

SOUTH AFRICA / JUDGMENT

PFC Food CC v Three Peaks Management (Pty) Ltd (5573/2009) [2012] ZAKZDHC 57 (10 September 2012) [2012] ZAKZDHC 57

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Sishi

CASE / FILE NUMBER
5573/2009

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IN

THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC

OF SOUTH AFRICA

CASE

NO.: 5573/2009

In

the matter between:

P

F C FOODS CC

.....PLAINTIFF

and

THREE PEAKS

MANAGEMENT (PTY) LTD

.....DEFENDANT

JUDGMENT

SISHI J

Introduction

This case mainly deals with the legal duties of a broker towards the insured. The plaintiff's claim against the defendant arises out of an insurance contract placed with Zurich Insurance Company South Africa Limited, and in respect of which the defendant was the intermediary. The plaintiff averred that the defendant breached its obligations in terms of its mandate in that when the insured event occurred, it was not paid the full amount insured by the insurance company.

The Parties

The plaintiff is PFC Foods CC, a close corporation duly incorporated and registered in accordance with the laws of the Republic of South Africa, carrying on business as a café, bar and restaurant at Shop 1, Summer Square, 37 Sol Harris Crescent, North Beach, Durban, KwaZulu-Natal.

The defendant is Three Peaks Management (Pty) Limited, a company duly registered in accordance with the laws of the Republic of South Africa, carrying on business as an insurance broker, and having its principal place of business at 22 Underwood Road, Sarnia, Pinetown, KwaZulu-Natal.

Background

The plaintiff at the relevant time was a tenant at shop No.1 Summer Square, 37 Sol Harris Crescent, North Beach, Durban where it carried on business as a café, bar and restaurant.

During the period 1 May 2008 to 28 May 2008, there existed an oral contract between the parties in terms of which the defendant held a mandate from the plaintiff to act as the plaintiff's insurance broker;

The terms of the defendant's mandate are set out in the particulars of claim as follows:

The plaintiff appointed the defendant as its insurance broker for the purposes of arranging insurance cover, including cover in respect of losses arising from business interruption, for the business conducted at Shop 1, Summer Square, 37 Sol Harris Crescent, North Beach, Durban;

The defendant would receive instructions from the plaintiff and, pursuant thereto, would canvass the insurance market for appropriate insurance cover in respect of potential losses arising from, inter alia, business interruption and arrange such cover with an appropriate insurance company;

The defendant would exercise the degree of care and skill reasonably to be expected of an insurance broker with a view to ensuring that the plaintiff was adequately covered from time to time, both in relation to the type of insurance cover and the sum insured;

The defendant would take reasonable steps to elicit and convey material information from and to the plaintiff, in particular information

about the terms of any policy, which, in the event of a loss suffered by the plaintiff following interruption of or interference

with its business in consequence of damage occurring during the period of insurance at the premises, might leave the plaintiff under or uninsured in respect of such peril;

The defendant would do everything reasonably necessary to draw the attention of the plaintiff to the obligations imposed on the plaintiff by any policy of insurance issued to the plaintiff;

The defendant would advise the plaintiff generally on its insurance needs and in particular on the procedures to be utilized in terms of the requirements of any policy to ensure that the plaintiff was adequately covered, inter alia, under the business interruption

section of such a policy.

Pursuant to its obligations in terms of its mandate from the plaintiff, for the period commencing from 1 May 2008, the defendant arranged insurance cover for the plaintiff with Zurich Insurance Company, South Africa (Pty) Limited;

Pursuant to this arrangement, Zurich Insurance Company South Africa Limited issued to the plaintiff a contract of insurance under policy number: SA COM4572520; a copy of the policy schedule is annexure 'A' to the particulars of claim. The schedule falls to be read together with the terms and conditions of the Multimark 111 Policy, annexure 'B', to the particulars of claim.

In terms of the said policy, read with the said schedule with effect from 1 May 2008, Zurich Insurance Company South Africa Limited insured the plaintiff inter alia, against loss following interruption to the business of the plaintiff, in consequence of damage occurring during the period of insurance, arising from fire.

On 28 May 2008, and at the plaintiff's premises, a fire caused damage to the plaintiff's machinery, stock, fixtures and fittings. As a result of the fire and the interruption of the plaintiff's business, the plaintiff suffered, inter alia, loss of profit as a result of business interruption, in the revised sum of R357 780.00.

The plaintiff's claim was originally completed in accordance with annexure 'C' to the particulars of claim which reflected a short fall of R448 989.00. The claim has been amended and is now the sum of R357 780.00 as computed in A4 to Mr Furmage expert summary at page 14 of the bundle of expert summaries

The plaintiff pleaded that the defendant breached its obligation in terms of its mandate in one or more of the following respects:

It failed to exercise the degree of care and skill reasonably to be expected of an insurance broker in ensuring that the plaintiff was adequately covered under the business interruption section of the plaintiff's policy;

It failed to comply with the plaintiff's instruction to ensure that the plaintiff was fully covered for any potential losses arising under the business interruption section of plaintiff's policy.

The above has been denied by the defendant in its plea.

Counsel placed on record that the annual financial statements contained in volume 2 of the bundle are admitted as is the standard turnover figure reflected on A4 of the attachment to Prissman's expert summary in the amount R3 110 165,00.

The Evidence

14. The first witness called for the plaintiff was Mr Brian Phillip Prissman who is employed by AON Risk Solutions and who testified that AON is the biggest firm of brokers in the country and in the world. He testified that he has had experience in business interruption insurance since 1979, a period of thirty two years. He was very critical of the manner in which the business interruption aspect of the insurance had been handled. He said so for the following reasons:

very few insurance policies are placed for a period of six months and not twelve months. The defendant needed to advise the plaintiff on this;

cover of R600,000.00 for business interruption was too low and the defendant should have advised the plaintiff thereon with reference to turnover figures and the plaintiff's balance sheets;

the plaintiff should have been advised that it is necessary to calculate the rate of gross profit on the turnover figures and then to add VAT and that if this was not done, the risk was that the plaintiff would have been under insured;

it would have been necessary to have calculated the plaintiff's rate of growth and to perform a trending exercise for eighteen months into the future to ensure that if the risk occurred on the last day of the indemnity period, the plaintiff would not be under insured.

15. Mr Prissman testified that when an intermediary considers the risk of business interruption with a customer, it is important to obtain the necessary information from the customer in order to advise on the cover that ought to be obtained and to explain how insurers calculate a claim and in particular, gross profit on the 'difference basis'.
16. Mr Prissman testified that an intermediary ought to perform calculations with the client so as to demonstrate to the insured that it understands the amount for which the client is insured is not necessarily the amount which will be paid in the event of business interruption occurring.
17. Finally, such an intermediary ought to record in writing what has been explained to the client and if there is a danger of average being applied, the client should be made aware that there is such a risk.

18. Under cross-examination it was put to Mr Prissman that if a client provides an intermediary with the correct gross profit, there will not be a loss. He conceded that if in this case the sum of R1.8 million was so provided, there would not have been a loss. He explained however that it is important to calculate the gross profit with the client and to project the turnover for a period of 18 months, to obtain the rate of gross profit and to advise on the necessity to add VAT. This needed to be done annually.
- 19 Mr Prissman said that it is important that what is discussed is contained in writing and signed by the client. AON has done this for 15 years and this is not a recent development in the industry as a result of that being a requirement of the Financial Services Board.
20. It was put to Mr Prissman that if the client fixes the cover for R600,000.00 and states that she is happy with that amount and does not want it increased then the broker has discharged his duty. Mr Prissman testified that that instruction ought to be obtained in writing but that he would not simply leave it at that. He would advise the client because in his experience clients do not understand how business interruption works. He would warn her that if she is under insured, average would apply and the amount paid to her would be less than the sum of R600,000.00.
21. It was also put to Mr Prissman that Mrs Flores Coehlo is an astute business woman and was capable of working out gross profit. Mr Prissman said that this should never be accepted and should only be done with the assistance and advice of an insurance broker.
22. The next witness called was Penny Flores Coehlo who testified that she and her husband conduct the plaintiff's business of 'Neo Cafe'. The witness testified that she and her husband purchased the business in 2004 and considered it necessary to have the business insured. She obtained insurance through the defendant and this included business interruption cover in an amount of R600,000.00 for a maximum period of six months. The witness testified that she was under the impression that should she suffer an interruption of her business, she would be paid an amount up to R600,000.00 for any loss. There is no dispute that if the plaintiff had been paid that amount, it would not have suffered a loss and the amount would just have been adequate.
23. Shortly after the renewal date of the policy in May 2005 Mrs Coehlo met with Mr Vandekan of the defendant and a number of amendments to the policy were effected. A number of items were deleted from the policy and some cover was reduced that being for fire, money and theft. Otherwise the policy was renewed, including the business interruption cover of R600,000.00. During cross-examination it was suggested that Mrs Coehlo was seeking ways of reducing the premium payable by the business. She refuted that suggestion and made the point that a number of the assets that had been purchased were worthless and it was therefore necessary to take them off the asset register and the policy of insurance. Fire cover was reduced to R600,000.00 because of her valuation of the assets in the business.

24. Neo Cafe is situated in Summer Square in Sol Harris Crescent. It is close to a medical centre in the shopping centre. On Thursday 24 November 2005 a fire occurred which caused her loss as a result of soot and smoke. She submitted a claim, including a business interruption claim and was paid the sum of R3,500.00. No average was applied. The Plaintiff was, therefore, not aware that the business was under insured.
25. On Thursday 23 August 2007 the sub-station at the corner of Playfair and Sol Harris Crescent blew up as a result of which the plaintiff's business lost a day's trading. She submitted a claim including a claim for business interruption and provided details of her turnover figures for three previous Thursdays. Her claim of R10,027.43 was paid without the application of average. Again there was no indication that the plaintiff was under insured.
26. Mrs Coehlo testified that yet another fire occurred in the shopping centre in a hair salon later on in August which caused her to reflect and consider whether the business was properly insured. She testified that she was afraid of a fire which may affect the business. She accordingly arranged a meeting with the defendant, the purpose of which was to review her insurance and to make sure that she was fully insured.
27. Mrs Coehlo testified that she had previously met Mr Allan Moodley from the defendant who had been introduced to her by Mr Vandekan. He was introduced as an expert in business interruption from S A Eagle Insurance company.
28. Although Mrs Coehlo could not remember the date of the meeting she agreed with the defendant that the meeting probably took place on 3 October 2007. She testified that Moodley attended that meeting. Under cross-examination it was suggested to her that the meeting took place when Mr Vandekan introduced Moodley and that Vandekan was present during the meeting. Mrs Coehlo denied this but conceded that Mr Vandekan may well have been present early on in the meeting but she definitely dealt with Mr Moodley when it came to discussing cover. She gave instructions that a number of items be increased such as fire cover to R700,000.00 and

she also discussed with him business interruption cover. He did not ask her for financial statements although she could have made the 2004 to 2006 financial statements available to him which would have shown that the business had grown substantially. She did, however, give him current sales figures for the period March to September 2007 which he jotted down and he said he would consider and revert. There was no discussion between her and Moodley about the formula with which business interruption cover is calculated and she left the matter to Moodley.
29. When she received the amended schedule from the defendant which reflected her instructions for inter alia increasing fire insurance to R700,000.00, she noticed that business interruption remained at R600,000.00. She concluded that Moodley had decided that that amount was adequate.

30. It was submitted that the fact that the plaintiff undertook a review of the plaintiff's insurance after fires had occurred in the shopping centre and increased her insurance bears out that she was not 'penny pinching' when it came to the payment of premiums but wished to be properly insured. She refuted the proposition put to her under cross-examination that she did not wish to change her business interruption cover. The point she made was that she would have expected advice from the defendant and more specifically, information which would have assisted her in arriving at an informed decision. She made the point under cross-examination that she understood that if she suffered business interruption, she would be paid a maximum sum of R600,000.00. She stated that she relied upon her financial advisor to guide her and provide her with advice on the question of business interruption.
31. In one of the final questions to the witness under cross-examination it was put to her that Vandekan will testify that she knew she was under insured. She refuted this and said her understanding of the business interruption section of the policy was limited and that she was misinformed as to the effect of the policy.
32. She stated under re-examination that had she been properly advised on the business interruption policy and assuming that the premium would have been three times the cost it was in 2007, the business could have afforded it and she would have been willing to pay the sum of approximately R6,000.00, assuming that the 75% premium had not been incorporated into the policy.
33. This is borne out by the policy which D Schoeman & Associates CC put in place with Zurich after the fire which provides for business interruption for R4 million at a premium of R933.33 per month.
34. The plaintiff then called another expert witness Mr Denver Furmage who is an accountant and who for the last five years has been employed by Commercial Claims Services (Pty) Ltd, a company which calculates and formulates insurance claims. Mr Furmage has specialised in preparing business interruption claims.
35. The witness testified that the schedule annexure 'C' in the pleadings (at page 122) was an early calculation of the claim which calculated a shortfall of R448,989.00. He has since then been able to refine the calculation and the result is contained in the schedules attached to his expert summary. The calculation of the claim itself is to be found at page 14 of the expert summary bundle and is marked 'A4'. Mr Furmage explained the manner in which the claim had been calculated, the result of which is that after deducting the amount paid to the plaintiff by Zurich in the sum of R174,746.00, the amount that remains owing is the sum of R357,780.00 plus interest. The reason for the claim is because the plaintiff only enjoyed coverage at the rate of 32.81% which demonstrates that she was under insured and that average was applied.

36. Mr Furmage was carefully cross-examined on the content of 'A1 – 4' but it was apparent from the cross-examination that there is no longer any dispute about the manner in which the amount had been calculated. It was submitted, on behalf of the plaintiff, that the amount of R357,780.00 had been proven as the measure of the plaintiff's loss.
37. The plaintiff's final witness to testify was Mr Mike Gains who is a director of Commercial Claims Services (Pty) Ltd and the person who wrote a letter to the defendant on 8 August 2008.
38. Mr Gains testified that his company was instructed to assist the plaintiff formulating a claim because he is a friend of Mr Coehlo. He considered the claim and formed the view that the plaintiff carried insufficient business interruption cover and that average would apply.
39. Mr Gains arranged a meeting with the defendant which took place on 25 May 2008 at which Mr Vandekan and Mr Moodley were present. He spoke to them about the claim and suggested that they notify their professional indemnity insurers in order to obtain assistance and also to ensure that their client did not suffer any loss.
40. Although Mr Vandekan was initially friendly, that changed when Mr Gains suggested to him that the defendant ought to have obtained financial statements from the plaintiff to determine the adequacy or otherwise of the sum insured for the loss of profits section of the policy. He was adamant that a professional broker need never obtain financial statements from his client. He stated that it is entirely the client's responsibility to determine the sum which it wishes to be insured for in respect of loss of profits.
41. Mr Vandekan added that he, Gains, should know that brokers never obtain financial statements from their clients because those statements are confidential. This stands in stark contrast to the evidence given by Mr Prissman.
42. The defendant's only witness was Mr Elaine Vandekan. He testified that he is a broker and that the defendant arranged insurance for the plaintiff in 2004 when she purchased the restaurant known as Neo Cafe and Bar. The cover arranged for her was as a result of the bank requiring insurance for a loan that had been made to the shareholders of the plaintiff. The cover was for fire, theft, business interruption and all risks. As far as the business interruption cover was concerned the restaurant did not yet have a track record under the new management and Mrs Coehlo was suspicious about the figures given to her by the previous owner, she estimated the gross profit at R600,000.00 per annum. She required cover for six months although it is normal to obtain cover for twelve months, it was felt that six months would be sufficient as only the kitchen and bar would be involved in a fire. A policy was obtained from SA Eagle for the period of May 2004 to April 2005. According to the witness, that policy was automatically renewed on 1 May 2005.
43. After the renewal, however, Mrs Coehlo instructed the plaintiff to amend the policy and those amendments are reflected in the defendant's file note dated 6 June 2005.

44. Mrs Coehlo reduced the fire cover from R640,000.00 to R600,000.00 and some other items reflected in the file note. These amendments are reflected in the document entitled 'Renewal Comparison' which compares the plaintiff's 2004 and 2005 premiums.
45. Although the witness testified that the plaintiff's motivation was to ensure that fixtures, fittings and the contents were insured at their proper value, it was suggested that the true motive was to reduce the premiums payable by the plaintiff. It is inherent in this suggestion that the plaintiff took upon itself the risk of under insurance.
46. Mr Vandekan testified that at a meeting held on 6 June 2005 when the question of the insurance was discussed with Mrs Coehlo, the question of business insurance was also discussed and he asked her whether the plaintiff's turnover had increased. He stated that she felt that R600,000.00 was adequate business cover insurance. The amendments to the plaintiff's policy were brought about and the business interruption cover remained at R600,000.00. The witness testified that the policy was renewed in May 2006 without making any changes thereto.
47. Before the next renewal in 2008, however, a meeting was held at the plaintiff's premises on 3 October 2007. Mr Vandekan testified that he and Mr Allan Moodley had gone to the premises to introduce Mr Moodley and that they had taken the plaintiff's file to the meeting. Both Mr and Mrs Coehlo were present and a discussion then took place regarding the plaintiff's cover. While Mr Moodley and Mr Coehlo walked around the premises, Mr Vandekan and Mrs Coehlo sat on the veranda talking about the plaintiff's cover. Moodley after a while then joined the meeting and the discussion continued. An SA Eagle new business form was used to record changes to the plaintiff's insurance cover.
48. The changes to the cover are reflected on the form and it is common cause that the plaintiff increased its cover in a number of respects. Fire risk was increased to R700,000.00, the plate glass was increased to R25,000.00 and the theft cover was increased to R20,000.00. These changes are reflected in the instructions from the defendant to SA Eagle.
49. Counsel for the defendant asked Mr Vandekan why the fire cover was increased. His answer was that 'it would have been explained that they would be under insured if a fire occurred'.
50. Counsel for the defendant also asked Mr Vandekan whether business interruption cover was discussed. He was asked whether Mr Moodley asked Mrs Coehlo for sales figures which he supposedly jotted down. Mr Vandekan denied that this occurred and said that if anything had been said in this regard 'it would be written down in our file'.
51. Mr Vandekan testified that the fire occurred on 28 May 2008. He said that the defendant had no further function to perform and the claim was put in the hands of the loss adjusters, GAB Robins.
52. The witness confirmed that he was contacted by Mr Gains from Commercial Claim Services (Pty) Ltd and that a meeting was held with Mr Gains on 25 June 2008. Mr Vandekan admitted that at that meeting Mr Gains had told him that the business interruption cover had been

insufficient and that the defendant should notify its professional indemnity insurers to submit a claim in order that the plaintiff would not suffer a loss as a result of the defendant's negligence. After the meeting, a letter of demand dated 8 August 2008 was addressed to the defendant, which records what occurred during the meeting.

53. Mr Vandekan testified that the content of the letter is largely accurate. Under cross-examination he was questioned about the final paragraph on the second page of the letter and first paragraph on the third page (see pages 315 and 316 papers). He admitted that he had told Mr Gains that the defendant at no stage ever asked the plaintiff for financial statements in order to determine the adequacy of the cover. Mr Vandekan disputed that he had told Mr Gains that a professional broker need never obtain financial statements from his client. He admitted that it was likely that he had told Mr Gains that it is entirely the client's responsibility to determine the sum which is to be insured for loss of profits. He accepted that it is correct that the establishment of a correct sum insured under the business interruption section requires insurance knowledge to determine both the extent of cover and the adequacy of the sum insured. He disputed, however, that he had stated that he did not have the expertise to determine the amount of adequate cover. Mr Vandekan averred that he did have sufficient knowledge and expertise to do so.
54. Mr Vandekan admitted that the defendant did not respond to the letter and conceded that the inference could be drawn from the failure to reply that the contents of the letter are accurate.
55. Under further cross-examination Mr Vandekan conceded that he could have asked the plaintiff for financial statements but he stated that he considers them to be confidential. He also conceded that he could have asked Mrs Coehlo for turnover figures and that he could have performed a calculation in order to determine the value at risk with her but did not do so. He also conceded that business interruption cover is more complex than fire or theft cover and that it requires expertise in order to determine adequate cover.
56. When Mr Vandekan was pressed on with the question as to whether he explained the mechanics of business interruption cover to Mrs Coehlo, he said that he had done so. It was pointed out to him by the cross examiner that this had not been his case at the outset and that he had not testified to this in chief, nor had this been put to Mrs Coehlo. He could not explain the change in his evidence.
57. The witness also testified that he did ask Mrs Coehlo for turnover figures but that she did not give him those figures and misled him as to the growth in the business and in turnover. He could not explain why his client would have misled him to her own detriment and the only explanation forthcoming was from a leading question from the defendant's counsel who suggested to him under re-examination that it might have been because Mrs Coehlo did not want to pay higher premiums for business interruption cover. This suggestion neither has any value because of its leading nature nor is it logical. If Mr Coehlo did not want to increase the cover she would have said so. She did not need to mislead her own intermediary.

The assessment of the evidence

58. It is apparent from the evidence and the cross-examination of the plaintiff's witnesses that the defendant's case is that Mrs Coehlo initially set the business interruption cover of R600,000.00 at the inception of the policy and that she did not want it changed at the meetings held on 6 June 2005 and 3 October 2007. It is further the defendant's case that the plaintiff sought ways of reducing the plaintiff's premiums. This latter issue has already been partly dealt with above. It completely ignores the meeting of 3 October 2007 from which it is clear that Mrs Coehlo sought to increase her insurance cover.
59. The defendant's case ignores the intermediary's obligations as described by Prissman. He made the point that he carries a form with him which is used to obtain information from the client regarding turnover and turnover projections so that the calculation may be done with the client to determine whether the business has adequate cover. He also advises the client on the application of average, the implications of under insurance and the necessity to add VAT to the calculation. He thereafter requests the client to sign the form for record purposes. This is not a recent requirement of the Financial Services Board as was suggested to him under cross-examination but is a practice that he has followed for close to fifteen years. This evidence by Prissman

was not disputed it being the defendant's sole contention that the level of cover had been set by Mrs Coehlo.

60. This defence raises more questions than answers. Did it advise her that she was running the risk of being under insured? Did it advise her on the manner in which value at risk is calculated together with its VAT implications? The answer is no and it follows that the defendant did not properly advise its client.
61. The question also arises why other meetings were not held with the plaintiff on an annual basis. Prissman testified that this exercise should be done on an annual basis and the reasons therefor are quite clear particularly in the case of a business which is in a growth phase.
62. It was submitted that Prissman was an excellent witness and that he is a highly experienced intermediary specialising in business interruption. His evidence ought to be accepted as being what is required of an intermediary in exercising reasonable care and skill in performing its mandate.
63. It was submitted that Mrs Coehlo was an impressive witness who testified in a forthright manner and who was quite willing to make concessions in favour of the defendant when she considered it appropriate to do so. One such example is the date of the meeting in 2007. Mrs Coehlo could not remember the date but she readily conceded that it may well have been on 3 October 2007. A second is the presence of Mr Vandekan at that meeting. She testified that Mr Moodley was present at that meeting. It was put to her that Mr Vandekan had been present to introduce Mr Moodley to her. Although she considered that she already knew Mr

Moodley, she readily accepted that Mr Vandekan may have attended the early part of the meeting but she was adamant that when the cover that she required was discussed, this was done in consultation with Mr Moodley.

64. Her evidence that the fires at the shopping centre had worried her and she wished to review her insurance so as to ensure that she was fully covered, sound entirely true. It is common cause that a meeting took place on 3 October 2007 the purpose of which was to review the plaintiff's insurance requirements to ensure that it was fully insured. This was in fact done and her fire insurance was increased from R600,000.00 to R700,000.00, the glass risk was increased to R25,000.00 and the theft risk increased to R20,000.00.
65. Mrs Coehlo's decision to increase the fire section of the policy supports her contention that she would have increased the business interruption cover if she had been advised to do so. The only person who is able to testify as to whether Mrs Coehlo provided details of the businesses' turnover is Moodley who has not been called to testify.
66. There is no necessity to traverse the evidence of Furmage as it is evident that there is no dispute about the quantum of the claim.
67. The plaintiff's final witness was Mr Mike Gains who testified that after the fire he was approached by Mr Coehlo, and old school friend, to assist him with the preparation of the claim to the insurance company. He realised that the insurance for business interruption was inadequate and for that reason made an appointment to discuss the matter with the defendant. A meeting took place on 25 June 2008 during which Mr Gains made the point that there had been inadequate business interruption insurance, that the insurer would apply average and that the defendant ought to notify its professional indemnity insurers because of their negligence. He testified that during the meeting he raised the question whether the defendant had ever obtained financial statements from the insured in order to determine the adequacy of the sum insured for loss of profits. It was confirmed to him that at no stage were the financial statements asked for and it was further Mr Vandekan's view that it is not necessary for financial

statements to be asked for as it is the client's responsibility to determine what sum is to be insured.

68. Mr Gains testified that he pointed out to Mr Vandekan that the establishment of the correct sum insured requires specialised insurance knowledge. Mr Vandekan told him that the defendant did not have such expertise.
69. After the meeting had ended Mr Gains addressed a letter to the defendant dated 8 August 2008 which records what was said during the course of the meeting and which ends by notifying the defendant that it was the plaintiff's intention to commence legal action against the defendant for the recovery of the shortfall in cover which claim was calculated at that stage in the sum of R494,172.00. There was no reply to this letter.

70. It was submitted that Mr Gains was a good witness whose evidence stood up under cross-examination. He readily conceded that his company operates on the basis that it takes a contingency fee if the claim is successful but because the claim is small, his company's fee will be minimal. It was suggested to him that it was important for him to 'nail' the defendant. He responded by saying that he had no interest in doing so but that it is important that the claim is properly formulated and submitted. He was accused of using words like 'preposterous' to Mr Vandekan and he admitted this by stating that the manner in which the defendant had dealt with the plaintiff was 'preposterous and appalling'. He was also accused of going out of his way to 'put the boot in' to the defendant. He replied that there was no malice on his part, and that he was simply appalled about the manner in which the defendant carried out its function as a broker.
71. In dealing with the question of the financial statements, he said that when he asked Mr Vandekan whether he had obtained financial statements from the plaintiff, his response was 'Mike, you should know brokers don't get financial statements from their clients.'
72. It was put to him that a broker may rely upon the information given to it by its customer and Mr Gains said that business interruption insurance is complicated and that it is critical to obtain the proper information to ensure that gross profit is properly calculated.
73. It was put to Mr Gains that Mr Vandekan denied saying that he could not read financial statements and he further denied that he did not have the necessary expertise to deal with business interruption insurance. Mr Gains confirmed that that is exactly what was said during the meeting. Mr Vandekan had told him that he did not have the knowledge to work out the figures in respect of business interruption cover.
74. It was submitted correctly, in my view, that Mr Vandekan's evidence was not only improbable in a number of respects, but that it was also untruthful. It was improbable in two main respects. The first is in relation to how the meeting of 3 October 2007 came about. Mrs Coehlo had testified that she called the meeting because of the fires that had occurred in the medical centre and in the hairdresser and that she was concerned about the plaintiff's insurance cover. Mr Vandekan, on the other hand, testified that the meeting came about when he took Mr Moodley to be introduced to Mrs Coehlo and he happened to carry the plaintiff's file with him to the meeting. In my view, Mrs Coehlo's version is more probable in view of the fact that there is no dispute that several fires had occurred in the medical centre and she must have been aware of the fact that there was a risk of a serious fire occurring. The second improbability relates to the reason for the increase in cover. Mrs Coehlo testified that she wanted to be 'fully insured'. It was for that reason that she called the meeting and that insurance cover on a number of items was increased. Mr Vandekan, however, testified that the increases were not made for the reasons Mrs Coehlo stated but because there had been an increase in value in stock. Mrs Coehlo's evidence must therefore be preferred on the probabilities.

75. There is, of course, a dispute between Mrs Coehlo and Mr Vandekan on whether Mr Vandekan attended the meeting of 3 October 2007. Mrs Coehlo was adamant that she and Mr Moodley discussed the question of insurance but she conceded that Mr Vandekan could have been there earlier on but had left by the time that the discussion took place. Mr Vandekan testified that he was at all times present when the question of insurance was discussed. He was untruthful about the reason for his attendance. He suggested that he was there to introduce Mr Moodley to Mrs Coehlo. During Mr Vandekan's evidence in chief he told the court that Mr Moodley had joined the defendant on 1 August 2007. When he was cross-examined on the reason for him (Mr Vandekan) attending the meeting, he said that Mr Moodley had joined the plaintiff on 1 October 2007 shortly before the meeting. It is clear that this was not true.
76. Mr Vandekan was questioned on the discussion that took place on the 3 October 2007 regarding the plaintiff's insurance cover. According to him he, Mr Moodley and Mrs Coehlo were present. When he was questioned about what Mr Moodley said to Mrs Coehlo about business interruption cover, he eventually conceded that he could not say what Mr Moodley said or what he told Mrs Coehlo. He stated that he could not answer and would not answer counsel's questions in that regard. It was submitted that this supports Mrs Coehlo's evidence that Mr Vandekan was not present during that discussion. It follows, therefore, that the defendant could not contradict Mrs Coehlo's evidence that Mr Moodley asked her for turnover figures and that she gave him those figures. Mr Moodley, however, did not revert to her and the policy was left unchanged in regard to business interruption cover.
77. It was submitted that the plaintiff had discharged the onus of proving that the defendant did not act with reasonable care and skill. No attempt was made by the defendant to explain even elementary aspects of business interruption cover to the defendant. No attempt was made to perform any calculations with the plaintiff to ensure that the correct level of cover was obtained. Mr Vandekan conceded that neither was an exercise performed to calculate the plaintiff's rate of growth nor was a trending exercise performed as explained by Mr Prissman in order to ensure that the plaintiff was adequately insured.
78. It was submitted on behalf of the defendant that Vandekan did what was expected of him as a broker in this case. He took reasonable steps to elicit and convey material information both from and to the plaintiff. At the outset, and at a time when the plaintiff had no financial records, he asked Flores-Coelho to estimate her gross profit for the period to be covered by insurance. The evidence has demonstrated that Flores-Coelho is a consummate and astute businesswoman. It has also been shown through the evidence of Prissman, the expert called by the Plaintiff, that if the insured correctly forecasts his or her gross profit and that is the sum insured for business interruption, then the insured will be fully covered. Prissman's method is no more than another way of arriving at an estimated gross profit. As was said in Lappeman's case *infra*, the broker is not the insured's keeper. He does not, and cannot be expected to control the business of the insured. He is entitled to rely on the truth of the information provided by the insured. That is exactly what Vandekan did in this case. It was

also demonstrated in her evidence that Flores-Coelho was well aware of the danger of under insurance. She explained this when testifying about the reasons she increased the fire cover from R600 000,00 to R700 000,00 at the stage of one of the renewals of the policy. She also knew that what she was insuring in the business interruption category was her gross profit. It was the loss of gross profit that was being insured. Throughout every renewal her instructions were to leave the gross profit at the same figure. Vanderkan was entitled to rely on the truth of that information provided by Flores-Coelho.

79. Counsel for the defendant submitted that Flores-Coelho was untruthful when she testified that she only dealt with Moodley on 3 October 2007 and that on that occasion he asked for and she gave him sales figures for him to use in estimating her profit. She could not possibly have done so for the very next day Moodley confirmed all changes agreed with Flores-Coelho, and indeed in Vandekan's presence, by letter dated 4 October 2007 addressed to Logan Naidoo of the Insurance Company (page 536, Vol 2). Doubt having been cast upon Flores Coelho's credibility, it was submitted that her evidence regarding her understanding of loss of gross profit insurance, could not be accepted.
80. The witnesses who testified on behalf of the plaintiff including the expert witnesses were reliable and credible. They were not shaken under cross examination. I have no reason to doubt the reliability of the evidence given by the witnesses who testified on behalf of the plaintiff.
81. The only witness who testified on behalf of the defendant is Mr Vandekan, the broker. The defendant did not call any expert witnesses in this matter. Mr Vandekan was not at all a good witness. There were inherent improbabilities in his evidence. Mr Prissman's evidence, the plaintiff's expert witness was that he was very critical on the manner in which the business interruption aspect of the insurance had been handled. The reasons therefor have been set out in his evidence above. That evidence was largely not disputed by the defendant.
82. There is clear evidence from Mrs Flores-Coelho that Mr Moodley, at the meeting of 3 October 2007 did not ask financial statements although she could have made the 2004 and 2006 financial statements available to him, which could have shown that the business had grown substantially. This is confirmed by the contents of the letter of 8 August 2008 from Commercial Claim Services (Pty) Ltd to Mr Vandekan. This letter was written by Mr Gains who also confirmed the contents thereof when he gave evidence on behalf of the plaintiff. He also confirmed meeting Mr Vandekan of the defendant where he expressed his view that the business interruption cover was grossly under insured. The last paragraph of page 2 of this letter on page 15 of the papers reads as follows:

"Furthermore, the insured advises that at no stage have you ever asked for financial statement to determine the accuracy or otherwise of the sum insured of the loss of profit section of the policy. In fact, at our recent meeting at your offices you were adamant that a professional broker need never obtain financial statements of his client and it is entirely your client's responsibility to determine the sum which is to be insured for 'loss of profits'".

83. The first paragraph, on the last page of the letter on page 16 of the papers reads as follows:

“The establishment of correct sum insured under this section of the policy requires specialist insurance knowledge to determine both the extent of the cover and the adequacy of the sum insured. You confirmed to us that you did not have the expertise to determine adequate loss of profits cover and this is evident from the manner in which you have advised Neo Cafe in this instance and your lack of professional advice has resulted in substantial loss to your client”.

84. It is common cause that this letter was not replied to and Mr Vandekan did not dispute its content and the contents of the paragraphs referred to above. Despite such overwhelming evidence, Mr Vandekan denied that they did not ask for financial statements and Mr Moodley was not called to give evidence in this regard. Mr Vandekan’s denial in this regard falls to be rejected.

The Legal Position and the Liability of Brokers

85. The nature of an insurance broker’s duty to the insured is expressed in *Lenaerts v JSN Motors (Pty) Ltd* 2000 (1) 4 SA 1100 (W) at 1109 H-I. Where Potgieter AJ, after traversing several English authorities in this regards stated:

“I consider that in our law, as in English law, the duty to exercise reasonable care and skill in appropriate cases extend to the duty to take reasonable steps to elicit and convey material information both from and to the insured. This includes the 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. ...” The Court relied on the following English cases:

Harvest Tracking (Pty) Ltd v P B Davies, trading as P B Davis Insurance Services 1991(2) Lloyds Rep 638 (QB) at 643;

Mc Nealy v The Pennine Insurance Company (Pty) Ltd, West Lanc Insurance Brokers Ltd & Cornell 1978 (2) Lloyds Rep (CA).

In these cases the broker was held not to have done his duty to use all reasonable care to establish whether an exclusion as to occupation applied to the insured. He failed to do all that was reasonable to elicit relevant and material information from the insured as to his occupation.

86. Counsel for defendant submitted that the Court in Lapperman’s case referred, with approval, to two English authorities relied upon by Potgieter AJ in *Lenaerts* case. The references to those cases are set out in paragraph [37] of Lapperman’s case. The Court quoted extensively from the *Harvest Trucking Co* case, and I quote the first paragraph of that quotation which sets out the ordinary functions of an insurance broker towards his client.

“The ordinary function of the insurance broker or other intermediary is to receive instructions from his principle 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 principle in accordance with his principle’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 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."

87. Both Lenaert's case and Lapperman's case were referred to and quoted from in:

Mutual & Federal Insurance Co Ltd v Ingram NO 2009 (6) SA 53 (ECD) at paragraph [19].

88. In paragraph [31] of Lappeman's case the Court referred to the evidence of two expert witnesses and stated:

"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."

89. Again, in Lappeman's case, the Court said the following in paragraph [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 the 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."

90. Counsel for the defendant submitted that the Court referred to a 'specialist broker' in Lappeman's case. That case dealt with peculiarities of the diamond trade. A specialist broker was distinguished from an ordinary broker by Schulz JA in the case of Durr v ABSA Bank Ltd & Another 1997 (3) SA 448 (SCA) at 460 F – 464 E, where he 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). This was quoted in Lappeman's case at paragraph [35].

91. Counsel for the defendant submitted, correctly in my view, that it is clear in this case that the defendant is no more than an ordinary broker, as Lappeman's case, supra, dealt with a specialist broker and the defendant in this case is not a specialist broker. That case dealt with peculiarities of the diamond trade. The level of skill by which they are measured is that of the members of the profession to which he belongs.

92. The decision in the English case of Mc Nealy, supra, has received the approval of the full bench in Stander v Raubenheimer 1996(2) SA 70 (O) at 675 G-676 I. In this case, the Court found that the broker was under a duty to elicit all material information from the insured and to convey that to the insurer. The broker knew that the contents of the plaintiff's house

would not be covered if they were damaged or destroyed in a house with a thatched roof but failed to ascertain from the insured whether his house had a thatched roof. The decision was that the broker breached its contractual obligation to ensure that the plaintiff's goods were covered.

(See : *Lenaerts's case v JSN Motors (Pty) Ltd & Another* supra at para 39.)

93. In assessing the standard of care and skill, the court may accept the evidence of another experienced member of the profession.

(See: *Lenaerts v JSN Motors (Pty) Ltd* (supra) 1106E-1108D.)

94. The duty to exercise reasonable care and skill extends, in appropriate cases, to the duty to take reasonable steps to elicit and convey material information from and to the insured. This includes information about terms of the policy which, if contravened, might leave the insured without cover, it being part and parcel of the broker's general duty to use reasonable care to ensure that the insured is covered.

(See: *Lenaerts v JSN Motors (Pty) Ltd & Another* (supra) 1109H-J

Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (supra) at paragraph 36 in which the dictum in *Lenaerts* was approved.)

95. In *Lappeman* the court held that an insurance broker's 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.

96. In *Mutual and Federal Company Limited v Ingram NO & Others* 2009 (6) SA 53 (E) the court held that the insurance broker has an obligation to ensure that the insured is adequately covered.

97. Counsel for the defendant reiterated that the defendant acted according to the insured instructions and also acted according to the information given to him by the client. He even submitted that refusal to answer question by Vandekan during cross examination was as a result of aggressive cross examination he was subjected to. He submitted that he was not completely unable to say anything.

98. Having considered all the evidence, the argument and the authorities referred to on behalf of both parties, I am satisfied that the plaintiff has discharged the necessary onus of showing that the defendant did not act with reasonable care and skill as it was required to do. According to the evidence and the principles enunciated in the cases referred to above, it was incumbent upon the defendant to explain to the plaintiff:

- (a) How a business interruption loss is calculated;

- (b) To obtain sufficient information from the plaintiff to be able to advise it as to satisfy itself that the plaintiff was adequately insured;
 - (c) To warn the plaintiff that average could be applied and that it could be under insured if the business interruption cover was not increased.
99. None of these were explained by the defendant to the plaintiff. Accordingly, the defendant's failure to have done so, means that the defendant did not act with reasonable care and skill and that it is liable to pay the plaintiff the amount claimed from it. The amount claimed has been amended accordingly and there is no dispute about the amount claimed.
100. There is no reason why the costs should not follow the result in this matter. The defendant is therefore liable for the costs incurred in this action.
101. In the result, I make the following order:

Judgment is given for the plaintiff against the defendant as follows:

Payment in the sum of R357 780,00.

Interest thereon in the rate of 15,5% per annum from 8 August 2008 to date of payment.

Cost of suit. These costs are to include the qualifying fees of the plaintiff's experts.

Sishi J

Judge of the KwaZulu Natal High Court , Durban.

Appearances

Date of hearing : 23, 24 & 25 November 2011,

14 December 2011 & 1 March 2012

Date of Judgment : 10 September 2012

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