

P K Harikasun v New National Assurance Company Ltd (190/2008) [2013] ZAKZDHC 67 (12 December 2013)

Of red herrings, sardines and insurance fraud: Something's fishy

1 Introduction

Fraudulent insurance claims may be divided into three broad categories. The first is unfounded or fabricated claims and these are claims for losses that never occurred (Reinecke *et al South African Insurance Law* (2013) 375-376). Here, the insured fraudulently attempts to obtain a benefit he would not have been entitled to, were it not for his fraud. The second is fraudulently exaggerated claims, which refers to those claims where the insured inflates the value of what was lost. The third category refers to claims that are fully valid but which are accompanied by fraudulent means or devices – this means that the claim is valid but because the insured is of the opinion that the fraud is necessary to render the claim valid, he perpetrates fraud. At common law, the principle is that an insured cannot claim more than he is actually entitled to. Insurance companies often deal with insurance fraud by including fraudulent claims clauses into their contracts. Standard fraud clauses entitle the insurer to repudiate such claims and, in some instances, the insurer may also be entitled to cancel the contract. These clauses confirm the parties' rights and where an insurer has, for instance, compensated a policyholder and it later transpires that the claim was fraudulent, the insurer has the right to recover benefits that were mistakenly paid to the policyholder.

Of particular interest is the inclusion of forfeiture clauses in insurance contracts. As they stand, these clauses typically stipulate that a policyholder who was fraudulent regarding a portion of his claim, regardless of how small that portion was, stands to forfeit his *entire* claim against the insurer. As is evident from the case in question, it seems

particularly harsh to enforce such a claim where the so-called fraudulent part of the claim is particularly small in relation to the total claim value. Although the South African common law position leads to equitable results, there is nothing that prohibits insurance companies from changing the *naturalia* of their contracts by including forfeiture clauses. These forfeiture clauses mirror the position in English law and seem to be widely accepted in insurance practice. However, as can be seen in the case under discussion, forfeiture clauses may lead to unfair results where only a small portion of a claim was fraudulent, yet the policyholder forfeits the entire claim.

The ultimate question, therefore, is whether it is fair to have these clauses in insurance contracts. The question of fairness versus *pacta sunt servanda* is a raging debate within the law of contract in general and much has been written on this topic. However, for the sake of brevity, this discussion will only highlight the main issues in so far as it is relevant to forfeiture clauses.

Additionally, this discussion will also compare the current common law position in South Africa to that in England to illustrate that the inclusion of forfeiture clauses actually places South Africa on par with England. The comparison with England was chosen here because many aspects of English insurance law became part of South African law over the years. Although English law is no longer a source of our law, and also no longer a binding source, Reinecke *et al* correctly state that it retains a persuasive authority (Reinecke *et al South African Insurance Law* (2013) 15).

2 Facts

In casu the plaintiff, Mr PK Harikasun, brought an action for indemnification under an insurance policy issued by the defendant, New National Assurance Company Limited, for loss suffered during an armed robbery (par 1). The uncontested facts of the matter were that the plaintiff completed and submitted a Personal Insurance Plan Proposal Form dated 20 March 2007 to GDI Schofield Insurance Brokers. The defendant accepted the risk and issued a domestic insurance policy to the plaintiff with effect from 1 April 2007. The insurer covered 41 items of jewellery under the 'All Risks Specified Section'. The 'Household Contents Section' contained certain limitations, including a limitation on cover in respect of cellular phones at the insured's private residence to R1 500, unless specified. Furthermore, the limitation stated that 'theft must be accompanied by forcible and violent entry and accidental damage is excluded' (par 24).

On 4 July 2007 there was a robbery at the plaintiff's home, which prompted him to lodge a claim form dated 6 July 2007. Attached to this form was a schedule dated 10 July, which included 43 specified items of jewellery valued at R305 775, and a cell phone valued at R4 500. It, therefore, was the plaintiff's contention that the incident at his house was

a defined event in terms of the policy and that the defendant was liable to compensate him. The plaintiff alleged that the defendant was in breach of its obligations in that, notwithstanding compliance by the plaintiff with all his obligations under the policy, the defendant had failed and/or refused to pay the claim amount of R321 275, which is the extent of the plaintiff's loss (par 3).

The insurance company admitted to having issued the policy. Their refusal to compensate the plaintiff was based on their contention that the items of jewellery that were allegedly stolen on 4 July 2007 had in fact been stolen prior to the inception date of the policy. In addition, the defendant averred that, as it extended insurance cover in respect of the three items relying on the plaintiff's misrepresentation, the policy was induced by fraud. The defendant, therefore, was entitled to cancel the policy and had tendered repayment of the premiums paid. The defendant also placed in dispute the robbery and the theft of the items listed in the plaintiff's schedule of stolen goods. Even if the plaintiff did prove the loss, the defendant contended that it was not obliged to indemnify him and it was entitled to avoid the agreement of insurance because the plaintiff lodged two fraudulent claims. This was in breach of clause 9 of the contract. The first of these claims was for the loss of a Sony Ericsson cell phone, which the plaintiff falsely represented was in use and had a replacement value of at R4 500. The second was for an 18 carat Loasia chain valued at R6 250, which had been stolen from him on 27 April 2006.

3 Decision

The plaintiff requested a separation of the merits and quantum in terms of Rule 33(4) of the Uniform Rules, and the trial proceeded only on the merits (par 7). There were three issues for determination. The first was whether the plaintiff had proved that a robbery had taken place at his residence on 4 July 2007 and established that he had suffered the loss, which included the cell phone and the Loasia chain. The second issue was whether the defendant was entitled to avoid the contract of insurance because it was induced by the plaintiff's misrepresentation to issue the policy and to extend insurance cover over three items which were not in his possession. The third issue was whether the defendant could repudiate the plaintiff's claim for compensation and cancel the insurance contract because the plaintiff had breached the contract by his fraudulent claims for the damaged cell phone with no value and the Loasia chain which was not in his possession on 4 July 2007 (par 8).

The court remarked – and this is trite – that the onus is on the plaintiff to bring his claim within the four corners of the contract and to prove the extent thereof (see *Schoeman v Constantia Insurance Co Ltd* 2003 6 SA 313 (SCA) at 323A). That simply means that the plaintiff must prove that a robbery took place at his house on 4 July 2007 and that he is entitled to be indemnified by the defendant for loss suffered as a result of the robbery, as it constitutes a defined event in terms of the insurance policy.

It is also true that an insurer who alleges fraud has to prove it on a balance of probabilities. The court remarked that this ‘burden is an onerous one and our courts have observed that the point of departure has to be that fraud – the insured’s intention to deceive and defraud the insurer – is not to be imputed lightly’ (par 10). Furthermore, insurance fraud cannot be presumed and an important element of fraud in respect of fraudulent claims is the intention of the insured to deceive the insurer ‘by misrepresentation or deception and to cause the insurer prejudice’ (see *Springgold Investments (Pty) Ltd v Guardian National Insurance Co Ltd* 2009 3 SA 235 (D) at 243F–G).

The plaintiff and his wife declined to take a polygraph test (par 24.5). However, the plaintiff did supply receipts and valuations for some of the jewellery on the schedule and two affidavits in respect of the cell phone. Upon investigation, MTN, the service provider on whose system the lost cell phone was registered, confirmed that they had inspected the cell phone on 18 February 2006. MTN established liquid damage to the phone and the repair cost was R3 780, whereas the replacement cost amounted to R4 028.32. The insured opted not to have the phone repaired (par 24.7).

As far as the legal principles are concerned, other than those pertaining to the onus of proof, the court remarked that with regard to the pre-contractual fraud, the insurer has the right to avoid a contract of insurance whether the proposer has misrepresented a material fact or he has failed to disclose one (par 12). The court relied on *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* (1985 1 SA 419 (A) at 432E–H) in this respect.

As their main reason for repudiating the case, the defendant relied on the exemption contained in clause 9 of the General Conditions of the agreement of insurance to avoid the agreement of insurance (par 16). The court remarked that while there is no general principle that exemption clauses should be construed differently from other provisions in a contract, the courts are wary of contractual exclusions since they deprive parties of rights that they would otherwise have had at common law, and in this respect the court referred to *Van der Westhuizen v Arnold* (2002 6 SA 453 (SCA) 4 All SA 331 at parr 37–40). Additionally, in applying the *dictum* in *Fedgen Insurance Ltd v Leyds* (1995 3 SA 33 (A) at 38B–E), the court observed that it is a well-recognised principle of interpretation of insurance policies that the courts should lean toward upholding the policy rather than producing a forfeiture (par 16).

To return to the evidence and onus of proof: there was no direct evidence and the court had to rely on circumstantial evidence, which means that the inference drawn must be consistent with all the proven facts and the proved facts should be such ‘that they exclude every reasonable inference from them save the one sought to be drawn’ (*R v Blom* 1939 AD 188 202–203). However, in a civil case it is also important to bear in mind that the court must balance probabilities and select the

most plausible conclusion (par 16). In this respect, the court referred to *Ocean Accident and Guarantee Corp Ltd v Koch* (1963 4 SA 147 (A) at 159C–D) and to *Santam Bpk v Biddulph* (2004 5 SA 586 (SCA) at 589G).

The court heard the evidence of the plaintiff, his daughter Tasha, and a cousin, Caveer Ramjathan. In summarising the evidence, the court remarked that the stolen cell phone was scheduled as having a value of R4 500. It is in fact the cell phone that upset the apple cart. Apparently, the plaintiff could not remember what his response was when asked to take a polygraph test. He and his wife were called to a meeting with the insurers at which he was asked why he had not declared that the cell phone was not functional or faulty. The plaintiff testified as follows:

I explained to them exactly what I knew at that point in time. That the cell phone was damaged, it went in for repairs, it came out unrepaired and I never used that cellphone from the time it went to MTN for repairs and was returned (par 45.)

He had not said that the phone was in use. The court dealt with Mr Harikasun's evidence about the cell phone and three other items, namely a Loasia chain, a quarter Kruger Rand with a diamond, and a hand chain. He admitted that the chain, the Kruger Rand and the hand chain were stolen during a previous 'smash and grab' robbery on 27 April 2006, and he had been compensated therefore by the insurer at the time, Mutual & Federal. Despite this he still insured these with the defendant.

The court described the plaintiff as neither an impressive nor a credible witness. The court described the many inconsistencies in the plaintiff's testimony (par 49). Funnily, the plaintiff's credibility was seriously undermined by his evidence about how the cell phone was damaged and this portion of the judgment makes for interesting reading. During his examination-in-chief, the plaintiff testified that the phone was damaged when he went into the water at Addington beach during a sardine run, with his phone in his back pocket. Apparently he 'got out happily with the sardines' and phoned his uncle with the good news about his catch (par 52). Under cross-examination the plaintiff could not tell how he phoned his uncle with a broken cell phone and he changed his version several times. Unfortunately his version became even more inconsistent when he was reminded that the sardine run occurred during the winter months and not in February as he alleged (par 54). The plaintiff then alleged that it was not sardines, but mackerel. At this time Moodley J remarked:

Having lived in KwaZulu-Natal all my life, although I am not a fisherman, I have never heard of a mackerel run, although unlike the plaintiff, I am familiar with the saying "To throw a sprat to catch a mackerel". Unsurprisingly the mackerel run turned out to be "a red herring". According to the South African Sustainable Seafood Initiative – the species of mackerel or the King mackerel (also called Cousta or Cuda) which is found near the KwaZulu-Natal coastline, are linefish. This species is targeted by commercial and subsistence fishers but also caught by recreational line and spear fishers. The plaintiff's

explanation about how liquid damage was caused to the phone while he was gathering armfuls of mackerel is consequently a ludicrous lie (par 54).

As far as the actual robbery was concerned, the court accepted that the event insured against did take place and the plaintiff was successful in proving this.

Turning to the inducement of the contract of insurance by a material misrepresentation, the court observed that the defendant had to prove the pre-contractual fraud and that the misrepresentation materially affected the assessment of the risk under the policy at the time of issue (par 66). However on the evidence, Moodley J remarked that the court found 'no merit or pertinence' in the plaintiff's allegation that the defendant suffered no prejudice because he paid the premiums on the items and did not include them in the claim he lodged with the defendant (par 71). In addition, the argument that the nondisclosure did not materially affect the risk assumed by the defendant in respect of the plaintiff was also without merits because the defendant extended cover for items which did not exist at the time of the issue of the policy and for which the plaintiff bore no risk. Overall, the court proceeded to remark that it was not convinced that the contract of insurance was induced by fraud on the part of the plaintiff (par 72). The court remarked that the plaintiff was assisted by a broker in the completion of the proposal and it was probably convenient to move the list of items covered by the previous insurer to the defendant, instead of re-listing all these items. This was apparently done on a previous occasion when the broker completed a form for insurance with SA Eagle. And even though the proposal to the defendant did carry the plaintiff's signature, the court was not satisfied that the plaintiff:

deliberately and with intent, made a material misrepresentation or non-disclosure in failing to note that certain items ought not have been transferred from the previous schedule to the policy with the defendant, as he was not solely responsible for listing the items included "All Risks" section in the policy (par 72).

Here, the court relied on *Fransba Vervoer (Edms) Bpk v Incorporated General Insurances Ltd* (1976 4 SA 970 (W) at 790 E-F).

Therefore, despite the duty of disclosure on the plaintiff and the objective test to be applied in determining the materiality of the misrepresentation, the facts *in casu* indicate that there are:

special circumstances that indicate that a reasonable man would not have disclosed certain facts. The court is therefore not persuaded that the defendant is entitled to rely on the provisions of section 53 of the Short Term Insurance Act 53 of 1998 to avoid the policy on the grounds that it was induced by fraud on the part of the plaintiff (par 72).

Because it was not possible for the defendant to avoid the entire claim because of a misrepresentation (or pre-contractual fraud), the court had to decide whether or not to allow the claims for the cell phone and the

Loasia chain. The court again referred to the evidence and rules that the plaintiff's version was 'inherently improbable'. The court agreed with the defendant that the fraud consisted in the plaintiff's misrepresentation that the cell phone did work and was worth R4 500. The plaintiff deliberately tried to claim for a benefit that was not due to him. In addition, it was 'fraudulent in the sense of having been made knowingly and with the intention of obtaining a benefit under the policy' (par 90).

In avoiding liability the defendant relied on clause 9 of the General Conditions of the insurance agreement, which provides that:

If any claim under this policy be in any respect fraudulent or if any fraudulent means or devices be used by the Insured or anyone acting on his behalf to obtain any benefit under this Policy or if any accident, loss, destruction, damage or liability be occasioned by the wilful act or with the connivance of the Insured all benefit under this Policy shall be forfeited (par 91).

The court found that the plaintiff's fraudulent claim in respect of the cell phone, constituted a breach of the conditions of the policy with the result that the defendant was entitled to avoid the claim (par 92). As far as the Loasia chain was concerned, the court found that there are 'many unsatisfactory aspects in the plaintiff's evidence in relation thereto'. However, the court found that it was not necessary to deal with this claim any further because the claim in respect of the cell phone was fraudulent and the entire claim was therefore dismissed (par 93).

4 Comment

4 1 South African Common Law Position

Although the court observed that the plaintiff was by no means a star witness and even though the way in which the truth regarding the cell phone was discovered by the court was rather comical, the application of the forfeiture clause *in casu* does seem unnecessarily harsh. It is a striking example of where a whole claim is forfeited because of fraud that actually only affects a relatively small portion of the claim. Translated into monetary terms, this meant that the plaintiff's total claim of R321 275 was repudiated because of the fraudulent claim of R4 500. This begs the question whether forfeiture clauses should in fact be allowed and whether it is fair overall to have these in insurance contracts.

When one investigates the theoretical background, it is evident that forfeiture provisions have the effect of depriving a policyholder of that which he would have been entitled to at common law (Reinecke *et al supra* 382–383). The effect of a fraudulent claim on the insurer's liability at common law depends on the category of fraud that applies.

As was pointed out in paragraph 1, the first category of fraudulent claims refer to unfounded or fabricated claims, the second is fraudulently exaggerated claims, and the third category refers to claims that are fully valid but are accompanied by fraudulent means or devices. Reinecke *et*

al (supra 377) explain that the rule in Roman-Dutch law is that an insured can gain no benefit from his fraudulent claim, which simply means that the insured cannot claim more than he is entitled to. This means that in the instance of fraudulently fabricated claims (the first category), the insurer is not liable for anything and the insured forfeits his entire claim. This makes sense simply because the insurer cannot claim for something he did not lose or for damage he did not incur. In the case of a fraudulently exaggerated claim (the second category), the insurer is liable for the insured's actual loss but is not liable for the exaggerated part of it. Again, the insurer cannot claim for something he did not lose but he can claim for his actual loss (Reinecke *et al supra 378*). Applied to the facts in *Harikasun*, the claim for the phone would be repudiated but the remainder of the claim would stand. In the instance of a valid claim accompanied by fraudulent means (the third category), Reinecke *et al (supra 378)* explain that the insurer's liability is not affected as the insured's fraud is 'merely incidental and causally irrelevant to his loss or the insurer's liability'. The fact remains that, regardless of the kind of fraud, the insurer's civil remedy is a claim for damages against the insured for any damages his fraud may have caused (Reinecke *et al supra 378*). In addition, the insurer may institute criminal proceedings against the insured for his fraud, regardless of the amount for which the insured instituted a claim (Reinecke *et al supra 378*). In all three these instances, fairness prevails as the actual loss is compensated, nothing more and nothing less. Furthermore, where the insurer has the option of instituting criminal proceedings against the policyholder for fraud, it must be evident that the policyholder's actions do constitute fraud in the criminal sense and nothing else because failing this, there can be no prosecution and absolutely no conviction. Here, it is important to note that Snyman (*Criminal Law* (2008) 520) defines fraud as 'the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'. Insurance fraud then relates to the unlawful and intentional making of a misrepresentation by the insured which then results in an actual or potential loss for the insurer.

It follows that where a policyholder made a misrepresentation regarding a claim but this was not done intentionally, it cannot be fraud. Applied to insurance contracts, this means that only the intentional misrepresentations of a policyholder invokes the sanctions described by Reinecke *et al (supra 378)* and that any actions that amount to something less than fraud may not form the basis of an action for damages against the policyholder. This to is fair, since the proper application of the definition of fraud will prevent insurers from acting in an arbitrary fashion and from repudiating claims that should in fact be paid, simply because the insurer is of the opinion that some act of the policyholder might be tainted with dishonesty.

It, therefore, is not the common law position that constitutes the *naturalia* of insurance contracts that is cause for concern. Neither is it disputed that if there is no express forfeiture clause in a policy, such term may not be implied *ex lege* or incorporated tacitly (*Schoeman v Constantia*

Insurance Co Ltd 2003 2 All SA 642 (SCA)). Rather, the concern is around forfeiture clauses such as the one in Mr Harikasun's case that lead to seemingly unfair results. This now turns the discussion to the raging debate on fairness.

4 2 Fairness in Insurance Contracts

Legal certainty is a foundational principle that underlies the South African legal system (Hopkins 'Developers, municipalities, wrong decisions, liability and the Constitution' 2004 *SAPR/PL* 433). This entails, *inter alia*, that the law must be certain in order to enable legal subjects to regulate their conduct (Brand 'The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution' 2009 *SALJ* 71). The principle of *pacta sunt servanda* (agreements must be kept) conveys the idea of certainty and implies that a party to a contract should be able to rely on the other party to keep their contractual promise. However, as was seen in *Barkhuizen v Napier* (2007 5 SA 323 (CC)), there are clauses in insurance contracts that have negative consequences for policyholders and it is often when disgruntled policyholders are faced with such clauses that the debate turns to the fairness of these clauses.

It is well-known that fairness, as a so-called abstract value, has been transported into contract law by the Roman law defence of bad faith or the *exceptio doli*, and that this defence was abolished in *Bank of Lisbon and South Africa Ltd v De Ornelas* (1988 3 SA 580 (A)). Joubert JA pronounced the *exceptio doli* a 'superfluous defunct anachronism', effectively abolishing the principle (*Bank of Lisbon and South Africa supra* 605). In the wake of this judgment, many called for legislative intervention and others debated the possibility of using public policy as an alternative concept to introduce fairness and good faith into contract law (Hawthorne 'The end of bona fides' 2003 *SA Merc LJ* 272). Much debate on the role of good faith followed and cases such as *Afrox Health Care Ltd v Strydom* (2002 6 SA 21 (SCA)) re-iterated that good faith, reasonableness and fairness do not provide an independent, free-floating basis for interfering with contractual relationships (*Afrox Health Care Ltd supra* par 32). It is also a fact that academic opinion remains divided on the use of the South African Constitution of 1996 as a vehicle to import good faith, equity and fairness into South African contract law (Davis 'Private law after 1994; Progressive development or schizoid confusion?' 2008 *SAJHR* 329; Barnard 'A different way of saying: On stories, text, a critical legal argument for contractual justice and the ethical element of contract in South Africa' 2005 *SAJHR* 278).

In the context of insurance, it is a well-known fact that in *Barkhuizen v Napier* (2007 5 SA 323 (CC)) the Constitutional Court had to rule on the validity of time bar clauses. In this case, the majority of the court held that public policy requires parties to comply with contractual obligations undertaken freely and voluntarily (Kuschke '*Barkhuizen v Napier*' 2008 *De Jure* 466), thus reinforcing the rule of *pacta sunt servanda*. Accordingly,

the clause in question did not deny the applicant the right to institute legal action but only limited the time within which he had to do so. Following this judgment however, the legislature intervened and formulated new rule 7.4 of the Policyholder Protection Rules (PPR's) in terms of the Long-Term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998. As from 1 January 2010, any time limitation provision may not include the 90-day period within which the insured may make representations to the insurer, and it must provide for a period of not less than six months after the expiry of the 90-day period for the institution of legal action. The new rule states that even in cases where the time bar period has expired, the policyholder may request the court to condone non-compliance if the court is satisfied that 'good cause' exists for the failure to institute legal proceedings, and 'that the clause is unfair to the policyholder'. This, no doubt, is fair.

The question remains whether legislation should be passed to exclude forfeiture clauses and, as promised, a quick overview of the position in England follows.

4 3 English Law

In English law, any fraud in connection with an insurance claim, causes forfeiture of the insured's entire claim (Birds *Birds' Modern Insurance Law* (2010) 291-292). This means that whether the claim is a fraudulently fabricated one, a fraudulently exaggerated claim or a valid claim accompanied by fraudulent means, the insured forfeits his entire claim (Birds *supra* 290-291). Evidently the position in English law is exactly the same as it is in South Africa where a forfeiture clause is included in an insurance contract. If the insurer did pay and the fraud was discovered later, it may recover payment from the insured (Birds *supra* 291). However, earlier non-fraudulent claims are not affected by subsequent fraud and it is not possible for an insurer to avoid the contract retrospectively (Birds *supra* 289). It is not possible for an insured to validate the claim by retracting the fraud (*Direct Line Insurance Plc v Fox* EWHC 386 (QB) 2009 1 All E.r. (Comm) 1017). In *Galloway v Royal Guardian Royal Exchange (UK) Ltd* (2000 Lloyd's Rep. I.R. par 209) the Court of Appeal ruled that even though the policy in question did not contain a forfeiture clause, the policy would be treated as if there was such a clause.

It is quite evident that in England, the courts are of the opinion that the purpose of the law must be to discourage fraudulent claims. This principle was in fact confirmed in *Axa General Insurers Ltd v Gottlieb* (EWCA Civ 112 2005 Lloyd's Rep. I.R. 369; see also Birds *supra* 290). This means that even in the absence of a forfeiture clause, policy considerations dictate that the fraudster should be deprived of his entire claim.

This position is, no doubt, much stricter than the position in South African common law, because the principle that is applied is *fraus omnia*

corruptit, which means that ‘fraud infects the whole transaction’ (Reinecke *et al supra* 377 n 209). The strong reliance on this adage has been confirmed in case law in England. In fact, in *Schoeman v Constantia* (2003 6 SA 313 (SCA)) the court states that this rule in English law is *unashamedly penal* and although the court did not have to rule on the fairness of these clauses in general, it does conclude that South African civil law is anti-penal (see *Pearl Assurance Co v Union Government* 1934 AD 560 (PC)). Therefore, although South African insurance law has much in common with English law, this very fundamental difference between South African insurance law and English insurance law on penal clauses, makes a good case against the inclusion of forfeiture clauses in insurance contracts.

Still, the fact remains that South African insurers are not prohibited from relying on forfeiture clauses. The next issue for investigation is the way in which fairness manifests itself in insurance contracts and whether rules pertaining to other onerous clauses may be used as an argument against forfeiture clauses.

4 4 Role of Insurance Intermediaries and the Financial Advisory and Intermediaries Act 37 of 2002

It is suggested that fairness has seeped into the South African law of insurance via the Financial Advisory and Intermediaries Act 37 of 2002 (the FAIS Act). This statute is primarily concerned with the regulation of the activities of financial advisors and intermediaries, and those who sell insurance inevitably have to abide by this statute. There are numerous provisions that are aimed at protecting consumers but perhaps the most relevant stipulation can be found in the General Code of Conduct (GCC) in terms of the FAIS Act. Section 7(c)(vii) of the GCC provides that financial service providers should provide a client, at the earliest possible opportunity, with full and appropriate information of, *inter alia*, ‘concise details of any special terms or conditions, exclusions of liability, waiting periods, loading, penalties, excesses or circumstances in which benefits will not be provided’.

Failure to do so, according to the FAIS Ombud, constitutes a breach of contract and that renders the provider or insurance broker liable to the client. This principle has been repeated in a number of Ombud cases, notably *Wiltash Musiek CC v Teneo Financial Services CC and Christiaan Stephanus Lessing* (case no FAIS 07648/12-13 FS 3) and *Fliptrans CC v S & P Insurance Advisors (Pty) Ltd t/a McCrystal and Partners and E Solmes* (case no FAIS 07987/11-12/GP3). The latter dealt with a broker who failed to inform the insured that his motor cycle needed to be fitted with a tracking device and when the claim was repudiated for failure to fit such device, the Ombud ruled that the broker failed to alert the policyholder of this particular clause.

As far as the debate on fairness is concerned, one must consider that the FAIS Ombud’s mandate, in terms of section 20 of the FAIS Act, is to

adjudicate complaints with due consideration of the ‘contractual relationship or other legal relationship’ between the parties and ‘by reference to what is equitable’. This means that the Ombud has a statutory mandate to consider fairness when making a decision. Ombud decisions such as in *Wiltash* and *Fliptrans* (*supra*) illustrate the Ombud’s approach to onerous clauses, namely that an intermediary or advisor has a duty to ensure that a policyholder is aware of these clauses.

It is submitted that the same holds true of forfeiture clauses. Although it was never Mr Harikasun’s case that he was not aware of the forfeiture clause, such clauses will no doubt not be enforced by the FAIS Ombud if a complainant can prove that he was not aware of the clause.

Overall, it can be argued that the FAIS Act introduces fairness in insurance law by means of the regulation of the activities of intermediaries and advisors. Unfortunately, the courts are not bound to reach an ‘equitable result’ whereas the FAIS Ombud is. This means that it is possible for the same case to be adjudicated differently by the Ombud and by a civil court. At the very least, although the FAIS Act does not forbid forfeiture clauses, there is an obligation on intermediaries and advisors to ensure that a prospective policyholder’s attention is drawn to these and every other onerous clause in an insurance policy.

5 Conclusion

South African common law allows for the forfeiture of that portion of the claim that is fraudulent. *In casu*, if there were no forfeiture clause, Mr Harikasun would only have forfeited the claim for the cell phone but the remainder of the claim would have been paid. That seems fair.

However, in order to be fair to insurers, fraudulent claims clauses have seemingly become necessary because of the high incidence of insurance fraud. Although the intentional misrepresentation of facts can be said to go to the heart of the contract and although there is a lot of truth in the maxim *fraus omnia corrumpit*, it is submitted that forfeiture clauses often strike at more than just the forfeiture of *fraudulent* claims. This was not the case in *Harikasun*, but it is possible for insurers to include, in forfeiture clauses, actions that are not fraud *per se*. That means that even honest mistakes can by interpretation be covered by a forfeiture clause and that may lead to unfair results.

Although the validity of forfeiture clauses have not been successfully challenged in a South African court, a clear call for legislative reform was uttered in *Napier NO v Van Schalkwyk* (2004 (3) SA 425 (W) at 444). The question, then, is what shape those reforms should take?. As was remarked before, unlike the position in England where forfeiture clauses are valid and enforceable, South African civil law does not have a penal nature and we should be cautious to allow forfeiture clauses, and thereby follow English law.

Ultimately, it would be ideal for forfeiture clauses to simply reflect the common law position, namely that a claimant would only forfeit that portion of the claim that was fraudulent. Even though it is doubtful that the legislature will ever outlaw forfeiture clauses, it is suggested that the inclusion of the other recommendations in the PPR's will temper the effect of these clauses and ensure a more equitable result. Therefore, it is submitted that the PPR's in terms of both the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998, should be amended to include rules on forfeiture clauses. These rules should, first, stipulate that where a policy contains a forfeiture clause, it should clearly define what is meant by fraud – this definition should be the common law definition of fraud and should not include any other actions by the policyholder. Second, the forfeiture clause should be very clear on the consequences of the fraud for the insured. These consequences should be the forfeiture of that portion on the claim which is fraudulent as opposed to the entire claim. As with any other clauses in a policy, this clause should be written in plain language. Third, it is suggested that where a policy does contain a forfeiture clause, the policyholder should, as soon as a claim is submitted, be reminded of the existence and consequences of the particular clause. This places a duty on an insurer to warn a policyholder, at claim stage, that there will be consequences for submitting a fraudulent claim.

Overall, the suggested amendments will deal effectively with those fishy claims and opportunistic policyholders without depriving them of compensation for the legitimate portions of their claims.

D MILLARD

University of Johannesburg