FAIRBRIDGES
WERTHEIM BECKER

Est. 1812

INSURANCE AND REINSURANCE

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IN THIS ISSUE:

PPR AND TCF PRINCIPLES PUT TO THE TEST

Ayanda Nondwana
Director

In *Dlulane v Clientele Life Insurance Ltd (Case No. FAB81/2022, 30 September 2022)*, the policyholder was the owner of a funeral policy where the main insured life passed away in January 2022. The insurer ('Clientele') initially rejected the claim because of no insurable interest. After the FAIS Ombud dismissed the complaint, the Financial Services Tribunal referred the matter back for reconsideration and Clientele accepted liability subject to its other rules. Clientele then rejected the claim again on the basis that the premium for December 2021 had been outstanding for more than 15 days and as such, there was no cover at the time of the death of the deceased (on 12 January 2022). The Ombud having dismissed the policyholder's second complaint, the policyholder applied to the Tribunal for reconsideration of the decision.

Clientele contended that the policy's monthly debit date was the 25th day of every month, and that it attempted to debit the December 2021 premium on its debit date, but the debit order was returned unpaid due to insufficient funds. The debit was sent through on Christmas Day (when no bank operated), that policyholder's bank statements show that there had not been any attempt to debit him on that date, and that Clientele debited on 31 December. The policyholder contended that he made a cash payment on 12 January 2022 and Clientele received the payment on 14 January 22, and therefore, the 15-day grace period in the policy-holder protection rules (PPR's) must be calculated with reference to normal days, not business days.

The chairperson of the Tribunal remarked that the PPR's definitions and those of the Interpretation Act do not apply to the interpretation of a contractual term. Accordingly, the chairperson found that 'day' is inherently ambiguous, and that there is no reason to assume that the policyholder or an uninterested bystander would have attached a limited meaning to the word within the context of the policy. The Tribunal further found that it was legally and factually impossible to pay at least four days during January, and to count them in is unlawful and unconscionable, and breaches the obligation of treating the customer fairly. The decision of the FAIS Ombud was set aside, and the complaint referred to the Ombud for further consideration.

PEDESTRIANS AND ATHLETES OWE EACH A DUTY OF CARE

Ayanda Nondwana
Director

In *Davids NO v WPA Athletics & Another (1 November 2022)* the court found that a pedestrian and runner owed each a duty of care on race day and based on the mechanics of the collision, the negligence of the pedestrian far outweighed that of the runner.

In April 2014, Ms. Salie was knocked to the ground by Ms Kalmer – an experienced and accomplished middle distance runner participating in the Spar Ladies' Race – organised by Western Province Athletics ('WPA'). Ms. Salie, out for a walk with her friend, had just taken a picture of Ms. Olckers and her friends participating in the Fun Walk, and moved across the sidewalk (used by participants in the race and Fun Walk) to hand over the camera, when the collision with Ms. Kalmer occurred. She suffered a fractured hip and consequently, instituted legal proceedings against the WPA and Kalmer for her damages arising out of the collision. The High Court dismissed Ms. Salie's claim and the SCA granted leave to appeal to the full Bench.

On appeal and at the outset, Ms. Salie conceded that she was negligent and what was left for the court to decide was the degree to which, if any, was Ms. Kalmer negligent. The court considered the topography of the area along the 10km route leading up to the collision, the video and photographic evidence, and the record of the eyewitness. The court remarked that Ms. Kalmer entered a race which wound its way through an area where the prospect of encountering non-runners along the way was entirely foreseeable. She was thus under a duty to keep a proper lookout for any such potential obstacles as she sped along both the Promenade and the sidewalk in her quest to achieve maximum points on the day. Her failure to keep a proper lookout and take evasive steps imputed liability on her part.

The court also found that the WPA was not negligent in its organization and/or management of the race. The court remarked that the evidence established that the event was unprecedented and there was no basis for the marshall to have anticipated the aberrant behaviour manifested by Ms. Salie, and that the claim against WPA was correctly dismissed by the High Court. Ms. Kalmer was found to be liable for 30% of the harm suffered by Ms. Salie.

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TEACHER KNOWS BEST

Ayanda Nondwana
Director

In *QMR and Others v MEC for Education, North-West (27 September 2022)*, the court found that a high court teacher was liable for failure to specify activities to the parents prior to the school excursion.

The Rustenburg Technical High School organised a school excursion in a farm in which three learners drowned and died. Two learners drowned when the canoe they were allowed to use on a dam on the farm, capsized. The circumstances surrounding the death of the third learner were uncertain. The guardians and parents of the three learners instituted action for damages against the North-West MEC for Education. The MEC acknowledged responsibility for the learners under the Schools Act but denied being negligent and denied a causal connection between the death of the learners and the steps taken to ensure their safety.

The court considered the relevant case law on negligence, reasonable foreseeability of harm and, *Rusere v The Jesuit Fathers* on the duty of care owed to children by school authorities. The court remarked that the school trip had not envisaged any water related activities and that parental consent was not given for such activities. The court found that the educator should have been acutely aware of the absence of parental consent and the fact that she allowed her own children to swim in the mass of water does not avail the MEC's case. The court further found that the educator – in the position of a careful mother (diligens paterfamilias) – should have refused any engagement in such activities. The court pertinently held that the educator's own version overwhelmingly proves negligence on her part, which negligence is causally linked to the drowning of the three learners: if it were not for the educator allowing the water related activities in the absence of parental consent, and without proper adult supervision, the harm which resulted in the death of the learners could have been averted.

On quantum, the court considered the emotional and psychological impact on the plaintiffs brought about by the untimely death of the learners and that the failure to hold a formal inquest and inform the plaintiffs of the informal inquest has done nothing to allow closure for those affected. Accordingly, the court found an amount of R375 000 in general damages for each of the three plaintiffs would be fair and appropriate.

MUNICIPALITY LIABLE FOR FAILURE TO COVER A WATER DRAIN ON THE ROAD

Ayanda Nondwana
Director

In *Bashman v Nelson Mandela Metropolitan Municipality, (27 September 2022)*, the court found that the municipality was liable for failure to cover a water drain on the road which was left open or unattended for a considerable period.

Ms. Bashman was walking on the roadway surface of a dark street in New Brighton one evening when a cyclist approached her from the front at high speed. To avoid a collision with the cyclist, she jumped onto the pavement and stepped into and was trapped in an open storm water drain – injuring her elbow. She instituted action for recovery of damages against the municipality.

She contended that the municipality's failure to cover the drain was reasonably foreseeable and it had a legal duty of care to ensure that the storm water drain was always covered. She contended that there were no adequate warnings to warn members of the public, including herself, of the hazards presented by the uncovered storm water drain.

The court remarked that Ms. Bashman was unfamiliar with the area and that there were no streetlights, and that the storm water drain was open for a considerable period of more than a year before this incident, and the undisputed evidence that the cover lids were inserted at different times, and it was the duty of the municipality to maintain and ensure that the storm water drains were securely covered. Referring to the recent case of *MOTH v Els*, the court found that the municipality's employees (who swept the street weekly and collected rubbish bags) were aware of the uncovered drain, and that the failure by the municipality to warn the members of the public, including Ms. Bashman, presented a risk of injury. The court found the municipality to be 90% liable of the proven damages arising from the incident. However, the court also found that Ms. Bashman was contributorily negligent in walking on the road surface instead of the pavement and failing to keep a proper lookout.

HEIGHTENED DUTY OF CARE OF A BROKER?

Kagiso Tshandu
Associate

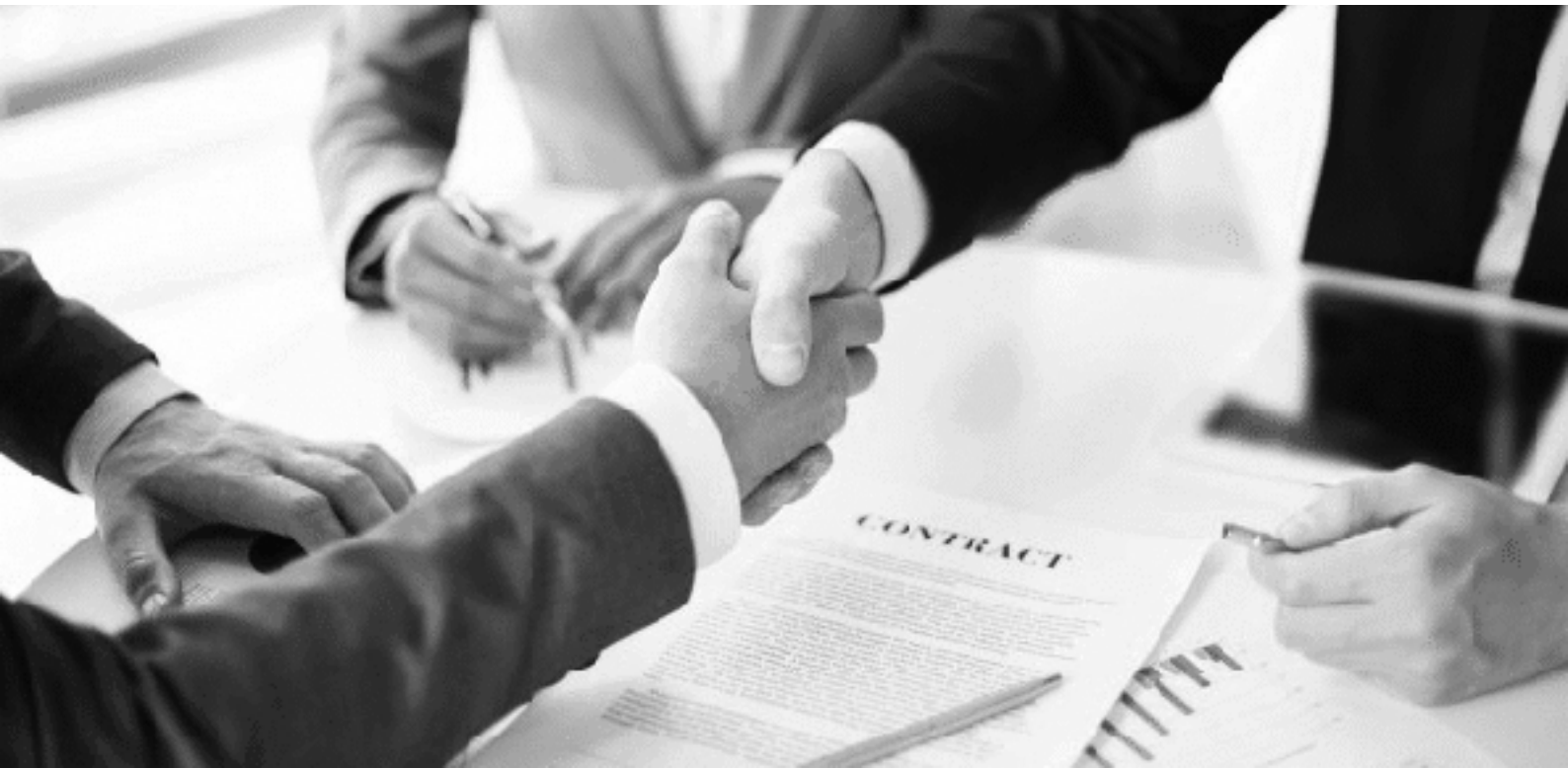
In *Dalmar Plant Hire (Pty) Ltd v RMB Structured Insurance Ltd and Another*, the appeal court found that a broker has a duty to communicate material change or alteration in a policy notwithstanding that the insured confirmed having read and acquiesced to the new terms of the policy. However, the court did not opine on the liability of the broker on the specific facts of this matter and referred the matter to oral evidence to enable the broker to take the stand.

Optimum Financial Services acted as Dalmar's insurance broker since 2010. Dalmar contended that Optimum advised it to change insurer from Centriq Insurance Company Limited to RMB Structured Insurance Ltd. The material difference in respect of the policy between that of Centriq versus that of RMB is that Centriq required one tracking device to be installed on Dalmar's vehicle whereas RMB required two tracking devices. This material change was allegedly not communicated to Dalmar by Optimum which omission was admitted by Optimum, but who stood on the contention that such a change was not material.

In consideration of the duties of an insurance broker, the Court referred to *Stander v Raubenheimer 1996 (2) SA 670 (O)* wherein which it was found that that the broker was liable for the loss suffered by the insured, given that the broker failed to perform his contractual duty by inter alia failing to ask the necessary questions or neglecting to obtain from the insured and disclose to the insurer details regarding the structure of the roof in question. The rationale for this decision was because the broker was aware that the contents of the insured's house would not be covered in accordance with the policy if they were damaged or destroyed in a house with a thatched roof and failed to ensure whether the insured's house would be affected by such an exclusion.

The court remarked that Optimum's duty fell within the ambit of communicating any material changes in an insurance policy to Dalmar as their insurance broker. Simply put, there would be no need to appoint an insurance broker if they were not going to communicate any material changes or exercise their duties with reasonable care and skill without negligence in favour of their clients. Had there been no material change then no duty rested upon on Optimum, however, at hand, Optimum needed to elucidate the alteration in tracking and recovery device requirements regarding an insured vehicle since it affected the wording of the insurance policy as Dalmar knew it to be. Naturally, Optimum had a duty to inform the insured of such a material change.

The observations made by the court are quite interesting in the context of the specific facts of this matter. It is undeniable that insurance brokers provide critical services for both the insurer and policyholder, which includes but not limited to assisting with placing of risk, claims processing and accounting for insurance premiums as well as (in the context of this matter) educating policyholders about all matters relating to their insurance policies. Simply handing a copy of a new policy terms with or without material changes to an insured by a broker may be wholly inadequate and our courts would not hesitate to impute liability should the circumstances dictate the imposition of same.



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