Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 10351/2004

In the matter between:

ANTON MARIUS SWART **Plaintiff**

and

MUTUAL & FEDERAL INSURANCE CO LTD **Defendant**

JUDGMENT DELIVERED : 4 AUGUST 2009

MOOSA, J:

Introduction

[1] On 24 July 2004 at approximately 18:30, the plaintiff and certain members of his family, were returning home to Riversdale from a rugby match in George when the Mercedes vehicle driven by the plaintiff, overturned. The collision occurred at the intersection of the road leading from Blanco to the N2 and the old road leading from Mossel Bay to George, near the George Airport. The vehicle came to rest in the old Mossel Bay/George Road. People arrived on the scene soon after the collision and assisted the passengers who were trapped in the car to get out of the car. One of them was Edward Mans ("Mans"), a security officer and former police Inspector. Another person

who was travelling in his vehicle behind the Mercedes and stopped at the scene of the collision, was former Regional court Magistrate, Bertus Louw ("Louw").

[2] The passengers in the Mercedes were Eddie Ten Hoope ("Ten Hoope"), the brother-in-law of the plaintiff and Johnny Swart ("Johnny Swart"), the father of the plaintiff; there were two children in the car as well; they were the six-year old son of plaintiff, John Charles Swart ("John") and the 11 year old son of the plaintiff's sister, André Ten Hoope ("André"). After the collision John was found walking around outside and André was found lying on the ground. André was apparently thrown out of the car and died at the scene of the collision. It does not appear that the plaintiff and the other passengers required medical attention at the scene of the collision. The Mercedes was a complete wreck. After the collision another vehicle travelling on the old Mossel Bay/George Road, collided with the wreck, left the road and landed in a ditch next to the road. Nothing, however, turns on the second collision.

The Proceedings

[3] It is common cause that the plaintiff's Mercedes was insured by the defendant in terms of an Insurance Policy which indemnified the plaintiff against any loss or damage arising from a collision ("the Policy"). Plaintiff submitted such claim, but the defendant repudiated the claim on the ground that plaintiff drove the vehicle while under the influence of liquor. The plaintiff then instituted these proceedings against the defendant for the recovery of the loss and/or damage suffered by him arising from the said collision. The defendant opposed these proceedings.

The Defences

[4] The defendant raised two defences. The first is that the plaintiff drove the vehicle

at the time of the collision while he was under the influence of intoxicating liquor. The second is that it was a tacit, alternatively an implied term, of the Policy that the plaintiff would, at all times during the currency of the Policy, display good faith and act in good faith towards the defendant, failing which the defendant would be entitled to repudiate any claim arising from such breach. The defendant pleaded that the plaintiff had failed to act in good faith and/or display good faith towards the defendant in that he left the accident scene before the SA Police Services or other emergency services had arrived on the scene.

The Issues in Dispute

[5] The parties agreed that the only issue in dispute which this court has to determine is whether the defendant, as the insurer, is liable to indemnify the plaintiff for the loss and/or damage suffered by him arising from the collision in the light of the two defences raised by the defendant. The parties further agreed that should the court find in favour of the plaintiff, the quantum of the loss and/or damage shall be the agreed sum of R300 000,00. The parties further agreed that the onus is on the defendant to prove that the plaintiff drove under the influence of intoxicating liquor at the time of the collision as pleaded in paragraph 2.2, read with paragraph 7.1 of its Plea, alternatively, that there was a tacit and/or an implied term which was breached by the plaintiff as pleaded in paragraph 2.3 read with paragraph 7.2 of the Plea. I will evaluate the two defences separately in the light of the evidence placed before me.

Whether the Plaintiff was under the influence of intoxicating liquor at the time of the collision?

[6] The first defence raised by the defendant is that the plaintiff drove the vehicle at the time of the collision while he was under the influence of intoxicating liquor. In this

regard, the promise to pay in terms of the Policy concluded by the parties is qualified by an exception, the relevant portion of which reads as follows:

> *"3. Ons is nie aanspreeklik nie vir enige verlies, skade, besering of aanspreeklikheid veroorsaak, opgedoen of aangegaan*
>
> *3.1 ...*
>
> *3.2 terwyl die voertuig bestuur of gebruik word*
>
> *3.2.1 ...*
>
> *3.2.2 ...*
>
> *3.2.3 deur u terwyl onder die invloed van bedwelmende drank of verdowingsmiddels of terwyl die alkoholpersentasie in u bloed die statutêre perk oorskry..."*

[7] For the offence of driving a motor vehicle under the influence of intoxicating liquor *"it is sufficient to show that the skill and judgment normally required in the manipulation of a motor car is diminished or impaired as a direct result of the consumption of alcohol. The judgment of a driver is impaired not only when his vision is dulled or his judgment is blunted or his muscular reactions to communication from his brain made sluggish, but also when the consumption of liquor has induced an exuberant over-optimistic frame of mind which causes him to take risks which he would not have taken but for the liquor he has consumed".* (Headnote in **Rex v Spicer** 1945 AD.) Although the description of *"driving under the influence of liquor"* relates to an offence in terms of the criminal law, I see no reason why it cannot apply equally to civil matters. The only difference, in my view, would be the standard of proof required in the two instances.

[8] In **Incorporated General Insurances Ltd v Boonzaaier, NO** 1974 (4) SA 200 (C)

at 203F-H, where the insurance policy had similar exceptions to the promise to pay as in the present case under consideration, the court held that the question of being *"under the influence of intoxicating liquor"* cannot be decided in abstract *"but must be decided in respect of the particular insured and with regard to the manner in which he reacted or reacts at the critical moment to the quantity of liquor actually consumed by him. The true question is whether it can be said that the insured carried his liquor to the extent that he remained in full possession of his faculties as judged by ordinary every day standards. If it can be said that the drinker has retained the composure of his mind and emotion, the circumspection and the physical dexterity of the ordinary normal person, then he cannot be said to be under the influence of intoxicating liquor".*

[9] In support of its case that the plaintiff was under the influence of liquor at the time of the collision, the defendant relied on the evidence of Mans and on circumstantial evidence. The plaintiff relied on the direct evidence of himself, Ten Hoope, Louw, Ane Silva and Adrie Swart. The defendant asked me to draw an inference from certain circumstantial evidence and the probabilities that the plaintiff was under the influence of intoxicating liquor at the time of the collision. I am going to evaluate the evidence as a whole to determine whether the defendant has discharged the onus of proving, on a balance of probabilities that the plaintiff, at the time of the collision, drove while he was under the influence of intoxicating liquor. In doing so, I will assess the credibility of the witnesses and examine the probabilities. Before embarking on that route, I want to set out the legal principles and approach when reliance is placed on an inference to be drawn from circumstantial evidence.

[10] It is a trite principle of our law that the inference to be drawn must be based on objective facts and not on conjecture and speculation. In **S v Essack and Another** 1974

(1) SA 1 (A) at 16D, the Appellate Court quoted with approval the remarks of Lord **Wright** in **Caswell v Powell Duffryn Associated Colleries Ltd** [1939] 3 All ER 722 at 733:

> *"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation and conjecture."*

(See also: **S v Mtsweni** 1985 (1) SA 590 (A) at 593E-G and **R v Blom** 1939 AD 188 at 202-203).

[11] In criminal matters the criterion is that the inference to be drawn must be the only reasonable conclusion that can be drawn from the objective facts but in civil matters, by balancing probabilities, the criterion is that the inference to be drawn ought to be the most natural and plausible conclusion which can be selected from amongst several possible conclusions even if the conclusion selected is not necessarily the only reasonable one. In **AA Onderlinge Assuransie Assosiasie Bpk v De Beer** 1982 (2) SA 603 (A) at 614H-615A, the court said:

> *"Dit is, na my oordeel, nie nodig dat 'n eiser wat hom op omstandigheidsgetuienis in 'n siviele saak beroep, moet bewys dat die afleiding wat hy die hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyt indien hy die hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-handliggende*

en aanvaarbare afleiding is van 'n aantal moontlike afleidings. In hierdie verband vereenselwig ek my met eerbied met die mening wat ***Selke, R*** *uitgespreek het in* ***Govan v Skidmore*** *1952 (1) SA 732 (N) waarin, te 734C-D, die volgende passasie voorkom: '....it seems to me that one may as Wigmore conveys in his work on* ***Evidence****, 3rd ed para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'."*

[12] Adv **Van der Merwe**, counsel for the defendant, submitted that the direct evidence of Mans, the circumstantial evidence and the probabilities indicate, on a balance of probabilities, that the plaintiff consumed more liquor than the two beers which he claims he consumed and that, at the time of the collision, he drove the vehicle when he was under the influence of intoxicating liquor. Adv **Van Zyl**, counsel for the plaintiff, submitted that there are two conflicting versions in regard to the question of whether the plaintiff drove the vehicle under the influence of liquor at the time of the collision. The one is by Mans who testified that the plaintiff was under the influence of liquor at the time of the collision. The other is by Louw who testified that the plaintiff was sober at the time of the collision. Both these witnesses are independent witnesses who appeared on the scene at the time of the collision. I will evaluate the evidence of both these witnesses in the light of the totality of the evidence and the probabilities to determine whose version is correct.

[13] Mans testified that he assisted the passengers to get out of the Mercedes in which they were trapped. The plaintiff got out of the vehicle without his assistance, but he spoke to the plaintiff and noticed that his speech was slurred, he smelt of alcohol and he slipped when he tried to get out of the vehicle. The plaintiff testified that he had consumed one

beer before the match started and had another during half-time. The last beer he had was more than two hours before the incident. He testified that he was sober at the time of the collision. The evidence of the defendant is corroborated by Ten Hoope, the brother-in-law of the plaintiff.

[14] The evidence of Mans with regard to the sobriety of the plaintiff is also materially contradicted by Louw. Louw testified that the plaintiff spoke and walked normally and he could not smell liquor on his breath immediately after the collision. Louw testified further, that other than for overtaking him at and unbroken traffic line in the road at a relatively high speed, the driver of the Mercedes was driving in a normal manner and not one that appeared to be under the influence of intoxicating liquor. The probability that the plaintiff lost control of the vehicle when he entered the sharp S-bend on the road cannot be discounted. The plaintiff testified that he remembers entering the S-bend, but everything else is a blank until he came to his senses after the collision. He remembers the Mercedes lying on its side and him clambering out of the vehicle.

[15] Ane Silva ("Silva") testified that she met the plaintiff, his passengers and the two children under the pavilion at the rugby stadium in George after the match and soon before they left for home. She did not see anyone with liquor in their hands and did not smell liquor on the breath of the plaintiff when she greeted him by kissing him. She knew the plaintiff for a long time and he was completely normal to her. This evidence was uncontested. Adrie Swart, the spouse of plaintiff ("Adrie") testified that when she found the plaintiff near the N2 turnoff to the airport, he was sober, but in a state of shock and confusion. Other than the evidence of Mans, there is overwhelming evidence that immediately before, during and after the collision the plaintiff was sober.

[16] In my view, Mans was not a very credible and reliable witness; he did not create a good impression as a witness; he contradicted himself; his evidence in court was at variance with his statement to the police in certain important respects; he adapted his version when confronted with certain inherent improbabilities; he could not give a reasonable explanation for certain inconsistencies and contradictions in his evidence; his evidence in certain important respects was inconsistent with the objective facts and probabilities and more importantly, his evidence with regard to the visit of Adrie to the airport with her son, John, is highly suspect, contradicted by Silva and is directly in conflict with the objective facts and inherent probabilities.

[17] Louw, on the other hand, was a credible and reliable witness: at the time of the incident he was a serving as a Regional Court Magistrate; Louw subsequently suffered a stroke as a result of which his speech was impaired; by agreement between the parties, his spouse assisted with relaying his evidence to the court; his evidence in court did not materially differ from his statement to the police; there were minor discrepancies, but this could possibly be ascribed to the fading memory because of the passage of time from the date of the incident to the date that he testified in court. His evidence is not only corroborated by the plaintiff and his witnesses, but is also consistent with the objective facts and inherent probabilities.

[18] Adv **Van der Merwe** argued that Louw's evidence with regard to the sobriety of the plaintiff is unreliable and it appears that the person he saw as the plaintiff on the scene of the collision was probably not him. I wish to differ. The evidence of Louw was far more reliable than that of Mans. I have earlier made a credibility finding in respect of both witnesses. The argument by Adv **Van der Merwe** that the person Louw saw at the scene of the incident was probably not the plainitff is pure speculation. The unchallenged

evidence is that Louw took the plaintiff to see his son about 60 meters from the scene of the incident and after the plaintiff was satisfied that his son was safe, they together returned to the scene of the incident. This evidence was confirmed by the plaintiff in his testimony. It is highly improbable that he could have mistaken the plaintiff for someone else. I accordingly have no hesitation in accepting the evidence of Louw where it differs with that of Mans with regard to the intoxication of the plaintiff at the time of the collision.

[19] Adv **Van der Merwe**'s submission that the plaintiff's intake of liquor at the rugby match, the fact that he remained at the pavilion area for a long time after the match, that he was seen at the bar area by Silva, the manner in which he drove immediately prior to the collision, his inability to explain how the collision occurred, his flight from the scene of the accident despite the warning from Mans that he should remain on the scene until the police arrives, his refusal to return to the scene despite the suggestion by his wife, the circumstances under which the son was left behind at the scene of the incident while the plaintiff was rushed to Riversdale by his wife and the fact that his father, who was an eye witness to the collision, was not called to testify, indicates, on a balance of probability, that the plaintiff had more than the two beers and that he drove the vehicle at the time of the collision while he was under the influence of intoxicating liquor.

[20] The plaintiff has tendered evidence in respect of each of these factors enumerated by the defendant's counsel. In my view, he has given a reasonable explanation in respect of each of these factors. Such explanation is inconsistent with the conclusion Adv **Van der Merwe** ask this court to draw. I cannot say with any degree of conviction that by balancing the probabilities in the light of the totality of the evidence, the inference the defendant wants this court to draw, is the most natural and plausible conclusion to be drawn from severable possible inferences. In the circumstances, the conclusion I am asked to draw

would be pure speculation and conjecture. In the premises, the defendant has failed to discharge the onus of proving that the plaintiff drove the vehicle, at the time of the collision, whilst he was under the influence of intoxicating liquor.

Did the Plaintiff Breach the Tacit and/or Implied Term of the Insurance Policy?

[21] I now turn to deal with the second defence which was pleaded as follows: *"It was an implied, alternatively a tacit term of the insurance policy that the Plaintiff would at all material times during the currency of the Policy, display good faith and act in good faith towards the Defendant, failing which the Defendant would be entitled to repudiate any claim arising from such breach"* ("the forfeiture clause"). Whether such a term can be read into the Policy will depend on the ordinary rules relating to the interpretation of contracts.

Implied Terms *ex lege*

[22] Before dealing with the question of interpretation, it is important to focus on the nature of implied and tacit terms. Implied terms are imposed *ex lege* and are regarded as rules of law.(*"naturalia"*). They are derived from common law, precedent, trade usage, custom or statute and do not necessarily arise from the consensus of the contracting parties. Once an implied term has been recognised to exist, it is implied in all contracts if it is of a general application or into a contract of a specific class, unless it is specifically excluded by the parties in their contract. A tacit term, on the other hand, is an unexpressed provision of the contract which is based on the common or imputed intention of the parties and which is inferred from the express terms of the agreement and the surrounding circumstances *("incidentalia").* (**Alfred Mc Alpine & Son (Pty) Ltd v Transvaal Provincial Administration** 1974 (3) SA 506 (A) at 531D-532F.)

[23] **Brand JA**, in **South African Forestry Co Ltd v York Timbers Ltd** 2005 (3) SA 323 (SCA) in para 28 at 339 made the following observation:

> *"Unlike tacit terms, which are based on the inferred intention of the parties, implied terms are imported into contracts by law from without. Although a number of implied terms have evolved in the course of the development of our contract law, there is no numerus clausus of implied terms and the courts have the inherent power to develop new implied terms. Our courts' approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognised explicitly that their powers of complementing or restricting the obligations of parties to a contract by implying terms should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith (see e g* ***Tuckers Land and Development Corporation Ltd v Hovis*** *1980 (1) SA 645 (A) at 651C-652G;* ***A Becker & Co (Pty) Ltd v Becker and Others*** *1981 (3) SA 406 (A) at 417F-420A;* ***Ex Parte Sapan Trading (Pty) Ltd*** *1995 (1) SA 218 (W) at 226I-227G)... It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and the set of facts can serve only as catalysts in the process of legal development."*

[24] The learned judge at para 32 went on to say:

> *"...While a court is not entitled to superimpose on the clearly expressed*

intention of the parties its notion of fairness, the position is different when a contract is ambiguous. In such a case, the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that the parties negotiated with one another in good faith..."

[25] With that background, I return to the interpretation of the policy in order to determine the true intention of the parties. In this regard **Smalberger, JA** in **Fedgen Insurance Ltd v Leyds** 1995 (3) SA 33 (A) at 38A-E has succinctly summarised the position as follows:

*"The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (**Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation** Ltd 1934 AD 458 at 464-5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be strictly interpreted (**Auto Protection Insurance Co Ltd v Hammer-Strudwick** 1964 (1) SA 349 (A) at 354C-D); for it is the insurer's duty to make clear what particular risks it wishes to exclude (**French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd** 1931 AD 60 at 65; **Auto Protection Insurance Co Ltd v hammer-Strudwick** (supra at 354D-E). 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 (****Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA*** *Ltd 1961 (1) SA 103 (A) at 108C).)"*

[26] The position has been reinforced in a recent judgment of the Supreme Court of Appeal in **Allianz Insurance Ltd v RHI Refractories Africa (Pty) Ltd** 2008 (3) SA 425 (SCA), where **Kgomo, AJA** writing for the court said at 428H-J:

"*The approach to the interpretation of contracts of insurance, in general, and exemption clauses in particular, has by now become well settled. For the present it can be summarised by the statement of two basic principles. First, a contract of insurance must be construed like any other written contract so as to give effect to the intention of the parties as expressed in the policy. Thus the terms are to be understood in their plain, ordinary sense unless it is evident from the context that the parties intended them to have a different meaning (see e g* ***Blackshaws (Pty) Ltd v Constantia Insurance Co Ltd*** *1983 (1) SA 120 (A) at 126H – 127A;* ***Fedgen Insurance v Leyds*** *1995 (3) SA 33 (A) at 38A – E). Second, whilst the ordinary rule is that the insured must prove itself to fall within the primary risk insured against by the policy, an exemption clause is restrictively interpreted against the insurer, because it purports to limit what would otherwise be a clear obligation to indemnify (see e g* ***Van Zyl NO v Kiln***

Non-Marine Syndicate No 510 of Lloyds of London *2003 (2) SA 440 (SCA) at 446A-H)."*

[27] Adv **Van der Merwe**, appearing for defendant, invited this court to make new law and find, in the light of the of the remarks by **Nugent, JA** in **South African Eagle Insurance Co Ltd v KRS Investments CC** 2005 (2) SA 502 (SCA) that the existence of good faith on the part of the insured towards the insurer continues during the currency of the contract. He was relying on the learned Judge's remark in para 8, to the effect: *"Perhaps an insured does have a duty - whether tacit or implied – to act in good faith towards the insurer for the duration of the contract."* It is perhaps appropriate to quote the passage in question in full for the purpose of our discussion:

> *"...And perhaps the deliberate submission of a false claim is a breach of that duty entitling the insurer to terminate the policy. But if that is so then on the ordinary principles of our law the insurer would be relieved of liability only from the time of termination, and the rights and obligations that had accrued before then, would remain extant... What the appellant seeks, however, is the recognition of something more: It seeks the recognition of a right to terminate the policy with retrospective effect from the date of the attempted fraud, with the result that the insured would forfeit rights that accrued before the termination."*

[28] In **Schoeman v Constantia Insurance Co Ltd** 2003 (6) SA 313 (SCA), defendant repudiated the claim of plaintiff on the basis of an alleged implied term *ex lege* that fraud on the part of the insured in connection with her claim would result in the forfeiture of all benefits under the contract. It was a case of an alleged fraud in which the insured with a

valid and legitimate claim which was covered by the policy, is alleged to have knowingly and falsely inflated the claim by 10%. The court of first instance upheld the existence of such implied term *ex lege* and found for defendant. On appeal to the Supreme Court of Appeal the judgment of the court a quo was reversed. **Marais, JA**, after making an extensive study of the result of fraud on contracts in terms of the Roman-Dutch, English and American jurisprudence, concluded at para 21:

> "*It appears that there is no authority in the Roman-Dutch law for the implication ex lege of what is in essence a penal term. Nor, in my opinion, is there a compelling social need for the adoption of such a doctrine as an incident of the common law. That its adoption would serve the ends identified in the English cases is of course so but, if the cost of doing so, would be that cases would arise in which great inequity would be the consequence, that is good reason to hesitate.*"

[29] The learned judge went on to say at para 24:

> *"When there is added to that the fact that insurance companies are master of their own policies in the sense that they are free to unilaterally devise them, the insured has no say in the process, and that it is a simple matter to include an appropriate clause to protect the insurer against fraudulent claims by providing for forfeiture, there does not appear to be any pressing need for the law to provide such protection."*

[30] In view of such formidable and overwhelming authorities against implying *ex lege* the term suggested by defendant in this matter, it would be foolhardy for me *"to make new law"*. A number of factors militate against me implying such term *ex lege* in the Policy

between the parties: in the first place, in terms of the doctrine of *stare decises*, I am bound by the decision in **Schoeman** *(supra)*; in the second place, the assumption made in the **South African Eagle Insurance Co Ltd** case *(supra)*, was obiter and I am not bound by such remarks, but in any case, the court refused to import the forfeiture rule for the reasons outlined in the **Schoeman** *(supra)* case; in the third place, the Policy was fully operative at the time the claim arose and for which loss the plaintiff was indemnified and covered by such Policy; the defendant would only be relieved from liability from cancellation of the Policy and such cancellation would have no retrospective effect; in the fourth place, as the defendant was the master and author of the Policy, there was no reason why it did not include such term in the Policy; in the fifth place, there is no reason why this court should make a contract for the parties by implying such term in the Policy; in the sixth place, I agree with **Marais, JA** that there is presently no compelling need for the adoption of the doctrine of forfeiture as a rule in our law; in the seventh place, the contract cannot be regarded as being ambiguous to justify, for the purpose of determining the true intention of the parties, the application of good faith as a tool of interpretation to resolve the question of ambiguity.

Tacit Terms

[31] I now turn to deal with the question of importing the forfeiture clause as a tacit term. In determining the existence of a tacit term, our courts have consistently approved and applied the *"bystander test"* which has been described by **Scruton, LJ** in the case of **Reigate v Union Manufacturing Co** 118 LT 479 at 483 as follows:

> *"You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such term that you can be confident that if at the time the contract was being negotiated someone had said to*

the parties: 'What will happen in such a case?' they would both have applied: 'Of course, so-and-so. We did not trouble to say that; it is too clear'."

[32] The *"bystander test"* has recently been described more explicitly in **Wilkens NO v Voges** 1994 (3) SA 130 (A) at 136H-137D as follows:

"*The paramount issue is the alleged tacit term. A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which was pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter only if they had thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one; after all if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into the contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have*

been unanimous on both the need for and the content of the term not expressed, when such a term is not necessary to render the contract fully functional. The above propositions, all in point, are established by or follow from numerous decisions of our Courts."

(The quoted authorities have been left out.)

[33] Applying the *"bystander test"* and taking into consideration the express terms of the policy and the surrounding circumstances, I am not convinced, that the tacit term that defendant wishes the court to read into the policy, passes the "bystander test". Firstly, it is unlikely that the parties would have been unanimous in the need for and the content of the forfeiture clause, when such term was not necessary to make the Policy fully functional; secondly, it cannot be said that the term was so self-evident and so glaring by its omission that it constituted an actual or imputed term of the Policy in that the plaintiff and the defendant had thought about the matter as pertinent but failed to assent thereto or had the matter been brought to their attention, they would have assented thereto; thirdly, it cannot be said that the said term was a necessary inference to be drawn from the express terms of the policy and admissible evidence of the surrounding circumstances; fourthly, to give recognition to the forfeiture clause as a tacit term of the Policy would not only conflict with this court's finding that it does not qualify as an implied term *ex lege* and be contrary to the overwhelming and formidable authorities referred to above but would permit the doctrine to be slipped into our law through the back door.

[34] Even if I should read into the policy the forfeiture clause as an implied term *ex lege* or alternatively as a tacit term, I am not persuaded that the defendant has succeeded in proving that the plaintiff had failed to display good faith by leaving the scene of the collision. His evidence was that he was traumatised following the collision but when he

learnt that his nephew had died at the scene as a result of the collision, the trauma intensified. He could not face the consequences of being responsible for the death of his nephew and impulsively left the scene in state of confusion *"to get away from it all"*.

[35] The two clinical psychologists, one for the plaintiff and the other for the defendant, agreed that the plaintiff suffered a significant trauma, exacerbated by the two accidents and the death of his nephew and which triggered the flight response. In the light of such evidence it would be difficult to make a factual finding that the plaintiff had failed to display good faith by not remaining at the scene of the collision in breach of the alleged implied and/or tacit term.

Conclusions

[36] It follows therefore, that the defendant had failed to discharge the onus of showing that the plaintiff drove the vehicle under the influence of intoxicating liquor at the time of the collision as pleaded in paragraph 2.2 read with paragraph 7.1 of its Plea, alternatively, that there was a tacit/and or an implied term which was breached by the plaintiff as pleaded in paragraph 2.3 read with paragraph 7.2 of the Plea. In the circumstances, the defendant is liable to indemnify the plaintiff for the loss suffered by him arising from the said collision.

Order

[37] In the result the following order is made:

(a) The defendant is liable to pay the plaintiff the sum of R300, 000,00 (three hundred thousand rand), in terms of the Insurance Policy, which indemnified plaintiff for the loss suffered by him arising from the collision;

(b) The defendant shall pay interest on the sum of R300, 000.00, at the prescribed rate, as from 8 September 2004 to date of payment;

(c) The defendant shall pay the costs of the plaintiff, including the qualifying expenses of the experts, Messrs Schkolne and Nel.

(d) No order is made in respect of the wasted costs occasioned by the postponement of the matter on 14 March 2008.

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