IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE JUDGMENT**

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Exercising its Admiralty Jurisdiction in terms of Act 105 of 1983, as amended

Case no. AC 38/2006

CLASSIC SAILING ADVENTURES (PTY) LTD	Plaintiff
v	
THE REPRESENTATIVE OF LLOYD'S	1st Defendant
THEBE RISK SERVICES (PTY) LTD	2nd Defendant
DEVEREUX MARINE CC	3rd Defendant

JUDGMENT DELIVERED THIS FRIDAY, 27 FEBRUARY 2009

CLEAVER J

[1] On 18 September 2005 the SY Mieke ("Mieke"), a motorised yacht owned by the plaintiff, sank in a position approximately 58 nautical miles south east of Angosche off the coast of Mozambique and became a total loss. At the time of the sinking, the Mieke was insured with a syndicate at Lloyds ("the underwriters") in terms of a contract of insurance ("the policy") and the sinking occurred within the navigational limits of the policy. The first defendant is the representative of the underwriters.

[2] The underwriters having rejected the plaintiff's claim in terms of the policy, the plaintiff now claims against them in Admiralty for payment of the sum of R9 940 000. The claim represents the sum insured (R10 000 000) less the value

(R60 000) of a stealth boat recovered after the sinking, less the costs of recovering the boat.

[3] The policy was, *inter alia*, subject to the Institute Fishing Vessel Clauses. The perils insured against in terms of the policy are set out in clause 6 of the Institute Clauses. This clause provides

> *"**6. PERILS***
>
> *6.1 This insurance covers loss or damage to the subject-matter insured caused by*
>
> *6.1.1 perils of seas rivers lakes or other navigable waters*
>
> *.....*
>
> *6.2. This insurance covers loss of or damage to the subject-matter insured caused by*
>
> *.....*
>
> *6.2.2 bursting of boilers breakage of shafts or any latent defect in the machinery or hull*
>
> *.....*
>
> *provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers."*

[4] In their plea, the underwriters deny that the loss of the vessel was caused by the events alleged by the plaintiff and also raise a number of specific defences namely

4.1 There was a material non-disclosure of the fact that the skipper of the Mieke, Mr W J Hennop ("Hennop"), was not properly qualified to serve as skipper of the Mieke.

4.2 There was a material non- disclosure of the fact that there was no stability information as described in section 226 of the Merchant Shipping Act ("MSA") and regulations 7, 8 and 10 of the Merchant Shipping (Safety of Navigation) Regulations of 1968 on board and that such information that was on board the vessel was not accurate, was not in the prescribed form and had not been approved by the South African Maritime Safety Authority ("SAMSA").

4.3 In the alternative, the plaintiff misrepresented the actual nature of the dispute with SAMSA relating to Hennop's qualifications; that the underwriters had relied upon this misrepresentation and were therefore entitled to avoid the policy.

4.4 The adventure insured had been carried out in an unlawful manner and therefore in breach of the implied warranty of legality in section 41 of the English Marine Insurance Act of 1906 ("the Act") which, it is common cause, was applicable to the insurance.

[5] Additional defences were also pleaded, namely, a breach of the warranty in the policy that the crew of the Mieke would at all times be in charge of the vessel and the exemption of liability for any loss attributable to seaworthiness set out in section 39(5) of the Act. These defences were not persisted with.

[6] The plaintiff did not deal directly with the underwriters in concluding the policy. What happened was that it instructed its brokers in South Africa, the second

defendant, which in turn instructed the third defendant, being an intermediary who specialises in the placement of *inter alia* hull insurance on the Lloyd's market, to insure the vessel at Lloyds. The third defendant has a relationship with Arthur J Gallagher UK Ltd ("AJG") who are accredited Lloyd's brokers and the policy was then negotiated by AJG with the underwriters. Since the alleged non-disclosure and misrepresentation was effected through the medium of the second and/or third defendants, the plaintiff joined these parties as defendants. The plaintiff's claim against them applies only in the event of any of the defences of the underwriters being upheld. In such event, the plaintiff claims from the second defendant, alternatively against the second and third defendants jointly and severally, payment of the amount of its claim against the first defendant on the basis that the second and third defendants failed to obtain valid insurance for the vessel and failed to make full and proper disclosure to the first defendant.

THE ONUS

[7] In terms of the cover note issued by AJG, the policy is governed by English law and practice.

[8] The onus is on the plaintiff to allege and prove the facts necessary to bring it within the terms of the insurance policy and the plaintiff must therefore prove that the loss claimed by it was occasioned by an insured event. The underwriters have the onus to prove the alleged non-disclosure, misrepresentation and illegality pleaded

by them and in the event of them succeeding, the onus will be on the plaintiff to prove that the second and third defendants are liable to it.

THE MIEKE

[9] The Mieke was a sailing vessel designed as a grand bank schooner. She had an overall length of 31 metres and a beam of 7,68 metres. The vessel was equipped with sails and powered by caterpillar turbo-charged marine diesel engines. The vessel was designed by Mr John Liverick ("Liverick") and Hennop who was the only skipper of the Mieke. The Mieke was constructed in 1997 in the South African Transport Services Workshop 17 in Port Elizabeth as a long line fishing vessel and was used for this purpose for five and a half years. During 2003 the vessel was converted into a luxury charter yacht with the capacity to carry 12 passengers. Liverick was responsible for some of the modification designs as was Mr Anton Viljoen ("Viljoen") who controls the company which owned the Mieke. Hennop acted as the project manager. In passing it may be mentioned that Viljoen is the controlling figure and mind in a number of companies, each of which own a fishing vessel and each of which were insured by the underwriters.

THE CONCLUSION OF THE POLICY

[10] The events which preceded the issuing of the policy which are relevant also to the non-disclosure defences, were briefly the following. Mr Mitch Brown ("Brown"), a consultant to the second defendant at the time, had since the early 1980's acted as the broker who had arranged the short term insurance for Viljoen's companies,

including in particular the insurance of his ships. As was his custom before renewing the policies each year, he met Viljoen at the latter's office in St Francis Bay on 9 November 2004 in order to take instructions in regard to the renewal of Viljoen's policies for the coming year. At the meeting Viljoen brought to his attention the fact that he was experiencing difficulty in obtaining certification from SAMSA for Hennop to operate as the skipper of the Mieke. Viljoen was of the view that Hennop was entitled to receive the appropriate certification as he had passed the necessary modules prescribed by SAMSA for certification, but had been unable to persuade SAMSA of this. It was decided that they would submit details of Hennop's qualifications to the underwriters as they expected the underwriters to be satisfied with his qualifications. They considered this step to be necessary so as to avoid a possible repudiation of the policy on the basis that Hennop was not competent to skipper the vessel in the event of a loss occurring. Accordingly Brown, on behalf of the second defendant addressed the following letter to Mr Paul Devereux ("Devereux") of the third defendant on the 23 November 2004

> *"We advise that the Insured has an ongoing difficulty with SAMSA with regard to the qualifications of the skipper of this vessel.*
>
> *Attached you will find a mass of documentation dealing with the skipper, Mr Willy Jan Hennop's certification which we are confident would enable Mr Hennop to operate a charter yacht vessel of the size of the 'Mieke' anywhere else in the world other than the bureaucratic mess that exists here regarding acceptability of certification from bodies such as the Royal Yacht Association U.K. I too have an ongoing fight with SAMSA regarding the re-issue in the new format of my own coastal skipper's certificate and I can tell you it is one long bureaucratic mess.*
>
> *As matters presently stand there is confusion in the offices of SAMSA as to whether or not they are able to issue a South African Certificate of Competency as they seem to be unable to decide as to whether or not they will accept bodies such as the Royal Yacht Association as being competent*

bodies for the certification of seagoing people onboard yachts, be they commercial or not.

We submit these documents as we seek confirmation that Insurers are happy with his qualifications."

Attached to the letter was a letter from the first defendant to the second defendant listing a number of documents which reflected Hennop's qualifications. On 23 November Devereux forwarded the documents reflecting Hennop's qualifications to AJG, under cover of the following letter

"Re: Classic Sailing – MY 'Mieke'

The skipper of this vessel a Mr Willy Jan Hennop is engaged in a dispute with SAMSA regarding his qualification to act as skipper.

Although the 'Mieke' is not a fishing vessel SAMSA seem keen to impose their authority and we have been asked to request that you view Hennop's qualifications not to try to override SAMSA but rather to ascertain whether they satisfy underwriters.

I believe that Kuttel had a similar problem with SAMSA but eventually prevailed and his Yachtmaster Ocean certificate was recognized."

[11] It is common cause that Devereux's letter with annexures was taken by Mr Nick Paice of AJG, to Mr J S James ("James"). James is and was at the time a lead underwriter for the corporate member of Lloyds which provided the capital for the syndicate and with which the contract of insurance was concluded. As lead underwriter he was authorised to set the terms of the insurance. James testified in court and confirmed that although he had no recollection of the conversation which he had had with Mr Paice after which he had concluded the insurance contract, he had endorsed Devereux's letter by writing on it the word 'seen' and appending his

initials and the date of the 24 November 2004 on the document. After setting the terms of payment, the contract of insurance was thereafter concluded.

[12] Before dealing with the non-disclosure defences, it is necessary to record the circumstances relating to the stability book and the vessel's movements after a new stability book had been prepared.

[13] At the time of the construction of the vessel in 1998 a stability book for the vessel was produced and approved by SAMSA. After the conversion of the vessel to a charter yacht, SAMSA required that a new stability book be produced. For this purpose, Liverick carried out an incline test and requested a naval architect, Mr M J Stewart ("Stewart"), to compile a new stability book. To do so, Stewart used the results of Liverick's inclining experiment, the lines and general arrangement plan prepared by Liverick as well as the stability book previously prepared for the fishing vessel.

[14] Upon the completion of its conversion, the Mieke sailed to Cape Town, but on 26 February 2004 it was detained by SAMSA as it had no approved stability book on board. Stewart then arranged for 19,3 tonnes of ballast to be placed in the vessel's sewage tank and forwarded a copy of a new stability book for the vessel to SAMSA. On 15 March 2004 SAMSA granted interim approval of the stability book valid until 15 April 2004 and the Mieke was then released from detention and

sailed for Mozambique where, save for a return trip to Port Elizabeth, it remained until October 2004.

[15] On its way to Mozambique the Mieke called at Durban where repairs were effected to its explosion box on 21 March. The explosion box was positioned on deck. It received the exhaust pipes from the main engine and two generators on the one side and allowed these exhaust pipes to exit on the other side before merging into a single exhaust which exited the hull through the transom.

[16] In September 2004 the vessel returned to Port Elizabeth where she was dry docked and surveyed by SAMSA. A hull survey was conducted by Mr Colenutt ("Colenutt"), the principal officer in SAMSA's Port Elizabeth office, and on 18 October Colenutt issued a survey report in which he described the condition of the vessel's hull and ship side valves as being *"satisfactory"*. On the same day Colenutt also issued a *"report of survey of a class X ship over 100 GT"*. Although this report states that *"the required 'SAMSA approved, stability book is aboard. And any special operating instructions contained therein have been clearly posted on the bridge"*, the fact is that no final approval for the new stability book had yet been obtained. On 19 October 2004 a Local General Safety Certificate in respect of the vessel was issued. This reflected the vessel as a class II sailing vessel undertaking charter excursions or unlimited voyages in the Indian ocean carrying 12 or less passengers and contained a certificate to the effect that the ship had been inspected in accordance with the requirements of, *inter alia*, Life-Saving

Equipment Regulations, the Merchant Shipping Radio Regulations, the Collision and Distress Signals Regulations, and the Safety of Navigation Regulations and that in all respects the ship complied with the regulations. The Mieke left Port Elizabeth on 21 October 2004 and returned to Mozambique.

THE LAW

[17] Section 18 of the Act reads as follows:

> *"(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is know to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such a disclosure, the insurer may avoid the contract.*
> *(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."*

[18] The English courts have held that it is not necessary to show that the circumstances would have a decisive influence on the judgment of prudent insurer. All that the insurer needs to show is that the circumstance would have had an effect on the mind/thought processes of the insurer in weighing up the risk[1]. It has also been held that an insurer needs to show that the circumstances would reasonably affect him in determining whether he will accept the insurance and if so, at what premium and on what conditions.[2]

A fact may be material, although if disclosed, it would not have led the prudent insurer to decline the risk or stipulate an increased premium. It will suffice if the

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1 *Pan Atlantic Insurance Co Ltd v Pine Prop Insurance Co Ltd* [1994] 3 All ER 581 (HL) per Lord Goff at 587c, per Lord Mustell at 618h

2 *Container Transport International Inc and Another v Oceanus Mutual Underwriting Association (Bermuda Limited)* [1984] 1 Lloyd's Rep 476 at 528-529

prudent insurer would rightly take it into account as a factor in coming to his or her decision[3].

[19] Understandably, an insurer must show that the non disclosure induced the making of the contract in the sense that he or she would not have made the same contract if he or she had known the matters in question. However, where the materiality of the undisclosed matter is obvious it may justify the court in presuming that the underwriter was induced[4]. Two other principles may be mentioned; one, a non-disclosure need not be the sole inducement of the contract as long as it was an inducing cause, even if it was not the sole inducing cause[5]; two, where the inducing cause is alleged to be a batch of documents containing a number of statements inter-connected, it is a general rule that for the purpose of determining the issue of inducement, a conjoined effect on the representee's mind of the entirety of the statements or documents and their mutual relation and qualification to one another is the question to be considered rather than the effect of any particular statement or document apart from the others[6].

[20] Counsel for the underwriters do not persist with the defence that the plaintiffs had failed to make proper disclosure with regard to Hennop's certification. This was due to the concession by James that it was implicit in the correspondence made available to him by Paice that Hennop had not been certified to skipper the Mieke and that the contract of insurance had been entered into on this basis. As far as

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3 McGilivray On Insurance Law (10th ed) 2003 para 17-35
4 McGilivray On Insurance Law (*supra*) para 17-35
5 Halsbury's Laws of England Vol 31 (4th ed re-issue) 2003 para 771
6 Halsbury's Laws of England **(*supra*) para 772**

Hennop's certification is concerned, lead counsel for the underwriters restricted himself to the submission that plaintiff's failure to disclose to the underwriters that Hennop had applied to SAMSA for an exemption from its requirements with regard to his qualifications and that his application had been refused, constituted a failure to disclose material information. In my view the concession by James that the underwriters knew that Hennop was not certified was sufficient to counter also the defence that the plaintiff ought to have disclosed the fact that Hennop had been refused an exemption. However, with regard to this aspect, it was submitted on behalf of the underwriters that the situation had been misrepresented to them. This aspect will be dealt with below.

[21] In order to understand the defence that the underwriters were entitled to avoid the policy on the ground that the plaintiff had failed to disclose the fact that at the time of the conclusion of the contract, the stability information on board the vessel was inaccurate and had not been approved by SAMSA, it is necessary to have regard to the evidence concerning the alteration of the ballast on the vessel. When the Mieke was detained by SAMSA in Cape Town on 26 February 2004 because of concerns as to its stability, Stewart recommended 19,3 tonnes of concrete be placed in the sewage tank and indicated where this should be placed. He then recalculated the stability information and on the basis of the revised book, SAMSA allowed the vessel to sail. A considerable amount of evidence was tendered in respect of the placing of the concrete ballast and unfortunately such evidence was not consistent. Correspondence addressed by Viljoen to SAMSA recorded on

11 March 2004 that eight cubic metres of concrete had been placed in the tank, as discussed with Stewart, and that the tank had been reduced from 10 metres to 2 metres in length with a sump of 1.8 metres at the rear. (Stewart testified that 8 cubic metres is equivalent to 19.3 tonnes.) On 14 March Stewart advised SAMSA that 18 tonnes of ballast had been added. In a document prepared on 17 October 2005 giving his view as to the probable cause of the sinking of the Mieke, Viljoen recorded that

* The tank consisted of a well area in the front into which the grey water of the six cabins drained, followed by a section containing approximately 8 cubic metres of concrete, followed by another well below the rear hatch.
* The two reservoirs thus created connected with a 150mm pipe only being installed some distance from the floor for the purpose of draining the front reservoir into the back one, from where the grey water was pumped out.

[22] In the report prepared by plaintiff's expert Dr Zietsman, described as a naval architect, the following was stated:

> *"Permanent steel and concrete ballast was located below the effluent DB tank. This was included in the lightship condition, as it was on-board at the time of inclining experiment. An additional 19.3 tonnes of cement ballast was added in sections of the Effluent DB tank subsequent to the inclining experiment, at the request of SAMSA...the converted tank consisted of a forward well area into which the grey water from the six cabins drained and another well aft of the new concrete ballast. The two well areas were connected by a 150mm pipe, some distance above the floor... There was an approximately 150mm gap between the top of the concrete ballast and the roof of the original bottom fuel tank."*

This description accorded with that contained in the document prepared by Viljoen on 17 October 2005. When he testified, Viljoen said that the plan was to build two

walls with the concrete ballast being placed within the walls and to place a 150mm pipe on the floor. When he was confronted with the diagram prepared by Stewart and which was submitted to SAMSA and which reflected the ballast being placed in two separate areas, he declined to be unequivocal and said that Hennop should be asked about the ballast as he was the person who had been responsible for placing the ballast in the vessel. Insofar as Viljoen's evidence is concerned, it must be borne in mind that he was not present in Cape Town when the ballast was added, although it appears that he had been in touch with Stewart in connection with the proposed addition. When he testified, Hennop produced a hand-drawn sketch which reflected the ballast being placed in two separate sections. He further testified that he had built three brick walls to contain the concrete in the two sections, that there were two pipes connecting the front grey water section to the aft grey water section and there was a gap above the section described as a *"klein spasie".*

[23] Mr Ehab Samier Awad ("Awad"), who was the motorman on the Mieke, was called by the underwriters. Awad's evidence was that he constructed only two walls creating only one area where concrete was introduced as ballast and that it was he who built the walls starting at about 18h00 and finishing about 05h00 the following day. According to him, the concrete was about 300mm below the level of the gap which was left for the pipe through which the concrete was injected.

[24] Stewart testified that the 19,3 tonnes referred to in the stability book was derived from calculations which he had made and that the diagram in the stability book reflected his calculations. The arrangement which he proposed was designed to add weight lower down in the boat so as to lower the centre of gravity and to reduce the free surface in the effluent tank. The ballast was to be distributed in two separate sections and his calculations were premised on the ballast totally filling the spaces. With regard to the discrepancies between his recommendations and the other versions, his view was

* If the concrete had been placed in two areas as recommended by him, 19,3 tonnes would have filled the two areas. If the volume was in any way different, that would make a marked difference.
* If 1 tonne less had been placed in the tank, i.e. 18 tonnes rather than 19,3 tonnes *"that would have a marginal effect on the stability calculations".*
* If he had known that the ballast was placed in the way described by Awad, he would have wanted to update the stability book to reflect the actual situation.
* If the pipe(s) had been inserted some distance above the floor (as in the Zietsman report and in certain of the correspondence) it would have been a concern for him, as it would mean that the tank could not be drained properly and as a result it might carry more weight than the 1 tonne restriction.

* If there was a gap of 150mm above the concrete he would have wanted to confirm by calculation whether it materially affected the stability of the vessel.

* If the location of the ballast was different it would result only in a marginal difference to the stability, unless it was spread out so that the quantity left a significant gap above the concrete. A significant gap would be a point for concern.

[25] In January 2005 (i.e. after the insurance had been renewed) Stewart had discussions with Ms Dzinic of SAMSA who had certain queries in relation, *inter alia*, to the design trim. Based on certain modified figures given to him by Ms Dzinic, Stewart amended the previous version of the stability book and resubmitted it to SAMSA on 13 April 2005. According to an endorsement on the stability book it was approved by SAMSA on 5 May 2005.

[26] It was submitted on behalf of the underwriters that in all probability two rather than three walls were constructed and that consequently the ballast was not placed in the positions indicated in Stewart's diagram but in one compartment only. The only evidence that there were three walls was that of Hennop who had been in court when Stewart's diagram was put to Viljoen and who testified the following day. I was asked to prefer Awad's evidence. This would mean that there was serious doubt as to the quantity of concrete which was placed in the tank. In my view there is no reason to prefer Awad's evidence. Not only did Hennop testify

that the walls had been constructed in accordance with the plan prepared by Stewart, but it is common cause that an official of SAMSA inspected the newly inserted ballast and presumably approved it, immediately after it had been added. By then of course SAMSA was in possession of the new stability book containing Stewart's diagram reflecting the two separate areas for the ballast.

[27] It was also pointed out that the plaintiff had on occasion said that 18 tonnes were placed in the tank while on other occasions the figure was given as 19,3 tonnes. Since Stewart's evidence was that if the volume of concrete was different to that envisaged by him, it would make a marked difference in respect of the stability calculations and since Dr Zietsman, the expert called by the plaintiff, indicated that he would have to redo his calculations if there were only two walls and one section of concrete it was submitted that the stability information contained in the booklet could not have been reliable.

[28] Counsel for the underwriters also drew attention to the uncertainty relating to the pipe or pipes connecting the forward and aft grey water tanks and the gap above the concrete. As to the pipes, a document prepared by Viljoen on 17 October 2005 as also Dr Zietsman's report referred to 150mm pipe installed some distance from the floor. When Viljoen testified he stated that the plan was to place a 150mm pipe on the floor. Hennop's version was that there were two pipes and Stewart said that if the pipe/s had been inserted some distance above the floor it would have been a concern for him as the tank would not drain properly. It seems clear from the

various versions given by the witnesses that some gap was left above the concrete, notwithstanding Stewart's plan which showed no gap. These were further reasons cited by the underwriter's counsel to support his submission that the stability information was not accurate.

[29] Although counsel for the underwriters submitted that the unreliability of the stability book was a material circumstance as contemplated by section 18 of the Act, he ultimately relied on the fact that the material circumstance was that no approved stability information had been in existence at the time the insurance was taken out and that the underwriters should have been informed that temporary approval for the stability book had lapsed and also that SAMSA had required the line drawings to be verified, something which was also not disclosed.

[30] On behalf of the underwriters it was submitted that the stability information in the stability book prepared by Stewart was inaccurate because the quantity and location of the ballast added to the vessel was not as reflected in the stability book and the pipes connecting the two walls were placed were some distance from the floor of the tank.

[31] The factual position with regard to the stability book is that the book which had been approved in March 2004, albeit for a month only, was on board the vessel at the inception of the policy. A stability book is required in order to give effect to section 226 of the Merchant Shipping Act which requires only *"information in*

writing about the stability of the book as is necessary for the guidance of the Master in loading and ballasting the ship." The form in which the stability information is to be contained is prescribed in Regulation 8 of the Safety of Navigation Regulations. Regulation 10 requires the information to be reliable and up to date. As will be seen, there is no requirement for an approved stability book to be on board, either in the Merchant Shipping Act or the Regulations.

[32] On 29 March 2004 SAMSA's naval architect recorded in an internal memorandum that the stability book which had been submitted to her for approval by Stewart was mathematically correct. On 23 April 2004 SAMSA advised Viljoen that the stability book was acceptable in essence, but required a few changes prior to the final approval and on 1 September Captain Dernier of SAMSA informed Viljoen that SAMSA's naval architect specifically wished to take note of the Mieke's underwater shape to confirm the lines plan and in addition wished to confirm the general arrangement. He indicated further that it would not be convenient for the naval architect to do the topside survey in October/December 2004 and that it would be more beneficial if she was to do the hull survey when due in October 2005.

[33] On 19 October 2004 SAMSA issued a local general safety certificate for the vessel after a dry dock hull survey had been carried out on the vessel on 13 October 2004. As already mentioned, that report also recorded *"The required 'SAMSA approved' stability book is aboard".* It was clear from Viljoen's evidence that by 9 November 2004 when he met with Brown at his offices, the issue of the vessel's

stability had been resolved with SAMSA to the extent that the stability book was no longer an issue. According to Viljoen it was an issue only in the sense that the book did not have a stamp of approval, but it wasn't an issue as far as the operation of the vessel was concerned.

[34] In considering these submissions made on behalf of the underwriters, regard must be had to the case pleaded by them which was to the effect that the stability information *"was not accurate, was not in the prescribed form"*. In trial particulars and in response to a request to indicate in what respects the underwriters had alleged that the stability book was not accurate, the reply was

> *"At the time that the contract was concluded the vessel's length overall, breadth as moulded, depth as moulded, gross tonnage and nett tonnage had not been accurately calculated."*

[35] Although the experts called by the plaintiff and the underwriters were of the view that the underwriters should have been told that there was no approved stability book on board and that non-disclosure of this would have been material, that was not the case which the plaintiff had to meet. It had to deal with the allegation concerning the inaccurate calculations referred to in the trial particulars. Such evidence as I heard in relation to these respects came from Stewart. He testified that after the SAMSA naval architect had received the Mieke's lines plan, she informed him that she would have to recalculate the vessel's tonnage and load line again. She had certain queries concerning the calculation of the drafts, but his explanation satisfied her and she informed him that what was reflected in the

stability book on that book was correct. Early in January of 2005 she raised a further query with him in regard to the design trim, but once again he satisfied her that he had used the correct figures for the lines plan. The only outstanding issue concerned the particulars of the vessel in the stability book which recorded the following:

"LENGTH O.A.	*29.70 M*
LENGTH B.P.	*22.68 M*
BREADTH MOULDED	*7.70 M*
DEPTH MOULDED	*4.86 M*
DESIGN TRIM	*0.24 M*
DEPTH OF KEEL	*0.80 M*
GROSS TONNAGE	*130.30*
NETT TONNAGE	*39.09"*

After the naval architect had given some modified figures for some of the parameters pertaining to the vessel, he amended the version which he had submitted by altering the following particulars of the vessel

"LENGTH O.A.	*31 M*
BREADTH MOULDED	*7.68 M*
DEPTH MOULDED	*4.05 M*
GROSS TONNAGE	*129.45 M*
NETT TONNAGE	*38 M"*

His evidence that the changes did not make any material difference to the calculations in the book was not challenged.

[36] Importantly in my view, it was never established from James what his attitude would have been had he been informed that the only respect in which SAMSA had not been satisfied in respect of stability information was the ostensibly negligible differences mentioned above.

[37] In the trial particulars it was also alleged that

> *"The information was not in the prescribed form as it did not comply with Regulation 10 of the Safety of Navigation Regulations."*

It was not stated in what respects it did not comply with Regulation 10. No evidence was led to establish in terms that the book failed to comply with the Regulations. In the circumstances I conclude that the underwriters have failed to establish the alleged non-disclosure in respect of the stability book.

MISREPRESENTATION

[38] On behalf of the underwriters, emphasis was placed on the requirements for establishing the defence of misrepresentation[7]. In particular, reference was made to the failure to disclose to the underwriters that Hennop had applied to SAMSA for an exemption, but that this had been refused. However, the case which the defendants had been called upon to meet was much more narrowly defined in the pleadings. Significantly, it is clear from the plea that the underwriters were aware of the fact that Hennop did not have the necessary certification from SAMSA. The relevant portions of the plea read as follows

> *"12A.1 On or about 23 November 2004 the plaintiff, represented by AJG informed the Lloyd's underwriters that:*
>
> *12A.1.1 the skipper of the vessel was engaged in a dispute with SAMSA regarding his qualification to serve as skipper of the vessel:*

[7] a) There must be a statement of fact or, in relation to the remedy provided for in section 20 of the Act, a statement of opinion of belief.
b) The statement must be untrue.
c) The statement must be material to the insurers' appraisal of the risk.
d) It must be a statement as to the present or past fact and not *de futuro*.
e) The statement must have induced the aggrieved party to enter into the contract of insurance.

12A.1.2 another person had been involved in a similar dispute and that person had prevailed and his qualifications had been recognised;

12A.1.3 there was confusion on the part of SAMSA as to whether or not they were able to issue a certificate of competency to Mr Hennop as SAMSA was unable to decide whether it would accept bodies such as the Royal Yacht Association as being competent bodies for the certification of seagoing people on board yachts.

12A.2 A copy of the letter in which certain of the aforesaid information was provided is annexed to the plaintiff's replication marked 'R1'.

12A.3 The documents presented to the Lloyd's underwriters did not include any information regarding the requirements prescribed by SAMSA for the safe manning of the vessel against which the information furnished could be compared with or related to such requirements.

12A.4 It was implicit in the representation aforesaid that the plaintiff anticipated that the dispute referred to in the correspondence would be resolved and that SAMSA would recognise Mr Hennop as being qualified and certificated which would enable him to serve as skipper on board the vessel."

(The letter marked R1 is the letter from Devereux to AJG quoted in paragraph 10.)

The evidence in support of these allegations was that given by Mr P Northfield, an English underwriter with considerable experience in the marine insurance industry. He suggested that it was implicit from the letters that Hennop would receive his certification very shortly or at least that there was the expectation of a decision as to whether they would accept him or not. In my view these are not inferences which can reasonably be drawn from the letters and Northfield was not able to explain any basis on which his evidence could be justified.

[39] On behalf of the underwriters it was submitted that it was incumbent on the defendants to have disclosed the background to the problem which had arisen with SAMSA, including in particular the fact that Hennop had at a stage applied for an exemption from SAMSA's requirements, but that this had been refused. James was the person with whom AJG had dealt and his view is most important.

[40] He was criticised for adopting the following view expressed by Northfield

> *"Had a prudent underwriter been advised that SAMSA, as the regulatory authority, had not approved the certification of the skipper of the yacht Mieke as rendering him qualified and competent to skipper the yacht in accordance with the applicable statutes and regulations, this would have had a substantial influence on the underwriter's decision as to whether or not to conclude the contract of insurance and accept the risk. The underwriter would either have declined to accept this altogether or would have restricted the terms of the insurance and may also have adjusted the premium."*

The criticism against him was that notwithstanding the view set out above he had accepted the fact that the skipper was not certified when he accepted the risk. In his evidence he contended that the fact that a list of qualifications had been sent to him was confusing, but conceded that notwithstanding such apparent confusion he had insured the vessel on the basis of the documentation furnished to him. In any event, such confusion, if it existed, is unrelated to the misrepresentation asserted in para 12A.4 of the plea. As to the letter from the second defendant, Brown testified that he himself had had difficulty in getting his skipper's certificate from SAMSA and that confusion did exist on the part of SAMSA which required Hennop to complete modules on celestial navigation and its exemption on the other hand of

the vessel from having a sextant on board. It is common cause that navigation was effected by the use of the GPS system.

In my view, the fact that the underwriters had been informed that Hennop's qualifications had not been accepted by SAMSA and had also been told that there was confusion in the offices of SAMSA meant that the underwriters had been put on guard and they could have ascertained the full picture by making the necessary enquiries. After all, Northfield in his expert summary recorded that had a prudent underwriter been advised that SAMSA had not approved the certification of the skipper, this would have had a substantial influence as to whether or not to conclude the contract. In the circumstance, I conclude that the underwriters have failed to discharge the onus resting on them.

ILLEGALITY

[41] Section 41 of the Act provides

> *"There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner."*

There are accordingly two elements to this section, but it is the second which is in issue, namely whether or not the adventure was carried out in a lawful manner. The underwriters contend that since (a) Hennop did not have a certificate to skipper the vessel and (b) the stability book was not reliable and up to date, the adventure was not carried out in a lawful manner. In this connection reliance was placed principally on the judgment in *Doak v Weeks*[8], a judgment of the Supreme Court of Queensland. In that case, section 47 of the Australian Marine Insurance

[8] *Doak and Another v Weeks and Another* [1986] 82 FLR 334

Act, which is identical to section 41 of the English Act, was in issue. The court considered the situation where an owner knowingly sent a vessel to sea with a crew which did not hold the certificate of competency required by the Queensland Regulations, even though the regulations did not prohibit the vessel sailing without a properly certified master and crew. Referring to the regulation, the judge remarked

> ***".....a** regulation which requires a ship which goes to sea to be provided with a duly certificated crew and imposes a penalty on the owner and master if this requirement is not complied with must be treated as one which is 'in effect a prohibition of the voyage unless performed with the crew or master that the law required...."*

with the result that he concluded that in such circumstances the implied warranty in terms of section 47 of the Act had been breached. In the result the insurer was discharged from liability from the date of the breach. Some support for this view is found in Professor Hare's work in this country. After referring to section 41 of the English act, he expresses himself as follows:

> *"There are two interesting practical applications of the rule against illegality: first, ... The second significance would concern a statutory illegality arising from non-compliance with safety requirements of the state in which the policy is effected. Thus for example, the South African Merchant Shipping Act has, as schedules with full force and effect, most of the world's current safety conventions. These conventions impose minimum standards of manning and safety upon the building, construction and operation of ships. If a vessel is operated in a manner inconsistent with the statutory requirements of the Merchant Shipping Act, and insurance be effected in South Africa, the insurance would be unenforceable by virtue of the domestic illegality alone."*[9]

[42] In English law it would seem that the emphasis is placed on the illegality of the adventure in order to constitute a breach of the implied warranty[10] or the

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[9] Shipping Law & Admiralty Jurisdiction in South Africa , John Hare, pp 718-9

[10] Arnould's Law of Marine Insurance and Average, Vol II, Sixteenth Edition by Mustill and Gilman at para 743

unenforceability of the original contract[11]. Arnould explains that where the statute contains no express provision prohibiting the contract, it is necessary to determine whether the statute intends to render the contract, in the course of which the prohibited act is performed, unenforceable. In this connection it is necessary to determine first whether the policy of the statute is aimed at prohibiting dealings in the course of which its provisions are infringed or whether the statute was passed for a collateral purpose. Shipping safety has in general been treated as collateral. In this connection

> *"The want of a written agreement with the crew, in the form and of the contents required by the Merchant Seamen's Act (5 & 6 Will. 4, c. 19), (now Merchant Shipping Act 1970, ss. 1* et seq.*) was held not to render a voyage illegal, and consequently an insurance thereon void nor the ship unseaworthy. Similarly, the overloading of a ship in contravention of load line legislation has been held not to invalidate a charterparty, so as to prevent the shipowner from recovering freight on the full cargo shipped."*[12]

I have omitted the cases mentioned by Arnould, but these may be found in the footnotes to para 756.

[43] In Volume III of Arnould under the heading 'Illegality under foreign law' the following appears

> *"It has been doubted whether the implied warranty in section 41 of the 1906 Act extends to illegality under foreign law, as well as illegality by English Law."*[13]

In her work on marine insurance, Susan Hodges points out

> *"Any adventure contravening a foreign law which had not been acted upon or enforced by its own country would not constitute a breach of the implied warranty. This was held in* Francis, Times and Co v Sea Insurance Co*,*

[11] Arnould's Law of Marine Insurance and Average (*supra*) at para 744
[12] Arnould's Law of Marine Insurance and Average (*supra*) at para 756
[13] Para 744 – 746 (with the authority being reflected as *Euro-Diam Ltd v Bathurst* [1990] 1 Q.B. 1 p13 per Staughton J, as first instance)

> *where insured goods, consisting of arms and ammunition, were sent to Persia where there was an edict issued by the Persian government prohibiting the importation of arms and ammunition into Persia. It was well-known that so long as duties were paid there was no prospect of interference by the authorities who were aware that the trade was open and notorious. As this law was never implemented, Mr Justice Bingham held that the voyage was not, according to the law of Persia, an illegal voyage."*[14]

Independently of section 41 of the English act, Arnould points out that the principle to be considered as to whether the underwriters can defeat a claim on the ground of its being tainted by illegality of the risk or of a transaction giving rise to the loss, rests on a broad principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal or immoral conduct of which the courts should take notice[15].

[44] In considering this aspect finally, regard must be had to the provisions of section 313 of the MSA. In terms thereof and insofar as Hennop's certification is concerned, a breach of the act would render him liable or imprisonment for a period not exceeding one year.

[45] As to the stability book, it is clear that although it had not been finally approved at the time the contract was concluded, the only outstanding matter relating to its approval did not affect the stability of the vessel. Furthermore, SAMSA had issued General Safety Certificate for the vessel in October 2004 and had allowed the vessel to proceed to sail with Hennop as skipper and with the stability information then on board. Also, having regard to the portion quoted from Hodges at p140 of

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[14] Law of Marine Insurance, Susan Hodges, p140

[15] Arnould's Law of Marine Insurance and Average, Vol III, para 747-748

Law of Marine Insurance not only did SAMSA take no steps against the Mieke, but in its report on the casualty the only recommendation made was that *"no further action is required".*

[46] On the basis of the authorities referred to by Arnould and Hodges I conclude that the plaintiff does not found its claim on an illegal contract, does not plead anything which is tainted by illegality and does not found its cause of action on an immoral or legal act. I am also of the view that no question of illegality arises, but even if it should arise in regard to a possible breach of the implied warranty relating to Hennop's certification, there has in my view, in terms of the tests applied in English law, been no breach notwithstanding any possible breaches of the Merchant Shipping Act and regulations.

[47] In any event I am of the view that by virtue of section 54(1) of the Short-Term Insurance Act No 53 of 1998 ("the Short-Term Act"), the contract of insurance is not void merely because provisions of the law may have been contravened. The section reads

> *"A short-term policy, whether entered into before or after the commencement of this Act, shall not be void merely because a provision of a law, including a provision of this Act, has been contravened or not complied with in connection with it."*

It is common cause that the insurance policy in question is a short-term policy as defined in the Short-Term Act. Counsel for the underwriters submitted that the Short-Term Act applies only to contracts to which South African law applies and does not apply to the contract under consideration which is governed by English

law and practice. I do not share this view. After all, it is by virtue of the Short-Term Act that Lloyd's underwriters are authorised to carry on short-term insurance business in South Africa and are required to have a representative in this country for this purpose. To exclude the authority of the Short-Term Act would in effect permit parties to contract out of the statute and this in my view could never have been the intention of the legislature. Prof Hare in a footnote to a section dealing with breach of warranty under a marine assurance policy and the ISM code supports this view and writes

> *"The policy will not however be void by reason of such illegality, per s 54 of the Short-Term Insurance Act, 1998."*[16]

[48] The plaintiff also pleaded that as far as Hennop's certification was concerned, the underwriters were estopped from relying on the alleged breach of the implied warranty once they accepted the risk and entered into the contract knowing that he did not have the necessary certification. In my view there is merit in this submission as well, but in view of the conclusion which I have already reached it is not necessary to debate it any further.

THE SINKING

[49] The Mieke left Vilanculos bound for Pemba during the early hours of 15 September 2005. Before departing from Vilanculos she took on board 3 400 litres of fuel. Shortly after the Mieke departed from Vilanculos the weather deteriorated, with the wind reaching 25 – 30 knots and the sea showing a swell of two to three metres.

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[16] Shipping Law & Admiralty Jurisdiction in South Africa, John Hare, p 234 ft 39

The bad weather lasted for nearly two days during which time the vessel's speed was between six and seven knots and the engine was operating at 1350rpm. After a period of bad weather, the wind died down, but the seas were still 'biggish'. During the early hours of 17 September, the Mieke ran out of fuel. Hennop and Mr Darryl Evan Grieve ("Grieve"), the engineer, could not explain how the loss of fuel had occurred. Hennop decided to make for land and as only a small quantity of fuel remained in the day tank, he decided to use the sails. The main engine was run at idling speed in gear. Hennop testified that it was not usual to run the engine in gear at idling speed and that when this is done, it vibrates. On the morning of 18 September while Hennop and Grieve were sitting on deck, the bilge alarm sounded at approximately 06h30. Hennop immediately sent Grieve down to investigate. When the latter entered the transverse passage forward of the engine room, he found that he had stepped into water, at possibly ankle depth. He also found that the area below was in darkness as there were no lights on. He attempted to turn on the emergency lights (powered by a 24 volt battery bank), but was unsuccessful. Hennop then came down from the gulley into the transverse passage and found there to be approximately 30cm water in the passageway. He went into the engine room and confirmed that the seacock was closed. Grieve attempted to start the port side generator, but without success. He was however able to start the starboard generator and got the electrical bilge pump going. Hennop went back on deck to confirm that the bilge pumps were working, but when he returned, it was obvious that the ingress of water was increasing. He and Grieve attempted to find the source of the ingress, but without success. Grieve

also checked to see whether the seacock was closed and found this to be the case. Eventually he had to switch the electrical system off for fear of being electrocuted. In endeavouring to trace the source of the ingress of water, he dived below the water level in the engine room on more than one occasion and on one of his dives he says that he heard sounds of the hull creaking and crackling. On that occasion he was sucked in under the engine and eventually thrown out again, apparently also being pulled out by Hennop. Hennop instructed the crew to bail the water out with buckets which was done in relay from the transverse passage. However, the inflow of water was so great that eventually Hennop instructed Grieve to get the crew off the boat. By that time the water in the engine room was up to his neck. Having got the rest of the crew onto the tender, Grieve left the boat by stepping on to the platform at the rear of the boat and then on to the tender. The main engine was still running and Hennop was still on deck. At this stage the Mieke was sinking from the stern and as its exhaust was under water Grieve expected to see bubbles coming up caused by the air in the exhaust being expelled. No such bubbles could be seen. He also testified that the day before the sinking and after the vessel had run out of fuel, he had noticed small traces of water trickling down the inside of the hull at the starboard side where the exhaust pipe exited the hull. He had also noticed that the lagging wrapped around the exhaust had become loose and unwound at the lower end and that it displayed a dark colour.

[50] When Grieve entered the engine room after coming down to find water in the passageway he was met with a strong smell of diesel exhaust fumes which increased while he was in the engine room. He also testified as to the condition of the hatch cover over the bilge in the transverse passage. The hatch cover was relevant in that initially the underwriters had pleaded that one of the reasons why the vessel was unseaworthy when it set sail was that the hatch cover had not been properly secured. It was common cause that the hatch cover was not bolted down. Grieve testified that it fitted snugly into the grooves provided for it in the floor and importantly, that when he went down into the passageway for the first time, he immediately checked the hatch cover to establish whether water was coming into the passageway from the bilge. He found that he could not lift the cover because of the pressure from the water above the lid and that no water was coming from the tank below. Hennop also testified that he tried to lift the cover, but that the force of the water above it prevented it being moved.

[51] Grieve and the rest of the crew steered the tender around the Mieke and photographs of the last minutes of the Mieke were taken by the cook were tendered in evidence. As the Mieke listed to port, Hennop jumped off the deck into the water and was helped into the tender before the Mieke came upright again and thereafter commenced her final descent by the stern. The photographs present a graphic picture of the final minutes of the vessel.

THE CAUSE OF THE SINKING

[52] It is for the plaintiff to identify the insured peril upon which it relies and it must prove that the peril was either the cause or a cause on a balance of probabilities[17]. The standard of proof required in matters of this nature has been authoritatively set out in two leading English cases, namely the *Popi M* and *The Marel*[18] with *Popi M* being quoted with approval in this country in the Supreme Court of Appeal in *The Wave Dancer*[19] .

* The burden of proving, on a balance of probabilities, that the vessel was lost as a result of a peril insured against remains throughout on the insured. Although it is open to the insurer to suggest and to seek to prove some other cause of the loss against which the ship is not insured, there is no obligation on it to do so. If it chooses to do so, there is no obligation on it to prove, even on a balance of probabilities, the truth of its alternative case[20]. A court may conclude, after consideration of all the evidence that the proximate cause of the loss of a vessel, even on a balance of probabilities, remains in doubt. In such case, the insured will fail to discharge the onus[21].

* *".....it should be observed that while an insured would ordinarily be obliged to adduce evidence identifying the precise cause of the loss and the particular defect responsible therefor, such evidence is not necessarily essential. In principle there can be no reason why, in the absence of evidence as to the precise cause of the loss, an insured should not in appropriate circumstances*

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17 *The Milisan* [2000] Vol 2 Lloyd's Rep, 458 (QB) at 464-465; *The Wave Dancer* 1996 (4) SA 1167 at 1178F and 1181H-I

18 *Rhesa Shipping Co SA v Henry David Edmunds, Rhesa Shipping Co SA v Fenton Insurance Co Ltd (The Popi M)* [1985] Vol 2 Lloyd's Rep. 1 (HL) and *Lamb Head Shipping Co Ltd and others v Jennings (The Marel)* [1994] Vol 2 Lloyd's Rep. 64 (CA)

19 *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd* 1996 (4) SA 1167 at 1182A-D

20 *The Popi M* at 2-3, *The Marel* at 627, *The Wavedancer* 1181J-1182D

21 *The Popi M* at 3

be able to establish inferentially that the loss was occasioned by a latent defect."[22]

A presumption or inference that the loss of a ship was caused by a peril at the sea can only arise when it is shown that the ship was seaworthy when she left on her last voyage and the circumstances of her sinking are wholly unexplained[23].

[53] In its particulars of claim the plaintiff pleads:

> *"7. The SY 'Mieke' sank due to:*
>
> *7.1.1 A peril of the sea when it encountered stormy weather and rough seas during which the hull sustained damage and/or when it collided with an unidentified object during the period 16 to 18 September 2005; and/or*
>
> *7.1.2 A latent defect in the hull of the 'Mieke', the defect being an excessive stress concentration in the structure of the hull which resulted in fatigue failure and associated sudden propagation of crack(s) and the sudden ingress of sea water."*

[54] Counsel for the plaintiff, correctly in my view, concentrated his submissions in support of the contention that the cause of the sinking was due to a latent defect in the hull of the vessel. In my view there is insufficient evidence to find that the vessel had struck any unidentified object. None of the witness testified to being aware of any collision, which according to the evidence of the witness Mr A J Sinclair ("Sinclair") called by the underwriters, would have been obvious to those on board had it occurred. Dr Zietsman considered this cause *"a possibility and no*

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22 *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd* 1996 (4) SA 1167 at 1179I – 1180 A
23 *The Marel* at 629

more". Furthermore, since the vessel sank from the stern, it is highly unlikely that it would have struck an unidentified object at the stern.

[55] In response to a request for trial particulars, the plaintiff provided the following further particulars in regard to the allegation that the sinking was caused by a latent defect.

> *"It is not possible to state exactly what caused the excessive stress concentration. It is likely that the stress concentration arose as a result of the welding and manufacturing process when the vessel was manufactured and/or the hull of the vessel was repaired. Vibration, temperature fluctuations and stress corrosion may have contributed to the stress concentration."*
>
> And
>
> *"It is not possible to state precisely where the excessive stress concentration occurred. However, it is likely that they occurred in the aft portion of the hull, and most probably in the area of the hull where the exhaust exits the hull and/or where the crack in the bilge area in the vicinity of the propeller shaft was found."*

[56] The only evidence from crew members which can possibly assist in determining the source of the ingress of water and the cause of the sinking was the following

a) Grieve's observation the day before the sinking that there was a trickle of water running down from the starboard side of the exhaust pipe onto the hull and that the lower end of the lagging around the exhaust pipe where it exited the hull was dark in colour. His view as to the colour was *"it's normal carbon as a result of the exhaust fumes".*

b) When Hennop went down to investigate he noticed that the side passage was full of water towards the rudder compartment. Both Hennop and Grieve

testified that at the time of the sinking, exhaust gases were also escaping into the side passageway and the engine room.

c) Grieve's evidence to the effect that when he stepped off the vessel there were no bubbles coming off the exhaust into the water although the main engine was still running.

In my view, it is reasonable to conclude that water had probably entered the rudder compartment prior to the bilge alarm going off, for when Grieve went down to the engine room after the bilge alarm went off, the 24 volt or emergency lights were not working and the battery system which operated them is situated low down in the rudder compartment adjacent to the engine room bulk head. This would not have worked while under water.

[57] I am satisfied on the evidence of plaintiff's witnesses that the water which led to the sinking had not entered the engine room from the grey water tank beneath that room. Both Hennop and Grieve testified that although the hatch cover was not bolted down, the cover was held firmly in place by the weight of the water above it.

[58] It is clear from the evidence of Hennop and Grieve that a large mass of water entered the aft portion of the vessel, including her engine room and the transverse passage at a significant rate which eventually caused the vessel to sink by the stern. In the confusion Hennop and Grieve were unable to identify where the water was coming in to the vessel, although Grieve established that this was not at the stern gland in the engine room. He did not check the rudder compartment.

According to Hennop and Grieve, water which entered the vessel in the rudder compartment could have entered the engine room through a drain in the rudder compartment and also through the side passages. What then was the cause of the sinking? Hennop had from the outset considered a break in the welds where the exhaust system leaves the hull to have been the cause and the fact that Grieve could see no bubbles being discharged into the sea when he left the vessel, supported this theory.

[59] In the absence of direct evidence as to the cause of the sinking, the plaintiff has to establish inferentially that the loss of the Mieke was caused by a latent defect.

[60] An unusual feature of the Mieke was that her hot exhaust exited the hull through the transim in the rudder compartment. It was clear from invoices for the repair of the vessel produced by the plaintiff that problems had been experienced with the exhaust system over a number of years. Although the repairers were not called, the facts of the repairs were not disputed.

[61] The relevant invoices were the following:

* An invoice from Harbour Marine Engineering ("Harbour Marine") in Port Elizabeth dated 31 October 2000 records that the thru hull fitting for the auxiliary engine was repaired. The invoice relates *"Please note: the area around the fitting is in a bad state."* Hennop testified that the problem was caused by a blistering of paint which caused rapid corrosion.

* An invoice from Harbour Marine dated November 2000 records that the thru hull's exhaust system was repaired by welding. It bears the note *"Area around fitting built up. (No future repairs can be done due to bad state)"*. Hennop testified that this was the same job referred to in the invoice of 31 October.

* Invoice of Harbour Marine dated 12 February 2001 recording that a hole was cut in the stern of the vessel to remove the exhaust assembly and a new stainless steel exhaust assembly was manufactured and fitted. Much of the expert evidence was focused on this repair in which the hole in the hull left by the removal of the exhaust assembly was filled with a carbon steel plate welded to the hull and the exhaust pipe with two stainless steel plates (the doubler plates) being installed, one on the outboard and on inboard. The outboard doubler plate was 700mm long and 400mm wide and the inboard doubler plate 60mm long and 300mm wide, although there was evidence from one of plaintiff's witnesses that he believed the doubler plates were smaller than indicated.

* Harbour Marine's invoice of 21 February 2002 related to the removal of an old cage mounting in the area of the propeller and the reparation of cracks in the hull by welding. This invoice related to the removal of a cage mounting that had been fitted around the propeller to deflect fishing lines and to prevent them from getting into the propeller.

* An invoice dated 25 March 2002 from Harbour Marine recording that the exhaust had been repaired. Neither Viljoen nor Hennop could recall the nature or reason for this repair.

* Harbour Marine's invoice dated 31 May 2002 records that a section of the exhaust below the explosion box was removed and a new elbow fitted. According to Hennop this repair concerned a problem where the exhaust came out of the explosion box while Viljoen testified the problem as being in the area where the exhaust entered the explosion box and bellows.

* A second invoice from Harbour Marine dated 31 May 2002 which appears to be for the same work as testified in the first invoice.

* An invoice from Harbour Marine dated 2 December 2002 recording that the main engine exhaust and explosion box were reinforced.

* An invoice from RS Marine Services from Durban dated 21 March 2004, recording that the explosion box was once again repaired. Viljoen testified that the Mieke was passing Durban and had an exhaust leak that was repaired, while Hennop testified that the repair was to do with the explosion box.

* An invoice from Engineering and Marine dated 18 October 2004 recording that *"cracks and holes in exhaust pipes"* were welded and that a new exhaust box was fitted. This work took place after the hull survey of 18 October 2004.

* An invoice from Engineering and Marine dated 22 October in respect of work done on the exhaust reflected as *"weld up cracks and holes in exhaust*

pipes on stem and bends". This invoice is troublesome in the sense that Viljoen reads the invoice as repairs in the exhaust pipes on stern and bends and in the absence of any further evidence, it is not clear precisely what was repaired.

[62] Unsurprisingly, the two expert witnesses called by the plaintiff were particularly interested in the repairs which had been effected to the stern and more particularly the doubler plate which had been fixed on to the stern and through which the exhaust exited the vessel.

[63] Dr Zietsman is the holder of a BSc degree in civil engineering and a doctorate in ocean engineering. He has over 30 years experience in engineering and has run his own practice since 1984. For the purpose of expressing his opinion on the sinking of the Mieke he prepared a numerical model of the vessel, analysed it, assessed the rate at which water may have entered the vessel through various possible apertures, did flooding calculations, had regard to the vessel's history and in particular the factual evidence given by the crew members as well as the layout of the vessel as described to him by Viljoen. He also considered theories as to the sinking put forward by others. He considered that the rate of flooding observed by the crew was consistent with a large opening to the sea and the sudden development of a long crack in the hull would explain the sudden rapid flooding which would have been consistent with the motor sailing which took place during the voyage. His view was that water leaks into the hull from the transom

> *"...would not have been obvious to the crew and water would have its way into the engine room in time. The penetrations were above the still waterline, but these would have been consistently submerged due to the pitching and rolling of the yacht and the passing ocean waves during the passage. Water would thus, in time, have leaked initially slowly into the hull, but at an ever increasing rate until rapid flooding would have occurred as the yacht settled by the stern. Most probably there was a sudden rapid growth of the crack(s) due to the vibration of the exhaust pipe with the associated sudden flooding observed by the crew."*

His conclusion was the following

> *"(a) Cracking had been experienced at the locations in or near the engine room.*
>
> *(b) Immediately prior to the sinking, the engine had been running and idling for some considerable time, thus causing vibrations in the hull which would have exacerbated the growth of cracks in that vicinity. These vibrations most probably served as a driver for sudden crack growth.*
>
> *(c) The cracks which had previously occurred had been repaired in part, by welding stainless steel doubler plates on either side of the hull. These repairs and modifications probably introduced stress concentrations at those locations."*

He explained that although the introduction of the stainless steel double plate at the exhaust exit reduced the occurrence of ongoing problems in that area, what had happened was that the potential for problems had increased enormously as a result of the repair. Vibration is always a problem in ships, particularly metal ships and if the frequency of material introduced into a ship is close to the natural frequency of the structure, little force is needed to cause a problem. Since the evidence was that the vessel had experienced quite high vibrations before she sank, he felt that vibration would have played a strong part in any failure that had occurred. As to the occurrence of cracks, he testified that cracks could have developed at a number of different locations, but since different materials with

different thermal expansion co- efficients were introduced with the introduction of the steel doubler plate, conditions were created where cracks might have developed along the toe of the fillet weld or on the stainless steel itself, or around the rim where the exhaust pipe goes through the stainless steel. He was of the view that the highest probability for the cracks to have developed was around the edge of the doubler plate. If cracks develop in the areas where there are high stress concentrations, they will grow from there and then run in different directions, depending on local conditions which in turn would give rise to the rapid development of a hole. He concluded that because of the different components associated with the doubler plate there was a high probability that a failure occurred in that area. In his view, everything pointed to a failure somewhere near the engine room that allowed a lot of water to come into the ship very suddenly and all the ingredients were there for such a failure to have occurred at the exhaust exit.

[64] Dr Grobler was called as Dr Zietsman required confirmation from a materials engineer that his focus on the area where the keel had cracked and where the exhaust exited the hull was correct. Dr Grobler has impressive qualifications in Metallurgy – physical, and was awarded a doctorate for his thesis on Weldability studies on 12% and 14% chromium steels. Independently of Dr Zietsman, **he,** after his investigation confirmed Zietsman's view.

[65] The underwriters called Mr Sinclair, an experienced marine consultant who is a chartered engineer with a Bachelor of Science (Hons) degree in marine engineering and a Master of Science degree and Diploma in the science of corrosion. Unlike Drs Zietsman and Grobler he did not have regard to any of the evidence of the crew which had been detailed in statements taken prior to the trial or the circumstances in which the vessel sank. He made some important concessions, namely

a) One would expect to find some type of cracking at the place where a hot exhaust joins the hull of the vessel;

b) thermal differential expansion, which occurs when different metals which have different co-efficients of expansion are tied together and heated up, would have played a roll at the exhaust exit due to the different types of metal being welded together. Because different metals expand at different rates, stress is caused which *"will bend and buckle or in some cases tear apart".*

c) Sea water splashing up the exhaust pipe would cause alternate heating and cooling of the exhaust pipe and the welds securing the exhaust pipe to the hull and the doubler plates which would encourage fatigue cracking. The toe of the fillet weld attaching the stainless steel doubler plate to the hull is an area where fatigue cracking could occur.

d) The stress induced by thermal effects can be very high and can exceed the yield stress of the material.

e) There was a foreseeable risk of cracking occurring in the exhaust pipe where it abuts the hull or the inboard doubler plate because of the bending stresses.

f) He conceded that the repairs prior to the introduction of the stainless steel doubler plates constituted positive evidence that heat was affecting the area where the exhaust exited the hull and that there were problems of corrosion.

[66] Certain portions of his evidence concerning the Mieke were unfortunate. For example, although he had no experience of the Mieke or a vessel of similar construction and design, he testified that the engine vibrations decreased while idling, whereas the unchallenged evidence of Hennop was to the opposite effect. He also stated that stiffening was probably present on either side of the stainless steel doubler plate but no such evidence was led or put to any of the witnesses. Finally, he testified that the main engine must have cut out when there was no more than a metre of water in the engine room whereas similarly the unchallenged evidence was to the opposite effect.

[67] Ultimately in his report he concluded that the transom plate could have failed by the combined effects of corrosion, thermal expansions/contraction and vibration and that this would have been a long-term process.

[68] Much of Dr Grobler and Mr Sinclair's evidence concerned the mechanics of the development of cracks due to fatigue, but ultimately the main point of distinction between them was Mr Sinclair's conclusion that long before the structure was

weakened to the degree that failure was imminent, substantial leakage would occur and be unavoidably noticed. As against this he testified that the volume of corrosion products of steel are about seven times that of the steel from which they are made. When asked whether that corrosion would not have disguised the existence of a crack, he answered that the presence of the corrosion often helps to vindicate the presence of a crack because it leaks out of the crack. Dr Grobler's view was that fatigue cracks are masked by corrosion products produced during galvanic corrosion and by fouling sea water organisms and may well not have been visible during a visual inspection, but was of the view that substantial leakage might not have occurred and that the water pressure on the outside of the stern was insignificant because of the exhaust pipe penetration being in the splash zone.

[69] Helpful as the expert evidence may be, the evidence of Hennop and Grieve is of great importance, more particularly since it has been taken into account by Dr Zietsman and Dr Grobler and is consonant with their theories. In my view a fact which has not been highlighted sufficiently is the position in the hull where the exit pipe is situated. Because the situation is above the water level and only in the splash zone, it is in my view quite feasible that cracks occurring in the area would have taken longer to develop. Perhaps the evidence of the cook, Christine du Plessis, is important in relation to the time it took for the vessel to sink, for she testified that at about 4am on the morning in question she felt that the vessel had settled by the stern. If that was so, there would have been more time when

pressure from the ocean would have been applied to any crack or cracks which might have been in existence without being observed.

In all the circumstances I conclude the most probable cause of the sinking was as a result of a latent defect having caused a crack to open at or near the exhaust exit which allowed progressive flooding and caused the vessel to sink.

[70] On behalf of the underwriters it was submitted that even if the theories of Drs Zietsman and Grobler were accepted, the flooding of the vessel was not caused by a latent defect in its hull as alleged by the plaintiff. In advancing this submission it was sought to distinguish the Mieke from the finding and reason for the finding in *The Caribbean Sea*[24]. In *The Caribbean Sea* the case pleaded was

> *"...that such failure was caused by a fatigue crack or cracks initiated at the circumferential weld joining the nozzle to the ship's plate and/or fatigue cracks initiated in the welds at the end of the gussets, and that the loss of the ship was caused by a latent defect in the hull."*

In the present case the latent defect is described as *"an excessive concentration in the structure of the hull"* which resulted in fatigue failure. Since the proximate cause of the sinking as suggested by Drs Zietsman and Grobler was a combination of heating and vibration, it was submitted that the fatigue failure was merely the mechanism by which the aperture in the transim was alleged to have been created. In my view this approach is overly technical. As I understood the evidence of Drs Zietsman and Grobler, it was the installation of the doubler plate which introduced what ultimately proved to be a defective condition which was exposed by the combination of heating and vibration. According to Arnould, a defect for the

[24] [1980] Vol. 1, Lloyd's Rep 338 (QB)

purposes of the risk insured against is a condition causing premature failure which is present in the relevant part of the hull when it is constructed, or comes into existence when the vessel is repaired and the repair produces a defective condition[25]. The description of the latent defect as an excessive stress concentration in the structure of the hull which resulted in a fatigue failure is accordingly sufficient in my view.

[71] It was also submitted that a thorough investigation of all possible causes of the sinking of the vessel had not been carried out and there was a reasonable possibility that the sinking could have been caused by an uninsured event. It was submitted that one of the following might apply

a) since the quality of the original welding was unknown a weld failure could have occurred. The flooding could have resulted from a failure of the hull or piping caused by wear and tear, since Grieve testified that when he stepped into the transverse alley water was approximately ankle deep and the engine room and alley way are separated by a cill or kicking plate, it was possible that there was an ingress of water forward of the engine room.

b) Since the cover of the sewage tank was not bolted down, the water could have come from beneath the engine room.

[72] The onus to be discharged by the plaintiff is to establish on a balance of probabilities that the loss of the vessel was caused by the latent defect as pleaded.

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[25] Arnould's Law of Marine Insurance and Average, Vol II, Sixteenth Edition by Mustill and Gilman at para 831

A complete hull survey of the vessel was concluded by SAMSA in October 2004 and Hennop and Grieve testified that when they were in Vilanculos they scraped the hull and found nothing untoward was found, save that on the sides of the hull annodes (which are not relevant to the matters in issue) were showing signs of wear. There is no suggestion that the piping had ever been a cause for concern. The fact that there was water between the engine room and the alleyway does not mean that the water must have entered from forward of the engine room.

[73] I have already indicated that I accept the plaintiff's evidence in regard to the cover of the sewage tank.

[74] In my view the evidence presented by the plaintiff is more cogent than the evidence upon which the court found for the plaintiff in the *Wave Dancer* (*supra*). In that case the plaintiff was required to discharge the onus that the sinking of the vessel was caused by *"external accidental means"*. On the facts the majority of the judges of the court found that if accidental, external damage was the cause of the loss of the Wave Dancer, it occurred after the inception of the insurance cover. After listing the facts on which this conclusion was based, the court held

> *"On the probabilities the appellant, a meticulous and caring owner would have noticed such damage when the vessel was lifted out of the water and onto the freighter. It is inconceivable that he would have allowed the vessel to be used on the open seas well-knowing that it had been damaged. The probabilities also indicate that had the boat been damaged prior to the insurance cover, it would have become clear much sooner, having regard to the sudden ingress of water into the vessel on the day in question. In my view, all the facts point to a more immediate preceding cause for the loss of the vessel. It must not be forgotten that the vessel was not only bodily lifted out of the water onto the freighter (where prior external damage would have*

> *been discernible) but that it was used for some weeks at the Comores prior to its loss.*
> *Consequently, I take the view that the appellant has proved the necessary facts to exclude the reasonable possibility of external damage to the vessel having occurred prior to the inception of the insurance cover. "*

This conclusion was reached by means of inferential reasoning and the judgment and the principle in my view applies equally to the *Mieke*. In the circumstances I find that the plaintiff has established on a balance of probabilities that the loss of the vessel was caused by the latent defect as pleaded.

[75] The Mieke was insured for R10 million which included the value of its ancillary boats. As one of the boats was recovered, the plaintiff's claim is for R9 940 000, the sum of R60 000 being the insured value of the stealth boat which was recovered, less the costs of R20 000 properly and reasonably incurred by the plaintiff in recovering it, having been deducted. Although the underwriters denied the expenditure of R20 000 for the recovery of the boat, Viljoen testified as to how this amount was made up and his testimony was not challenged. In the circumstances the plaintiff is entitled to succeed with its claim.

PLAINTIFF'S CLAIM AGAINST THE SECOND DEFENDANT

[76] As I have found that the underwriter's defences have been unsuccessful, the plaintiff's claim against the second defendant does not apply. I am of the view that the plaintiff has in any event failed to establish any claim against the second defendant in respect of which slightly different considerations apply. As broker for the plaintiff, the second defendant's function was to

> *"...receive instructions from his principal as to the nature of the risk or risks and the rate or rates of premium at which he wishes to insure, to*

> *communicate the material facts to the potential insurers and to obtain insurance for his principal in accordance with his principal's instructions and on the best terms available."* [26]

In short, having regard to the concession made by James that he agreed to insure the vessel, well-knowing that Hennop was not certificated, second defendant cannot be held liable in respect of the alleged non-disclosure, nor was it ever suggested to Brown that he had breached his contract with the plaintiff in this connection. Such information as was conveyed by the second defendant was in effect conveyed jointly with the plaintiff.

As to the alleged failure to disclose to the underwriters that the required stability information was not on board, it was never contended that the second defendant was aware or should have been aware of any factual defect in the vessel's stability and as I have already indicated, such deficiencies as there were in respect of the stability book were ultimately of little import. Although Brown in a letter dated 8 December 2004 addressed to the plaintiff refers to problems concerning the stability book, his direct evidence was that he was unaware of any defects in this connection and would have advised Viljoen that he could not sail without it if he had been aware of any defects. As to the defence of misrepresentation, it is only the 'information' to the effect *"that there was confusion on the part of SAMSA as to whether or not they were able to issue a certificate of competency to Mr Hennop as SAMSA was unable to decide whether it would accept bodies such as the Royal Yacht Association as being competent bodies for certification....."* that could be attributed to the second defendant. Brown's evidence demonstrated that as far

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[26] *Harvest Trucking Co Ltd v P B Davis t/a P B Davis Insurance Services* [1991] 2 Lloyd's Rep 638 (QB) at 643, per Diamond QC

as he knew, there was in fact confusion on the part of SAMSA in this connection. In any event, such confusion is unrelated to the alleged misrepresentation that Hennop's qualifications would shortly be recognised by SAMSA.

As to the defence of illegality, the plaintiff did not suggest to Brown that he should have advised Viljoen of the provisions of section 41 of the Marine Insurance Act, or of the consequence of a failure to comply with it. Even if he had done so, Brown would no doubt have explained that Viljoen was aware of the consequences of a failure to comply with the law. No breach was established and in fact it was never suggested to Brown that the second defendant had breached this alleged contractual obligation.

[77] What must be decided ultimately is whether the information conveyed to the underwriters represented a fair presentation of the risk proposed for the insurance. A fair presentation of risk in English law has been described as follows:

> *"The assured must perform his duty of disclosure properly by way making a fair presentation of the risk proposed for insurance. If the insurers thereby receive information from the assured or his agent which, taken on its own or in conjunction with other facts known to them or which they are presumed to know, would naturally prompt a reasonably careful insurer to make further enquiries, then, if they omit to make the appropriate check or enquiry, assuming it can be made simply, they would be held to have waived disclosure of the material fact which that inquiry would necessarily have revealed."*[27]

When the presentation is in summary form, it must be a fair and substantially accurate presentation of the risk

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[27] Macgillivray on Insurance Law, 10th Ed, 2003, para 17-83

> *"....so that a prudent insurer could form a proper judgment – either on the presentation alone or by asking questions if he was sufficiently put on enquiry and wanted to know further details – whether or not to accept the proposal and, if so, on what terms?"*[28]

[78] More than a century ago it was held

> *"But it is not necessary to disclose minutely every material fact; assuming there is a material fact which he is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information they should ask for it."*[29]

In *Container Transport International* (*supra*) the following is said with reference to the passage quoted above

> *".....if the disclosed facts give a fair presentation of the risk, then the underwriter must enquire if he wishes to have more information. This is borne out by the authorities."*

[79] Mr B Sullivan, called as an expert by the plaintiff, in effect echoed the view expressed in *Container Transport*. In cross-examination he testified

> *"----I would need to actually go through those documents again, but certainly when I've read all the documents, and I've read them all twice, I was under the impression that they probably had enough information to probably make a decision, <u>but if not they had the opportunity, and they should have just then asked for more information</u>."*
> (Emphasis added.)

[80] Lead counsel for the second defendant stressed that for the risk to be presented fairly, it must be specific to and with reference to the situation sought to be underwritten. It seems clear from the defence that the risk which was of greatest

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[28] *Container Transport International Inc. v Oceanus* [1984] 1 Lloyd's Rep 476, at 497/7, cited with approval by Rix LJ in *Wise (Underwriting Agency) Ltd & Ors v Grupo Nacional* ***Provincial SA***[2004] 2 C.L.C. 1098, at 1116

[29] *Asfar v Blundell* [1896] 1 QB 123 at 129 (Lord Esher MR)

concern to the underwriters was Hennop's lack of certification. In this respect it should be remembered that the vessel had been insured by the underwriters for several years with Hennop in command, that at all material times SAMSA knew that Hennop was not certificated as a skipper unlimited, but nevertheless permitted him to remain in command of the vessel and permitted the vessel to proceed to sea when it was within SAMSA's power to detain her.

[81] Hennop was a competent and skilled mariner to the knowledge of SAMSA, that there were in fact difficulties with SAMSA concerning the appropriate manning and skills required for the vessel of this nature and that the certification of Hennop as a skipper unlimited would simply constitute a formal or official recognition of his competence and skill. In the light of this, it would seem to me that a fair presentation of the risk was made which should have put the underwriters on guard, but they failed to direct any enquiries to the second defendant. Indeed, James subsequently conceded, that he had made a mistake by accepting the risk. It follows then that the underwriters failed to establish any of the defences and accordingly that the plaintiff has failed to establish any breach by the second defendant of its contractual obligations.

THE PLAINTIFF'S CLAIM AGAINST THE THIRD DEFENDANT

[82] As in the case of the second defendant, plaintiff's claim against the third defendant falls away since I have found that plaintiff has established its claim under the policy against the underwriters. As in the case of the second defendant, I am of the view

that even if the plaintiff had not succeeded with its claim against the underwriters, its claim against the third defendant could also not succeed.

[83] The plaintiff seeks to hold the third defendant liable in contract, alternatively in delict.

The claim in contract is based on a misconception of the third defendant's role. In the plaintiff's particulars of claim the following is stated:

> *"The Plaintiff has no knowledge of exactly what contractual arrangement was concluded between the Second and Third Defendants. However, the Third Defendant was either appointed to act as a further broker on the Plaintiff's behalf, alternatively the Third defendant was appointed by the Second Defendant to act on its behalf, alternatively, the Third Defendant acted on behalf of the Lloyds Underwriters."*

The expert called on behalf of the plaintiff, Sullivan, saw the defendant's role merely that as that of a message box. He was simply required accurately to pass information on to the underwriters or to the broker representing the underwriters. Brown referred to the third defendant as an independent contractor or a Lloyd's underwriting agency dealing exclusively in the Lloyd's market, while Devereux himself stated that the plaintiff was not his client but that the second defendant was his client. None of this evidence was challenged and in the circumstances the plaintiff failed to establish the existence of a brokerage contract between the plaintiff and the third defendant.

[84] The main allegations of negligence relied upon were that the third defendant failed

a) To obtain valid insurance for the Mieke;

b) To inform the plaintiff that adequate steps had not been taken to procure valid insurance;

c) To investigate what disclosures were necessary in order to obtain valid insurance for; or

d) To disclose all information which would be necessary to obtain valid insurance and to advise the plaintiff that the disclosure which had been made was not sufficient; and

e) To advise that further information should be obtained in regard to the qualifications of the master and the mate and the vessel's stability book.

Once again, these allegations misunderstand the role of the third defendant which was described by the plaintiff's witness Sullivan as follows:

> *"In my experience, it's an unusual role. It's a role that I am not familiar with. But, to answer your question, really, the role of – the role would be as a message passer. The client will rely on the broker; the broker then has to pass the information via this middle channel; the middle channel then must accurately pass the information on to the underwriters or the broker representing the underwriters. The – and must pass communication, in fact, in both directions, one to the underwriter's representative or to the underwriters, and, secondly, to pass back information to the broker or the client. I see him as a message box.*
> *Court: But does the fact that he is operating in this area place any additional duties on him, other than just a messenger? --- He obviously has placed the business, M'Lord, with Gallagher or the underwriters, but in so doing, I still see him simply as a message box. I am not sure whether he is regulated in any way, but he can do no more, really than just pass on one piece of information in one direction, and the information back again to the client or his broker"*

Sullivan summarised the third defendant's duties as follows:

> *"....1 to ensure that whatever communications Third defendant addressed to either Arthur J Gallagher or the Lloyds Underwriters were factually accurate with reference to the information which had been furnished to it;*

> *...2 that the plaintiff was correctly informed concerning the contents and meaning of any communications made by the Lloyds Underwriters to it; and*
>
> *...3 that it did not make any misrepresentations to Lloyds Underwriters."*

The third defendant accepted that its duties were correctly summarised by Sullivan. It is common cause that the only information that the third defendant had regarding the qualifications of Hennop and his dispute with SAMSA was the information furnished to him by Brown under cover of his letter of 23 November 2004. Accordingly, the only allegations of negligence that can apply to the third defendant are

a) That the disclosure made to the underwriters was insufficient; and

b) By advising the plaintiff that it was acceptable to the underwriters that Hennop could act as the skipper.

As to the first allegation there is no basis in fact or in law to attribute the obligation to the third defendant. His advice to the plaintiff that it was acceptable to the underwriters that Hennop could act as skipper was a correct assessment of the position. In the circumstances no case has been made out by the plaintiff to sustain the allegations of negligence pleaded in respect of the third defendant.

COSTS

[85] Since the plaintiff has succeeded with its claim against the underwriters, the underwriters must pay plaintiff's costs. In this connection it was submitted that the plaintiff's costs should include the costs of providing the security demanded by the underwriters. In advancing this submission reliance was placed on the judgment in the *MT Argun v Master and Others* [30]. In my view the authority relied on is no

[30] 2004 (1) SA 1 (SCA) at 5H-I, para 19, p14 B-G, para 47 and 48

warrant for the proposition advanced. In the *MT Argun* the issue was the sheriff's costs of preserving the vessel after its attachment. What the plaintiff seeks is an order compensating it for the costs which it incurred in financing bank guarantees issued on its behalf for payment of the underwriters' costs in the event of a costs award being granted against it. I am not aware of any authority authorising such an award and I am not persuaded that such an order should be granted.

[86] Counsel for both the second and third respondents submitted that in the event of plaintiff's claim against the underwriter succeeding, the costs of their clients should be paid by the underwriters since their clients only became parties to the proceedings as a result of the defences of non-disclosure, breach of warranty and unseaworthiness pleaded by the underwriters. In plaintiff's original summons, only the underwriters were cited as a defendant and it was only after the plea had been amended to include the specific defences that the plaintiff joined the second and third defendants in order to deal with those defences.

Before dealing with these submissions, it is necessary to record that although counsel for the second and third defendants (a senior and junior in each case) were present in court throughout, they took no part whatsoever in the proceedings insofar as they related to the adjudication of the insured peril. Notwithstanding that that their clients had denied that the sinking was caused by an insured peril, they did not cross-examine the plaintiff's witnesses in relation to the evidence given in that connection. All of that was left to the underwriters. It is estimated that the

evidence of Hennop, Grieve, Dr Zietsman, Dr Grobler, Sinclair, Liverick, Du Plessis and Stewart, all of whom dealt with that part of the underwriters' defence relating to the insured peril, together with the evidence of Viljoen relating to the cause of the sinking, took up probably half of the time spent in court (approximately 9 out of 18 days). In exercising my discretion with regard to costs, I consider that I should have regard to this fact and I will tailor my costs order accordingly.

[87] In my view there is merit in the submissions made on behalf of the second and third defendants. Even though they were joined as defendants, this was done as a result of the allegations relating to non-disclosure, misrepresentation etc made by the underwriters in their plea. But for this, they would not have been involved. The underwriters must therefore bear their costs which will however be restricted so as to take account of that portion of the hearing which did not concern the two defendants.

[88] The following orders are made

1. Judgment is granted for the plaintiff against the first defendant for

    1.1 Payment of the sum of R9 940 000.

    1.2 Interest thereon at the rate of 15.5% per annum from 18 September 2005 to date of payment.

    1.3 Plaintiff's costs of suite, including

        1.3.A The costs of two counsel; and

1.3.B The preparation, expenses[31] incurred by Dr Zietsman, Dr Grobler and Mr Sullivan.

1.4 The first defendant is ordered to pay the costs of the second and third defendant, including the costs of two counsel in each case, but in respect of the hearing, the second and third defendants will be entitled to recover only one half of their costs. The second defendant's costs are to include the preparation expenses of Mr Child.

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R B CLEAVER

For plaintiff:	Adv R W F **MacWilliam** SC, Adv Lance **Burger**
Instructed by:	Dawson, Edwards & Associates – Mr Peter Lamb
For 1st defendant:	Adv Mike **Wragge** SC, Adv Darryl **Cooke**
Instructed by:	Bowman Gilfillan – 4807800
For 2nd defendant:	Adv M J **Fitzgerald** SC, Adv David **Melunsky**
Instructed by:	Deneys Reitz – Mr Matt Ash
For 3rd defendant:	Adv R D **McClarty** SC, Adv Peter A **Corbett**
Instructed by:	Reillys
Dates of hearing:	6 May 2008, 7 May 2008, 8 May 2008, 12 – 15 May 2008, 19 – 22 May 2008, 26 – 29 May 2008, 2 June 2008, 4 June 2008, 5 June 2008, 11 June 2008 and 12 June 2008
Judgment:	**Friday, 27 February 2009.**

[31] This terminology is used in view of the judgment in *Transnet Limited v The South African Rail Commuter Corporation Limited* – unreported judgment of the SCA, case no 5172007