REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
Case number: **540/04**

In the matter between:

TRUCK AND GENERAL INSURANCE CO LTD Appellant

and

VERULAM FUEL DISTRIBUTORS CC 1st Respondent
AON SOUTH AFRICA (PTY) LTD 2nd Respondent

CORAM: **MPATI DP, FARLAM, MTHIYANE, JAFTA JJA and MAYA AJA**

HEARD: **14 MARCH 2006**

DELIVERED: **31 MAY 2006**

Summary: Insurance Law – Interpretation of policy – indemnity in respect of liability to third parties – fuel conveyed by insured's vehicles spilling and causing ecological damage which insured obliged to clean up under environmental legislation – whether insured entitled to claim indemnity under policy for costs of clean-up without liability to a third party having been established.

Neutral citation: This judgment may be cited as *Truck and General Insurance Co Ltd v Verulam Fuel Distributors CC* [2006] SCA 84 RSA.

JUDGMENT

MPATI DP:

[1] This appeal concerns the interpretation of a contract of insurance. The first respondent (plaintiff *a quo*) is a close corporation which carries on business from Verulam, Kwa Zulu Natal, as a distributor and transporter of fuel. It successfully sued the appellant (first defendant *a quo*) in the Johannesburg High Court, for payment of the sums of R96 359,64 and R997 667,64 respectively, under an insurance policy issued by the latter. The first respondent had, in the alternative, and conditional upon its success or otherwise against the appellant, claimed damages in the same amounts against the second respondent (second defendant *a quo*), an insurance broker, which it had appointed to obtain a contract of insurance in terms of which the insurer would indemnify it against loss or damage arising out of the use of its vehicles. The basis for the conditional claim was that the second respondent had failed to obtain the required insurance from the appellant and thereby breached its mandate. (I shall, for convenience, henceforth refer to the parties as in the court below.)

[2] Because the plaintiff was successful against the first defendant, the court *a quo* (Boruchowitz J) dismissed the conditional claim against the second defendant and ordered the first defendant to pay the second defendant's costs. The court found it unnecessary to consider other alternative claims against the first defendant based upon estoppel and rectification. Its judgment is reported *sub nom Verulam Fuel Distributors CC v Truck & General Insurance Co Ltd and Another* 2005 (1) SA 70 (W). This appeal is with leave of the court below. Leave was also granted to the plaintiff to cross-appeal against the order dismissing the conditional claim against the second defendant. The cross-appeal is again conditional upon the success or otherwise of the main appeal.

[3] During the trial before Boruchowitz J the first defendant applied for a separation of issues in terms of Rule 33(4). The application was not opposed and an order was granted

in terms of which the issues of liability and quantum were separated: the trial proceeded on the former issue only. The court *a quo*, however, overlooked its earlier order at the time of delivering its judgment and ordered the first defendant to pay the sums claimed, and ancillary relief. Counsel were agreed that in the event of the appeal being dismissed, that order should be corrected accordingly.

[4] The policy referred to above was initially issued by Global Insurance Company Limited. On 25 January 1999 Mr B D Ogden, the managing director of the first defendant, wrote to the plaintiff and advised that the first defendant, as a new insurance company – it had previously conducted business as underwriters – 'will commence underwriting on 1st February 1999'. The letter states further that:

'The Global Insurance Company Ltd has decided not to participate in the new insurance company's re-insurance program and in order to transfer your insurance portfolio to Truck and General Insurance Company Ltd, it is necessary in terms of the policy to give you formal notice of cancellation of the existing policy, and unless we hear from you, your policy will automatically be transferred to the new company and Global Insurance Company will be off risk by the 1st March 1999.

The policy conditions will remain the same as your existing policy and it is our aim to cause you no inconvenience.'

[5] The agreed facts upon which the plaintiff's claims are based, are these:

'On or about 16 March 2000, whilst the first defendant's policy was of full force and effect, diesel being conveyed by the plaintiff's vehicles, namely truck bearing registration number NJ 53530 and tanker-trailer bearing registration number NJ 63282 leaked from the tanker/trailer causing a spill which polluted, contaminated and caused ecological damage to an area of land not belonging to the plaintiff at Rossburgh, Durban, KwaZulu Natal.

On or about 27 March 2000, whilst the 1st defendant's policy was in full force and effect, the plaintiff's vehicles, namely, truck bearing registration number NJ 53530 and tanker-trailer bearing registration numbers NJ 29500 and NJ 8381 overturned outside Heidelberg and as a result, the diesel conveyed in the said tanker-trailer leaked from them causing contamination and ecological damage to an area of land not belonging to the

plaintiff.'

Following each of these incidents the plaintiff engaged a contractor to clean up the spillage, incurring, in the process, costs in the sums of R96 359,64 and R997 667,64 respectively.

[6] The first defendant repudiated plaintiff's claims for a refund of these amounts. In response to a demand in respect of the second incident the first defendant made a tender (in an undated letter) of R25 000 in full and final settlement of the claim. The tender was based on the provisions of an endorsement or addendum to the policy, which reads:

'SUBJECT OTHERWISE TO ITS TERMS CONDITIONS AND LIMITATIONS THE POLICY IS ENDORSED AS FOLLOWS:

"THE POLICY IS EXTENDED TO INCLUDE ADDITIONAL COSTS REASONABLY INCURRED BY THE INSURED OR FOR WHICH HE IS HELD RESPONSIBLE RESULTING DIRECTLY OR INDIRECTLY FROM AN ACCIDENT TO THE INSURED VEHICLE AND WHICH RESULTS IN THE LEAKAGE AND/OR SPILLAGE OF THE PRODUCT BEING TRANSPORTED.

SUCH ADDITIONAL COSTS INCLUDE:

1) EMERGENCY SERVICES CALL OUT COSTS.

2) CLEANING AND [OF?] ACCIDENT SITE OF DEBRIS AND PRODUCT.

3) REMOVING NULLIFYING OR CLEARING UP SEEPING, POLLUTING OR CONTAMINATING SUBSTANCES CARRIED BY THE INSURED VEHICLE.

4) FINES AND/OR PENALTIES LEVIED BY THE AUTHORITIES AS A CONSEQUENCE OF THE POLLUTION CAUSED BY THE ACCIDENT.

SUCH ADDITIONAL COSTS ARE LIMITED TO THE AMOUNT OF R25 000 ANY ONE INCIDENT."'

The addendum was inserted or added to the policy with effect from 8 August 1998 although it was signed on behalf of the first defendant on 8 June 1999.

[7] In its particulars of claim the plaintiff alleged that the incidents were 'accidents' which resulted in it becoming legally liable to pay the sums claimed, being expenses incurred by it as contemplated by subsection B of the Motor Section of the policy. That the incidents qualify as 'accidents' was not in issue in this court. In terms of the policy the first defendant agreed 'to indemnify or compensate the insured by payment or, at the option of the [insurer], by replacement, reinstatement or repair in respect of the defined events occurring during the period of insurance . . .'. The relevant part of subsection B is in the following terms:

'Sub-section B Liability to third parties

Defined events

Any accident caused by or through or in connection with any vehicle described in the schedule or in connection with the loading and/or unloading of such vehicle against all sums including claimant's costs and expenses which the insured and/or any passenger shall become legally liable to pay in respect of

(i) . . .

(ii) damage to property other than property belonging to the insured or held in trust by or in the custody or control of the insured or being conveyed by, loaded into or unloaded from such vehicle.'

[8] The first defendant pleaded that the plaintiff's two claims 'and the facts surrounding them', did not fall within the ambit of the first defendant's liability in terms of the policy, 'more particularly the provisions of subsection B of the motor section of the policy'. In this court, and in the court below, counsel for the first defendant accepted that the claims were covered by the policy, but contended that they were covered under the endorsement (quoted in para 5 above), which limits the first defendant's liability to a maximum of R25 000 in respect of each incident. The plaintiff, however, did not claim under the endorsement.

[9] It seems common cause that subsection B of the policy may be categorised as

indemnity insurance. It provides indemnity against 'all sums', including a claimant's costs and expenses, which the plaintiff 'shall become legally liable to pay', ie it provides for indemnity against loss. The measure of such loss is the measure of the payment (*Medical Defence Union Ltd v Department of Trade* [1979] 2 All ER 421 at 424).[1] Counsel for the plaintiff submitted that the endorsement constitutes contingency insurance, which provides no indemnity, but rather a payment on a contingent event, ie on the happening of an event, similar to a life policy or a personal injury policy. The sum to be paid is not measured by the loss, but is stated in the policy.[2] The 'trigger' for the endorsement, counsel argued, is cleaning up product which, while being transported by an insured vehicle, causes spillage. Legal liability to pay, as required by subsection B of the policy, is not a necessity for a claim under it. I agree with the submission that 'legal liability to pay' is not a necessity for a claim under the endorsement. I am not convinced, however, that the endorsement constitutes contingency insurance in the sense described above. The amount provided for in it is a maximum amount payable: a lesser amount may be paid, depending on the 'costs reasonably incurred' by the plaintiff (insured) or for which the insured 'is held responsible'. It does not provide for payment of a specified amount on the happening of an event. In essence, it covers the insured for additional costs 'reasonably incurred' or 'for which he is held responsible', to a maximum of R25 000. It has been suggested, however, that in a sense all insurances are related to a contingency and that in liability insurance the contingency is incurring the specified liability to a third party.[3] The endorsement, in my view, may best be described as pecuniary loss insurance (see *Lawsa* (reissue) vol 25 para 780).

[10] Much was said during argument on the question whether, because of the heading 'Liability to third parties', subsection B of the policy provides for what is commonly referred to as third-party insurance. As was said in *Digby v General Accident Fire and Life Assurance Corporation Ltd*[4] the insurance against third-party liability involves three parties,

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[1] See too *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 825D-E.
[2] See *Medical Defence Union Ltd v Department of Trade* [1979] 2 All ER 421 at 424.
[3] Joubert (ed) *The Law of South Africa* (reissue) vol 25 para 780.
[4] [1943] AC 121.

'the insurer, the insured and the third party who is making a claim'.[5] These observations were made with regard to s 2(1) of the policy at issue in that case, which indemnified the policyholder against 'all sums which the policy holder shall become legally liable to pay in respect of any claim by any person (including passengers in the automobile) for loss of life . . . or damage to property . . . caused by, through, or in connection with such automobile . . .'. The case itself was concerned with s 2(3) of the policy, which is not relevant for present purposes. In my view, it is not necessary to give an opinion on this aspect at this stage. Suffice it to mention, however, that there is a difference between the wording of the policy in the *Digby* case and that in the instant case. It is sufficient, for present purposes, merely to say that in the instant case, for entitlement to claim indemnity the plaintiff is required to prove a loss[6] arising from a legal liability to pay money in respect of damage to property other than his own.

[11] The policy decrees that 'specific exceptions, conditions and provisions shall override general exceptions, conditions and provisions'. Relying on this stipulation counsel for the first defendant submitted that the plaintiff's claims are in respect of costs that it incurred in cleaning up the 'accident' sites of product that was being transported by its insured vehicles. It is the endorsement, so counsel argued, that specifically indemnifies the plaintiff against these costs rather than subsection B which, although also indemnifying the plaintiff against costs and expenses, provides that such costs and expenses are those that the plaintiff becomes legally liable to pay to a claimant. Counsel's further contentions were: that a claim under subsection B must be for payment of 'all sums including [a] claimant's costs and expenses' which the plaintiff became legally liable to pay in respect of damage to property other than the plaintiff's; that there is no suggestion in the present matter of indemnity being sought against costs and expenses incurred by a claimant; and, that although the first defendant admitted that there was 'damage to an area of land' not belonging to the plaintiff in both incidents, it was only ecological damage, which, according

[5] See Lord Wright's speech at 139. See also the speeches of Viscount Simon LC at 127 and Viscount Maugham at 132.
[6] Compare *West Wake Price & Co v Ching* (footnote 1) at 825D.

to counsel, does not equate to damage to property. With regard to the first incident the evidence was that diesel from the plaintiff's tanker spilled onto the tarmac. Counsel consequently argued that there was no evidence that the tarmac was 'damaged' as a result of the spill. He said that the term 'pollution' – it was admitted that the diesel spill in the first incident polluted an area of land – appears in the endorsement and not in subsection B. All this, counsel submitted, ineluctably leads to the conclusion that the plaintiff's claim should have been brought under the endorsement. No claimant, nor damage to property, he said, correctly in my view, is required for an indemnity of the insured (plaintiff) under the endorsement.

[12] In its particulars of claim the plaintiff alleged that in terms of s 20 of the National Water Act, 1998 (the Water Act) and s 30 of the National Environmental Management Act, 1998 (the Environmental Act) it became legally liable 'to pay the costs relating to all reasonable measures to contain and minimise the effects of the spill, to undertake clean-up procedures and to remedy the effects of the spill'. Section 20(1) of the Water Act defines 'incident' as including 'any incident or accident in which a substance (a) pollutes or has the potential to pollute a water resource; or (b) has, or is likely to have, a detrimental effect on a water resource'. Subsection 4 provides that a responsible person, ie a person who is responsible for the incident or owns the substance involved in the incident or was in control of such substance must, inter alia, take reasonable measures to contain or minimise the effects of the incident. In my view, the Water Act has no application in the present case. There is no suggestion of the substance (diesel) having polluted or having had the potential to pollute a water resource, or that it had, or was likely to have had, a detrimental effect on a water resource.

[13] Section 30 of the Environmental Act is more to the point. Subsection 1 defines 'incident' as 'an unexpected sudden occurrence . . . leading to serious danger to the public or potentially serious pollution of or detriment to the environment, whether immediate or

delayed'. The other relevant subsections read:

'(4) The responsible person . . . must, as soon as reasonably practicable after knowledge of the incident –

(a) take reasonable measures to contain and minimise the effects of the incident, including its effects on the environment and any risks posed by the incident to the health, safety and property of persons;

(b) undertake clean-up procedures;

(c) remedy the effects of the incident;

(d) . . .

(5) . . .

(6) A relevant authority may direct the responsible person to undertake specific measures within a specific time to fulfil his or her obligations under subsections (4) and (5): Provided that the relevant authority must, when considering any such measure or time period, have regard to the following:

(a) . . .

(b) the severity of any impact on the environment as a result of the incident and the costs of the measures being considered;

(c) . . .

(d) the desirability of the state fulfilling its role as custodian holding the environment in public trust for the people;

(e) any other relevant factor.

(7) . . .

(8) Should –

(a) the responsible person fail to comply, or adequately comply with a directive under subsection (6);

(b) . . .

(c) there be an immediate risk of serious danger to the public or potentially serious detriment to

the environment,

a relevant authority may take the measures it considers necessary to –

(i) contain and minimise the effects of the incident;

(ii) undertake clean-up procedures; and

(iii) remedy the effects of the incident.

(9) A relevant authority may claim reimbursement of all reasonable costs incurred by it in terms of subsection (8) from every responsible person jointly and severally.'

A relevant authority means a municipality with jurisdiction over the area in which the incident occurs; a provincial head of department or any other provincial official designated for that purpose by the Member of the Executive Council in a province in which an incident occurs; the Director-General of the Department of Environmental Affairs and any other Director-General of a national department (s 30(1)(c)). The plaintiff accordingly averred that it 'was obliged to pay such costs by carrying out the measures' referred to in s 30(4) of the Environmental Act or 'to pay the Government of the Republic of South Africa to do so'. It thus carried out the measures in accordance with its legal liability to do so.

[14] Counsel for the first defendant accepted, correctly so in my view, that statutory liability to pay may qualify as the 'legal liability' required by subsection B of the policy, but he submitted that the subsection requires that there should also be damage to property. He argued, however, that the endorsement also covers statutory liability because it speaks of 'fines and/or other penalties levied by the authorities as a consequence of the pollution caused by the accident'. Counsel also accepted, again correctly so in my view, that the State may be a claimant as envisaged by subsection B of the policy (see s 30(9) of the Environmental Act), but contended that in the present matter it is not; the claimant is Ecosorb, the company that undertook the cleaning-up procedures. There is thus no claimant, so the argument continued, for whose loss, costs or expenses, in respect of damage to property, the plaintiff became legally liable to pay.

[15] On the question of the existence or otherwise of a claimant, counsel for the plaintiff informed us that because the trial court was pressed for time and it had become evident that the trial would have had to be postponed if further evidence were to be led, the parties, to obviate the calling of witnesses from government departments, agreed that the relevant authority would have exercised their rights against the plaintiff had the latter failed to fulfil the obligations imposed upon it by the two statutes (the Water Act and Environmental Act). The question, however, as posed by counsel for the first defendant, is: (1) what is the nature of the steps that would have been taken by the relevant authority in the exercise of their rights and (2) would the costs thereof have been as extensive as the amounts claimed by the plaintiff? The answer to the first question, I venture to say, is to be found in s 30(6), (8) and (9) of the Environmental Act (quoted in para 13 above). As to the second question, it seems to me that it can only be answered at the second stage of the trial, ie the *quantum* stage, were the plaintiff to be successful on the merits.

[16] As has already been mentioned, for the plaintiff to sustain a claim under subsection B of the policy it must have become legally liable to pay the sums claimed. Counsel for the first defendant contended that under subsection B the plaintiff could only acquire a right to sue the first defendant for the moneys claimed when its liability to 'the injured' person has been established, for it is only then that a right to indemnity arises. For this proposition counsel relied on *Post Office v Norwich Union Fire Insurance Society Ltd*[7]. In that case certain contractors, Potters & Company Ltd, while digging a hole in the street so as to find a water main, struck and damaged an underground telegraph cable. The Post Office, which had laid the cable, demanded from Potters payment of the costs of repairs to the cable. Potters refused to pay and before the Post Office could institute action against them, they went into liquidation. The Post Office then discovered that Potters were insured under a public liability policy covering their liability to third parties. It instituted action against Potters' insurers, claiming a right to do so under the Third Parties (Rights against Insurers)

Act, 1930.[8] The insurers denied that the Post Office could claim against them direct. The policy contained a 'no admission' clause, ie a clause barring the insured from making any admissions without the insurer's written consent. Lord Denning MR said the following:

'It seems to me that the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement. Until that is done, the right to an indemnity does not arise.'[9]

And further:

'The right procedure is for the injured person to sue the wrongdoer, and having got judgment against the wrongdoer, then make his claim against the insurance company. This attempt to sue the insurance company direct (before liability is established) is not correct.'[10]

The following statement by Devlin J in the *West Wake* case[11] was quoted with approval by both Lord Denning and Salmon LJ:

'The assured cannot recover anything under the main indemnity clause or make any claim against the underwriter until they have been found liable and so sustained a loss.'

Counsel for the first defendant accordingly submitted that in the absence of a judgment, an arbitration award or an agreement in terms of which the plaintiff's liability to a claimant (injured person) has been ascertained and determined to exist, the plaintiff has not acquired a right to sue the first defendant.

[17] In countering this submission counsel for the plaintiff argued that the *Post Office* case dealt with the particular provisions of the Third Parties Act, 1930, which related to insolvency and that it is therefore not applicable here. In my view the *Post Office* case

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[7] [1967] 2 QB 363, particularly the judgments of Lord Denning MR and Salmon LJ in the Court of Appeal.
[8] Section 1 provided that where a person has a claim against an insured who is covered against liabilities to third parties, which he may incur and such insured becomes bankrupt, the insured's rights against the insurer under the contract shall be transferred to and vest in the third party to whom the liability was so insured.
[9] At 373-4.
[10] At 375.
[11] See footnote 5.

(confirmed by the House of Lords in *Bradley v Eagle Star Insurance Company* [1989] AC 957), while interpreting the Third Parties Act, laid down a general rule (the Post Office rule) relating to when an insured may claim indemnity from an insurer for liability incurred by it to an injured party. Sir Jonathan (now Lord) Mance observes that the principle that a contractual right to indemnity only arises on proof of 'loss' 'well pre-dates the 1930 Act'.[12]

[18] But the *Post Office* case is not without criticism.[13] In my view, the criticisms are not without foundation. In *MacGillivray and Parkington on Insurance Law* (footnote 13) the authors submit that the Post Office rule is too narrow and that the assured suffers a loss when all the events have occurred which give rise to the liability of the assured to the third party, even though the amount of the liability is not quantified; that 'the assured's cause of action arises at this time for the purposes of limitation and he can presumably sue the insurers for a declaration that they are liable under the policy and that on payment by the assured, they will be obliged to indemnify the assured for a similar amount'. (Footnotes omitted.) This submission has not been repeated in subsequent editions of *Mac Gillivray and* Parkington, but its correctness was accepted by the Ontario Court of Appeal in *Re St Paul Fire and Marine Insurance Co and Guardian Insurance Co of Canada*[14], and I agree with it. In his work *The Law of Insurance Contracts,* Professor Clarke (see reference at footnote 13) refers[15] to a decision of the House of Lords in *Daff v Midland Colliery Owners' Mutual Indemnity Co*[16], a decision under s 5 of the Workmen's Compensation Act, 1906 (6 Edw 7, c 58), where Lord Shaw said[17] that at the date when an accident occurred in which the appellant workman was injured, 'the rights of all parties were settled in the following sense: First, there arose to the workman a right to compensation which was of the nature of a debt due by the employer. Secondly, there rested on the employer as from that date,

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[12] Sir Jonathan Mance 'Insolvency at Sea' [1995] *Lloyd's Maritime and Commercial Law Quarterly,* p 34 at 38.
[13] See Malcolm Clarke 'Liability Insurance on Pollution Damage: Market Meltdown or Grist to the Mill?' [1994] *Journal of Business Law* p 545; Nicholas Legh-Jones and Andrew Longmore *MacGillivray & Parkington on Insurance Law* 7ed p 824; Sir Jonathan Mance (see footnote 12); Malcolm Clarke *The Law of Insurance Contracts* 4ed pp 197-203 and pp 494-499.
[14] (1984) 1 DLR (4th) 342 at 359.
[15] At p 202.
[16] (1913) 82 LJKB 1340 (HL).

and so long as compensation was due, a liability as debtor to the workman as creditor. Thirdly, under the contract of insurance, that liability was *in toto* transferred to the insuring company'. In the same case Lord Moulton said[18]:

'On the occurrence of the accident during the protected period a right to indemnity against the pecuniary consequences of that accident becomes vested in the member [ie the insured under the contract of insurance between the employer and the company].'

Thus until the *Post Office* case, Professor Clarke submits, 'loss in the context of liability insurance included the case of the insured who had incurred liability – although its existence and amount had yet to be formally or definitively established'.

[19] In *Reinecke v Incorporated General Insurances Ltd*[19] the insured was sued for damages sustained by the claimants in an accident in which the insured's vehicle was involved. The insurer denied that it was liable to indemnify the insured, who then instituted action against the insurer seeking a declarator that the insurer was liable in terms of the insurance policy. The latter action was instituted before the liability of the insured to the claimants had been established. In confirming the court *a quo*'s decision to grant the declarator, this court said[20]:

'[A]t the stage the proceedings were instituted by appellant, his interest did not relate to any ultimate right to claim, but to the existence of a contingent right to claim under the policy upon the future occurrence of certain specified events, namely a legal liability to compensate his passengers in a quantified amount.'

A difficulty that may arise from a strict application of the Post Office rule is well illustrated by the facts of the instant case. As has been seen, s 30(4) of the Environmental Act requires the responsible person, as soon as reasonably practicable after knowledge of the incident, to, inter alia, take reasonable measures to contain and minimise the effects of the incident and to undertake clean-up procedures. Where, for example, the diesel spillage (the

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[17] At 1345, col 1.
[18] At 1351, col 1.
[19] 1974 (2) SA 84 (A).
[20] At 99G-H.

incident) causes damage to property and there is a potential that more damage may be caused, the responsible person (in this case the plaintiff) is required by law to contain and minimise the effect of the incident, ie to avoid further damage. And if such damage was to the property of a third party, it would hardly lie in the mouth of the insurer to argue that the insured should not have contained or minimised the damage.

[20] Counsel for the first defendant, however, submitted that for liability to be established in the instant case an organ of State must first have given direction to the plaintiff to act, or it must have submitted an account (s 30(6) and (9) of the Environmental Act quoted in para 14 above). I fail to appreciate counsel's contention when s 30(4) specifically enjoins the insured (as the responsible person) to act 'as soon as reasonably practicable *after knowledge of the incident*'. (Emphasis added.) For the plaintiff to have waited for a direction from an organ of State or for the organ of State itself to take the measures (s 30(8)) and then submit an account to it (s 30(9)) might have defeated the very purpose of subsection (4), viz to ensure that the effects of the incident are contained and minimised as soon as reasonably practicable after knowledge of the incident. To suggest that an insured in the plaintiff's position should stand by and not act in terms of his/her obligations under the Environmental Act is not only contrary to the spirit of that Act, but could result in much more serious consequences which that Act strives to avoid. A strict application of the Post Office rule to the facts of this case would result in an absurdity.

[21] Clearly then, s 30(4) of the Environmental Act imposes a legal obligation on the responsible person (the plaintiff in the instant case) to contain and minimise the effect of an incident. Such legal obligation constitutes, in my view, a legal liability covered by subsection B of the policy,[21] provided there is damage to property other than the insured's and the legal liability is in respect of such damage. As to the expression 'in respect of' the court *a quo* held that it is used in the policy in its narrow sense, ie a direct relationship or

[21] Compare *Smit Tak Offshore Services v Youell* [1992] 1 Lloyd's Rep. 154 at 159.

causal connection must exist between the costs and expenses for which the plaintiff, as insured, is legally liable and the damage to the property concerned.[22] This conclusion was not challenged in this court and I can find no fault with it.

[22] I have mentioned that damage to the area of land where the diesel spillage occurred in both incidents was admitted (para [5] above). But counsel for the first defendant submitted that the spillage only caused ecological damage, which did not equate to damage to property. With regard to the first incident, it was agreed that the spill 'polluted, contaminated and caused ecological damage to an area of land not belonging to the plaintiff'. Counsel for the plaintiff accordingly argued[23] that 'pollution' of land is by itself actual damage to property. That proposition is, in my view, not necessarily correct. For pollution to be actionable one must show that one has suffered damages as a result of such pollution.[24]

[23] I find it unnecessary, however, to embark upon a major enquiry on whether ecological damage equates to damage to property. Section B of the policy makes no distinction between ecological damage and other kinds of damage to property. In *Fedgen Insurance Ltd v Leyds*[25] this court said (at 38 B-E):

'The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise

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[22] *Verulam Fuel Distributors CC v Truck & General Insurance Co Ltd* 2005 (1) SA 70 (W) para 11; compare also *Sekretaris van Binnelandse Inkomste v Raubenheimer* 1969 (4) SA 314 (A) at 319H-320 *in fin*; *Barnard NO v Regspersoon van Aminie* 2001 (3) SA 973 (SCA) paras 11-12.

[23] Referring to Joubert (ed) *The Law of South Africa* vol 18 para 241 where the example is given of rain-water dissolving deleterious matter from slimes from mine dams which then percolates onto adjoining land and into streams thus polluting the land and water; and the decision of the House of Lords in *Hunter and Others v Canary Wharf Ltd*; *Hunter and Others v London Docklands Development Corp* [1997] AC 655 dealing with damages for nuisance.

[24] See references at footnote 19.

[25] 1995 (3) SA 33 (A).

(*Scottish Union v National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464-5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (*Auto Protection Insurance Co Ltd v Hanmer-Strudwick* 1964 (1) SA 349 (A) at 354 C-D); for it is the insurer's duty to make clear what particular risks it wishes to exclude (*French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd* 1931 AD 60 at 65; *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* (supra at 354D-E). A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* rule, which requires a written document to be construed against the person who drew it up, would operate against [the insurer] as the drafter of the policy (*Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (A) at 108C).'

If it wished to exclude ecological damage from other kinds of damage to property the insurer, as the party responsible for the policy document, should have done so.

[24] I accordingly agree with the court *a quo* that the plaintiff's claims are covered under subsection B of the policy. It follows that the appeal, in so far as that finding is concerned, must fail. This conclusion renders a consideration of the plaintiff's cross-appeal against the dismissal of its claim against the second defendant unnecessary; and so also the plaintiff's alternative claims.

[25] There remains the question of costs. Contrary to the submission of counsel for the first defendant that the latter should not be saddled with the second defendant's costs of the appeal, I am satisfied that it was necessary for the plaintiff to cross-appeal against the dismissal of its claim against the second defendant. It was indeed prudent to do so because if the first defendant's appeal had been successful and the second appellant was not before this court the plaintiff would have lost its opportunity to have its claim against the second defendant considered. It had to bring the second defendant to this court and thus cannot be punished for doing so by being mulcted with the second defendant's costs of the appeal. In my view, it is only fair that the first defendant bear those costs.

[26] With regards to the costs relating to the trial before the court *a quo*, I think it would be advisable to set aside the order of the court *a quo*, for it to consider that question afresh after it has dealt with the issue of *quantum*. I say this because the court *a quo* might find that the sum in respect of which the plaintiff is entitled to indemnity, because of the extent of the actual damage to property, is such that a different costs order, if any, should be made.

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

1. Paragraph 1 of the order of the court *a quo* is set aside and for it is substituted the following:

   '1. The first defendant is liable to indemnify the plaintiff in terms of Subsection B of the Motor Section of the policy of insurance issued in respect of the plaintiff's vehicles, for such loss that the plaintiff is able to prove to have suffered as a result of damage to property occasioned by the accidents of 16 and 27 March 2000.'

2. The appeal is otherwise dismissed with costs.

3. The matter is remitted to the court *a quo* for consideration of the issue of *quantum*.

4. The cross-appeal is dismissed.

5. The appellant is ordered to pay the second respondent's costs of the cross-appeal.

L MPATI DP

CONCUR:

FARLAM JA)

MTHIYANE JA)

JAFTA JA)

MAYA AJA)