CONSUMER WORKSHOP

INSURED'S OBLIGATION TO EXERCISE DUE CARE

1. INTRODUCTION

1.1. Like any contract, an insurance contract too creates rights and duties/obligations.

1.2. One such obligation in an insurance contract is the obligation of the insured to exercise due care to avoid/ minimize loss or damage. This clause is often referred to as the "due care" clause or the "reasonable precautions" clause.

1.3. It is usually noted as a general term and condition in the policy and will usually read for example as follows:

"General conditions",

"2. Prevention of loss

You must take all reasonable precautions to prevent loss, damage or liability."

1.4. This obligation is created by the insurer and entrenched in the policy in order to control the risks that the insurer is willing to cover, as it is the insured's negligence that is covered/assumed by the insurer.

1.5. The purpose of a condition such as this is to ensure that the insured would not refrain from taking precautions that ought to be taken, simply because he was covered against loss by the policy.

1.6. Many complaints which arrive at this office relate to claims which have been rejected based on the "due care" clause.

2. HOW DOES OUR OFFICE DEAL WITH MATTERS OF THIS NATURE

2.1 When our office considers matters of this nature, like any other matter, we are guided by case law.

2.2. The classic case which guides us when dealing with these matters, is **Santam v cc Design cc**, **1999.**

In this case, the insured had advertised his vehicle for sale. The insured was approached by a potential buyer and it was agreed that the vehicle would be sold to that buyer. It was also agreed that buyer would deposit the purchase price into the insured's account and that he would supply the insured with the deposit slip. The buyer deposited a cheque into the insured's account and presented the insured with a deposit slip. The insured then released the vehicle to buyer. Not long after, the insured became aware that the cheque had bounced and that the deposit slip was a fraudulent slip. The insured had realized that he had become the victim of a fraudster and that his vehicle had been stolen. The insured claimed the value of the vehicle from the insurer. The insurer

rejected the claim on the basis that the insured did not exercise due care in releasing the vehicle without making sure that funds were properly released to him and that the buyer was trustworthy. The insured was unhappy with the rejection and sued the insurer for this claim. The insured was successful and the insurer was unhappy so they took the matter on appeal.

b). The appeal court found that in order for the insurer to lawfully repudiate the claim based on this clause, it must be able to prove that the insured had acted recklessly. This case showed that gross negligence on the part of an insured was not sufficient and that in order to act recklessly, the insured was required to have subjectively foreseen the risk of the harm occurring and to have proceeded regardless.

c). The court found that that what the insurer had to show, in order to take advantage of the reasonable precautions clause, was that the insured acted recklessly. The court said that it was not enough that the insured's failure to take any particular precautions to avoid a loss should be negligent but that it had to be at least reckless, in other words made with the actual recognition by the insured himself that a danger existed and regardless of whether or not it was averted.

d). The court found that the insurer did not prove this and therefore the appeal was dismissed.

2.2. In a more recent case of **Renasa v Watson, 2018**, the court also interpreted the reasonable precautions clause.

A). In this case, a factory owner arrived at his premises after a holiday to find that an elaborate contraption of petrol cans had been elected over various machines and were ready to be set alight by an arsonist. The factory owner called the police who arrived at the scene and then took him to the police station to make a statement. He was told not to enter the factory, as a forensics team would be deployed to go and collect evidence. The insured went to a friend's house in the interim, at which point he received a call from the neighbor to say that his factory was on fire. The insured claimed for the loss from his insurer.

b) The insurer repudiated the claim on the basis of fraud, alternatively a failure by the insured to take reasonable precautions to prevent the loss from occurring. The insured was not happy with the outcome and he sued the insurer for his claim. He was successful. The insurer took the matter on appeal.

c) The appeal court rejected the insurer's argument that the insured had set the fire and then turned to the insurer's alternate argument on the reasonable precautions clause. The court considered the Santam decision where it was decided that such a clause required proof of recklessness before liability could be excluded.

d) In this case the court said that the bar was set too high in the Santam case, by requiring the insurer to prove recklessness on the part of the insured.

d) The Supreme Court of Appeal found that the insured had not even be negligent. It was then unnecessary for the court to decide whether such a clause required that recklessness be approved before liability must be excluded.

e) In this case, the court found that it was unnecessary to determine this issue in view of the conclusion it reached on an alternative defense raised in the matter, but held at the very least that proof of foreseeability is required.

f) This would require proof that a reasonable person in the position of the insured would have foreseen the reasonable possibility of the loss occurring and would therefore have taken reasonable steps to prevent it.

h) The Supreme Court of Appeal dismissed the insurer's appeal in this matter.

3. **CASE STUDIES:**

3.1. In a recent case decided by OSTI, we were guided by both the **Santam** case as well as the **Renasa** case.

The facts are as follows:

The insured submitted a claim for accidental damage to his vehicle. The assessor appointed an assessor to inspect the vehicle and to determine the nature and cause of the damage. The assessor found that the vehicle had sustained physical damage including damage to the engine sump which was as a direct result of the impact from the collision. The insurer authorized this portion of the claim. It was also found that there was damage which was sustained to the engine in excess of R200 000.

It was found that the damage to the engine was caused by the vehicle being driven without engine oil after the collision. It was the continued running of the engine with the reduced oil pressure resulted in the motor seizing. According to the assessor the loss of oil pressure would have been immediately indicated on the vehicle instrument cluster through the oil pressure warning light, to alert the driver to turn off the engine in order to prevent any further damage.

The insured did confirm that he noticed a number of warning lights on the dashboard and that the vehicle was not responding well after the collision. He decided in any event to drive the vehicle further in order to get it to a place of safety.

The insurer excluded the claim for the engine damage on the ground that the insured did not take all reasonable steps to prevent loss, damage or liability.

The insured's argument was that he did not feel safe to stay where he was after the collision and even though there were so many lights which came on his dashboard after the accident, he drove the vehicle to a place where he felt safer.

He drove for about 800 meters and the vehicle stalled.

He argued that he did not know that there was an oil leak when he drove the vehicle after the collision. OSTI found no reason to disbelieve the insured that he did not know.

Being guided by the case law highlighted before, we considered the matter on whether the insured was reckless in his action to drive the vehicle after the collision.

In so doing we considered the facts of the matter as this enquiry is one of fact.

On the authority of CC Designing in determining whether an insured's conduct was reckless, regard must be had to the policy and the particular circumstances of the claim. As was recognized by the court, "the question of recklessness is predominantly one of fact".

We found that the insured was not reckless by driving the vehicle from the accident scene but that the lights going on in the vehicle would have been an indication that there was mechanical damage and the insured would be required to exercise caution in his operation of the vehicle.

The insured confirmed that all these lights came on and that he noticed that and that the vehicle did not respond well when he drove it away.

On the authority of the Watson case, it was established that the insured could foresee the eventuality of the loss. A reasonable person in the position of the insured would have recognized the imminent or possible danger of the significant mechanical damage to the vehicle.

It was found that the insured was also not in any imminent danger bearing in mind the time and place he was at. A reasonable person would have stopped the vehicle and switched of the engine.

We found that by the insured continuing to operate the vehicle he courted the danger of a separate cause of damage, which to us amounted to recklessness and the insurer therefore assumed the risk for himself. It was found that the insured assumed the risk for himself.

As a result we found that the insurer was justified in its decision to decline liability for the engine damage on the basis of the breach of the due care clause.

3.2 In another case decided by OSTI, we used the same guidelines.

The facts are as follows:

The insured claimed the damage to his vehicle arising out of the collision, which occurred while the insured was driving and was a single vehicle accident.

The rejected the claim on the basis that the insured failed to take reasonable care and breached his duty by speeding.

The issues that we had to decide were whether the insurer was entitled to reject the insurance claim on the grounds that the insured failed to take care of his belongings by speeding and if so whether the insured was in fact speeding.

The first issue is a question of law and the second one is a question of fact.

In making a determination on the matter was found that speeding in itself is not an indicator of recklessness. You would have to look at the particular facts of the case in order to make a decision on recklessness.

The insurer provided the reports of an expert who found among other things, that the insured was traveling at a speed of 95 to 105 km/h in a 60 km/h zone.

The insured provided a report prepared by insurance claims consultants who concluded that, and without any substantiation, the most likely cause of the accident was an oil spill and all other highly slippery substance such as but not limited to diesel fuel on the road which caused the vehicle to lose control on the bend and an overflowing sewage train which overflowed into the road most likely could be the cause of the vehicles getting/losing control on the bend.

We found that the evidence of the insurance expert had not been validly challenged by the insured and that the insured, had done no more than a raise speculative attacks on the substance of the report. This left the insurance expert evidence largely unchallenged and this office was compelled to accept it is correct.

It was found at best for the insured that the facts in this matter gave rise to a factual dispute which must be determined by court and tested through oral evidence, including the cross-examination of witnesses to test the veracity of the version. This office has no power to hold a formal ruling or take witnesses evidence under oath.

Ultimately, the matter was found on a balance of probabilities, in favor of the insurer.

3. CONCLUSION:

The cases above illustrate how the clause is used and interpreted. Ultimately, what it means is that an insured is under an obligation to exercise due care and to take reasonable precautions in order to avoid a loss.

Further, that the insurer may not just rely on the clause to exclude liability based purely on the insured's negligence and that the insurer must show that there was foreseeability by the insured in order to validly rely on the close to reject the claim.