THE OMBUDSMAN'S BRIEF CASE.

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(Newsletter of the Ombudsman for Short-Term Insurance)

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DEVELOPMENTS IN THE OFFICE

- **The FAIS Ombud officially opened its doors on the 1st October 2004 and has since such date started formally dealing with claims relating to advice or intermediary services.**
- **We have employed an additional Assistant Ombudsman , Mr Paul van Onselen, to deal with the growing volume of complaints**
- **A workshop on communication issues took place on the 6th of October 2004 to address expediting the resolution of complaints which will hopefully result in speedier and more effective resolution of complaints.**

OMBUDSMAN'S ADVICE

Misunderstanding of the consequential loss exclusion on the motor policy

The insured was travelling east on the N4 from Witbank. Near a filling station at Machadodorp he saw that the temperature on his Mazda Etude was very high, and switched off the engine. Upon inspection, he found that it had been damaged by a bolt that had emanated from a truck, gone through the grill and damaged the radiator and air conditioner. He immediately called the towing services and his car was towed to Nelspruit. The insurer admitted liability for replacement of the radiator, shroud, grill and condensor as well as associated labour and coolant. However, it denied liability for mechanical damage to the engine contending that it was consequential loss.

The damage to the engine is not a consequential loss as contemplated by the policy. The vehicle sustained 'loss or damage' as a result of an accidental occurrence and therefore all the damage is recoverable. The only point of enquiry would have been the actions of the insured in minimising the damage, who stopped his vehicle as soon as he noticed the high reading on the temperature gauge. The insurer conceded and settled the claim in full.

Premium based on alleged incorrect information

In the early hours of Sunday morning, 11 January 2004, the insured's Volkswagen Citi Golf was stolen. The insurer repudiated liability on the ground that the insured had failed to provide the insurer with the correct information regarding her previous insurance history. She had informed the insurer that she had had uninterrupted comprehensive insurance for a number of years preceding the time that the vehicle was added to the policy, without any claims or losses, which was not the case. Based on this information, she was allocated a four-year no claim bonus.

The Ombudsman pointed out to the insurer that the present claim was the first claim lodged by the insured since December 2001, and that she had therefore been claim-free for a period of two and a quarter years. Furthermore, on looking at the transcript of the sales conversation, nowhere did the insured claim to be entitled to a no-claim bonus, but on the basis of the answers given was granted a no claim bonus, presumably as a marketing exercise. The issues were debated with the insurer, who eventually agreed to

accept the claim.

Vehicle stolen from motor dealer's premises

The insured decided to sell his vehicle, a Jeep Grand Cherokee, valued at R250 000. He arranged for the agents of the vehicle to display the vehicle on the showroom floor. Not unexpectedly, the motor dealer required the insured to sign a contract headed — *'Agreement for the Sale of a Vehicle on Consignment'.* The Agreement contained a condition that the motor dealer would be held harmless for any damage, loss or theft which might occur. The vehicle was stolen by a security guard employed by the motor dealer, but was recovered with damages, which made it uneconomical to repair. The insured lodged a claim against his insurer in terms of his motor policy, which was declined.

The Ombudsman's office could not fault the insurer's decision, as on investigation it was found that liability was declined on the following grounds:

- The insured failed to notify a change in the risk address where the vehicle would usually be kept.
- The vehicle was in possession of a member of the motor trade, contrary to the description of use clause.
- The insured had deprived the insurer of any subrogation rights, which the insurer might have had if the claim had been accepted.

Insurer liable for towing and storage charges notwithstanding repudiation of claim

On 4 September 2003, the insured was involved in a collision. 10 days later she was informed that an assessor had been instructed to assess the damages. The vehicle was at her home, but she was told to arrange for it to be taken one of the insurer's preferred panelbeaters and the insurer also confirmed to her that the towing costs would be paid. Three days later she received a phone call from the insurer informing her that her claim had been rejected because of her failure to pay the premium payment falling due on 1 September 2003. A week later she went to collect the vehicle, and to recover it she was charged R1 880 release fees and a further amount of R250 to tow the vehicle back to her premises.

The Ombudsman agreed with the insurer that it was entitled to repudiate the claim based on the non-payment of the premium. In view of the undertaking which the insurer had given to the insured with regard to the towing charges however, the insurer was ultimately persuaded to make payment of the full amount of R2 130.

Insured allegedly did not take proper care

The insured, who was the sole breadwinner, parked a Volkswagen Citi Golf in front of the Kempton Park High School to collect a fax. She locked the car, but because it did not have a separate boot, she put her handbag (containing spare keys to the car) underneath the passenger's seat and out of sight. In the 20 minutes it took to collect the fax, her car was stolen. The insurer repudiated liability based on the insured's alleged failure to take due and proper precautions to avoid the loss.

The Ombudsman pointed out that the whole purpose of insurance is to cover the insured for the negligence. The insurer was then persuaded to admit the claim.

Honesty is the best policy

During the period August to September 2003, the insured noticed that his cell phone and a bracelet belonging to his wife had gone missing. He deliberately did not claim for these items because of the excess that would be applicable. On 25 November 2003, his house was burgled and a number of items of jewellery were stolen. The insured then included in the list of items the stolen cellphone as well as the bracelet. The insurer, upon becoming aware of the inclusion of these two items, repudiated the entire claim on the grounds that the insured had used fraudulent or dishonest means to claim a benefit to which he was not entitled.

The Ombudsman agreed with the insurer that in view of the dishonesty of the insured, the insurer was entitled to maintain its repudiation.

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Cellphone insurance

The insured's Motorola cellphone was stolen and the insurer repudiated the claim on the grounds that when the insured took out the insurance, he insured a Nokia cellphone, which was insured for R2 000. The insurer alleged that the insured should have advised the insurer of the change of cellphone. The insured then enquired what the use of paying a debit order for cover on the cellphone was, upon which the insurer stated that it would refund him six instalments totalling R390.

The Ombudsman suggested that, as a matter of fairness and equity, the claim should be met. The insurer agreed to settle the claim on an *ex-gratia* basis.

Unroadworthy vehicle - tyre tread not meeting requirements

The insured was travelling on the R21, which is a dual carriageway in each

direction with a grass lane separating the two directions of travel. Because it was already after 20:00, the traffic was quiet. He was travelling at an approximate speed of 110km per hour because he wished to remain in sight of his wife who was following him. The road surface was dry and visibility good. He suddenly became aware of dust/smoke, and in order to escape the total blockage of his front view, he swerved to his right-hand side. He clipped the right rear corner of a truck in front of him which resulted in his bonnet flying open. This totally blocked his view. All this happened so quickly that he did not have time to brake.

Immediately after the aforesaid collision, the airbag inflated and all he could do was to take his foot off the accelerator and the car ultimately overturned.

Significantly, the car travelling immediately behind the insured was also caught in the emission of dust/smoke and he too swerved to his right-hand side, but collided with the insured's wife's vehicle. (His wife had in the meantime pulled over to the right hand lane in order to overtake the vehicle behind the insured). The insurer repudiated liability because the left front tyre did not have sufficient tread on it.

The Ombudsman pointed out that at a speed of approximately 110km per hour the insured was covering approximately 31 metres per second. Generally, the Courts accept that the driver has a one second reaction time, and based on the facts as related by the insured, a full tread on the left front tyre would not have avoided the collision. The insurer was persuaded to admit the claim.

Failure to meet security requirements set out in the policy

During 2002 the insured bought a pre-used Uno Fire 1996 model. The vehicle was fitted with an immobiliser, but the insured had no documentation in respect thereof

Approximately 18 months later the vehicle was stolen. The insurer repudiated liability on the grounds that in terms of the policy, it was a requirement that the immobiliser be VESA approved, and he had failed to deliver proof thereof.

The Ombudsman agreed with the insurer that in terms of the policy, the immobiliser had to be VESA approved. In view of his failure to provide proof of the installation thereof or that it met VSS requirements, the insurer was entitled to maintain its repudiation.

Policy wording contradicted by excess schedule

The Insured, the owner of a Nissan Bakkie, made arrangements for her brother's garage to service the vehicle. On 18th August she slept over at her brother's flat.

The next morning she discovered that the Bakkie had been stolen. The Insurer repudiated liability on the ground that the vehicle was not fitted with a VESA approved Gearlock.

Ombudsman's response

The Ombudsman pointed out to the Insurer that although it was a requirement in terms of the Policy that the vehicle be fitted with either a VESA approved Gearlock or a VESA approved Level 3 Immobiliser and the vehicle was not so fitted, the Excess Schedule, which forms part of the Policy, inter-alia, contained the following words "If the vehicle is not equipped with either a Tracking device, Gearlock or VESA approved Immobiliser, and the claim amount is less than R25,000 - 15% of the claim" and that this created the perception in the mind of the Insured that she would still be entitled to have cover, but with a higher Excess applicable. The Insurer was then persuaded to meet the claim.

Failure to report accident to the SAPS within specified period

On 14th March 2004 and at approximately 23h00 the Insured was travelling home when he swerved in an attempt to avoid a stray dog and collided with a tree. In view of the fact that his vehicle was not badly damaged and no-one else was involved in the accident, he proceeded home and did not bother reporting the matter to the Police. The Insurer repudiated liability on the ground that the Insured had failed to report the accident to the Police within 24 hours.

Ombudsman's response

The Insured believed that in view of the circumstances of the accident, that there was no obligation to report to the SAPS. The Insured was not in possession of the Policy wording. In the circumstances the Insurer agreed to accept the claim.

Presumption of the driver being under the influence of alcohol

On Saturday, 5th June 2004, the Insured played golf in the country town of Porterville. He spent some time at the 19th hole and he was on his way home at 21h30. One of the tyres of the vehicle burst, which caused the vehicle to swerve and he then collided with another vehicle. His vehicle rolled and landed in an open piece of land. One of his passengers fell out of the vehicle and walked approximately 5 Kms. to seek help. The Police as well as the Ambulance arrived at the accident scene where the Insured was still trapped in his vehicle. The Insurer repudiated liability on the ground that the Insured was driving whilst under the influence of alcohol. The Insurer justified its repudiation because the barman at the Golf Club had confirmed that the Insured was in the bar earlier on the incident date, a Farmer confirmed that one of his workers had picked up a crate of beer and two glasses where the vehicle had landed, the insured had been seen at the rugby where he had been seen drinking Red Heart Rum with his friends and a witness, who was at the rugby, confirmed that the Insured was "definitely drunk".

Ombudsman's response

The Ombudsman pointed out to the Insurer that no blood alcohol analysis had been taken, no breathalyser was administered and that the Police who arrived at the accident scene, did not arrest the Insured or call for a blood alcohol analysis to be taken. The Ombudsman pointed out that the mere fact that the Insured had been drinking prior to the accident, is insufficient evidence to establish on a balance of probabilities that the Insured was under the influence of liquor at the time of the accident. As they could not produce any evidence of the Insured being under the influence of alcohol other than observations of witnesses, the Insurer met the claim.

Requirement to produce evidence of the vehicle service record

The Insured was travelling between Klerksdorp and Stilfontein in his Opel Kadett 200se when his vehicle broke down. He had a Motor Warranty Policy, which repudiated his claim because he was unable to produce proof that the vehicle was serviced at regular intervals.

Ombudsman's response

Whilst the Insured was in breach of the requirements, it transpired that he was a mechanic by trade and serviced his own vehicle. The Insurer conceded the point and the claim was settled.

Alternative burglar protection

The Insured's property was burgled and the Insurer declined the claim as they contended that the premises were not adequately protected by security gates and burglar bars.

Ombudsman's response

It was drawn to the Insurer's attention that the requirement set out in the Policy required security gates and burglar bars OR a linked alarm system. The alarm did not trigger on the day of the burglary and it was found that certain magnetic points failed due to some technical reason. It was proved that the alarm had in fact been activated, and in the circumstances the Insurer gave the benefit of the doubt to the Insured and dealt with the claim.

Double debit has the effect of the insurer giving credit for the preceding month

The Insured's Policy incepted on 1st June 2003 and four days later i.e. on 4th June his mag wheels were stolen. The Insurer repudiated liability because the Insured had failed to pay the premium due on 1st June 2003.

Ombudsman's response

The Ombudsman pointed out to the insurer that subsequent to the return of the debit order for 1st June 2003 due to insufficient funds, the insurer had lodged a double debit on 1st July 2003 and it duly received the money. The Ombudsman pointed out that the Insurer had accordingly given credit to the insured for the preceding month and that he was consequently covered as at date of the loss, i.e. 4th June 2003. The insurer agreed and settled the claim.

Insurer electing to repair a vehicle

The Insured's vehicle a Daewoo Lanos was involved in a front end collision. The Insurer instructed a repairer to repair the vehicle, which in turn sub-contracted to Specialist Radiators to re-core the radiator. Three months later the engine overheated and it then transpired that the radiator should have been replaced and not re-cored. As a result of the defective repairs the Insured had incurred costs amounting to R8,794.38, which the insurer

refused to pay on the ground that it had discharged its liability by instructing the repairer to do the necessary rectifications.

Ombudsman's response

The election by the insurer to repair the vehicle attracts certain responsibilities, including that the vehicle be repaired in a fit and proper manner. The repairer in this case is effectively the agent of the insurer and any shortcomings in the repair of the vehicle is the responsibility of the insurer. Following negotiations with the insurer it accepted the position and settled the claim by reimbursing the insured.

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TIME-BARRING

FOLLOWING THE REPUDIATION OF A CLAIM

Judgement

The constitutionality of Time-barring Clauses in Insurance Policies was the subject of a recent decision handed down in the Transvaal Provincial Division of the High Court in the matter of **Barkhuizen v Napier (unreported)**. The Court held that the limited period allowed for the service of a Summons from the date of the repudiation is in conflict with Section 34 of the Constitution. The effect of this decision is that Insurers can be sued up to expiry of the periods provided for in terms of the Prescription Act 1969 (Act 68 of 1969) (usually 3 years).

Ombudsman's office

Whist there are indications that the matter may be taken on appeal, the Ombudsman's office will deal with complaints, which may technically be time-barred, in terms of the decision handed down by the Court. The decision has the effect that a complainant wishing to pursue a matter which has become time-barred, but not prescribed, can request that we re-open a file and pursue it once more with the relevant Insurer.

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INSURABLE INTEREST IN STOLEN PROPERTY

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Emerging principles

Given the incidence of crime, it is surprising that the legal issues surrounding the insurance of stolen property have so far attracted so little attention from our courts. Two decisions on the insurable interest in stolen property, one of them recent and the other not so recent, therefore provide welcome guidance in an area of increasing practical importance.

In ***Foster v Mutual & Federal Insurance Co Ltd*** (TPD 10 November 1995 (case no 3239/1995) unreported), the insured, Foster, bought a motor vehicle for R145 000 from a private individual by way of an investment. He had it insured. He supplied the brokers with details about the year, model, make, and registration number of the vehicle, but was not asked to furnish the engine number or the chassis number.

Five months later the vehicle was stolen, and the insured claimed R145 000 from the insurer. The latter refused to pay because the vehicle seemed to have been previously stolen: the engine and the chassis numbers had been falsified and did not agree with the manufacturers' serial numbers; nor could the seller be traced. The insured did not dispute these facts.

The sole issue before the court was 'whether [the insured had an insurable interest in the vehicle when the [insurance] contract was entered into and when the loss occurred'.

The court started off by noting that it is trite law that an interest will be insurable if the insured can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, even though he does not have a legal right in or in respect of the object of risk.

Here the insured had bought a vehicle and had paid money for it. It was for all intents and purposes his, because it was registered in his name and if anything happened to the vehicle that deprived him of his possession by theft, he would stand to lose the vehicle which was worth R145 000, the amount he paid for it and the amount in respect of which he insured it and also paid a premium. His interest in the vehicle clearly had value.

The fact that in buying the vehicle in the way he did, the insured had acted rather carelessly, gullibly, and with what the court termed 'a lack of business acumen', did not mean that he had not acted in good faith. He was not part of

any scheme acquiring stolen vehicles, insuring them and endeavoring to claim from the insurer in the knowledge that he was not nor could be the owner.

The court concluded that the insured had established on a balance of probabilities that he genuinely believed, when he bought the vehicle, that he would obtain ownership of it. The court was also satisfied that the insured, not only when he concluded the insurance contract but also when the vehicle was stolen, 'had a demonstrable insurable interest in the vehicle'.

So the insured was held entitled to be paid 'for the loss of his insurable interest', which was agreed at R145 000 less the amount of the excess on his claim.

If the insured does not possess the property in good faith (that is, if he is not a *bona fide* but a *mala fide* possessor), however, then the position is, of course, different. Any question of an insurable interest should then not arise, because the insurance contract will be void. As the insured knows that the contract involves insuring stolen property, the purpose of the contract will be unlawful and it will be null and void for illegality. In other words, as there is no valid contract in this case, any question whether that contract may qualify as one of insurance because of the presence or absence of an insurable interest cannot and should not logically arise.

The fact that in these circumstances the insured's belief is relevant not only at the time of the loss but also at an earlier stage, when he acquired possession of the property and when he had it insured, should not obscure the generally accepted rule about the time when an insurable interest is required to exist. For indemnity insurance, an insurable interest is required only at the time of the loss, and not (also) when the insurance contract is concluded. The court's enquiry into whether the insured had an insurable interest in the vehicle when the insurance contract was entered into *and* when the loss occurred should not be taken as contradicting this rule.

The amount of the insured's claim was not disputed here, and the interest was unlimited. I should stress that, in these circumstances, the amount recoverable from the insurer under an indemnity insurance contract is then normally the value of vehicle at the time of its loss. It is not (or not necessarily) the amount which the insured paid for it when he acquired it, or even its value at that time, or the sum for which the vehicle may have been insured.

The existence of an insurable interest in stolen property was also at issue more recently in ***Pienaar v Guardian National Insurance Co Ltd*** 2002 (3) SA 640 (C).

Pienaar had bought a luxury motor vehicle under an installment sale agreement from a bank. The price was R342 000, and with finance and other charges the total amount owed to the bank over a period of five years was R488 000. A deposit of R100 000 was paid and had to be followed by 60 monthly installments of R6 468 each. The passing of ownership to Pienaar was reserved until he had paid the full amount. But he bore the risk of loss of or damage to the vehicle as from delivery, and was obliged by his agreement with the bank to keep the vehicle insured, to have the bank's interest as seller noted on the policy by the insurer, and to transfer any rights acquired under the insurance contract to the bank.

Pienaar insured the vehicle comprehensively, the insurer undertaking to indemnify him by payment up to the sum insured and other limits of indemnity.

About ten months after Pienaar had bought and taken possession of the vehicle, it was stolen. He claimed R400 000 from the insurer, being the alleged value of the vehicle. The insurer denied liability, and the insured sued.

His claim was dismissed in the court below. One of the insurer's defences involved non-disclosure. It alleged that at all material times the insured was or ought to have been aware that the vehicle which he had bought from the bank had actually or possibly been stolen before it was delivered to him, and that he had failed to disclose this material fact to the insurer before the conclusion of the contract. The insured explained that about two months before it was stolen, the police had attached and removed the vehicle from his possession but had later returned it to him after positively identifying it as not having been stolen. He also argued that through his broker he had informed the insurer of these events. Yet the court below upheld the insurer's defence and apparently did not consider the validity of its other defences, including its denial that the insured had any insurable interest in the vehicle.

After reviewing the evidence, the Full Bench on appeal disagreed with the lower court's findings on the question of non-disclosure. It held that although the vehicle was probably stolen at the time when Pienaar took possession of it, it had not been adequately established that he in fact suspected that it was, or might have been, stolen until some months after he had acquired (and insured) it, when it was seized by the police.

The court then turned to the question whether Pienaar had an insurable interest in the vehicle. It noted that '[a] n insurable interest must be shown to have existed at the time of the loss, for, if there is no interest, then no loss will have been suffered by the insured and he will not be entitled to be indemnified' (*at 645*).

Although Pienaar did not own the vehicle at the time of its theft and loss, he

had bought it and still possessed it under an installment sale agreement. He was entitled, as against the seller, to enjoy undisturbed possession of it until he had paid the last installment owing on it (at which time he would, of course, become the owner of the vehicle). Pienaar was also entitled, as against the seller, to be protected or guaranteed against eviction. If his possession were disturbed by an owner evicting him, he would have enjoyed a claim for cancellation of the sale and damages against the seller. And until the termination of the installment sale, Pienaar bore, as against the seller, the risk of any loss of or damage to the vehicle.

There was no doubt, the court noted, that the possessor of goods who had bought them under a hire-purchase or installment sale agreement had a right to sue for damage caused to those goods. The same was true of bona fide possessors in general, such as Pienaar in this case.

So the court concluded that 'the purchaser of a motor vehicle under an installment sale agreement ... to whom the vehicle has been delivered, enjoys an insurable interest in it' (at 646).

As long as the purchaser (or possessor) neither knows nor suspects it, this position is not altered by the fact that the vehicle is actually (or may possibly be) stolen. Nor does it matter that the purchaser's interest may be defeasible, that is, that it may be terminated by his eviction by the true owner of the vehicle. Even though the insured purchaser can never acquire good title to the vehicle, he still has an interest in it, because he stands to lose something of appreciable commercial value if the vehicle is lost or damaged. What he stands to lose is his continued useful possession of it until it is vindicated from him by the true owner; something which may, of course, never occur. That, the court continued, 'is sufficient [an] interest to be categorized as insurable' (at 647). But, of course, that is the case only if, as here, the insured purchaser possesses in good faith.
So the court held that when the vehicle was stolen from him the insured (Pienaar) had an interest in it.

The court then turned to the amount recoverable by the insured. It noted that the fundamental rule was that of indemnity: the insured was entitled to be restored to the financial position he was in at the time of the loss.
But as the parties had agreed that the amount of Pienaar's claim was R400 000, the court did not need to decide this matter or to quantify the insured's loss as a result of the theft of the insured vehicle.

To recap :

- A person who acquires stolen property cannot be the owner but merely the

possessor of that property.

- The possessor of stolen property is either a mala fide or a bona fide possessor.
- If a mala fide possessor insures the property in question, the insurance contract which he has concluded as regards the property is either invalid (because of illegality) or at least voidable (because of non-disclosure). The insurer must prove the absence of good faith on the part of the insured.
- But if the insured is a bona fide possessor (which may be the case simply if there is no proof of bad faith on the part of the insured), there is no doubt about the *existence* of the insured's insurable interest in the stolen property.

The Ombudsmans view:

This office has taken the view that a bona fide possessor has an insurable interest in the property insured and being claimed for. Our office is further of the view, in the absence of any judicial authority to the contrary, that the insured's interest is an unlimited one.

Acknowledgements: JP van Niekerk: University of South Africa – South African Mercantile Law Journal 2004 .

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