IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 14664/2012

In the matter between:

CHRISTOPHER BRIAN WATSON	First Plaintiff
FLASHCOR 201 CC	Second Plaintiff

and

RENASA INSURANCE COMPANY LIMITED	Defendant

Coram: Justice J Cloete

Heard: 29, 30 and 31 October 2018; 1, 5, 6 and 7 November 2018; 6 December 2018

Delivered: 14 February 2019

JUDGMENT

CLOETE J:

Introduction

[1] This case demonstrates the quite extraordinary lengths to which the defendant insurance company has gone to avoid payment to its insured, the first plaintiff. For convenience, I refer to him as *'the plaintiff'*, given that during 2017 the defendant eventually settled the second plaintiff's claim for damage to the factory from which the first plaintiff's business operated.

[2] The chapter of this saga before me pertains to the *quantum* of the plaintiff's claim in respect of machinery destroyed or damaged beyond repair in a fire that occurred on 10 January 2011 at his print finishing business, Canterbury Coaters, in Elsies River.

[3] The plaintiff claims the cost of replacing or reinstating his machinery in accordance with the reinstatement provisions of a certain policy of insurance issued by the defendant, as read with the *'alternative replacement conditions'* (ARC) contained therein. He quantifies his claim at the date of the loss in the amount of R15 743 405.25 plus VAT of R2 204 076.74, i.e. R17 947 481.99. In the alternative, he claims payment of R28 093 207 plus VAT of R3 933 048.98 calculated at 31 May 2017, being the date agreed upon by the respective experts for purposes of more recent valuation. Both amounts exclude interest thereon which is also claimed.

[4] During the trial the plaintiff testified and called two experts, Mr Carel Smit (a specialist valuer of plant and machinery) and Mr Russel Whalley, a retired loss adjuster with some 58 years experience in the field of adjusting claims on behalf of insurance companies both locally and abroad. The defendant ultimately only called one witness, Mr Ivor Mumford, an industrial engineer, whose area of expertise lies predominantly in the design and implementation of complex industrial production facilities. He testified on both factual and expert issues.

[5] At the outset it must be stated that all three experts were credible, objective, fair and of considerable assistance to the Court. They understood their function as experts and, where there were areas of disagreement on value between Messrs Smit and Mumford, they were resolved between them or by Mr Mumford making appropriate concessions during testimony. This ultimately resulted in the experts being *ad idem* on the alternative valuations upon which the plaintiff's claim is calculated.

[6] The plaintiff himself was a good witness who, despite testifying for 4 days, was consistent in his evidence in all material respects. During argument there was rightly no suggestion to the contrary. Accordingly issues of credibility do not arise.

[7] The background facts and findings on the merits are comprehensively set out in the judgments of Savage AJ (as she then was) of 30 October 2014[1] and the Supreme Court of Appeal of 11 March 2016[2] and are thus not repeated, save to the extent necessary. Savage AJ found in the plaintiffs' favour and her decision was upheld on appeal.

[8] The main defence in the merits trial was that the plaintiff deliberately set fire to his factory in order to make a fraudulent claim under the policy. While it has always been undisputed that an arsonist was responsible, the defendant's approach to the plaintiffs' claim at merits stage was aptly summarised by Savage AJ as follows:

> *'[134] Given the nature of the meticulously planned and executed fire scene, I accept that the arsonist must have had knowledge of the premises and was on the probabilities a key holder, it was natural for the investigation to focus on Mr Watson as a suspect. However, what occurred was that Renasa singled Mr Watson out from the first days of the investigation as the prime suspect, and in doing so appeared to have lost focus on the fact that what the investigation required was a careful consideration of the facts to include a thorough investigation of the fire scene and a detailed and careful investigation of all possible perpetrators. This required that one culprit not be singled out early on in the life of the investigation to the exclusion of all others, given the lack of clear facts to justify doing so…'*

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1 Unreported case number 14664/2012 (WCHC).

2 Reported on SAFLII *sub nom Renasa Insurance Company Ltd v Watson and Another* [2016] ZASCA 13 (11 March 2016).

The nature of the plaintiff's claim

[9] The plaintiff's claim is one for damages based on the defendant's repudiation of the contract of insurance, and not one for specific performance.

[10] It is common cause that the policy in question is for indemnity insurance, the defendant agreeing *'to indemnify or compensate the insured by payment or, at the option of the company, by replacement, reinstatement or repair in respect of the defined event occurring during the period of insurance… up to the sums insured, limits of indemnity, compensation and other amounts specified'.*

[11] By the time the *quantum* trial was concluded, nearly 8 years had elapsed since the incident. It is not in dispute that in those 8 years:

11.1 The plaintiff spent 38 days in Court seeking to enforce his claim against the defendant: before Davis J – 4 days on the separated issue of *locus standi;* before Savage AJ – 26 days on the defendant's liability; before the Supreme Court of Appeal – 1 day on unsuccessful appeal against Savage AJ's judgment; and another 7 days on trial before this Court, excluding argument;

11.2 The plaintiff has expended a total of approximately R3 million in legal fees in seeking to enforce his claim against the defendant;[3]

11.3 The plaintiff has received no payment (other than in respect of costs awarded to him for the earlier litigation) from the defendant, nor has the defendant given any unequivocal undertaking to make payment in terms of the policy, whether on account and subject to reinstatement, or otherwise; and

11.4 The second plaintiff's claim (in respect of the damaged building) was only settled by the defendant in 2017 (some 6 years after the building had been damaged).

The relevant general principles of insurance law

[12] For present purposes, I deal only with the common law provisions relating to contracts of insurance. The various statutory or derivative insurances which are so much a feature of modern life are not included.

[13] In *Lake v Reinsurance Corporation Ltd*,[4] following *Prudential Insurance Co v Inland Revenue Commissioners*,[5] the Court defined a contract of insurance as a

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[3] Exhibit "C" refers in this regard.

'contract between an insurer (or assurer) and an insured (or assured), whereby the insurer undertakes in return for the payment of a price or premium to render to the insured a sum of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest'.

[14] This definition has been criticised for failing to draw the fundamental distinction between the two divergent forms of insurance, namely indemnity and non-indemnity insurance.[6]

[15] The General Law Amendment Act 1879 (Cape), which was mirrored in the Orange Free State by the General Law Amendment Ordinance of 1902, provided that *'in every suit, action and cause having reference to fire, life and marine insurance… the law administered by the High Court of Justice in England, for the time being… shall be the law to be administered by the said Supreme Court or other competent Court'*.[7] These enactments were repealed by the Pre-Union Statute Law Revision Act 43 of 1977, the effect of which was held by the Appellate Division per Joubert JA[8] to be that the South African law of insurance is governed mainly by Roman-Dutch law as our common law (while at the same time noting that both the Roman-Dutch and the English law of insurance derived

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4 [1967] 3 All SA 225 (W); see also Lee & Honore: *South African Law of Obligations* p149.
5 [1904] 2 KB 658.
6 Non-indemnity insurances include life, sickness or disability; see *Lawsa* 2nd Ed Vol 12 Pt 1 para 84; Davis p83.
7 See the discussion in Davis: Gordon & Getz, *The South African Law of Insurance*, 4th Ed., pp2 – 3.
8 *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 430G – 431D.

from the same common *lex mercatoria* of the Middle Ages). Accordingly, and as submitted by Reinecke et al in *Lawsa*[9], *'where principles derived from English insurance law have been taken over into our law, and where those principles operate satisfactorily and are not in conflict with the general principles of our law, they will be retained and that English insurance law will in respect of those principles, even if no longer of binding authority, continue to carry great persuasive force in our law… Judicial decisions since the passing of the legislation in question have accordingly followed the beaten track and there is no indication of any judicial rejection of acceptable principles derived from English insurance law'.*

[16] This approach is also of application in construing the terms of a policy. Although the construction of an insurance contract is a matter of law[10] and is, accordingly, governed in accordance with Roman-Dutch principles, the insurance industry should be able to rely on the interpretation of particular words or provisions in a policy, even though it has been many years since a court first decided their meaning.[11] It is stated in McGillivray on *Insurance Law*[12] that:

> *'Consequently, as with all questions of law, the ordinary rules of the doctrine of precedent apply, and the tribunal interpreting the words in question will either be*

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9 Op cit, para 22.

10 *General Life Assurance Co v Moyle* 1919 AD 1 at 9; *Norris v Legal & General Assurance Society Ltd & Another* 1962 (4) SA 743 (C) at 744.

11 *Andersen v Martin* 1908 AC 334 at 340, per the Earl of Halsbury.

12 13th Edition, para 11-002.

bound to follow the previous court's interpretation or strongly persuaded to do so…'.

[17] Accordingly, pre-1977 decisions of the English courts interpreting policy provisions couched in identical wording, or wording which is to the same effect, remain authoritative; and post-1977 decisions on the same or similar provisions have considerable persuasive authority.[13]

[18] Furthermore in cases of ambiguity, not only does the *contra proferentem* rule frequently operate against the insurer as the drafter of the policy wording, but a further principle also operates to favour the insured:

'The construction of a warranty is generally taken in favour of the assured and against the insurer; and this is particularly the case when the warranty is expressed in doubtful or ambiguous language. It is laid down that, as assurance is a contract of indemnity, it is to be construed reasonably and fairly to that end. Hence conditions and provisos will be strictly construed against the insurers because they have for their object the limitation of the scope and purpose of the contract."[14]

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[13] *Orenstein Arthur Koppel Ltd v Salamander Fire Insurance Co Ltd* 1915 TPD 497 at 501.

[14] Per Kotzé JA in *Norwich Union Fire Insurance Society Ltd v SA Toilet Requisite Co Ltd* 1924 AD at 22; cited with approval and followed in *Kliptown Clothing Industries (Pty) Ltd v Marine & Trade Insurance Co* of SA Ltd 1961 (1) SA 103 AD at 106.

Indemnity Insurance

[19] In *Malcher & Malcomess v King Williams Town Fire & Marine Insurance & Trust Co*[15] Buchanan J held that:

> *'The very essence of the contract of insurance is that it is a contract of indemnity; its sole and exclusive object is to procure for the insured indemnity, in the strictest sense of that word, for any losses he may sustain, through the agency of the risks against the effect of which the underwriter, by the terms of his policy, stands pledged to protect him. (Arnould on Marine Insurance, sec. 8; Dalby v India and London Assurance Company 15 CB 387; Chapman v Pote 22 L.T. NS, 306).'*[16]

[20] Accordingly, the insured would usually[17] be entitled to recover the "real and actual" value of what he has lost through the happening of the event insured against.[18] In the context of indemnity insurance two important fundamental principles apply. The first is that the event giving rise to the claim under the policy constitutes a fictional breach of the contract (a legal fiction). The second is compensation for damages as a consequence of that legal fiction (this is not to be conflated with any subsequent repudiation by the insurer under the policy). With the passage of time there have been variations, modifications and

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15 (1883) 3 EDC 271.

16 *Ibid*., at p284.

17 I.e., in the absence of any express provisions in the policy to the contrary.

18 *Nafe v Atlas Assurance Co Ltd* 1924 WLD 239 at 243. 246: '*The policy in this case is what is termed an "unvalued" or "open" policy, i.e., the insured is only entitled to recover the value of the subject-matter, as proved by him, subject to the limitation imposed by the amount specified in the policy…".*

sophistications to these contracts, but the underlying principles themselves have not changed.

[21] These modifications and the like have given rise to certain possibilities. One is that instead of only payment of money, performance can be made in other ways as well; for example, a clause to the effect that in case of damage the insurer can elect to reinstate or repair itself. Another, of more recent evolution, is a clause which allows the insurer himself to elect to be insured on the basis of a reinstatement value.

Reinstatement

[22] As alluded to above, the term "reinstatement" may be employed, and operate in consequence, in two quite distinct ways. First, and as in this case, insurance policies frequently give the insurer the option of reinstating the property insured instead of paying a money indemnity to the insured. This "usual reinstatement clause" renders the insurer's obligation in terms of the insurance contract a facultative obligation.[19] *'The clause is intended to benefit the insurers and to protect them from liability to pay the full pecuniary value of the loss, if the loss can be more cheaply made good otherwise.*[20] *Hence, the assured cannot take advantage of the clause and insist on reinstatement if the insurers do not elect to*

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[19] Davis, *op cit*, p 253.

[20] *Anderson v Commercial Union Assurance Co* (1885) 55 IJQB 146 CA.

reinstate; nor on the other hand, can he prevent them from reinstating if they have elected to do so'.[21] Their purpose is to protect insurers against excessive demands and fraudulent claims.[22]

[23] Should the insurers so elect, they thereby substitute a different mode of discharging their obligation under the policy. Their contract is no longer a contract to pay a sum of money, but a contract to reinstate the property insured.[23] Once having elected, they cannot withdraw from such election and are obliged to reinstate the property adequately regardless of the cost, and they are further liable for the consequences of a failure to perform such reinstatement adequately.[24] The terminology of these usual clauses frequently distinguishes between "replacing" or "rebuilding" (in the case of total destruction of the insured property) and "reinstating" or "repairing", in case of damage which is capable of reinstatement or repair.[25]

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[21] Ivamy: *General Principles of Insurance Law* 6th Ed p 484; Birds: *Modern Insurance Law* 10th Ed p320; Davis *op cit* p254.

[22] Birds *op cit* para 16.1 p319.

[23] Ivamy *op cit* p 485; *Brown v Royal Insurance Co* (1859) 1 E & E 853.

[24] Ivamy *op cit.,* p485; *Davidson v Guardian Royal Exchange Assurance* [1979] 1 Lloyd's Rep 406.

[25] *Anderson v Commercial Union Assurance Co Ltd* (*supra*) at 146.

[24] In the instant matter, it is not suggested that the defendant insurer at any stage elected to exercise this option under the policy and itself reinstate the damaged property.[26]

Replacement value

[25] The other manner in which the term reinstatement is sometimes encountered in indemnity policies is in the context of the basis upon which a claim is to be valued. As stated above, the usual basis of indemnity would be strictly that the actual loss or diminution of value of the property insured at the date of the insured event is covered. However, as noted by Birds, *'(p)olicies containing express undertakings to pay replacement value are increasingly common, and there can be no doubt that, subject to the sum insured, the insured is entitled to what it actually costs to replace the lost property by equivalent new property. These "new for old" policies were no doubt a major inroad into the traditional principle of indemnity, but it goes without saying that insurers demand higher premiums for such cover*"[27] (emphasis supplied). Put differently, the insured is entitled to receive the value of the loss based on replacement value of equivalent new property, not the actual value of the property insured at date of the loss, but subject to the maximum of the insured value under the policy.

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[26] Although as a fact the defendant did exercise such an election by itself attending to the repair of the roof which had been broken through by vandals, subsequent to the occurrence of fire and before the defendant's repudiation of the claim.

[27] Birds, *op cit.,* para 15.4.2 p309.

[26] In the policy under consideration, the basis of valuation of a claim is contained in a "Reinstatement value conditions clause" ("RVC clause"),[28] which provides that, in the event of property other than stock being damaged, the amount payable *'shall be the cost of replacing or reinstating on the same site property of the same kind or type but not superior to nor more extensive than the insured property when new'* (emphasis supplied).

[27] This constitutes provision for the full costs of repair of the property; alternatively, in respect of property not capable of repair, replacement by "like-for-like' property (in the instant matter, machinery) where the same (or closely similar) property exists in the market. (The use of the term "reinstatement" in this context should not be confused with the more commonly-found reinstatement at the option of the insurer, dealt with above; it is perhaps more usefully called a "replacement value clause", to make that distinction plain. However, in the context of this policy I use the term employed in the document, with the caveat that this distinction needs to be kept in mind.)

[28] The application of the RVC clause is subject to certain conditions:

28.1 The *'work of replacement or reinstatement'* must be commenced and carried out with reasonable dispatch, otherwise no payment beyond the indemnity value will be paid (proviso 1);

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[28] Pleadings p66.

28.2 Until such time as expenditure has been incurred by the plaintiff, the defendant is not liable for any amount in excess of that amount which would have been payable, had the replacement value conditions not been incorporated into the policy, (i.e. the continuing and underlying indemnity liability) (proviso 2); [29]

28.3 *'If, at the time of replacement or reinstatement, the sum representing the cost which would have been incurred in replacement or reinstatement if the whole of the insured property had been damaged, exceeds the sum insured thereon at the commencement of any damage to such property by a defined event, then the insured shall be considered as being their own insurer for the excess and shall bear a rateable proportion of the loss accordingly. Each item of this section (if more than one) to which these conditions apply shall be separately subject to this provision'*:(proviso 3); and

28.4 The RVC conditions shall be without force and effect should: (a) the plaintiff fail to *'intimate'* to the defendant within 6 months of the date of damage, or such further time as the defendant may in writing allow, his

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[29] This was also the evidence of Mr Whalley: namely that, at the very least, as soon as an insurer accepted its liability under the policy, it became legally obliged to make payment of at least its own determination of the indemnity value payable in terms thereof; which in the instant matter required the defendant insurer to pay to the plaintiff not less than the cost of purchasing second hand machinery of the type or nearest equivalent, the price being determined at the date of the fire. Transcript Vol 6, p572, lines 19 – 25 to p537, line 5.

intention to replace or reinstate the property; and/or (b) the plaintiff is unable or unwilling to replace or reinstate the property on the same or another site (proviso 4).

[29] Clauses of this nature can give rise to difficulty and are open to potential abuse by an insurer who is less than *bona fide*. If no payment is made by an insurer at all, it places an impecunious (or relatively impecunious) claimant at a severe disadvantage when compared to similarly-placed insured parties, who are possessed of greater means. Such an impecunious insured would be required not merely to evidence a sincere intention to replace or reinstate the destroyed or damaged property, but would further be required to do so, absent any firm commitment by the insurer that it accepts liability for the resultant costs.

[30] This conundrum has received consideration. In McGillivray,[30] the authors submit:

> *'It has been held in the United States that these clauses must be interpreted according to their terms but it is rather hard that an insured, who needs the money with which to repair his property, should be expected to incur the cost of reinstatement from his own funds. This is particularly so if the insurers, in breach of the contract, deny liability under the policy or assert that the insured should be compensated on a basis other than that of reinstatement. It is, therefore, submitted that the requirement that the insured should commence and carry out the work of reinstatement with reasonable despatch should only operate if the*

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[30] *Op cit*., para 21-022 p610.

> *insurers, in accordance with the contractual obligations, accept that reinstatement is the appropriate measure of indemnity.'*[31]

[31] The issue came before the English court in *McLean Enterprises v Ecclesiastical Insurance Co.*[32] Staughton J declined to decide the point on the basis that the insured had already formed the intention to sell the damaged property prior to the fire. Therefore, on the facts, he did not have the necessary intention to reinstate and would not have done so, even had the insurer paid the claim promptly. In so doing, the learned judge stated:

> '*Counsel for the insurers maintained that the owners' intentions at the time of the fire are irrelevant. They have not in fact incurred any costs of reinstatement….*
>
> *The owners' only answer to this point is that they could not reinstate the property until the insurers had paid their claim, as they did not have the resources; accordingly to give effect to par. (3) of the reinstatement clause would be to allow the insurers to take advantage of their own breach of contract. It was, said Mr. Davies on the owners' behalf, Catch 22.*
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> *I do not decide whether this argument would have succeeded in other circumstances. In this case it fails, because it is not proved that the owners would have reinstated the premises if they had had the resources to do so, or if the insurers had paid the claim promptly.*"[33]

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[31] *Carlyle v Elite Insurance Co* (1984) 56 BCLR 331.
[32] (1984) 2 Lloyds Rep 416.
[33] Ibid., pa 426.

[32] In *Grand Central Airport (Pty) Ltd v AIG South Africa Ltd*[34] Boruchowitz J considered an RVC clause virtually identical to the one in the instant case save that provisos 3 and 4 above were seemingly absent. It is nonetheless instructive to quote the following passages from that judgment, with which I am in full agreement:

> *'[12] On the defendant's construction of the clause the insured's obligation to commence and complete the reinstatement with reasonable expedition under the reinstatement clause becomes operative even where the insurer repudiates liability. There is nothing in the language of the policy to support such a construction. The reinstatement clause, on its plain wording presupposes that the insurer is to indemnify or compensate the insured by payment and that the insurer has not elected to replace or reinstate the damaged property. The manifest purpose of the clause is to determine the extent of the indemnity payable by the insurer to the insured and that question only arises for consideration if the obligation to indemnify is admitted by the insurer or fixed by a court. It does not arise where the insurer repudiates liability.*
>
> *[13] The construction contended for by the defendant is an improbable one and in conflict with a businesslike construction of the policy. Where the insurer repudiates liability the insured is obliged to institute action in order to enforce its claim. If the defendant's construction of the clause is correct, the insured would have the additional burden of commencing and completing the work of replacing or reinstating the damaged property at its own cost without any certainty that it would be indemnified in respect thereof. This is the very eventuality that an insured would seek to avoid by procuring a policy of insurance, that is the risk of itself having to fund the replacement or reinstatement.*
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> *[14] To interpret the policy in the manner contended for by the defendant would impact negatively upon an impecunious insured. Such an insured would*

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[34] 2004 (5) SA 284 (WLD).

> *probably not have the means to commence and effect the reinstatement and will be deprived of the benefit of the insurance for which it has effected payment of premiums. On the other hand, where the insurer has accepted liability or liability has been fixed by a court, it would not be difficult for an impecunious insured to raise the finance necessary to commence and complete reinstatement of the damaged property as the insurer's liability would amount to a guarantee of payment.'*

[33] In the policy under consideration the RVC provisions are moderated by further provisions contained in what is termed the *'Alternative replacement conditions (design capacity) clause'* ("ARC clause"), which reads as follows:[35]

> *'In the event of property insured which has a measurable function, capacity or output being damaged by a defined event and it not being possible to replace or reinstate such property in terms of the reinstatement value conditions, then the company will pay the cost of replacing such property with property the quality, function or output of which is as near as possible but not inferior to that of the original property.'*
>
> (emphasis supplied)

[34] The provisos that qualify the RVC clause apply also to the ARC clause. Most significantly, a further condition in the ARC clause expressly stipulates that:

> *'2. in applying the provisions of proviso 3 of the reinstatement value conditions, the cost (as provided for in proviso 3) "which would have been incurred in replacement or reinstatement if the whole of the insured property had been damaged" will be increased by such amount payable*

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[35] Pleadings, page 66.

> *under the alternative replacement clause which is in excess of that which would have been payable under the reinstatement value conditions clause, had it been possible to reinstate or replace the property in terms thereof.'* [36]

[35] Accordingly the parties expressly acknowledged that the implementation of the ARC provisions might lead to the amount payable by the insurer exceeding (by an indeterminate sum) the actual maximum amount insured, which in terms of the policy is R17 545 871.[37]

The pleadings

[36] I turn to deal with certain material aspects of the defendant's case at the commencement of the *quantum* trial, having regard to the defendant's amended plea.

[37] First, despite accepting[38] that the defendant is bound by the judgment of the Supreme Court of Appeal dated 11 March 2016, there is no tender of payment in the plea and, as a fact, the defendant has not made any payment to the plaintiff nor tendered any payment on an interim basis, or on account.

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[36] Proviso 2 of the ARC clause.
[37] Pleadings, p17.
[38] Pleadings, p41.

[38] Second, the defendant persisted with the attitude that the plaintiff is not entitled to reinstatement under the policy because:

38.1 He did not carry out work in respect of such reinstatement with reasonable dispatch after the fire;[39]

38.2 Alternatively, he failed to do so after the Supreme Court of Appeal judgment;[40]

38.3 He did not incur expenditure in reinstating the property and *'forfeited'* the right to rely on the reinstatement clause;[41] and

38.4 He was at all material times unable and unwilling to reinstate the property and the reinstatement clause is thus *'of no force and effect'*.[42]

[39] The defendant pleaded in the alternative that, if the reinstatement provisions are found to be applicable, then it is entitled *'in accordance with the word and spirit of the RVC clause'* to insist that the plaintiff shall not be indemnified unless and until

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[39] Pleadings, p47 para 9.2.2(a)(i).
[40] Pleadings, p47 para 9.2.2(a)(ii).
[41] Pleadings, p48 para 9.2.2(b).
[42] Pleadings, p49 para 9.2.2(c) and p50 para 9.3.

the reinstatement is actually carried out by him.[43] The defendant pleaded as follows:

> *'… the defendant insists that in such event the parties should agree (failing which, the court should rule) on a mechanism whereby the defendant can guarantee that payment will be made … as and when such cost is incurred by the first plaintiff and proof thereof is furnished to the reasonable satisfaction of the defendant …'*
>
> (emphasis supplied)

[40] Despite this "insistence" no relief was claimed by the defendant to this effect. Moreover the defendant made no tender in this regard, whether during the trial or in argument. In any event, the *'mechanism'* is not provided for in the policy wording and is certainly not part of the RVC clause.

[41] The plaintiff filed a replication to the plea in which it was pointed out, *inter alia*, that during the merits trial, the defendant's case (put to the plaintiff in cross-examination) was expressly that the conditions for the application of the RVC clause had been complied with by the plaintiff after the fire; and accordingly the defendant was not entitled to take the stance which it had in its plea.[44]

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[43] Pleadings, p50 para 9.4.
[44] Pleadings p70 para 6.

[42] The plaintiff again pointed this out in his request for trial particulars and asked the defendant whether it nevertheless persisted with the defence,[45] to which the defendant replied in the affirmative.[46] When asked whether the defendant accepted that its own repudiation of the plaintiff's claim contributed to the plaintiff not having been able to reinstate, the defendant answered in the negative.[47]

[43] In the application for a further separation of issues brought by the defendant at the commencement of the *quantum* trial (which was refused), counsel for the defendant stated that the *'nub'* of its defence was that the plaintiff did not incur expenditure or commence reinstatement. This he contended was the central issue in dispute.

The curtailment of the defences in the course of the trial

[44] On the fourth day of the trial I ruled that the defendant's case put to the plaintiff during cross-examination at merits stage constituted an admission against interest, and it was thus precluded from challenging the fact that the plaintiff commenced reinstatement and showed a continuing intention to reinstate in the period between the fire and the judgment of the Supreme Court of Appeal.[48]

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[45] Pleadings p140 para 9.4.
[46] Pleadings p161 para 9.4.
[47] Pleadings p140 para 9.5 read with p161 para 9.5.
[48] Transcript: Vol 5, page 448, lines 12 - 25

[45] Almost a year after the latter judgment, the defendant's attorneys, expressly writing on the instructions of their client, addressed an open letter to the plaintiff's attorneys on 14 February 2017 in which it was stated that if the plaintiff *'did not have the financial wherewithal (to reinstate), then our client will not rely on the plaintiff's failure to have commenced the process of reinstatement of the property and the business despite the lapse of time'.*[49] This was the case, it was stated, because the defendant was *'not unreasonable'*.

[46] Despite this, the defendant did a *volte face* and the plaintiff thus had to testify at some length on the steps taken by him subsequent to March 2016. As it turned out, his evidence in this regard was virtually unchallenged in cross-examination; and during argument at the end of the trial *Mr Oosthuizen SC* (who had taken over as counsel for the defendant when his predecessor was unavailable after the plaintiff's testimony) properly informed the Court that the plaintiff's intention to reinstate post-March 2016 was no longer an issue. I will however refer to salient aspects of the plaintiff's evidence later, given their relevance to his ability to reinstate.

[47] In summary, the issues that remain to be determined by this Court are:

47.1 Whether the plaintiff has demonstrated an inability, despite his best efforts, to reinstate;

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[49] Bundle B.2 p604.

47.2 If so, whether the plaintiff's inability precludes him, as a matter of law, from relying on the RVC provisions of the policy; and

47.3 If the plaintiff is entitled to reinstatement, the value of his claim and in this regard, whether it ought to be quantified *tunc* at 2011 or subsequently, and what compensation (in the form of interest) ought to be applied to take into account the passage of time.

Inability to reinstate

[48] The evidence in regard to the first issue is clear and almost entirely uncontested. The defendant's concession in the merits trial that the plaintiff had complied with the reinstatement conditions was well made. The plaintiff's evidence indicates that he immediately started taking steps to get his factory back on its feet. These included:

48.1 The incurring of some R896 354.81 in expenses[50] over a period of seven months, including retaining all his staff, repairing the electricity, alarm,

[50] Exhibit "A" – the schedule of expenses.

roofing, doors and windows, cleaning the factory and complying with his statutory obligations to keep a functioning business operational;[51]

48.2 The incurring of significant expenditure in trying to repair the Billhofer machine in order to generate an income for the business while waiting for the defendant to make a decision;

48.3 Obtaining quotations for replacement machinery within days of the fire;[52] and

48.4 Attempting to generate an income by taking on work even though the factory was not really in a position to complete these jobs properly.[53]

[49] The months following the fire were characterised by the plaintiff attempting to get the defendant to commit to a decision on the claim and the defendant focussing exclusively on the plaintiff as the only suspect of the arson. At an early stage, the plaintiff's attorneys had to call upon the defendant to investigate all avenues in the arson[54] but to little avail. The correspondence usefully illustrates the plaintiff's increasingly desperate situation in these months:

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[51] It should further be noted that at an early stage the defendant informed the plaintiff that this expenditure would be for his own account until such time as liability was accepted: Bundle B.1 p214.

[52] See for example: Bundle B.1 pp200 – 212.

[53] Exhibit "B" refers in this regard.

[54] See Bundle B.1 p238.

49.1 The plaintiff's attorney (perhaps hopefully in retrospect) called on the defendant from 21 January 2011 to finalise the claim as the plaintiff was suffering losses from not being able to continue the business; an explicit request for an interim payment was made at this point.[55]

49.2 Two months later, the plaintiff's attorney was still pleading with the defendant to expedite the investigation and pointed out that the plaintiff could not generate an income from the business as a result of the damage.[56]

49.3 At that stage, the defendant would not even commit to paying towards the repair of the building itself.[57]

49.4 On 5 May 2011 the plaintiff's attorneys again pointed out that the delay on the defendant's part in making any decision was severely prejudicing the plaintiff.[58]

49.5 As the plaintiff's insurance broker Mr Knoetze rather aptly put it: *'Come on say now: 'Mr Watson we are paying your claim but there are still outstanding questions' …or 'No Mr W have a nice day in court.*'[59]

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[55] Bundle B.1 p217.
[56] Bundle B.1 p 268.
[57] Bundle B.1 p 269.
[58] Bundle B.1 p 293.

49.6 On 2 June 2011 the plaintiff's attorneys again referred to his *'dire financial position*' as a result of the failure to reinstate the factory and stated that he was unable to conduct his business and was *'staring bankruptcy in the face'*.[60]

49.7 On 15 June 2011 it was pointed out that the plaintiff was being *'held ransom'* by the defendant's refusal to make a decision.[61]

49.8 On 15 July 2011 the plaintiff's attorneys advised that the position was untenable and that should a decision not be made, it would be regarded as a repudiation of the claim.[62] The response was simply that defendant will *'not be forced into making a decision'* (some 6 months after the incident).[63]

49.9 On 10 August 2011, the plaintiff personally informed the defendant that, with much reluctance, he had no option but to close the factory down.[64]

[50] The plaintiff was asked in evidence whether, looking back on the events after the fire, there was anything he could have done differently to keep the business

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[59] Bundle B.1 p 307.
[60] Bundle B.1 p 322.
[61] Bundle B.1 p 332.
[62] Bundle B.1 p 338.
[63] Bundle B.1 p 340.
[64] Bundle B.1 p 348.

going for longer. His answer was persuasive and credible: there was no communication from the defendant who simply refused to make any decision, and although he remained hopeful for months, ultimately he ran out of capital and could not continue.[65]

[51] The position subsequent to the Supreme Court of Appeal decision is much the same: by that stage the plaintiff had spent 31 court days in litigation against the defendant, had taken his mortgage bond to its maximum, had sold his motor car and had loaned money from his mother to keep going. His factory had been closed for over five years and the premises had been sold. The defendant had still not paid anything towards the plaintiff's claim, and had given no clear indication that it would do so.

[52] Despite this, the plaintiff's attempts to revive his business are clear:

52.1 Shortly after the judgment had been received, the plaintiff obtained quotations on replacement machinery.[66]

52.2 The plaintiff attempted to secure financing from Standard Bank but without success.[67] In this regard it should be repeated that in *Grand Central Airport* (*supra*) Boruchowitz J reasoned that, once the insurer has

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[65] Transcript: Vol 1, p139, lines 5 – 13.
[66] Bundle B.2 pp493 – 576.
[67] Bundle B.2 p577 – 584; pp597 – 603.

accepted liability, or liability has been fixed by a court, it would not be difficult for an impecunious insured to raise the necessary finance since this would amount to a guarantee of payment. While this may well be the case in many instances, the plaintiff had no such luck. In July 2016 he applied to Standard Bank for a loan but was informed months later in November 2016 that it was declined since *'we do not finance legal costs* (sic) *in relation to court rulings… this falls out of our* [lending criteria] *policy'*.[68] This did not however deter the defendant from latching onto this in cross-examination of the plaintiff in an effort to demonstrate that he failed to take any meaningful steps.

[53] The plaintiff testified how excited he was when he was shown the letter of 14 February 2017[69] from the defendant, as he genuinely believed that he could now enter into negotiations with it for the reinstatement of the business.[70] His evidence was unchallenged in this regard. The letter is important not just because the defendant undertook not to argue that the plaintiff's financial inability to restart the business would be used as a defence against him, but it also suggested a willingness to enter into discussions around reinstating the business.

[54] However, it is apparent that the defendant then stepped back from the position reflected in the open letter and when the plaintiff's attorney queried whether the

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[68] Bundle B.2 p601.
[69] Bundle B.2 p604.
[70] Transcript Vol 2, p252, lines 2 – 10.

offer still reflected the defendant's position, the reply was unhelpful and simply a reference to implementing the policy.[71]

[55] The suggestion put to the plaintiff in cross-examination that he ought to have pursued discussions with the defendant more assertively is a little startling. After years of litigation and accusation, and a dogged refusal to make any payment whatsoever, it could hardly be expected by the defendant that the impecunious plaintiff – whilst still being obliged to incur ongoing legal costs in pursuit of an actual payment – should be trying to negotiate for some sort of conciliatory makeweight settlement.

[56] When asked in evidence if he still had a genuine desire and intention to recommence the business, the plaintiff's reply was unequivocal and credible.[72] He testified that he just needed a commitment from the defendant and he could then find premises and secure funding. None of this evidence was seriously challenged in cross-examination.

[57] Most importantly, bearing in mind the evidence of Mr Whalley, it is notable that the defendant has until today still not actually paid, or even tendered to pay, what it regards as being its uncontested liability in respect of the indemnity value of the machinery in question.

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[71] Bundle B.2 p614.

[72] Transcript Vol 2, p257, line 1 to p258, line 14.

Whether the plaintiff is precluded from relying on the RVC clause as a result

[58] Against this background, the evidence of Mr Whalley becomes particularly significant on the second issue:

58.1 He testified that, in accordance with common industry practice, he would expect an insurer in these circumstances to make a payment on account so as to enable the insured to commence the process of reinstatement.

58.2 In any event, and at the very least, the insurer ought to pay (or tender to pay) the unquestionable liability of the indemnity value of the damaged machinery, which would provide the insured with the means to pay deposits and secure replacement machinery.[73] (It should be pointed out that Mr Mumford (the defendant's own expert) calculated this amount to be R4 384 481 including VAT at January 2011, and R9 712 461 including VAT at May 2017, over a year after the Supreme Court of Appeal judgment).[74]

58.3 It is unreasonable to expect the average insured to have the financial wherewithal to finance, or even obtain the necessary financial backing, for the replacement or reinstatement of damaged property and the start-up of

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[73] Transcript: Vol 6, p591- p593.
[74] Expert Bundle p29.

> the interrupted business, without the co-operation and assistance of the insurer; and without such co-operation, in many cases it would simply not be feasible.

[59] For the reasons that follow, and as argued by *Mr Irish SC* (who appeared together with *Mr Brown* and *Mr Mauritz* for the plaintiff), payment of the indemnity value provides the very "*mechanism*" that is available to an insurer in terms of such a policy to ensure compliance with the requirements of the RVC clause.

[60] Where there is such a clause in a policy, the insurer should make payment of the indemnity value; if the insured fails to expend it on reinstatement within any time period contemplated in the policy, then the insurer is absolved from making further payment. This provides the insurer with the comfort of knowing that, unless the insured utilises this money, it has no obligation beyond that.

[61] Moreover, as soon as the defendant elects not to exercise its option to reinstate itself, but to perform its obligation to pay money, it no longer has any entitlement to such reinstatement by itself and is limited to making payment under the policy, whether of an indemnity or of the replacement or reinstatement value. This proposition appears to be fortified by the so called *once and for all rule.*[75] There

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[75] See *Signature Design Workshop CC v Eskom Pension and Provident Fund and Others* 2002 (2) SA 488 (C) at pp492 to 497 for a discussion on the principles of *res judicata* and the "once and for all" rule. In particular, the reference to *Evins v Shield Insurance Company Ltd* 1980 (2) SA 814 (A) at 835 where Corbett JA (as he then was) said:

is certainly nothing providing otherwise in the policy wording,[76] save possibly for proviso 4 to the effect that *'these conditions shall be without force or effect if the insured is unable or unwilling to replace or reinstate the property on the same or another site'*.

[62] To interpret these words as sanctioning the defendant's conduct is a bridge too far. To my mind, it would offend against the legal convictions of the community to find that, in the present case, the defendant insurer should nonetheless be permitted to effectively slash the extent of its payment liability after having withheld the performance of its own indemnity payment obligation under the policy.

'The "once and for all" rule applies especially to common law action for damages in delict, though it has also been applied in claims for damages for breach of contract.
Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages, both already claimed and prospective, flowing from one cause of action.'
Its introduction and the manner of its applications by this Court have been subjected to criticism...but it is a well entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigations. [emphasis added]
Closely allied to the "once and for all" rule is the principle of res judicata *which establishes that, where a final action has been given in a matter by a competent Court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible, and if attempted by one of them, can be met by the* exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of law suits, the harassment of the defendant by a multiplicity of actions and the possibility of conflicting decisions" (at 835C–G). Mr Muller referred however to the minority judgment of Jansen JA who stated: "It may even be desirable to re-examine the so-called 'once and for all' rule and enquire whether in our law its application should not, in appropriate circumstances, be restricted*"*'*.*

[76] See *Bruwer v Nova Risk Partners Limited* 2011 (1) SA 234 (GSJ) a full bench appeal of the North Gauteng High Court where the Court said: *'Finally, the courts have also formulated a rule that a contract of insurance should be construed in favour of the insured rather than the insurer where an ambiguity arises on the face of the policy. This rule has been justified simply by saying that an insured's claim for indemnity should not be defeated and that a policy should be upheld in favour of the insured and not be forfeited. This rule is often used in conjunction with the rule that limitations on or exceptions to the insurer's obligation must be interpreted strictly and therefore in favour of the insured. This rule will also be of assistance in the present case.'* [emphasis added]

[63] The plaintiff's evidence that he was genuinely desirous of restarting his business and remains so, cannot be doubted. The fact that he is unable to do so is a direct consequence of the defendant's actions. In the circumstances, the defendant's attempt to undermine the plaintiff's reliance on the reinstatement provisions of the policy after the Supreme Court of Appeal's decision must fail.

Valuation of the plaintiff's claim

2017 reinstatement value

[64] Prior to the hearing, Messrs. Mumford and Smit concluded the joint minute handed up as Exhibit "F". This minute, insofar as the 2017 values were concerned, was refined into the minute handed up as Exhibit "G" which included input from a third machinery expert, Mr Bobby Van Zyl from Heltronics.

[65] The experts agreed to a total reinstatement value as at May 2017[77] of R28 093 207 plus VAT of R3 933 048.98 as follows:

65.1 Based on an exchange rate of R13.62 to the USD and R17.06 to the Pound Sterling:

65.1.1 R6 956 071 for the Steinmann;

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[77] Evidence of Mr Smit Transcript Vol 7, p732, line 24 to p733, line 9.

65.1.2 R2 628 660 plus an agency fee of R262 866 for the Colordry;

65.1.3 R2 200 000 plus an agency fee of R220 000 for the Roland;

65.1.4 R2 807 316 for the Sakurai;

65.1.5 R762 720 plus an agency fee of R204 300 for the Canter; and

65.1.6 A combined R6 482 800 plus an agency fee of R648 280 for the Billhofer and Dixon;[78]

65.2 R1 400 000 would be a reasonable provision for services (the electrical infrastructure and mechanical services, i.e. air compressors and dryer);[79] and

65.3 R450 000 would be a reasonable provision for installation support being all the ancillary costs associated with setting up the new factory.[80]

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[78] The agreement was that because the Billhofer, a precision German made machine would, at the time of the loss, have been the plaintiff's primary laminator given that a new Billhofer was available in 2011, but was not available due to the company's winding-up in 2017, instead of giving the plaintiff two Taiwanese Wen Chyang machines which are superior to the Dixon but inferior to the Billhofer, the plaintiff should receive one superior British made Autobond laminating machine for the Billhofer and Dixon; Transcript: Vol 7, p718, lines 17 – 25.

[79] Evidence of Mr Smit Transcript: Vol 6, p647, lines 9 – 13.

[80] Evidence of Mr Smit Transcript: Vol 6, p647, lines 9 – 13.

2011 reinstatement value

[66] In relation to the 2011 costs, Mr Smit considered the invoices actually obtained by the plaintiff, which he had independently verified with the relevant suppliers,[81] as being a reasonable representation of the value of the claim at the time of the fire and immediately thereafter. Under cross-examination, Mr Mumford made the following concessions:

66.1 It would be reasonable for the Court (faced with those differing figures presented by Mr Smit and himself as reflected on exhibit "F") to simply take an average of the two;[82]

66.2 If a 10% agency fee was being charged for the specified machines to which agency was applicable on the 2017 figures, there was no logical reason why this factor should not also be applied to the 2011 figures;[83]

66.3 He had not factored the compressors and dryer into his 2011 calculation at all (as Mr Smit did), given that he assumed the existing infrastructure at the premises would be utilised. However, since there are in fact no longer

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[81] Evidence of Mr Smit Transcript: Vol 5, p514, lines 10 – 11.

[82] Evidence of Mr Mumford record Transcript: Vol 7, p711, line 25 to p712, line 18; Vol 7, p718, lines 1 – 4

[83] Evidence of Mr Mumford Transcript: Vol 7, p728, line 18 to p729.

extant premises, it is reasonable to factor this into the 2011 costs in the sum of R925 000 as suggested by Mr Smit;[84]

66.4 Installation fees of R266 540 are a reasonable mean between his estimated costs and those of Mr Smit;[85] and

66.5 He had not believed that the material handling charges formed part of the claim and therefore did not cost them, but the cost appeared reasonable.[86]

[67] For sake of completeness, it must be mentioned that during March 2011 the plaintiff's erstwhile attorney, Mr Odendaal, advised the defendant that the Dixon and Canter were *'surplus to requirements'* and that the plaintiff would accept indemnity value in respect of these two machines. The plaintiff explained in his evidence the erroneous basis for this decision and why, eight years later, he felt that it would be unfair to hold him to that election, given that he was now to try and resurrect his business. During argument *Mr Oosthuizen* informed me that this is no longer in issue.

[68] For convenience, a table containing a breakdown of the 2011 claim is set out hereunder, having a total excluding VAT of R15 743 405.25 and including VAT of R17 947 481.99:

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[84] Evidence of Mr Mumford Transcript: Vol 7, p731-743.
[85] Evidence of Mr Mumford Transcript: Vol 7, p732, lines 16 – 18
[86] Evidence of Mr Mumford Transcript Vol 7, p731, lines 15 – 18.

NO	REPLACEMENT MACHINE	AGREED COST	CALCULATION	AGENCY ON MACHINE
1.	Colordry UV varnish	**R1 195 226.00**	CS **R1 310 945** + IM **R1 079 507** ÷ 2	Yes at 10% **R119 522.60**
2.	Roland Press	**R1 548 140.00**	Mumford concession under cross-examination that when new, Wen Chyuang machine suggested by Carel Smit is a functional replacement	Yes at 10% **R154 814.00**
3.	Sakurai	**R1 441 628.00**	CS **R1 690 820** + IM **R1 192 436** ÷ 2	**NO**
4.	Canter	**R1 002 253.50**	CS **R925 000.00** + IM **R1 079 507** ÷ 2	Yes at 10% **R100 225.35**
5.	Dixon	**R1 593 000.00**	Mumford concession under cross-examination that absent the Autobond in 2011, the Wen Wen Chyuang machine suggested by Carel Smit at £150 000.00 was reasonable (exchange rate of R10.62 to the £)	Yes at 10% **R159 300.00**
6.	Pioneer	**R1 237 917.00**	CS **R1 282 691** + IM **R1 193 143** ÷ 2	**NO**
7.	Steinemann	**R4 124 524.50**	CS **R3 982 500** + IM **R4 266 549** ÷ 2	**NO**
8.	Billhofer	**R1 663 013.00**	CS **R1 996 211** + IM **R1 329 815** ÷ 2	Yes at 10% **R166 301.30**
SUB TOTAL MACHINES				**R13 805 702**
9.	Services	**R925 000.00**	Mumford concession under cross-examination that he did not factor the compressors and dryer as Smit did and that given the reinstatement into a new building Smit's figure including same is reasonable	**NO**

10.	Material handling	**R46 000.00**	Mumford concession under cross-examination that he did not believe these items formed part of the claim and therefore did not cost them but the cost appeared reasonable	**NO**
11.	Installation	**R266 540.00**	CS **R290 000** + IM **R243 080** ÷ 2	**NO**
12.	Agency (10%)	**R700 163.25**		R119 522.60 + R154 814.00 + R100 225.35 + R159 300.00 + R166 301.30
SUB TOTAL SERVICE				**R1 937 703.25**
TOTAL				**R15 743 405.25**
VAT (AT 14%)				**R2 204 076.74**
GRAND TOTAL				**R17 947 481.99**

[69] I am satisfied that the experts applied themselves to the valuation of the replacement claim appropriately within the RVC and ARC clauses of the policy and that these are values upon which this Court may rely.

[70] I have the comfort of knowing that the final amount (excluding VAT) is below the maximum insured value reflected in the policy of R17 545 871, and with VAT it is a marginal 2.20% excess variance on the sum insured. I also have the comfort of knowing that, if interest as claimed is applied to this sum, the result is a figure

that is not far removed from the 2017 value for reinstatement agreed between the experts.

Interest

[71] In *Drake Flemmer & Orsmond Inc and Another v Gajjar NO*[87] Rogers AJA dealt with the calculation of interest on unliquidated claims (more particularly in circumstances of significant delay in settling a claim) and the impact of section 2A(5) of the Prescribed Rate of Interest Act (No 55 of 1975). It was held as follows:

> *'[66] …In terms of s 2A(2)(a) of the Interest Act, interest usually runs on unliquidated claims from the date of demand or summons. The plaintiff's earliest demand or summons against LRI was the service of the joinder application in June 2012. However, it would be manifestly unjust for the plaintiff to receive no more than the value of his claim as at December 2002 together with interest as from June 2012. The delay from December 2002 until June 2012 was attributable to LRI, not him.*
>
> *[67] Section 2A(5) of the Interest Act provides that, notwithstanding the other provisions of that Act, a court may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run. I have no doubt that in the present case justice required that interest should run from 21 December 2002, the date on which LRI became indebted to the plaintiff by virtue of having allowed his claim against DFO to prescribe. This conclusion is fortified by the consideration that, but for LRI's negligence, the plaintiff's summons against DFO*

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[87] 2018 (3) SA 353 (SCA).

would have been issued by 1 December 2002 and such summons would have claimed interest at the prescribed rate of 15,5% from that date until payment; and a similar rate would have applied to the subsequent judgment against DFO.

[68] In summary, the correct approach in the present case would have been for the plaintiff to prove the nominal value of his damages as at the notional trial date of 1 December 2002. That would have been the value of the claim against DFO which LRI allowed to prescribe on 21 December 2002. The time value of money would have been dealt with by an order for interest in terms of s 2A(5), such interest to run from 21 December 2002. Put differently, s 2A(5) provides the means by which a court in this country can apply the interest-rate solution…

*[80] The court a quo did not have occasion to consider s 2A(5) because it expressed damages in December 2015 terms. I am entirely satisfied, however, that if the court a quo had instead expressed damages in December 2002 terms, the only just order would have been to apply s 2A(5) so as to shield the plaintiff from the corroding effects of delay for which LRI, not he, was responsible. There is no question of onus in relation to s 2A(5). The court, having regard to all the facts of the case, gives effect to its own view as to what would be just (*Adel Builders (Pty) Ltd v Thompson *2000 (4) SA 1027 (SCA) ([2000] 4 All SA 341) para 15)…*

The in duplum rule

[83] The correct analysis of the position does, however, raise the potential application of the in duplum rule, since the interest needed to sustain the full amount assessed by the court a quo exceeds the capital…

[85] In the present case the interest the court a quo could have imposed in terms of s 2A(5) would not have been arrear interest. Until the court invoked its power in terms of s 2A(5), the only interest that would run on the unliquidated debt would, at most, be interest in terms of s 2A(2)(a)*, ie interest from date of demand or summons. Upon the court's exercising its power in terms of s 2A(5), additional interest in respect of the earlier period would there and then become owing. Stated differently, the in duplum rule is concerned with the running of interest, the effect of the rule being to cause interest to stop running once the*

unpaid interest equals the capital. In a case such as the present, the interest which the court can award in terms of s 2A(5) in respect of the period prior to demand or summons is not interest which was running at that earlier time.

[86] The practical effect of this is that, by way of s 2A(5), the court can – if this is just – order interest to be paid which exceeds the amount of the unliquidated debt. Because this accords with the general principle of the common-law rule as expounded in Ethekwini Municipality*, it is unnecessary to decide whether s 2A(5) does not in any event confer a power on the court to override the in duplum rule.'*

[72] *Mr Oosthuizen* submitted that interest should only run from 11 March 2016 (the date of the Supreme Court of Appeal decision) at the rate applicable at that time of 10.25% per annum, since it is only from that date that the defendant can be said to have been *in mora*.

[73] Having regard to my findings and what was held in *Drake* (*supra)*, it is my view that the correct and appropriate manner in which to compensate the plaintiff is to value the claim at 2011. Interest ought to be calculated at the rate of 15.5% per annum[88] on the basis that it runs from the date of the incident (which is the same

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[88] *Davehill (Pty) Ltd and Others v Community Development Board* 1988 (1) SA 290 (A) which was recently reiterated by the SCA in *Crookes Brothers Limited v Regional Land Claims Commission for the Province of Mpumalanga and Others* 2013 (2) All SA (1) SCA - the interest rate that is applicable is the rate that was applicable at the date the action was instituted notwithstanding the date of amendment to the prescribed rate.
Ponnan JA in *Crookes* (*supra)* stated as follows with reference to <u>*Davehill*</u>:
'[22] In Davehill (at 300J–301E), Smalberger JA stated:
*"Section 1(1) is couched in peremptory terms, and its application is obligatory, not discretionary (*Katzenellenbogen Ltd v Mullin *1977 (4) SA 855 (A) at 885G). To give effect to the intention of the Legislature the words 'shall be calculated at the rate prescribed under s (2) as at the time when such interest begins to run' must be given their ordinary and literal meaning. Such meaning is clear. <u>The rate prescribed under ss (2) at the time when interest begins to run governs the calculation of interest.</u>*

date as the notification to the defendant of the claim), namely 10 January 2011 or, at the very latest, interest should run from the date of service of summons, being 14 September 2011. I intend to be cautious and fix the date at 14 September 2011.

Interest on VAT component

[74] *Mr Oosthuizen* submitted during argument that the plaintiff cannot seek an award of interest on the VAT component of the plaintiff's claim, as he "*will only, when and if the machinery is acquired, pay the VAT component over to SARS*".

[75] This was neither pleaded nor addressed in evidence, despite the VAT component always forming part of the plaintiff's claim.[89] To my mind the inclusion of the VAT component as an element of the claim is correct. The plaintiff as the

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The rate is fixed at that time and remains constant. Subsection (1) does not provide for the rate to vary from time to time in accordance with adjustments made to the prescribed rate by the Minister of Justice in terms of ss (2). The fact that the Minister may from time to time prescribe different rates of interest therefore has no effect on the rate applicable to interest which has already begun to run. The plain meaning of the words in question must be adopted as they do not lead to 'some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended' (per Stratford JA in Bhyat v Commissioner for Immigration *1932 AD 125 at 129).*

The only exception to the above method of calculation is where "a court of law, on the ground of special circumstances relating to that debt, orders otherwise". "Special circumstances" are not defined in the Act. It is not necessary for the purposes of the present appeal to consider what circumstances are envisaged under that term. The existence or otherwise of special circumstances in any given case must needs depend upon the facts and circumstances of that case. What is clear is that the special circumstances must relate to a particular debt, not to debts in general.' [emphasis supplied].

[89] I accordingly do not intend to deal with Mr Mumford's written opinion on this aspect which was provided by the defendant's attorney subsequent to the conclusion of argument.

end-user would be liable to pay VAT on the purchase/replacement price of any of the machines, and on the services provided in respect of any reinstatement, as a legally enforceable obligation. Any indemnification must accordingly of necessity place him in sufficient funds to do so.

[76] In addition, VAT always was and accordingly remains payable in respect of the machinery forming the subject matter of the plaintiff's claim and, in precisely the same way that provision has to be made for the costs of the actual mechanical installation of the machines, so too must provision be made for the incurrence of VAT, particularly as the plaintiff is not currently a VAT vendor.

[77] The VAT which would have been charged on the machines has been included as same would, but for the defendant's breach, have been payable by the defendant to the plaintiff *tunc*. This provision for VAT, which is an element of the claim for damages, should not be confused with an obligation to pay VAT arising from a future purchase. Its inclusion in the sum claimed is aimed at awarding the plaintiff, as damages, that amount that would have been required to be expended by the defendant in order to indemnify the plaintiff against the loss suffered by him, on the basis agreed in the policy.

[78] It therefore follows that, if interest is to be applied to the plaintiff's damages as contemplated by section 2A(5) of the Prescribed Rate of Interest Act, as Rogers AJA put it '*so as to shield the plaintiff from the corroding effects of delay for which LRI, not he, was responsible',* there can be no reason why the VAT provision

should not be similarly adjusted, seeing that the VAT percentage will at present be applied to a higher invoice cost and result, accordingly, in a larger VAT payment.

[79] The following order is made:

1. The defendant shall pay to the plaintiff:

1.1 The sum of R17 947 481.99, being the value of the claim for reinstatement as at January 2011 including VAT;

1.2 Interest on the aforesaid sum at the rate of 15.5% per annum from 14 September 2011, being the date of service of summons, until date of payment in full.

2. The defendant shall pay the plaintiff's costs on the scale as between party and party as taxed or agreed, including the costs of 2 of the 3 counsel employed, the qualifying fees of Mr Smit and Mr Whalley, the costs of transcribing the record, and any reserved costs orders.

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J I CLOETE