test for determining whether a non-

disclosure has the effect of invalidating a policy or excluding the liability of the insurer. It reads:

'Misrepresentation and failure to disclose material information

(1) (a) Notwithstanding anything to the contrary contained in a short-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2) -
(i) the policy shall not be invalidated;

(ii) the obligation of the short-term insurer thereunder shall not be excluded or limited; and

(iii) the obligations of the policyholder shall not be increased,

on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof.

(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.

. . .'.

[35] Thus even if there had been a failure to disclose that the stability book was not accurate, it could hardly be said to be material. The 'reasonable, prudent person' would not have thought that information as to the measurements of the ship, or a stamp of approval, affected the assessment of the risk, given that the purpose of the stability book information is to guide the master in loading and ballasting the ship. SAMSA itself was not concerned about the stability of the *Mieke*. It had allowed her to sail, from Cape Town to Port Elizabeth and to Mozambique and back. And the safety certificate issued by Colenutt on 16 October 2004, which remained valid until 6 October 2005, was not placed in issue. Accordingly I find that there was no failure to disclose by Classic Sailing that would have invalidated the policy or exempted Lloyds.

The second defence: The misrepresentation as to Hennop's certification

[36] The second special defence relied upon by Lloyds is that Viljoen, through Brown and Devereux, misrepresented the nature of the dispute between Classic Sailing and SAMSA as to Hennop's certification as a skipper. The correspondence between Brown and Devereux, and Devereux and Paice of A J Gallagher form the basis of the defence based on misrepresentation.

[37] On 23 November 2004 Brown of Thebe sent a fax to Devereux. It was some 19 pages long, including the cover page which read:

'Re: Classic Sailing Adventures – Cover Note

We advise that the Insured has an ongoing difficulty with SAMSA with regard to the qualifications of the skipper of the vessel.

Attached you will find a mass of documentation dealing with the skipper, Mr Willy Jan Hennop's certification which we are confident would enable Mr Hennop to operate a charter yacht vessel of the size of the "*Mieke*" anywhere else in the world other than the bureaucratic mess that exists here regarding acceptability of certification from bodies such as the Royal Yacht Association U.K. I too have an ongoing fight with SAMSA regarding the re-issue in the new format of my own coastal skippers certificate and I can tell you it is one long bureaucratic mess.

As matters presently stand there is confusion in the offices of SAMSA as to whether or not they are able to issue a South African Certificate of Competency as they seem to be unable to decide as to whether or not they will accept bodies such as the Royal Yacht Association as being competent bodies for the certification of seagoing people onboard yachts, be they commercial or not.

We submit these documents as we seek confirmation that Insurers are happy with his qualifications.'

Some 14 certificates were attached to the fax.

[38] On the same day Devereux sent a fax to A J Gallagher, for the attention of Paice, attaching the same documents. Devereux wrote:

'Re: Classic sailing – MY "*Mieke*"

The skipper of this vessel a Mr Willy Jan Hennop is engaged in a dispute with SAMSA regarding his qualification to act as skipper.

Although the "*Mieke*" is not a fishing vessel SAMSA seem keen to impose their authority and we have been asked to request that you *view Hennop's qualifications not to try to override SAMSA but rather to ascertain whether they satisfy underwriters.* (My emphasis.)

I believe that Kuttel had a similar problem with SAMSA but eventually prevailed and his Yachtmaster Ocean certificate was recognized.'

[39] Paice took the fax from Devereux with the attached documents to James at Lloyds. And as I have already said, James wrote 'seen' on the fax. Paice advised Devereux of this by email the following day. And Devereux in turn sent an email to Brown on 25 November 2004 advising him that the underwriters had noted 'seen' on his fax. He also ventured the view that

'from a practical point of view my contract says nothing about compliance with the Merchant Shipping Act nor has it a skipper's warranty so as your client has demonstrated that his skipper has the necessary qualifications . . . the unseaworthy warranty which is what we would rely on if the skipper was unqualified would not be breached.
Underwriters having only noted "seen" on the documents are basically saying that they don't object and as far as they are concerned the skipper is acceptable.'

[40] The high court found that no misrepresentation had been made. The fact that Lloyds had been informed that SAMSA had not accepted Hennop's qualifications, and that there was confusion in the SAMSA offices meant that Lloyds had been put on guard. The court thus did not accept the view of an English underwriter, Mr P Northfield, called by Lloyds. Northfield, who had considerable experience in marine insurance, had testified that it was implicit from the letters that Hennop would receive the certification required from SAMSA imminently. Moreover, Northfield had said that a prudent underwriter would have been substantially influenced as to whether to accept the risk, or restrict the terms or adjust the premiums, had he been aware that the regulatory authority's certification was not imminent. Of course Northfield's opinion on the meaning of the statements made is not even relevant:[16] it is for the court to interpret what was said and would be understood. But the high court found in any event that whether or not a prudent underwriter would have been influenced, James had in fact accepted the risk having seen that Hennop was not certified by SAMSA. No misrepresentation had thus been

[16] See *KPMG Chartered Accountants (SA) v Securefin & another* 2009 (4) SA 399 (SCA) para 40.

proved.

[41] On appeal Lloyds accepted that the high court correctly set out the tests for determining whether a misrepresentation vitiates a contract. These were that there must be a statement of fact, present or past, or opinion, which is untrue, material to the insurer's appraisal of the risk and which in fact induced the insurer to enter into the contract. (As I have said earlier, the test is now to be found in s 53 of the Short-Term Insurance Act.) But Lloyds argued that the statements about Hennop's qualifications imply that SAMSA would issue formal certificates; that in effect the dispute was about minor paperwork to be completed by an office in disarray; and the matter was of no consequence. In effect, the problem with SAMSA was trivialized, and what was conveyed to James was actually false. The essence of the defence, as argued on appeal, was that Devereux had implied, in his letter of 23 November to Gallagher, that Hennop's dispute with SAMSA would be resolved and that SAMSA would recognize him as qualified and certificated to skipper the *Mieke*.

[42] In my view the letter written by Devereux, seen by James, made it absolutely plain that SAMSA had not certified Hennop as a skipper for a vessel of the class of the *Mieke*. Lloyds was asked only if it were satisfied with Hennop's existing qualifications. James' conduct made it clear that it was. No misrepresentation was proved and the test in s 53 need not be applied.

The third defence: Illegal voyage

[43] Section 41 of the English Marine Insurance Act provides:

'There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.'

Lloyds' argument was that the *Mieke* was sailed in an unlawful manner, contrary to the provisions of the Merchant Shipping Act, and to the regulations promulgated in terms of that Act. Section 73(1) of the Merchant Shipping Act

provides that the owner and master of every ship going to sea from any South African port 'shall ensure that there is employed on board of that ship . . . the number of officers and other persons, duly certificated as provided by regulation . . .'. Contravention of the section amounts to an offence attracting a penalty of a fine or imprisonment not exceeding one year. Section 226(1) of the Merchant Shipping Act requires that such stability information as is necessary for guiding the master in loading and ballasting the ship be kept on board. And the regulations require that this information be reliable and up to date.

[44] Lloyds argued that Classic Sailing and Hennop had contravened both these sections knowingly, and were thus guilty of a breach of the implied warranty of lawfulness. Cleaver J in the high court found that the 'adventure' was not illegal, relying largely on English and Australian authorities in this regard and in part on s 54 of the Short-Term Insurance Act. I do not consider it necessary to traverse any of the English or other cases. The defence of illegality can be disposed of shortly.

[45] First, the stability book was on board and met the requirements of the Merchant Shipping Act, as discussed earlier. And SAMSA had had no difficulty in allowing the *Mieke* to sail. It has a discretion to do so under s 85 of the Merchant Shipping Act. And in relation to the certification of the crew, even if no formal exemption had been granted to Hennop, he had been permitted by SAMSA to sail the *Mieke*. Colenutt certainly knew that Hennop was going to sail to Mozambique when he issued the general safety certificate in October 2004. On the face of it, no illegality was committed.

[46] Secondly, Classic Sailing, through Thebe and Devereux, advised Lloyds that Hennop's certificates were not recognized by SAMSA. It could hardly have warranted that he was properly certificated. There was thus no warranty in this regard.

[47] And thirdly, s 54(1) of the Short-Term Insurance Act is not consonant with s 41(1) of the Marine Insurance Act.[17] I have said earlier that Classic Sailing and Lloyds could not contract out of that Act and to the extent that English law is inconsistent with the provisions of the Act it is inapplicable to the contract. Section 54 (1) provides:

'54 Validity of contracts

(1) A short-term policy, whether entered into before or after the commencement of this Act, shall not be void merely because a provision of a law, including a provision of this Act, has been contravened or not complied with in connection with it.'

On the assumption that Hennop or Classic Sailing were guilty of contraventions of the Merchant Shipping Act, the effect of s 54(1) is that the insurance policy would not be void 'merely because a provision of a law' had been contravened.

[48] Lloyds argued that the use of the word 'merely' indicated that the contravention must be collateral to the claim and not related to the cause of the loss in order for the policy to remain valid. That may be so. In court the analogy of an insured car being stolen, and the insurer refusing to meet the claim because of a traffic offence committed by the insured before the theft, was debated. Clearly the insurer would not be allowed to escape liability in such a case.

[49] But equally in this case the sinking of the *Mieke* was not related to Hennop's lack of certification, nor to the stability information onboard. That is common cause. In my view, s 54(1) of the Short-Term Insurance Act precludes Lloyds from relying on any breach (if there was one) of an implied warranty introduced by the English Marine Insurance Act. This defence must thus also fail.

[17] It should be noted that Hare op cit pp 902-903 does not consider the effect of s 54 (1) of the Short-Term Insurance Act on the breach of a warranty of legality but does state that warranties that the insured will comply with statutory requirements is subject to s 54, such that a policy will not be void because of the illegality: p 327 fn 51.

The sinking of the *Mieke*

[50] The principal witnesses for Classic Sailing who testified as to the sinking of the *Mieke* were Hennop and Mr D Grieve, the vessel's engineer. The cook on board, Ms C du Plessis, who testified for Lloyds, also described the event and took photographs of the vessel, from the tender, as she sank.

[51] Prior to the sinking, and before leaving Vilanculos for Pemba on 15 September 2005, the crew loaded 3 400 litres of diesel in the fuel tanks. The weather deteriorated after they left Vilanculos, and a heavy swell and strong wind lasted about two days. On 17 September Grieve discovered that they had somehow, inexplicably, lost the fuel taken onboard at Vilanculos. Hennop decided to sail to shore. A small amount of fuel remained in what was termed the 'day tank'. The main engine was run at idling speed. This was not normally done, and it had the effect of making the engine vibrate.

[52] Early in the morning (at about 6h30) of 18 September, Hennop and Grieve were on deck when the bilge alarm sounded. Grieve went to investigate. As he entered the transverse passage in front of the engine room he stepped into water, which he said was about ankle depth. He attempted to turn on the emergency lighting but could not. When he went into the engine room there was water 'swishing in and out, up and down the walls'. He was able to start the starboard generator, the lights came on and he primed the mechanical bilge pump and started to run the electrical bilge pump. He asked Hennop, who had come into the engine room, to increase the revolutions for the main engine. But there was water everywhere: 'it was chaos'. And the pumps were not having any effect. He had checked several times that the seacocks in the engine room and elsewhere were closed.

[53] Hennop, in seeking the source of the inflow of seawater, noticed that the side passage close to the rudder compartment, was full of water. A smell of exhaust gases was evident in the side passage and the engine room.

[54] When the water was about hip-height Grieve had to shut down the generator to avoid electrocution. He dived below the water level in the engine room to see if he could find the source of the ingress of water, but could see nothing except disintegrating cardboard boxes that had been stored there and were floating around. He could hear the hull cracking. There was a strong smell of diesel.

[55] Hennop instructed the crew to bail the water out with buckets, but the inflow of water was so great that he decided they should get off the vessel, and instructed Grieve to see to it. Grieve and the rest of the crew got on to one of the tenders. Hennop remained on deck. The vessel was sinking from the stern. Its exhaust was under water. When Grieve had discovered that the fuel tanks were empty, he had noticed that there were traces of moisture around the exhaust as it exited the hull. The area was damp. He had not told Hennop about this, thinking it was of no significance. But as the vessel sank, Grieve observed from the tender that there were no bubbles coming off the exhaust into the water although the main engine was still running. This too suggested that something was amiss in the exhaust area.

[56] One of the reasons suggested by Lloyds as to the cause of the sinking was that the cover for the sewage tank had not been secured. However, Hennop and Grieve testified that the hatch cover had been firmly in place at the time of the ingress of water, although it had not been bolted down. Grieve said that when he first went into the transverse passage to attend to the bilge alarm he had tried to lift the cover so see if the ingress was through the sewage tank. But the pressure of water above the cover was such that he could not lift it. Hennop too said that when he had tried to lift the cover the force of the water prevented it from being moved. Du Plessis testified that she had seen sewage in the water swirling through the vessel. No one else had done – but Hennop had said he smelled sewage. In fact, nothing turns on this and it is clear that the very rapid and large ingress of water could not have

been a result of the cover of the sewage tank being unsecured.

[57] When the *Mieke* listed to port Hennop jumped off deck and swam to the tender. The crew watched the vessel come upright again and then sink at the stern. They proceeded to shore.

The cause of the sinking of the *Mieke*

[58] Cleaver J in the high court found that Classic Sailing had discharged the onus of proving that the *Mieke* sank as a result of a latent defect in the hull – an excessive stress concentration in the structure of the hull which resulted in a fatigue failure and associated sudden propagation of cracks and the sudden ingress of seawater. In this regard, the judge had regard to the evidence of Hennop and Grieve, described above, and concluded that a large mass of water had entered the aft portion of the *Mieke*, where the exhaust was located, which caused the *Mieke* to sink by the stern. This conclusion was supported by the evidence of Hennop that there was a break in the welds where the exhaust system exited the hull, and by that of Grieve that he could see no bubbles discharged into the sea when he had left the vessel and was on the tender.

[59] The high court took the view that in the absence of direct evidence as to the cause of the sinking, Classic Sailing had to establish inferentially that the loss of the *Mieke* was caused by a latent defect – a peril insured against. This was the approach of the majority of this court in *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd & another*.[18] Scott JA (in the minority judgment) said:[19]

'.....it should be observed that while an insured would ordinarily be obliged to adduce evidence identifying the precise cause of the loss and the particular defect responsible therefor, such evidence is not necessarily essential. In principle there can be no reason why, in the absence of evidence as to the precise cause of the loss, an insured should not in appropriate circumstances be able to establish inferentially that the loss was occasioned by a latent defect.'

The majority considered that on the probabilities the owner of the vessel, being 'caring and meticulous',[20] would not have allowed it to go to sea had he known that there was any defect in the hull. This court concluded that the

[18] 1996 (4) SA 1167 (A).

[19] At 1179I-1180A. The principle was not in issue in the majority judgment.

[20] At 1188A-D.

inference to be drawn from the absence of evidence of wear and tear or patent damage was that there was an inherent defect covered by the insurance policy.

[60] Cleaver J also accepted the evidence of two expert witnesses who testified for Classic Sailing: Dr J Zietsman and Dr C Grobler. Their reports and testimony were based on the evidence of Hennop and Grieve as to how the sinking occurred, and on scientific hypotheses flowing from that and from evidence as to the structure of the vessel and repairs done to the exhaust in particular over several years. Before dealing with their evidence I must emphasize that where there is eyewitness or direct evidence of an occurrence this may render the reconstructions of experts less relevant or even irrelevant (this observation is particularly pertinent to the evidence of Lloyd's expert Mr A J Sinclair): see *Parity Insurance Co Ltd v Van den Bergh*[21] and *Van Eck v Santam Insurance Co Ltd*[22] where the court said that while it was not unusual for parties to tender expert evidence to determine the cause of a collision, the expert's evidence is 'inevitably based on reconstruction and cannot conceivably bear the same weight as direct, eye-witness testimony of the event in question'. See also *Michael & another v Linksfield Park Clinic (Pty) Ltd & another*.[23]

[61] Before turning to the evidence of the experts it is important to state that all causes of the *Mieke's* sinking save a latent defect in the hull that allowed for the ingress of seawater can be excluded. The vessel was not scuttled; the crew were not negligent; the seacocks were closed; there was no patent defect and there was no evidence of wear and tear that had any causal connection. (Viljoen had thought that a collision with a floating object might have caused a crack in the hull to develop, but the crew had not been aware of any collision and the experts were agreed that if there had been one sufficient to cause damage the crew would have been aware of it. In any

[21] 1966 (4) SA 463 (A) at 476B-H.
[22] 1996 (4) SA 1226 (C) at 1229H-1230B; see also the cases cited at 1229I-1231H.
[23] 2001 (3) SA 1188 (SCA) para 40.

event a collision would have been covered by the policy.)

[62] Counsel for Lloyds argued on appeal that there was no objective evidence – such as that of a SAMSA surveyor – that wear and tear were excluded: but Hennop and Viljoen's evidence that the *Mieke* was in good condition when she set sail for Mozambique was not gainsaid. The only inference to be drawn then is that the hull was latently defective. There does not need to be proof of the precise defect that caused the sinking.

[63] In any event, it was the conclusion of an expert, Captain David, hired by Lloyds to investigate the loss, and whose expert report was filed by Lloyds, that there was no readily apparent cause for the sinking: while discounting the pleaded cause, he could not say what other factor had allowed for a rapid ingress of seawater, other than an overflow from the sewage tank which had not been properly sealed. This suggestion is not consonant with the evidence of Hennop and Viljoen and was rejected by Zietsman. Moreover, David's theory would not have explained the large ingress of water that resulted in the sinking of the vessel. Interestingly, David did not testify, although he was available to Lloyds and in court throughout the proceedings.

[64] The evidence of the experts who prepared reports and testified for Classic Sailing supported the inescapable inference that there was a latent defect of the nature pleaded by Classic Sailing. Zietsman, who has a doctorate in ocean engineering, and over 30 years' experience, took into account the evidence of Hennop and Grieve as to the structure of the vessel and the vibration of the engine when idling; the invoices reflecting repairs to the exhaust and the hull in the area of the exhaust over a period; prepared a numerical model of the *Mieke* and assessed the rate at which water may have entered the vessel through various apertures, and did flooding calculations. His view was that the sudden and rapid flooding seen by the crew was consistent with a large aperture having opened to the sea. Although water

might have leaked slowly into the hull when cracking first occurred, it was probable that there was a sudden growth of a crack because of the vibration of the exhaust pipe.

[65] Over the years since the *Mieke* was built cracks had appeared from time to time near the exhaust. These had been repaired by welding. In February 2001 a hole was cut in the hull at the stern and the exhaust assembly was replaced with a stainless steel doubler plate, welded to the hull, to reduce cracking in the area of the exhaust exit. The hull itself was made of a different metal.

[66] Immediately prior to the sinking the engine had been idling for some time, causing vibrations in the hull which Zietsman said would have exacerbated the growth of cracks near the engine room. In his report he stated:

'These vibrations most probably served as a driver for sudden crack growth. . . . The cracks which had previously occurred had been repaired in part, by welding stainless steel doubler plates on either side of the hull. These repairs and modifications probably introduced stress concentrations at those locations. . . . The repairs to the exhaust penetrations through the hull occurred in the splash zone and the chance of development of corrosion fatigue was thus enhanced due to wetting and drying in that area.'

[67] This hypothesis was confirmed by Grieve's evidence that he had noticed damp in the area of the exhaust. Zietsman could not find confirmation that the correct welding procedures had been used to weld stainless steel to the hull. Even if they had, however, differential expansion rates of different metals could lead to excessive stresses, he said.

[68] Zietsman concluded that the sudden rapid flooding was probably caused by an aperture or apertures that developed near the engine room.

'Stress concentrations in those areas, together with fatigue corrosion mechanisms, driven by the vibrations caused by the engine most probably caused the cracks to grow suddenly. . . . The growth of the cracks was most probably associated with an initially slow, but finally rapid flooding, causing the yacht to settle by the stern and then sink.'

[69] Zietsman had requested Classic Sailing to consult a metallurgist, Dr Grobler, to confirm his conclusions. Grobler spoke to Viljoen and to the person who had over the years repaired the hull, Mr F J J Botha, about the structure of the *Mieke* and the repairs effected over the years. Grobler concluded that the welding done in the past and the use of the stainless steel doubler plate had been far from ideal (the latter increasing the risk of fatigue cracking) and that there was additional cyclic loading because of the differential thermal expansion of the different metals used. Other factors, such as dissimilar welds, had also led to stresses on the hull. There is no need to consider these. Grobler's evidence confirmed Zietsman's conclusions.

[70] The expert witness for Lloyds on the question of the cause of the sinking, Mr Sinclair, also wrote a report and testified. Unlike Zietsman and Grobler, however, he did not take into account the evidence of Hennop, Grieve and Viljoen, and denied that there would have been excess vibration caused by the engine idling for a long period. He offered no explanation as to the reason for the *Mieke* sinking and conceded reluctantly when cross-examined that the vessel had indeed sunk. He insisted that there must have been substantial leaking before the morning of 18 September 2005, which could not have gone unnoticed. He could not of course counter the evidence of the crew as to the sudden ingress of seawater. Cleaver J correctly rejected his evidence.

[71] When asked by this court to point to any finding in relation to the cause of the loss by the high court that was wrong, counsel for Lloyds could suggest only that Cleaver J had drawn his own conclusions not based on evidence. The learned judge said that because the exhaust exited above the water level it was 'feasible that cracks occurring in the area would have taken longer to develop'. The evidence of the cook had been that at 4h00 in the morning she felt that 'the vessel had settled by the stern'. If that were the case, the learned

judge continued, 'there would have been more time when pressure from the ocean would have been applied to any crack or cracks which might have been in existence without being observed'.

[72] But in fact the court's conclusion was based on Zietsman's evidence that a critical area for corrosion is the splash zone which is at times immersed and at times above water and that that was another area where the crack that ultimately became a large aperture might have developed. The criticism is thus without warrant, and there is no reason to differ from the high court's findings as to the cause of the sinking.

Was the cause of the loss a 'latent defect'?

[73] Lloyds argued that even if the conclusion drawn by the high court (that the *Mieke* sank because of a crack in the hull that had developed into a large aperture) was correct, the crack was not a latent defect. As I understood the argument it was that there was no defect when the hull was constructed. A fatigue crack that developed during the course of sailing was not a peril insured against.

[74] Cleaver J rejected the argument, referring to *The Caribbean Sea*,[24] where Robert Goff J held that fatigue cracks, developed over time, but attributable to faulty design (also in respect of the manner of welding) amounted to latent defects. A combination of circumstances resulted in a fracture opening up a significant period of time before the end 'of the natural life of this ship'.[25] The court held that the defective design had the effect that defects would inevitably develop in the ship, but would not amount to ordinary wear and tear. A similar approach is to be found in *The Nukila.*[26]

[24] *Prudent Tankers Ltd S A v The Dominion Insurance Co Ltd (The "Caribbean Sea")* [1980] Vol 1 Lloyd's Rep 338 (QB).
[25] At 347.
[26] *Promet Engineering (Singapore) Pte Ltd v Sturge & others (The "Nukila")* [1997] Vol 2 Lloyd's Rep 146 (CA). See also *Arnould's Law of Marine Insurance and Average* 17 ed (2008) 22-22, pp 939-940.

[75] In my view, the high court correctly found that the 'excessive concentration in the structure of the hull' which led to fatigue failure as a result of heating and vibration amounted to a latent defect covered by the policy. I have already said that all other causes of the sinking can be excluded. Accordingly Lloyds is liable on the policy and Classic Sailing's conditional cross appeal does not arise for consideration.

The appeals by Thebe and Devereux CC on the costs orders

[76] Cleaver J correctly found that because Lloyds was liable, the conditional claims against Thebe and Devereux CC fell away. And since I find that Lloyds is liable, there is no need to consider the soundness of these claims. But the high court decided that because counsel for Thebe and Devereux CC had not participated in the hearing in so far as the sinking of the *Mieke*, and whether the loss was covered by the policy, were concerned, they should be awarded only half the costs of the trial (although senior and junior counsel for each had been present throughout the hearing). They have appealed against the costs awards.

[77] It will be remembered that Thebe and Devereux CC were joined by Classic Sailing as defendants only when Lloyds raised the special defences. Since these rested, to a substantial extent, on letters written by Brown and Devereux, I consider that Classic Sailing had no choice but to join both. Brown had written to Devereux, and Devereux had in turn written to Paice of Gallagher. These letters formed the basis of the defences of misrepresentation and non-disclosure.

[78] It is trite that the award of costs is a matter within the trial court's discretion, although the general rule is that in commercial litigation costs follow the event. The discretion must be exercised judicially, and in this case it must be asked why the general rule was departed from.

[79] Cleaver J considered that costs in respect of the days on which the evidence on the sinking, and its cause, was given by Hennop, Grieve, Zietsman, Liverick, Du Plessis and Stewart should not be awarded to Thebe

and Devereux CC. This decision ignored the fact that Thebe and Devereux CC's liability was directly affected by whether the sinking was caused by an insured event – the latent defect. They were thus entitled to be represented in court when that evidence was given. And the evidence was not self-contained. Viljoen, for example, gave evidence in respect of the structure of the *Mieke* and the repairs to it, as well as on the misrepresentations and non-disclosures alleged. Hennop testified as to the sinking and as to the stability book and his certification. On what basis should Thebe and Devereux CC have decided when and when not to be in court? The issues were not separated, nor even susceptible to separation.

[80] Thebe and Devereux CC were compelled to defend the claims against them, which had been initiated by the defences raised by Lloyds. They were entitled to representation throughout the trial. Counsel for both point out that these two appellants may have been penalized with a costs order had they extended the period of the trial by cross-examining witnesses unnecessarily.

[81] In the circumstances I consider that the discretion exercised by the high court in awarding Thebe and Devereux CC only half their costs cannot be justified. Lloyds must pay the full costs of Thebe and Devereux CC who were joined only because of Lloyds' defences.

[82] In the circumstances Lloyds' appeal must be dismissed and the appeals of Thebe and Devereux CC must be upheld.

1 The first appellant's appeal is dismissed with costs, including those occasioned by the employment of two counsel.
2 The appeals by the second and third appellants are upheld with costs, including those occasioned by the employment of two counsel.
3 Paragraph 1.4 of the order of the high court is replaced with the following:
'The first defendant is ordered to pay the costs of the second and third defendants including the costs occasioned by the employment of two counsel and the preparation expenses of Mr Child.'
4 The respondent's conditional cross-appeal is dismissed.

_____
C H Lewis
Judge of Appeal

APPEARANCES

FIRST APPELLANT:	M Wragge SC (with him D J Cooke) Instructed by Bowman Gilfillan Attorneys, Cape Town. Matsepes, Bloemfontein.
SECOND APPELLANT:	M J Fitzgerald SC (with him D Melunsky) Instructed by Deneys Reitz Inc Cape Town Claude Reid Attorneys Bloemfontein
THIRD APPELLANT:	R D McClarty SC (with him P A Corbett) Instructed by Reillys, Cape Town Matsepes, Bloemfontein
RESPONDENT:	R W F MacWilliam SC (with him L Burger) Instructed by Dawson Edwards & Ass Cape Town McIntyre & Van Der Post, Bloemfontein.