220 Lange Street,
Nieuw Muckleneuk,
Pretoria, 0181
PO Box 178, Groenkloof,
South Africa, 0027
Docex 42, Brooklyn
Tel: +27 (0) 12 452 8900
Fax: +27 (0) 12 452 8901
www.kebd.co.za

EXTENT OF THE DUTY OF CARE IMPOSED ON AN INSURED AND THE OBLIGATIONS FOR THE INSURER ARISING FROM DAMAGE CAUSED NEGLIGENTLY BY THE INSURED IN SOUTH AFRICAN LAW

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In South Africa, insurance and the laws and principles upon which it is based, is a topic not short of debate and argument. At the centre of this debate, one will often find contentious exclusionary clauses, such as the duty which insurance companies and Financial Services Providers alike impose on their insureds to take all reasonable steps or precautions to avoid, prevent or minimise the damage to risk object which is insured. In the case of *Santam Ltd v CC Designing* 1999 (4) SA 199 (C) 200 it was held that the *status quo* is that the insurer cannot rely merely on the negligent conduct of the insured who did take all reasonable measures to essentially protect the insured object, to repudiate their claim and exclude their liability which arises from the contractual obligations and the cover afforded to the insured.

In order to legally repudiate a claim by an insured, the mere negligence on the part of the insured is not sufficient. The onus is on the insurer to prove on a balance of probabilities not only that the insured was not acting in a reasonable manner, but also that there was an element of gross negligence and/or recklessness involved. There is a plethora of case law which dealt with this specific duty, and other similar duties which are imposed through the common law, and this will form the basis of this article.

KEBD
KLAGSBRUN EDELSTEIN BOSMAN DU PLESSIS INC.
Attorneys | Notaries | Conveyancers
220 Lange Street,
Nieuw Muckleneuk,
Pretoria, 0181
PO Box 178, Groenkloof,
South Africa, 0027
Docex 42, Brooklyn
Tel: +27 (0) 12 452 8900
Fax: +27 (0) 12 452 8901
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The basic principles of indemnity insurance was considered in the case of *Walker v Santam Ltd and Others* 2009 (6) SA 224 (SCA) and states that the policy holder, i.e. the insured, is allowed to claim from the insurance company the value of the insured object which was lost, or the damage sustained thereto, as a result of an event occurring which was insured against in terms of the policy. The ordinary rule inferred from this case which related to claims associated with this form of short-term insurance, is that the insured is obliged to prove that the claim is one that is covered by the policy, and that the *onus* falls on the insurer to prove that an exception to the liability is applicable, and which exception must be stated clearly and unambiguously in the wording of the policy. These exceptions come in the form of explicit exclusionary clauses, as well as exclusions under common law, and they place a duty on the insured to act in a certain manner.

An insurance policy is to all intents and purposes, a contract entered into between the insurance company (the insurer), and the policy holder (the insured). As an insurance policy is a contract, when it comes to the interpretation of the wording and the clauses in the policy, the normal rules that govern such interpretation must be applied, as was the case in *Fedgen Insurance Ltd v Leyds* and *Waksal Investments (Pty) Ltd v Fulton.* The learned judge Smalberger JA took into consideration various older reported cases where the interpretation of insurance policies was analysed and concluded that in order to appropriately interpret a policy a court must, as a starting point, gain clarity on the intention of the parties concluding the contract. First of all, the plain language approach must be applied whereby the words of the policy must be given their plain, ordinary and popular meaning, unless the context indicates otherwise.

An interpretation can often be ambiguous, and leads to the adoption of the *contra proferentem* rule which states that in the event of ambiguity, the provisions should be interpreted against the drafter of the policy due to the fact that it had the opportunity to expressly and clearly state under which circumstances it would be entitled to exclude liability, and further that the policy should be interpreted in a manner which favours the insured.

The most common form of express exclusionary clause which aims to limit or exclude the liability arising on the part of the insurer, especially in short-term insurance, is the “reasonable precaution duty”. This duty, as is imposed on the insured, is an extremely broad concept, and at the best of times, unclear as to what it precisely entails and to what extent the duty is imposed. The honourable Judge James described this duty in the *Aetna Insurance Co v Dormer Estates (Pty) Ltd* 1965 (4) SA 656 (N), and despite it being related to the facts in that matter, it is fairly applicable across the board when it comes to interpreting such a clause. He stated that ‘It is not easy to define within any degree of exactness what the “reasonable precautions” were which should have been taken’. This is due to the fact that the insurance companies include these in their policies with a vague and broad applicability which does not expressly state what the extent of this duty is. As was discussed earlier, the insurer has the duty to be clear as to which circumstances would entitle them to escape liability. Through application of *contra proferentem* rule it has been established in our law that there needs to be <u>gross negligence</u> or an element of <u>recklessness</u> in order for the insurer to repudiate a claim.

The duty of care which is imposed on the insured is an extremely broad concept and is very much a concept which has to be considered based on the particular facts in each case. What has been made clear in the research is that a vague clause that excludes liability holds no water in our law today and more often than not, the Court will, when interpreting the circumstances and the specific clause, do

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so in favour of the insured. The insurer will always bear the *onus* of proving a breach in a clause, whether it is based on reasonable precaution, or on one of the two common law exclusions which were discussed in the section above. The extent that the duty is imposed on the insured is gauged on the particular set of facts as well as the cover which is afforded under the policy, and negligence is by no means a preclusion from claiming under the policy, as is evident from the judgments discussed above, the *status quo* remains that insurance policies do cover an insured's negligence.

By Jean du Plessis (Director) and Erik Terblanche (Associate) | Litigation Department

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