REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/2695

DELETE WHICHEVER IS NOT APPLICABLE

1) REPORTABLE : YES/NO
2) OF INTEREST TO OTHER JUDGES: YES/NO
3) REVISED

DATE_____ _____

SIGNATURE

In the matter between:

HYPERCHECK (PTY) LTD Plaintiff

and

MUTUAL AND FEDERAL INSURANCE COMPANY LTD Defendant

JUDGEMENT

MAYAT J:

INTRODUCTION

[1] The plaintiff in this matter seeks indemnification from the defendant, an insurer, in terms of an insurance agreement between the parties in respect of damages to a structure which formed part of a building on an immovable property owned by the plaintiff.

[2] By agreement between the parties, the determination of the merits of the plaintiff's claim for indemnification and the *quantum* of the plaintiff's claim were separated in terms of rule 33 (4) of the Uniform Rules of Court. The proceedings before this court were accordingly limited to a determination of the defendant's liability to indemnify the plaintiff for specified damages in terms of an insurance policy. To this end, the court was called upon to interpret the provisions of the said policy in the context of certain events. Specifically, the court was called upon to interpret the provisions of an exclusionary clause in terms of the said policy which limited the defendant's liability to the plaintiff.

PERTINENT BACKGROUND

[3] *Ex facie* the pleadings and pursuant to an agreement between the parties, pertinent facts and conclusions pertaining to the cause of the plaintiff's damages are not in dispute. The plaintiff adduced additional evidence with respect to certain details on the basis of the testimony of two witnesses. The defendant, on the other hand, premised its case solely upon the common cause facts, and accordingly closed its case without leading any evidence.

[4] In these circumstances, it is common cause that the plaintiff is the owner of an immovable property situated at 132 Field (now Joe Slovo) Street, Durban ("the property"). A building on the property traverses the corner of Joe Slovo and Bertha Mkhize Streets. It is further common cause that during or about March 2009, the plaintiff and the defendant concluded a written contract entitled the Property Protect Gold Policy of insurance, in terms of which the plaintiff was indemnified against stipulated losses and damages inter alia in relation to specified

property, public supply connections and rentals. The said agreement is hereinafter referred to as "the policy". Whilst the policy extended to certain broad categories of loss and damages, including loss of rental on a limited basis, as the name of the policy suggests, the primary cover in terms of the policy related to accidental physical loss or damages to specified property.

[5] In these circumstances, the plaintiff was indemnified in terms of the policy against loss or damage to specified property arising from defined events. Specifically, as regards the property protected in terms of the policy, it was provided that the policy covered perils to:

> *"the buildings (constructed of brick, stone, concrete or metal on metal framework and roofed with slate, tiles, metal, concrete or asbestos unless otherwise stated in the schedule) including landlords' fixtures and fittings therein and thereon, plant equipment, structures and other improvements of a permanent nature, walls (except dam walls) gates, posts and fences (except hedges), brick, tarred, concrete or paved roads, driveways, parking areas and paths, fire extinguishing equipment, railway sidings, all the property of the insured, and if so stated in the schedule, tenants' fixtures and fittings."*

Unless the context otherwise indicates, the said buildings, including all the parts specified above, are hereinafter referred to individually and collectively as "the insured property". Thus, as stated above, the insured property expressly includes "*structures and other improvements of a permanent nature"*.

[6] The policy further provided under the heading "*ACCIDENTAL DAMAGE EXTENSION"* that specified perils covered by the policy extended to:

> "*Accidental physical loss or damage to the property insured by any cause not excluded by exceptions 1 to 9 appearing below…"*

Thus, the accidental damage extension in terms of the policy excluded

indemnification for damages arising from contingencies specified in 9 clauses. One such clause (clause 6), excluded protection in terms of the policy for loss or damage to property arising from:

> "*Settlement or bedding down, ground heave, collapse or cracking of structures or the removal or weakening of support to any property insured"*

The stated exception is hereinafter referred to as "exception 6".

[7] It is not in dispute that concrete awnings or cantilever slabs on the sides of the building on the property constituted architectural features at the time when the said building was built. It is also not in dispute that on the 1st of November 2009, one such concrete awning, which was located on the side of the said building at the corner of Joe Slovo and Bertha Mkhize Streets, fell to the ground. The said awning is hereinafter referred to as "the awning".

[8] Pursuant to a discussion between expert witnesses for both parties, the structural features of the awning as well as the cause of the collapse of the awning were not in dispute. Thus, it was common cause in joint minutes between the two experts that the awning formed an integral part of the insured property, and the experts agreed that the said awning was a structure of a permanent nature. It was also not in dispute that the awning was continuously supported by the perimeter beam of the first floor of the building. Moreover, the outside edge of the awning was also continuously supported by a perimeter beam. The external ridge of the awning was supported by a number of steel plate hangers or metal fins at regularly spaced intervals, which were attached to the top of the external perimeter beam and to a metal plate attached to the underside of the awning. The experts also agreed that the said metal plate formed an integral part of the support structure of the awning.

[9] It was not in dispute that prior to the collapse of the awning in

November 2009, five of the metal fins which were connected to the metal plate support under the awning had been cut away by someone. Whilst neither expert had any direct knowledge of who had cut away the said fins, it was subsequently ascertained that two of these fins had been cut away by a previous tenant of the plaintiff, approximately one or two years prior to the collapse of the awning in November 2009. It was also ascertained that approximately two months prior to the awning collapsing in November 2009, three further fins had subsequently also been cut away by another tenant of the plaintiff, who operated a Chicken Licken fast food outlet from leased premises on the property at the corner of Joe Slovo and Bertha Mkhize Streets. The said premises were located beneath the awning, and the tenant who occupied same subsequently informed the plaintiff that three metal fins had been removed by the tenant to enable the said tenant to affix signage against the awning. It appeared that after the three metal fins were cut away by the said tenant, the awning was supported from the top by two anchor bolts for approximately two months. Eventually, as already indicated, the awning came crashing down to the ground outside the Chicken Licken outlet on the 1st of November 2009.

[10] Whilst the experts concerned recorded in their joint minutes that neither party had direct knowledge of the cutting away of the metal fins, it was also recorded that a competent engineer would have been aware that cutting away the said fins or hangers would have increased the risk of the awning collapsing. In these circumstances, the said experts further agreed that cutting away the steel plate resulted in the removal and weakening of the support structure of the awning, which in turn caused the collapse of the awning.

[11] As already indicated, the plaintiff also adduced more detailed evidence pertaining to certain aspects which were common cause at a general level. Thus, Mr Raffi Aboobaker Abdoola testified on behalf of the plaintiff that he was a director and shareholder of the plaintiff, which was a property owning company, leasing retail and shopping premises

to various tenants. The said tenants included a tenant who operated a Chicken Licken fast food outlet, referred to above, at premises which were located at a corner of the building on the property. Abdoola confirmed during cross-examination that even though the plaintiff had appointed managing agents inter alia to maintain the insured property and to collect rental, he also dealt with aspects of maintenance himself. However, he also stated in this respect that he did not conduct any periodic inspections of the property for the purposes of maintenance.

[12] It was Abdoola's further evidence that he was the duly authorised representative of the plaintiff when the policy between the parties was concluded. To the extent that it is relevant in this context, he indicated that whilst the plaintiff had access to legal advice pertaining to the terms and conditions of the policy, he appreciated at the time that the said terms and conditions were standard in these circumstances.

[13] It was Abdoola's further evidence that on the Friday preceding Sunday the 1st of November 2009 he had received a report of a crackling noise from the awning. He went up to the first floor of the building on the property to investigate, accompanied by a maintenance manager, and had examined the awning from the top. He indicated that whilst he was not an engineer or a builder, he had assessed the awning from a lay perspective at the time. He also testified that he did not consider the awning to pose a threat at the time. He further stated that as he had only viewed the awning from the top, he did not notice any cracks on the underside of the awning at the time. Thereafter, on Sunday the 1st of November 2009, he received a telephone call at approximately midday from the tenant operating the Chicken Licken, reporting a problem with the awning. He told the tenant to clear his patrons and immediately went to the property. It was his evidence that by the time he arrived at the property, the awning had already fallen to the ground. The tenant's signage was also damaged in the process.

[14] It was also Abdoola's evidence that prior to leasing premises for the

Chicken Licken outlet, the plaintiff had leased the said premises to another fast food outlet, named Captain Dorego. Both outlets had arranged for signage above their premises, over the awning. Abdoola stated in this regard that he subsequently found out that both the tenants had cut the metal fins supporting the awning to place their signage against the awning. Specifically, he found out that the tenant who operated the Chicken Licken outlet had removed a number of fins approximately one month prior to the 1st of November 2009. Thus, Abdoola confirmed from certain photographs shown to him, apparently taken by a tenant approximately one month prior to the 1st of November 2009 that the metal fins supporting the awning had indeed been cut. However, he also confirmed in this respect that no permission had been sought from the plaintiff by the tenants concerned to cut the said metal fins.

[15] Mr Gordon Fleming testified on behalf of the plaintiff that he was a consulting civil and structural engineer. He confirmed that he had a telephonic conference with his counterpart, who had been appointed by the defendant and that pursuant to such conference, their agreement on certain aspects of this matter was recorded in a joint minute prepared by them for these proceedings. He further confirmed, as reflected in the said joint minute, that the awning in this matter failed as a result of the steel fins having been cut off by someone.

[16] Fleming indicated in his testimony that the awning was a common architectural feature or design in buildings constructed in the 1980s. As reflected in the joint minute, he also confirmed in his testimony that the awning as well the steel hangers (including the steel plate under the awning) formed integral parts of the building constituting the insured property. He further confirmed that the steel hangers or fins as well as the metal plate were necessary to support the awning. As such, he stated during cross-examination that cutting the steel plate had resulted in a "*significant collapse"* of the awning. He also indicated during cross-examination that it might not have been obvious to a lay

person that the structural integrity of parts of the building on the property might have been compromised as a result of the said fins being cut.

[17] Against this background, it was not in dispute that the plaintiff lodged a claim with the defendant for indemnification in terms of the policy for loss or damages sustained by the plaintiff as a result of the awning falling. The defendant repudiated liability for the plaintiff's claim in this respect on the basis of the provisions of exception 6 of the policy.

THE ISSUE

[18] In these circumstances, it was averred on behalf of the plaintiff that none of the eventualities stipulated in exception 6 applied to the present case. It was averred on behalf of the defendant, on the other hand, that indemnification for the collapsed awning was excluded in terms of the provisions of exception 6. The primary dispute between the parties accordingly relates to whether or not the cause of the plaintiff's loss or damages fell within the ambit of exception 6.

LEGAL FRAMEWORK

[19] Against the background of the common cause facts in this matter, the legal submissions by counsel were premised upon an interpretation of the provisions of the policy, particularly, exception 6. In view of the fact that there were no factual disputes in the context of the stipulated exception, the onus of proof was not an issue in these proceedings. [1]

[20] The general principles and rules relating to the interpretation of contracts, which are relevant in the sphere of insurance contracts, can be summarised as follows:

i) As with all other contracts, it is well-established that if the language is clear, the court must give effect to the language

1 The principles in this respect were set out in the case of *Agiakatsikas N.O v Rotterdam Insurance Company Limited* 1959 (4) SA 726 (C) at 727 H

which the parties have themselves used in the insurance contract. Thus, the words in an insurance contract must be given their plain, ordinary, popular and grammatical meaning, unless this would result in some absurdity, or it is evident from the context that the parties intended the words in question to bear a different meaning.[2] There is no room for a more reasonable interpretation than the plain meaning of the words themselves convey, particularly so if there is no ambiguity.

ii) In order to establish the intention of the parties, the court must look at the insurance contract as a whole rather than at isolated expressions, bearing in mind the language of the policy.[3]

iii) As stated in the cases of *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd 1961 (1) SA 103 (AD) at 108C* and *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (AD) at 38 D-E, if the meaning of a word or clause in an insurance contract is not clear, or the word or clause is ambiguous, the *verba fortuis accipiuntur contra proferentem* rule is applicable. This rule requires a written document to be construed against the person who drafted it. Thus, as stated by Smallberger JA in the *Fedgen* case, at 38 B-E:

> *"Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted…for it is the insurer's duty to make clear what particular risks it wishes to exclude…. A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the contra proferentem rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy."*

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2 This "golden rule" of interpretation is endorsed in numerous cases including *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD at 464-5 and a long line of cases thereafter, including the case of *Coopers & Lybrand and OthersvBryant* 1995 (3) SA 761 (A) 767E-768E

3 See Ivamy *General Principles of Insurance Law* 5th edition 331 *et seq*

Therefore, as also stated in the case of *Allianz Insurance Ltd v RHI Refractories Africa (Pty) Ltd* 2008(3) SA 425 (SCA) at 428 paragraph 7,

> *"...an exception clause is restrictively interpreted against the insurer, because it purports to limit what would otherwise be a clear obligation to indemnify*".

iv) In addition to the *contra proferentem* rule, Schreiner JA pointed out in the case of *Kliptown Clothing, supra* at 106 H -107 C that there is also the further related rule that if a warranty is ambiguous in an insurance contract, a court should incline towards upholding a policy against forfeiture on the part of the insured. Relying on the *dicta* of Kotze JA in the case of *Norwich Union Fire Insurance Society Ltd v SA Toilet Requisite Co Ltd* 1924 AD 212, Schreiner JA stated at 106 (*ibid*) that:

> *" The warranty must be interpreted in the same way as any other condition of the policy (ibid). In interpreting those conditions not only may the rule verba fortius accipiuntur contra proferentem operate against the company, but there is the further rule that the Court should incline towards upholding the policy and against producing a forfeiture. So KOTZE, J.A., in the Toilet Requisite case, supra at p. 222, said,*
>
> > *" The construction of a warranty is generally taken in favour of the assured and against the insurer; and this is particularly the case when the warranty is expressed in doubtful or ambiguous language. It is laid down that, as insurance is a contract of indemnity, it is to be construed reasonably and fairly to that end. Hence conditions and provisos will be strictly construed against the insurers because they have for their object the limitation of the scope and purpose of the contract."*
>
> *For this statement of the position May on Insurance (secs. 174-175) was cited. The opening words of sec. 175 in the 4th ed. are worth quoting -*
>
> > *" No rule, in the interpretation of a policy, is more firmly established, or more imperative and controlling, than that, in all cases, it must be liberally construed in favour of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted."*
>
> *The same approach is found in MacGillivray on Insurance Law (4th ed.) in sec. 708, where, after referring to the contra proferentem rule, the learned author says,*

> *" But whichever party is responsible for the language there should be a tendency in all cases to hold for the assured rather than for the company. It is for the benefit of trade that policies should be construed in favour of protection and against forfeiture."*

v) Insurance policies should also be construed in such a way as to allow for business efficacy, and in accordance with sound commercial principles.[4]

vi) Another rule of restrictive interpretation is premised upon the principle of *eiusdem generis*, which holds that where a phrase with a particular wide meaning is followed by a phrase of general application with a limited meaning, the meaning of the former phrase can in those circumstances be restrictively interpreted to the generic meaning of the limited phrase.[5] Thus, as encapsulated in the maxim *noscitur a sociis,* words or phrases can in certain circumstances be interpreted on the basis of accompanying words or phrases. The underlying notion is that general words accompanied by particular words could in a specific context be limited to the *genus*, species or class of the particular words. Thus, wider words could in a specific context be limited by narrower ones with which they are associated. In other words, where it appears that the language indicates a class, *genus* or species, words or phrases utilised should be restrictively interpreted to connote the same class, *genus* or species as the accompanying words or phrases.[6]

[21] To the extent that the words and phrases in exception 6 must generally be interpreted on the basis of their plain, ordinary and grammatical meaning, the plaintiff's counsel referred the court to dictionary definitions of certain words and phrases used in exception 6.[7] Thus, the

4 See, for example *Van Zyl NO v Kiln Non-Marine Syndicate NO 510of Lloyds of London* 2003(2) SA 440 (SCA) at 457B-D and *Grand Central Airport (Pty) Ltd v AIG South Africa Ltd* 2004(5) SA 284 (W) at 288 H-I

5 See, for example, the case of *Moodley v Scottsburgh/Umzinto North Local Transitional Council and another* 2000(4) SA 525 (D) at 530I-531C

6 See, for example, the case of *Grobblaar v Van der Vyver* 1954(1) SA 248 (A) 254 G-H

7 The court was given copies of relevant pages of the Oxford dictionary(with the edition not being specified) stipulating the dictionary definitions of certain words

verb 'collapse' in relation to a structure is defined to mean:

> *"**1** suddenly fall down or give way **2**…**3** fail suddenly and completely"*

Furthermore, the noun 'collapse' is defined to mean:

> *"**1** an instance of a structure collapsing **2** a sudden failure or breakdown.*

Whilst the notion of the cracking of any structure appears to be self-evident in plain and ordinary language, it may be mentioned that the dictionary definitions provided to the court included "*give way under pressure or strain".*

THE PLAINTIFF'S LOSS

[22] Against this background, I turn now to the question whether the plaintiff's loss falls within the ambit of exception 6. As already stated, the indemnification by the defendant in terms of the policy extends to accidental, physical loss or damages occasioned by "*any cause"* excluding the stated exceptions. Both counsel accepted that the words "*any cause"* in the context of the policy conveyed wide and expansive cover, save and except for the stated exceptions in terms of the policy.

[23] As already mentioned, the stated exceptions in terms of the policy included exception 6. Thus, the policy provided that the defendant was not obliged to indemnify the plaintiff against any accidental loss or damage caused by the contingencies specified in exception 6. The said contingencies are:

i) settlement or bedding down;
ii) ground heave;
iii) the collapse or cracking of structures; or
iv) the removal or weakening of support to any property insured.

[24] Whilst counsel for the plaintiff made a number of inter-linked

submissions relating to the interpretation of exception 6, it appears that none of these submissions were directly premised upon any averred ambiguity in the wording of exception 6. Be that as it may, I now proceed to deal with these submissions in turn.

[25] It was emphasized by the plaintiff's counsel that the proximate cause of the damage in the present case was the conduct of a third party, who had unintentionally cut off of a part of the structure of the building on the property. It was also emphasized in this context that the 'breaking away' of the awning was clearly not deliberate to the extent that the tenant who had placed signage over the awning had not intended the awning to come crashing down. This was particularly so as the tenant's own signage was also destroyed when the awning came crashing down. It was further averred in this context that to the extent that the plaintiff is a property owner, and to the extent that the policy also indemnifies the plaintiff against loss of rental, on a narrow construction of exception 6 based upon business efficacy, the policy was not intended to exclude accidental damages caused by the plaintiff's tenants. It was also contended that the submission in this regard was supported by the fact that the parties clearly contemplated that the property would be occupied by the plaintiff's tenants. Thus, it was contended that the parties envisaged accidental damage by tenants, who occupied the property.

[26] In my view, the accidental nature of the third party conduct *per se* is of no moment, given the wide ambit of cover, and given the fact that the contingencies excluded from cover in terms of the policy are specified in plain and ordinary language. Thus, both the wide cover of the perils insured against and the exceptions in terms of the policy apply, irrespective of whether such perils and exceptions are caused by the tenant or not. In other words, irrespective of the averred proximate cause of the stated contingencies in terms of exception 6, the pertinent issue is whether or not any of the stated contingencies have occurred. In the same way, the policy indemnifies the defendant against

accidental loss or damage by "any cause" (excluding, of course, the 9 stated exceptions), irrespective of whether or not the proximate cause of such accidental loss or damage is attributable to a tenant's conduct. More importantly in this regard, on the basis of an absolutely literal interpretation of the stated contingencies in exception 6, it is my view that it is neither impractical in the circumstances, nor is it productive of startling results, nor is it commercially unsound to state that the collapse or cracking of the awning, or the removal or weakening of support of the awning constituted one of the contingencies described in exception 6.

[27] My view relating to the interpretation of exception 6 in the context of the policy is also supported by the fact that the plain and ordinary meaning of unambiguous words and phrases such as "*collapse*", or "*cracking of structures*", or the "*removal of support*", or the "*weakening of support*" in relation to the awning do not result in any repugnancy within the context of the policy. Moreover, from the perspective of both parties, it is not commercially sound for an insurer to extend insurance cover to property which has any part of its structural integrity compromised. In addition, as already indicated, it is also significant that if exception 6 is interpreted to include the collapse of the awning, such an interpretation will not result in any inconsistency with the rest of the terms and conditions of the policy. There is accordingly no room in these circumstances for a more reasonable interpretation than the words themselves convey.[8]

[28] It was also averred by the plaintiff's counsel on the basis of the *eiusdem generis* principle that the words and terms stipulated in exception 6 should be restrictively interpreted to connote the same class, *genus* or species of causes of accidental loss or damages.[9] Thus, as I understood this submission, it was averred that all the causes of accidental loss or damages incorporated in exception 6

8 See *Scottish Union* case, *supra* fn. 2 at 465
9 See the case of *Grobbelaar supra at* 254

should be restrictively interpreted on the basis that all the stated contingencies in the said exception relate to "*the removal or weakening of support"* to the building on the property. It was accordingly averred that the common denominator in the class or species of damages specified in exception 6 was rooted in the 'building-bedrock' relationship, or the relationship between the insured property and the ground (as a supporting factor). It was also contended in this regard that the generic link between the stated contingencies was illustrated by the fact that the notion of settlement (which connotes sinking down slowly in this context) or bedding down, or ground heave, or the removal or weakening of support, all fall within the species or class of causes relating to lateral support of the building insured. It was accordingly contended that the wider notion of collapse or cracking must be restrictively interpreted to relate to the collapse or cracking of the lateral support to the building, effectively interpreting exception 6 on the basis that the collapse of the awning was not contemplated in terms of the provisions of exception 6.

[29] My difficulty at the outset with the averments premised upon the *eiusdem generis* principle is that there is nothing in the wording of exception 6 which suggests that the eventualities or contingencies therein stated are generically linked by any common denominator as a species, or class. Thus, to illustrate with a different example given in Du Plessis, *The Interpretation of Statutes* (1986) at 154 the word "*premises*" in the context of an enactment which makes reference to "*any place of entertainment, café, eating house, race course or premises or place to which the public are granted to have access*"[10], must obviously be restrictively interpreted to mean premises to which the public have access. By contrast, none of the categories of contingencies mentioned in exception 6 readily conveys an all-embracing generic meaning relating to lateral support of the building. This is particularly so as exception 6 makes reference to "*support to any property insured"* and not to support **to the building** on the

10 Referred to in the case of *Moodley, supra* at 531B-C

property (my emphasis) or lateral support **to the building** (my emphasis), as suggested by the plaintiff's counsel. Therefore, on the basis of the plain wording of exception 6, the notion of collapsing or cracking of structures, and the notion of removal or weakening of support to the property insured can accordingly apply equally to a building and to structures of a permanent nature such as the awning, which form part of the insured property.

[30] In these circumstances, to the extent that the insured property expressly includes structures of a permanent nature, fixtures and fittings and certain equipment, which do not necessarily have any bearing in relation to lateral support, as suggested, there is no basis for restricting the phrase "*property insured*" in exception 6 to the building on the property only. Therefore, as suggested by L C Steyn in Die Uitleg van Wette, 5th ed (1981) at 30[11], in the absence of a distinct species or class of causes or an identifiable link of general application between the stated causes, the *eiusdem generis* principle cannot apply. This is particularly so as each of the stated causes in exception 6 are autonomously stated and the word "*or"* between the phrases "*collapse or cracking of structures"* and the phrase "*the removal or weakening of support to any property insured"* is clearly expressed to convey alternatives in the context of except 6 and the policy as a whole.

[31] For similar reasons, the suggestion that the wider notion of collapsing or cracking was limited to collapsing or cracking which resulted in the removal or weakening of support to the building, is also misdirected. As already indicated in this respect, exception 6 clearly makes reference to "*support to any property insured"* and not support to the building only. Thus, in the context of the hypothetical analogy given by the plaintiff's counsel of a load bearing internal wall being accidentally knocked down, resulting in the collapse of a part of the external building on the property, I was not persuaded by the suggestion that

11Also referred to in the *Moodley* case, *supra* at page 531E-F

the policy would in those circumstances presumably cover compensation for the rebuilding of the internal wall, but not for the collapse of any part of the external building. This is so by virtue of the fact that similar to structures of a permanent nature, the internal wall is expressly included within the ambit of the insured property. Thus, in my view, the accidental collapse of a load bearing internal wall would also fall within the ambit of exception 6, irrespective of whether or not the said collapse is linked to the collapse of any support to the building or not. This is also supported by the fact that the section in the policy stipulating the perils covered by the policy, also expressly excludes "*loss or damage to retaining walls*".

[32] In these circumstances, as stated in the *Grobbelaar* case, *supra* at 255 A-C, even though the *eiusdem generis* principle is a useful instrument in certain cases where a clear class or species is identified, this principle must not be utilised as a means to substitute an artificial intention for the real intention of the parties, as evidenced by the plain language used.[12]

[33] In the final analysis, it is significant in the present case that the insured property expressly includes structures of a permanent nature. Thus, as acknowledged by the experts, the awning is an integral part of the property insured. It is also pertinent on the basis of the facts which are common cause that the awning was cracked on the underside **and** (my emphasis) thereafter physically and accidentally collapsed. Therefore, despite the fact that plaintiff's counsel characterised such accidental loss on the basis of the awning 'breaking away', such accident can, in my view, equally well be described in terms of a number of the dictionary definitions provided to the court. In these circumstances, the dictionary definitions provided simply sustained the clear, plain and unambiguous notion of collapsing or cracking of a structure of a permanent nature. To paraphrase on the basis of the said dictionary definitions, it can hardly be disputed that the awning suddenly fell down

12 See also *Lindsay & Pirie v General Accident, Fire & Life Assurance Corporation Ltd* 1925 AD 574

and gave way, or failed suddenly and completely. Moreover, even Fleming characterised the damage to the awning in his evidence on the basis of a "significant collapse". In addition, the experts agreed in relation to the collapse of the awning that that the cutting away of steel plates resulted in the "*removal and weakening of the support structure for the concrete awning*". In these circumstances, the contingencies which occurred included the cracking of the awning, the collapsing of the awning, the removal of the support to the awning, as well as the weakening of support to the awning. In my view, the occurrence of any one of these contingencies by itself clearly places the events in this matter squarely within the ambit of exception 6. As such, as already stated, on a clear and unambiguous reading of exception 6, it was not intended by the parties that the policy would indemnify the plaintiff for damages caused as a result of the awning collapsing.

CONCLUSION

[34] In these circumstances, to the extent that the awning was a structure of a permanent nature, which formed an integral part of the insured property, and to the extent that the awning was not only cracked, but also collapsed, and the support thereof was weakened, the accidental loss and damages sustained by the plaintiff fall within the ambit of more than one peril specified in exception 6. As such, the provisions of exception 6 apply and the plaintiff is not indemnified against such loss or damages in terms of the policy.

ORDER

[35] Based on the aforegoing, the following order is made:

i) It is declared that the plaintiff is not entitled to indemnification in terms of the Protect Gold Policy between the parties, as a result of the damages sustained by the plaintiff pursuant to the collapse of a concrete awning on the 1st of November 2009 on the immovable property owned by the plaintiff at 132 Field (now Joe Slovo) Street, Durban.

ii) The plaintiff is directed to pay the defendant's costs.

DATED AT JOHANNESBURG THIS 11th DAY OF JANUARY 2012.

_____

H MAYAT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT

For the plaintiff	:	K J Kemp SC
Instructed by	:	Cox Yeats Attorneys c/o Knowles Husain Lindsay Inc
For the defendant	:	A Govender
Instructed by	:	Norton Rose (Incorporated as Deneys Reitz)