THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 312/2002
Reportable

In the matter between

LAPPEMAN DIAMOND CUTTING WORKS (PTY) LTD
APPELLANT

AND

MIB GROUP (PTY) LTD
FIRST RESPONDENT

GLENRAND MIB LTD
SECOND RESPONDENT

CORAM: HOWIE P, BRAND, LEWIS, HEHER JJA, VAN HEERDEN AJA

HEARD: ***19 AUGUST 2003***

DELIVERED: ***29 SEPTEMBER 2003***

Summary: Extent of specialist insurance broker's duty to advise insured of implications of promissory warranty or obligation: when claim arose and whether prescribed.

JUDGMENT

LEWIS JA

[1] The principal issue in this appeal is the nature and extent of a specialist insurance broker's duty to his client to draw to the attention of the client, and to explain, the existence and implications of an onerous term in an insurance policy. A subsidiary issue is whether, should a breach of the duty be found to have occurred, prescription has run against the appellant.

[2] The appellant carries on the business of diamond cutting and polishing in Randburg, Gauteng, and in the erstwhile Pietersburg (now Polokwane). Roger Lappeman, the managing director and a shareholder of the appellant, is the principal protagonist in the litigation against the respondents, insurance brokers. The respondents have by agreement assumed joint and several liability for any order made against the first respondent, and the second respondent plays no role in the determination of the issues before this Court. I shall refer, thus, only to the first respondent ('the MIB Group').

[3] The litigation commenced with an action against the underwriter and the MIB Group for payment of a claim by the appellant for the loss of diamonds. The action against the MIB Group was, however, withdrawn during the course of the proceedings. The action against the underwriters was dismissed by Plewman J in November 1993. The appellant then instituted action against the MIB Group for two payments of US $2 751 936 and $9 851 467 respectively (the amounts claimed initially from the underwriter), alleging that these sums were the damages sustained by it as a result of the MIB Group's breach of contract, alternatively, negligent performance of a duty. Its case was pleaded in the form of a main claim with various alternatives. Only the main claim is relevant here and, for convenience, when I refer to the claim I mean the main claim.

[4] This is both an appeal and a cross-appeal against the decision of the majority of a full bench in the Johannesburg High Court (the cross appeal lies against the finding that the claim had not prescribed). Both appeals lie with the special leave of this Court.

The history of the action

[5] When the trial (in the Johannesburg High Court, before Joffe J) commenced at the beginning of 1997 various aspects of the *lis* had already been separated for determination in terms of rule 33(4). A further ruling under rule 33(4) was made at the outset of the trial that the MIB Group's liability under the claim be determined, but that its quantification would be dealt with subsequently. After the appellant's first witness, its attorney, had given evidence it was further ruled that the question whether the claim had prescribed should be determined first. A subsequent amendment to the appellant's further particulars made the last ruling nugatory, and in the result the trial on the merits proceeded.

[6] A number of further amendments, occasioning postponements, were granted such that the trial resumed only towards the end of 1998. It is not necessary to traverse the evolution of the particulars of claim and the defences. The claim ultimately adjudicated is the following. In July 1988, Lappeman, representing the appellant, and Mr Alec Holmes, representing the MIB Group, entered into a contract in terms of which, inter alia, the MIB Group would act as the appellant's insurance broker and would procure insurance from underwriters. In doing so, the MIB Group would act with reasonable care and skill 'such as could be expected of a professional insurance broker'. Further, the MIB Group undertook to familiarise itself with the nature and the scope of the appellant's business, which included ascertaining whether the appellant was able to fulfil the requirements of an underwriter in terms of a policy. The MIB Group was obliged to 'draw the

attention of the plaintiff [the appellant] to any promissory warranties . . . applying to the policies'.

[7] The critical provision in the policy taken out by the appellant, and on which the underwriters had relied in avoiding the claims made by the appellant, was clause (b) of the 'Specific Conditions' which reads:

'It is understood and agreed that the Assured shall keep detailed records of all sales, purchases and other transactions and that such records shall be available for inspection by the Underwriters or their representatives in case of a claim being made under this Insurance Certificate.'

The underwriters were held not liable to the appellant when sued because it had not kept the records required. Plewman J found that clause (b) constituted a promissory warranty and that it had been breached.

[8] The basis of the appellant's claim is that the representatives of the MIB Group, over the period when the appellant was insured, had not told Lappeman about the existence of this provision; had not familiarised themselves with the appellant's business which was such that not every record of a transaction was kept; had not explained to him the implications of failure to keep records, and was therefore in breach of its duties as listed above. Consequently, it was alleged, the appellant did not keep records strictly in compliance with the requirements of clause (b) with the result that the underwriter avoided, or cancelled, the policy, alternatively refused to indemnify the appellant, because of non-compliance. The appellant was accordingly not able to recover the losses suffered by it.

[9] Joffe J in the trial court found that the MIB Group was not liable for any breach of duty to the appellant, and that in any event its claim had prescribed. He granted leave to appeal to a full bench of the High Court, Johannesburg on the issue of prescription and this Court granted leave also to appeal against the decision that there was no breach of a duty. Malan J, with whom Blieden J

concurred, found that there had been no breach on the part of the MIB Group, and that the claim had to fail. Cloete J dissented, holding that there had been a breach of a duty by the MIB Group in failing sufficiently to enquire about the appellant's manner of doing business and record-keeping. I shall return to the respective findings in the full court later in the judgment. That court unanimously held, however, that the appellant's claim had not prescribed.

The evidence

[10] The insurance claims made by the appellant were in respect of diamonds stolen from its premises in Pietersburg in the 1989/1990 insurance period. These were all diamonds of low grade. Lappeman contended, and this was not contested, that the records in respect of the diamonds stolen had been properly maintained. He conceded, though, that he did not keep records of all transactions done by the appellant.

[11] This was so, Lappeman claimed, because the diamond trade is one with a tradition of confidentiality. Deals are done informally, and records are not retained. A contract for the sale of a diamond may take place on a handshake, or may be recorded on a slip of paper that is subsequently discarded or destroyed. Such transactions are referred to as being 'off-the-book'. The reason for non-retention of records is primarily to protect the identity of the purchaser. The tradition arose in Europe where trading in diamonds was done by people who bought and sold confidentially, particularly preceding and during the Second World War, when diamonds were sold, or handed for safekeeping, to dealers who would keep the stones and return them to the owners in due course.

[12] The evidence for the appellant of Mr Noel Newton, also a diamond cutter with considerable experience in the diamond trade, was that off-the-book transactions are common throughout the world. If one did not understand that off-the-book transactions were customary in the trade one should not be in it: one could not survive in the trade if ignorant of the custom, he said.

[13] Lappeman and Newton testified that the practice of entering

into off-the-book transactions was not illegal. The purpose was not to avoid paying tax, for example. A record would be kept of the transaction but not of the identity of the purchaser. Another transaction often not recorded was the swapping of rough stones for smooth. It was not denied, however, that certain transactions undertaken by diamond dealers were indeed illegal: 'schlepping' of diamonds abroad (that is, smuggling them out of South Africa to avoid the application of exchange control regulations) was also common in the industry. Lappeman denied participating in such activities. (A representative of the MIB Group, Mr Alec Holmes, to whose evidence I shall return, testified that on the way to a meeting with the underwriters in London, Lappeman had confessed to him that he indulged in schlepping. Lappeman denied this.)

[14] The essence of the appellant's case was that the representatives of the MIB Group, as experts in the field of diamond insurance, would have known of the practice of doing off-the-book transactions. Accordingly they should have drawn Lappeman's attention to clause (b) and alerted him to the fact that he would be in breach of a promissory warranty, and would lose indemnity, should he not keep full records of all transactions. Lappeman denied that he had been aware of the existence of the clause before his dispute with the underwriters commenced. Although it had been in the policy from inception, he had not read it, and had not ever been told about it. He had not been questioned about his record-keeping systems. He had no recollection of ever meeting the representative of the MIB Group who had first placed the insurance with the underwriters, nor of any discussion with subsequent representatives about the existence or implications of clause (b).

[15] The various representatives of the MIB Group denied the truth of Lappeman's allegations. All claimed to have drawn his attention to the clause. And none was aware of the practice in the diamond trade of not keeping records.

[16] Insurance had first been sought by the appellant when he started his business in Randburg in 1982. Lappeman had been advised by the Diamond Club that the specialist insurance broker in the diamond industry was Stewart Wrightson, represented then by Mr Graham Sanders, the head of the specie department (bullion and diamonds) of the brokerage at that stage. (The MIB Group

effectively stands in the place now of Stewart Wrightson: the brokerage has undergone a number of changes in name and ownership from 1983 to date.)

[17] Although Lappeman had testified, as I have said, that he had no recollection of any meeting with Sanders, the documentary evidence makes it clear that a special specie contract was negotiated with the underwriters through Sanders, and was concluded in 1984. Sanders testified that the policy was a particularly simple one, offered only to select clients. It was developed to provide cover for De Beers sight holders. Almost all sight holders were insured through Stewart Wrightson. The policy offered what was termed ‘cradle to grave’ protection: it covered the stock of the insured from the time of acquisition until he was no longer responsible for it. The client had but a few obligations to meet. These included ensuring the security of the premises and the stock, and the keeping of records.

[18] Records of all transactions had to be kept in terms of clause (b). The keeping of records was of the essence of the policy. Sanders, and the broker who took over from him, Mr Ian Martin, both testified that they had discussed the clause with Lappeman, Sanders on inception of the policy and Martin in June 1985 when the policy was renewed.

[19] Sanders claimed to have traversed every aspect of the policy with Lappeman on the inception of the policy. He had not kept notes recording that he had done so, but it was his practice to go through the policy with every client, he said, and he had met specifically with Lappeman for that purpose. He had read the clause to Lappeman. He did not recall whether Lappeman had a copy of the policy in front of him at the time. He had not dealt with the question of off-the-book transactions because he was unaware of the alleged practice of diamond dealers in this regard. Sanders did not, however, recall having asked Lappeman anything specific about the way in which the appellant carried on business. He had assumed that, when he read clause (b) to Lappeman, it was understood that full records of all transactions had to be kept by the appellant.

[20] Martin, too, testified that he had met with Lappeman to go through the policy on its renewal in 1985. He had taken a questionnaire with him for his own reference. He said that he had

asked Lappeman specifically about whether he kept detailed records of all sales, purchases and other transactions. He had not indicated on the questionnaire that he had gone through clause (b) with Lappeman, but said that he had in fact done so. Furthermore, Martin testified, he had obtained a copy of the Diamonds Act 56 of 1986, which requires strict record-keeping, and had sent a copy of the Act to the brokers in London, who would have forwarded it to the underwriters.

[21] The third representative of the MIB Group who gave evidence, Mr Alec Holmes, joined the group in May 1987, and worked for a while in the specie division with Martin, from whom he took over as head of the department some six months later. Martin had taken Holmes through the files of every client, including that of the appellant. When the appellant's policy was due for renewal in mid-1988, Holmes said, he had gone through its file, and then set up a meeting with Lappeman.

[22] At the meeting Holmes had asked about the business, the security arrangements, and record-keeping, in particular whether there had been any changes in this regard. He and Lappeman had walked through the Randburg premises together, and Holmes had been shown the record-keeping offices. He was satisfied, he said, that the appellant fulfilled the record-keeping requirement of clause (b). On the two successive occasions when the policy was renewed (in 1990 and 1991) Holmes said he had asked about the record-keeping of the appellant.

[23] In July of 1989 the appellant discussed a potential claim with Holmes for some R800 000. An investigation followed and a report was made which was sent to London. The report made adverse comments about the appellant's record-keeping. A meeting was held with Lappeman who insisted that his record-keeping system was good. And subsequently a further meeting was held at which a presentation of the computer systems of the appellant was made to Holmes and to Mr Tim Davidson, a director of the appellant, and also a member of the Jewellery Council and the Master Diamond Cutters Association. Holmes was then satisfied about the record-keeping of the appellant. Yet a further presentation was made in Pietersburg when the broker from London and a potential underwriter were present.

[24] Holmes therefore had no reason to question Lappeman's

assertions that he kept full records as required by the policy. Moreover, a claim was made in respect of the theft of diamonds by a former employee of the appellant in early 1990. All records were checked before the claim was settled.

[25] It was only when the appellant made the claims presently in dispute that its record-keeping practice was questioned. It was then that Lappeman refused to give to the underwriters' attorneys records of certain transactions unless an undertaking were given that these would not be disclosed.

[26] By March 1991 the claim had not been settled. Holmes was told, he said, that the policy was to be cancelled and the claim rejected because of the appellant's failure to comply with clause (b). The version of the MIB Group is that the cancellation and rejection were communicated on 4 March. The dates when rejection of the claim and cancellation of the policy took place are crucial to the question whether the claim had prescribed, and I shall deal with them separately.

[27] On 6 March 1991 a letter written by the attorney for the underwriters, Mr Kapelus, was sent to the appellant. It read:

'We write to inform you that the underwriters reject the whole of your client's claim on the ground that your client has failed to prove that it has sustained any loss which is the subject of indemnity under any of our clients' relevant insurance contracts.

Our clients furthermore reserve all their rights in respect of any breach or breaches by your client of the terms and conditions of the insurance contracts and further arising from any non-disclosure of material facts or misrepresentations in respect of the cover or at inception of any relevant renewal.'

[28] The day before the letter was sent a meeting had been held between Mr Frank Garrett and Holmes of the MIB Group, and Lappeman. The meeting was recorded on a videotape. The meeting is relevant primarily to the issue of prescription. But the

transcription of the videotape shows also that Lappeman disclosed to Garrett and Holmes at the meeting that the appellant kept what he termed ‘confidential’ stock as well as ‘official’ stock, and that he was not willing to go through an entire sight with the underwriters unless he was given an undertaking of confidentiality. Holmes did not express any surprise at Lappeman’s disclosure in this regard. It was accepted, it appears, that the losses incurred were all in respect of ‘official stock’.

The evidence of the experts on a specialist broker’s duty

[29] Two experts gave evidence on the duties of an insurance broker working with members of the diamond trade. The expert called by the appellant, Mr Donald Gallimore, testified that when the appellant first took out the policy the representative of the MIB Group, then Sanders, had a clear duty to draw the appellant’s attention to the existence of the obligations imposed on it, including that embodied in clause (b). Sanders should also have explained the meaning of the provision to Lappeman. He drew a distinction, however, between the broker’s duty when a policy was first taken out and that when it was renewed. The provision was identical from inception to termination. Thus in Gallimore’s view, each time the policy was renewed the broker had a duty only to establish whether there were any changes in the appellant’s business practices.

[30] Gallimore accepted that if Sanders had indeed explained clause (b) to Lappeman then the MIB Group’s obligation to the appellant would have been discharged; and that similarly, if Martin and especially Holmes, had questioned Lappeman on changes in respect of record-keeping or business practice, then there would have been no breach of any duty imposed on the MIB Group. It was Gallimore’s view that a broker is dependent on the client to inform him of any peculiar aspect of his business. In this case, the failure of the appellant to maintain his diamond register accurately was significant and the MIB Group should have been told about it.

[31] The MIB Group’s expert witness, Mr John Hollinrake, agreed with the views expressed by Gallimore. He too expressed the opinion that it is the insured who must provide information to the broker, who offers insurance on the information provided. The

broker does not control the insured's business: he is entitled to rely on the truth of the information provided by the insured.

The findings of the trial court on credibility and fact

[32] Joffe J considered Lappeman to have been a poor witness. His contention that clause (b) had not ever been drawn to his attention was not only in conflict with the evidence of the three representatives of the MIB Group who had dealt with him over the period when the policy was in force: it was also inconsistent with his initial failure to confront Holmes or anyone else in the MIB Group about their failure to draw the clause to his attention. He was, said the learned judge, a 'skilled and consummate businessman' who was determined to pursue his claim. Yet he had not contended at the outset, when the underwriters rejected the claim, that he was ignorant of his duty to keep full records. And when the claims in issue were initially made against the underwriters, he had refused to allow them to go through a full sight unless an undertaking of confidentiality was made. Lappeman's evidence was thus inconsistent with his conduct, and improbable.

[33] On the other hand the trial court considered that both Sanders and Martin were reliable and credible witnesses. Holmes' evidence was less satisfactory, but the court accepted that for the 1989/1990 renewal Holmes had satisfied himself that the appellant's business practices had not changed; and that for the 1990/1991 renewal the issue of record-keeping had again been raised, in particular because of the consideration of the loss-adjuster's report in respect of the loss suffered in the previous year. The court thus found that the MIB Group had at all material times advised Lappeman of the appellant's duty to keep records of all transactions.

Should the MIB Group representatives have done more than apprise Lappeman of the record-keeping obligation ?

[34] The majority of the full court, affirming the decision of the trial

court, considered that it was sufficient for the brokers to have drawn Lappeman's attention to the record-keeping requirement on the inception of the policy, and to have satisfied themselves on each renewal that the appellant's business practices had not changed. Once the appellant had been advised of the obligation to keep full records of all transactions, and had assured Sanders that he would comply with the requirement, the duty of the MIB Group was discharged. Although the MIB Group had undoubtedly professed to have specialized skill and experience in the diamond insurance business, it could not have been expected to question Lappeman about the appellant's business practices. To require more of them, in particular that they ask about off-the-book transactions, the majority held, would be to expect too 'high or perfectionist a standard'.

[35] Cloete J, in the minority judgment, took a different view. Off-the-book transactions – in the sense of confidential transactions rather than illegal ones – were common in the diamond trade. Records are routinely destroyed. Any broker with specialist knowledge, as the MIB Group professed to have, ought to have known that clause (b) would be a problem if records were destroyed. The learned judge relied in this regard on *Durr v ABSA Bank Ltd & another* 1997 (3) SA 448 (SCA) at 460F-464E where Schutz JA held that a specialist broker must demonstrate greater skill and knowledge than the ordinary broker, just as the specialist doctor must show greater skill than a general practitioner (*Van Wyk v Lewis* 1924 AD 438 at 444).

[36] The nature of an insurance broker's duty to the insured is

expressed in *Lenaerts v JSN Motors (Pty) Ltd & another* 2001 (4) SA 1100 (W) where Potgieter AJ, after traversing several English authorities in this regard, said (at 1109H-J):

'I consider that in our law, as in English law, the duty to exercise reasonable care and skill in appropriate cases extends to the duty to take reasonable steps to elicit and convey material information both from and to the insured. This includes information about terms of the policy which, if contravened, might leave the insured without cover. It is part and parcel of the broker's general duty to use reasonable care to see that the insured is covered.'

[37] The English cases particularly relied upon in *Lenaerts*, and adduced as authority in this case by both parties, are *McNealy v The Pennine Insurance Co Ltd, West Lanc. Insurance Brokers Ltd and Carnell* [1978] 2 Lloyd's Rep 18 (CA) and *Harvest Trucking Co Ltd v P B Davis t/a P B Davis Insurance Services* [1991] 2 Lloyd's Rep 638 (QB). In the latter, Judge Diamond said (at 643):

'The ordinary function of the insurance broker or other intermediary is to receive instructions from his principal as to the nature of the risk or risks and the rate or rates of premium at which he wishes to insure, to communicate the material facts to the potential insurers and to obtain insurance for his principal in accordance with his principal's instructions and on the best terms available. The liability of an insurance agent to his employer

for negligence is comparable to that of any agent. He is bound to exercise reasonable care in the duties which he has undertaken. In no case does the law require an extraordinary degree of skill on the part of the agent but only such a reasonable and ordinary degree as a person of average capacity and ordinary ability in his situation and profession might fairly be expected to exert.

The precise extent of the insurance intermediary's duties must depend in the last resort on the circumstances of the particular case, including the particular instructions which he has received from his client. . . . It is normally not a part of the broker's . . . duty to construe or interpret the policy to his client, but this again is not of course a universal rule. . . . [I]f the only insurance which the intermediary is able to obtain contains unusual, limiting or exempting provisions which, if they are not brought to the notice of the assured, may result in a policy not conforming to the client's reasonable and known requirements, the duty falling on the agent, namely to exercise reasonable care in the duties which he has undertaken, may in those circumstances entail that the intermediary should bring the existence of the limiting or exempting provisions to the express notice of the client, discuss the nature of the problem with him and take reasonable steps either to obtain alternative insurance, if any is available, or *alternatively to advise the client as to the best way of acting so that his business procedures conform to any requirements laid down by the policy*' (my emphasis).

[38] In *McNealy*, where the policy excluded liability where the insured was a part-time musician, and the broker had failed to

establish whether the insured was such (the insured had indicated on the policy that he was a repairer of property) the court held that the broker was guilty of a breach of his duty in failing to draw the exclusion to the attention of the insured. Lord Denning MR held that the broker ought to have asked the insured, when the latter said he worked as a property repairer, if he was also a part-time musician in view of the peculiar exclusion. However, *McNealy* does not assist the appellant in this case since there the broker had failed to advise the insured of the existence of the exclusion.

[39] The MIB Group, as a specialist brokerage, should have had knowledge of the practice in the diamond business of off-the-book transactions, Cloete J found. Thus, he held, it was not sufficient for Sanders, Martin and Holmes to have drawn the attention of Lappeman to clause (b), or on renewal to have established whether the appellant's business practices had changed: they should have gone further. They should have asked ' "Do you enter into off the book transactions?" In the context of the diamond trade, the question cried out to be asked both at inception and renewal.'

[40] That is the crux of the difference between the majority and minority judgments of the full court. And, of course, the appellant now contends that in the light of the well-known practice of doing off-the-book transactions, the MIB Group representatives should expressly have asked Lappeman whether the appellant did off-the-book transactions and warned him of the consequences of doing so.

[41] There are in my view two problems with the contention. The one is fact-bound. It was not established that any of Sanders, Martin or Holmes was aware of the practice of not keeping full records of all transactions. Although Newton had testified that one could not survive in the trade without knowledge of the practice,

the MIB Group representatives denied knowledge and their evidence was accepted. And even if they had some knowledge of off-the-book transactions, what precisely did that mean? There was certainly no clarity in this regard. Newton's evidence related largely to confidential transactions where the anonymity of the purchaser of diamonds was preserved. Lappeman's evidence, on the other hand, referred also to other transactions in respect of which full records were not kept, such as the swapping of rough diamonds for smooth, and the illegal export of diamonds. There was no evidence that the MIB Group was, or should have been, aware that a diamond dealer would invariably participate in such practices.

[42] It is true that Garrett, at the meeting held (and videotaped) on 5 March 1991, did not seem surprised at Lappeman's disclosure that the appellant had 'confidential stock'. But one cannot infer from that that he, or any representative of the MIB Group, had knowledge of precisely what this meant, or of other off-the-book transactions.

[43] The second difficulty with the appellant's argument relates to a broker's duty in principle. Even if the representatives of the MIB Group had had knowledge of the practice in the diamond trade, was it then incumbent on them to have asked Lappeman whether the appellant did off-the-book transactions? I consider not. The authorities on which the appellant relies, and the evidence of the experts on insurance broking, suggest that once the insured is apprised of the duty to keep full records of all transactions, there is no need for the broker to go further and ask whether the insured does in fact keep records. In the *Harvest Trucking* case (above), for example, it is not suggested that a specialist broker has a duty to make enquiries about the business of the insured once the

insured has been fully informed of his obligations under the insurance contract.

[44] A broker does not, and cannot be expected to, control the business of the insured. Even the specialist broker's duty does not encompass a duty to ensure that the insured complies with his obligations under the policy. He is not the insured's keeper. His duty, as a specialist broker, is discharged when he has done everything reasonably necessary to draw the attention of the insured to obligations imposed by the policy. It is the insured's responsibility to ensure compliance.

[45] Once it is accepted – as it is – that the MIB Group representatives did advise Lappeman of his obligations there cannot be room for arguing that Lappeman, an astute businessman, needed to be asked whether the appellant complied with the obligation to keep full records. It was the appellant's responsibility alone to ensure compliance. I consider therefore that the MIB Group did not breach any duty to the appellant. For that reason alone this appeal must fail. However, the MIB Group cross-appealed against the full court's finding that the appellant's claim had not prescribed. It is thus necessary to deal with the issue of prescription, albeit briefly.

Prescription

[46] The critical questions relating to prescription of the alleged claim are when the debt had become due, and when the appellant had knowledge of the identity of the debtor and the facts from which the debt arose, or should reasonably have been expected to have such knowledge: s 12 of the Prescription Act 68 of 1969. The trial court held that the appellant had become aware of the basis of its claim – the rejection of the insurance claims because of failure to comply with clause (b) – on 6 March 1991, if not before. The court found, accordingly, that the appellant's claim had prescribed since more than three years had elapsed between the time when the underwriter's attorney's letter of 6 March 1991 had been sent to the appellant and the issue of summons.

[47] The full court found, however, that the appellant's claims had not been formally rejected before 6 March 1991, when the underwriter's attorney had written to the appellant, and that even then, the letter stated that the reason for the rejection was failure to prove loss rather than failure to keep records. The claim had thus not prescribed.

[48] On appeal to this Court the MIB Group argued that the appellant had known for some time before 6 March 1991 that the claims were rejected because of failure to comply with clause (b). There is indeed some evidence that the MIB Group and the appellant were aware that the failure to keep records was in issue before the letter formally advising of rejection was sent. It is not necessary to traverse this evidence, however. Whatever the MIB Group might have been told by the underwriters, and in turn communicated to the appellant, prior to 6 March the appellant had not been formally advised that the claims were to be rejected or that the policies were to be cancelled. The potential rejection for want of compliance with clause (b) does not create a debt. Nor does discussion about the reasons for repudiation. Until the claims were formally refused, *on the basis that the appellant had failed to keep full records of all transactions*, the debt of the MIB Group would not have arisen.

[49] The letter of 6 March was the first formal notification of

repudiation of the appellant's claims. Even in that letter, the basis for the repudiation (which is what would have given rise to an action against the MIB Group for breach of a duty) is not said to be the failure to keep records, but failure to prove the loss.

[50] The first paragraph of the letter, set out earlier in the judgment, states expressly that the underwriters have rejected the appellant's claim 'on the ground that your client has failed to prove that it has sustained any loss which is the subject of indemnity under any of our client's relevant insurance contracts'. Although the second paragraph states that the underwriters reserve their rights in respect of any breach of the insurance contract by the appellant, this does not amount to a rejection of the claim on that basis. Indeed, the first paragraph clearly shows that the reason for rejection is another ground. Thus on 6 March 1991 the appellant did not know that it had a claim against the MIB Group.

[51] I consider thus that the court *a quo* correctly found that the appellant did not know, nor ought reasonably to have known, of the MIB Group's alleged breach of duty more than three years before it instituted action. If there had been a claim, it would not have prescribed. The cross appeal thus fails.

Order

1 The appeal is dismissed with costs, including those attendant on the employment of two counsel.

2 The cross appeal is dismissed with costs.

C H LEWIS

JUDGE OF APPEAL

CONCUR
HOWIE P

BRAND JA
HEHER JA
VAN HEERDEN AJA