THE FINANCIAL SERVICES TRIBUNAL

Case No: FAB79/2021

In the matter between:

MILLION DOLLAR FARMS (PTY) LTD Applicant

and

OLD MUTUAL INSURE LTD First Respondent

THE OMBUD FOR FINANCIAL SERVICES PROVIDERS Second Respondent

Coram: SK Hassim SC (chair),
C Woodrow SC
Ms Moloto-Stofile

For the applicant: Mr Bode
For the first respondent: Adv Laher
For the second respondent: No appearance

Summary: Further evidence in terms of section 232(5) of the FSR Act read with Rule 23 of the Tribunal Rules must be in the form of an affidavit by the witness giving the evidence – the consequence of a failure to report an event that may result in a claim – onus regarding breach of notification clause on insurer – reasonableness of time to report a claim dependent on the circumstances of a case – the act or omission referred to in section 27(3) of the FAIS Act is not the act or omission giving rise to the claim but rather the act or omission of the insurer in repudiating the claim.

DECISION

Introduction

1. The applicant is aggrieved by a determination by the Ombud for Financial Services Providers ("**the Ombud**") made on 14 May 2021. With the leave of the Deputy Chairperson of the Tribunal, the applicant applies in terms of section 230 of the

Financial Sector Regulation Act, Act No 9 of 2017 (**"the FSR Act**") for the reconsideration of the Ombud's determination. The first respondent, Old Mutual Insure Ltd ("**Old Mutual**"), opposes the application.

Background facts

2. The applicant is the owner of Plot 260, Douglas Valley, Bloemfontein ("**the farm"**), which was at all relevant times occupied by a tenant. To Old Mutual's knowledge, a farming/horse riding/irrigation business was being carried on, on the farm.

3. The buildings on the farm were insured against loss or damage by Old Mutual in terms of an Agriplus policy ("**the Policy**"). The Policy covered loss or damage to the buildings on the farm as well as the owner's liability to third parties for bodily injury.[1]

4. On 13 January 2016, during a windstorm, the tenant's fiancé ("**the fiancé**"), and a visitor of the tenant ("**the third party"**), sought cover behind a structure ("**the wall**") on the farm which did not have a roof. The wall collapsed ("**the incident**").

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[1] We quote from paragraph 33 of the written submissions of Old Mutual (record Part A at page 82) which indicates that in terms of the Policy, Old Mutual undertook to indemnify the applicant in respect of, amongst others (under the "*Building Combined*" section under "*Sub-section D: Legal Liability"*):

"**33.** ***Building Combined***
33.1 ***'Defined events***
The company will indemnify the insured in respect of:
...
Sub-section D: Legal liability
Damages for which the insured shall become legally liable to pay consequent upon:
1. accidental death of or bodily injury to or illness of any person ...
occurring during the period of insurance in, on or about the property insured and arising from the insured's ownership thereof ..."

The fiancé and the third party were seriously injured. The fiancé succumbed to her injuries.

The condonation application

5. The applicant failed to deliver heads of argument timeously. The first respondent did not object to the late delivery thereof. Mr Bode, who appeared for the applicant, applied for condonation from the bar. We condoned the late delivery of the heads of argument, and the hearing proceeded.

The application to lead further evidence

6. The applicant applies in terms of section 232(5) of the FSR Act read with rules 22 to 28 of the rules of the Tribunal ("**the Tribunal Rules**") for the submission of further evidence.

7. The Tribunal Rules require the further evidence to be adduced by way of an affidavit.[2] An applicant must show good cause for the application and amongst others must address the credibility of the evidence and its relevance to the decision.[3]

8. The application for leave to lead further evidence is supported by an affidavit deposed to by the applicant's property manager. He recounts that the applicant was advised by its attorney during September 2021 to obtain a report from the South

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2 Rule 26.

3 Rule 24.

African Weather Service on the weather conditions on the day of the incident. The evidence which the applicant seeks to introduce seems on the face of it to be an extract[4] from a document or report prepared by the South African Weather Service. The heading on the first page in bold type is "***Extreme weather event – 13 January 2016***". The report concludes as follows:

> "*Given the above weather observation report, the squall line produced heavy downpour and the wind of the scale of gale force on her path. The weather forecaster [sic] conclude that the thunderstorms were not ordinary but severe. Moreover, according to beaufort wind force scale, the wind of 100km/h is referred to as whole gale and seldom experienced inland. Such wind is capable of uprooting trees and causing considerable structural damage*."

9. Considering that Old Mutual's position is that the wall collapsed due to the applicant's failure to maintain the wall, this report is relevant. However, the report is not confirmed under oath by its author.

10. Section 232(5) of the FSR Act leaves no room for doubt whether a report which is not confirmed under oath can be accepted as evidence. Section 232(5) is the source of the right to receive further evidence. It obliges the person presiding over the panel to administer the oath to the witness who gives evidence in terms of section 232(5). There is thus no ambiguity that the witness must testify under oath. We can find no reason why evidence produced in writing does not have to be under oath while *viva voce* evidence must be.

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[4] The first line on the page reads "*Private Bag X 097, Pretoria, 0001 Tel + 27 (0)12 367 6000 www weathersa.co.za USSD:*120*7297#".* This, first line, suggests that it is a continuation of text on the preceding page.

11. Even though rule 4 of the Tribunal Rules empowers the chairperson of the panel to deviate from the Tribunal Rules, this rule cannot be invoked. The deviation is limited to the extent permitted by the applicable law. Additionally, the legislature has not conferred upon the Tribunal the power to condone the failure to comply with a statutory provision.

12. In view of the fact that the further "evidence" which the applicant seeks to adduce is not put before us under oath, the application cannot be granted. It is accordingly refused.

The notification of the incident to the insurer and the submission and rejection of the claim

13. On 10 January 2019, being two days short of three years from the date that the third party was injured in the incident, the third party commenced an action[5] against the applicant, as well as the tenant, for compensation in an amount of R1,308,000.00 for the bodily injuries suffered by her.

14. The summons came to the attention of the applicant's representative on or about 10 January 2019.[6] As a result of this, on 15 February 2019, the applicant submitted to

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5 Summons issued on 10 January 2019.

6 On the applicant's version, the summons was not served on it. It was served on the tenant who brought it to the attention of the applicant's representative. Whether there was proper service or not, is not an issue which arises in this matter.

Old Mutual a "*Public Liability Accident Report Form*" as well as a "Claim Report" The summons was attached to the former.

15. On 4 April 2019 Old Mutual, in writing, repudiated the claim ("**the written repudiation**"). The repudiation was seemingly on three grounds:

(i) The claim was reported almost 3 years after the incident. This constituted a breach of clause 7 (a) of the General Conditions and Exceptions to the policy ("**the General Conditions and Exceptions of the Policy**") which required the applicant to notify Old Mutual of the incident "*as soon as reasonably possible*" after its happening.

(ii) The applicant had failed to inform the underwriters of the incident when the policy was renewed. (We note that the express written term in the Policy which imposes this obligation was not identified in the written repudiation).

(iii) The buildings on the farm were not maintained and the structure which collapsed did not comply with the National Building Regulations. (We point out that the express written term in the Policy which imposes this obligation was not identified. It seems to us that this ground of Old Mutual's repudiation rests on clause 4 of the General Conditions and Exceptions of the Policy which requires the applicant to "... *take all reasonable steps and precautions to safeguard the insured property and to prevent and minimise accidents, loss, damage or liability*.")

16. The applicant was granted an opportunity to make further representations or provide further information to enable Old Mutual to review the rejection. The applicant's response to this invitation was a letter dated 10 April 2019. The applicant conceded that it "[*was*] *perhaps remiss in not advising [Old Mutual] of the 'event which may (have) result(ed) in a claim under the policy…. as soon as reasonably possible"*" but added that it had never occurred to the applicant's representative to advise Old Mutual of the incident and there had been no deliberate attempt to withhold information from it. The applicant stated that it reported the incident to Old Mutual "*… 'as soon as reasonably possible' after the summons was served on the insured, and [it] became aware that there was to be a possible claim instituted against [it]*".

17. There was a further exchange of correspondence in which Old Mutual, amongst others, mentioned what the investigations revealed about the collapsed structure and the applicant's failure amongst others to maintain the wall. The applicant responded to these. Old Mutual did not change its decision despite further representations to it.

The complaint to the FAIS Ombud

18. The applicant submitted a complaint to the Ombud on or about 11 July 2019.

19. Old Mutual's response to the complaint was sent to the Ombud on or about 11 September 2019. Therein Old Mutual repeated the reasons[7] it had given to the applicant for rejecting the claim, namely that:

    (i) the applicant had failed to report as soon as reasonably possible an event that may have resulted in a claim;

    (ii) the applicant had failed to take reasonable care to prevent and minimise accidents, loss, damage or liability by failing to ensure that the wall (which collapsed) was strong enough to withstand the storm; and that even if the applicant was correct in its view that the wall was not weak, Old Mutual was not liable because the wall would not have collapsed due to fault on the part of the applicant.

20. It argued that the wall contravened the National Building Regulations. Insofar as the timeous reporting of the incident/lodging a claim for compensation is concerned, it argued that a delay of more than a month after an event that may result in a claim is unreasonable.

21. It advanced a further reason for rejecting the claim which is difficult to follow. It is articulated as follows:

    "*The liability claim does not arise due to no blame but rather due to wrongful action or failure of the insured that can be shown on a balance of probabilities to prove the claim. It therefore cannot*

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7 No reliance was though placed on the applicant's alleged failure to bring the incident to the attention of the underwriters when the policy was renewed.

be pronounced with full conviction, with the client facing a [sic] suite of R1,308,000, that there is no wrongful action or omission that gives rise to the claim."[8]

22. Old Mutual submitted that the Ombud did not have the power to entertain the complaint. In this regard it contended:

(i) The "*matter*" had become time-barred (we assume the argument is based on section 27(3)(a)(i) of the FAIS Act) and had also become prescribed. It argued that even though the third party's claim against the applicant had not prescribed by 10 January 2019,[9] the applicant's claim against Old Mutual had prescribed by the time the applicant reported the incident and submitted its claim to Old Mutual on 15 February 2019.

(ii) The Ombud does not have the power to entertain a complaint regarding a claim that has prescribed.

(iii) The quantum of the claim exceeds R800 000.00 and therefore falls outside the monetary jurisdiction of the Ombud.[10]

(iv) The complaint should be directed to the intermediary and not the product provider, Old Mutual.

23. The Ombud's powers on receipt of a complaint include the following:

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8 Record: Vol 1, p. 50 par 1.

9 The date when the action was instituted by the third party and brought to the applicant's attention.

10 Whilst this does not appear to have been considered by the Ombud, it is clear from the complaint form that the applicant had agreed to forego the amount of its claim in excess of R800 000.

(i) decline to investigate the complaint for the reasons referred to in section 27 (3) (a) (i) and 27 (3) (b) (i);

(ii) dismiss it;

(iii) uphold it wholly or partially;

(iv) determine that it is more appropriate that the complaint is dealt with by amongst others a court.

24. The Ombud's determination is contained in a letter dated 14 May 2021 ("**the determination**"). It is however not clear what the determination is and what the reasons therefor are. The Ombud purported to state certain "*reasons for [the] decision*". The Ombud after setting out "*the reasons for [the decision]"* states that *"[t]hough we empathize with your situation, we are unable to assist you in this matter and we shall therefore proceed to close our file.*" [11]

25. It seems that the complaint was 'rejected'[12] for one or more of the following reasons (partly paraphrased by us):

(i) The Ombud was not in a position to resolve the "... *material dispute of fact regarding whether or not lack of maintenance caused the damage to the wall* ..." in the absence of the findings of an independent assessor.[13] (We assume

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11 The letter ends with the applicant's attention being drawn to its right to apply for the reconsideration of the "decision".

12 In inverted commas because it is not clear from the determination what the Ombud in fact decided.

13 The paragraph numbered 1 on the second page of the determination which reads:

"*1. Kindly note that there is a material dispute of fact regarding whether or not lack of maintenance caused the damage to the wall. We are therefore unable to make a finding without the need to appoint an independent assessor to verify the respondent's findings in respect of the wall. The Ombud for Short-Term Insurance does*

that this was stated with reference to the grounds of repudiation relied upon by Old Mutual relying on the insured's obligation in terms of clause 4 of the General Conditions and Exceptions of the Policy to "*take all reasonable steps and precautions to safeguard the insured property and to prevent and minimise accidents, loss, damage or liability*".)

(ii) Because the Ombud for Short-Term Insurance did not investigate public liability insurance complaints[14] "*hence the recommendation that the matter can be appropriately dealt with by a court of law."* [15]

(iii) The applicant should have submitted a claim for damage to the wall.[16]

(iv) The claim for the wall was rejected and therefore the public liability claim cannot be approved.[17] (This statement is nonsensical considering that the Ombud found that a claim for damage to the wall should have been lodged,

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not investigate public liability matters and therefore the complaint cannot be referred to that Office, hence the recommendation that the matter can be appropriately dealt with by a court of law;

14 The paragraph numbered 1 on the second page of the determination. Notwithstanding the reference to a "*recommendation*" no recommendation is made in the letter.

15 The paragraph numbered 1 on the second page of the determination.

16 The paragraph numbered 2 on the second page of the determination which reads as follows:

"*2. We submit that it is not reasonable to report a claim 3 years after the incident which led to the claim. Our view is that a claim for damages to the wall ought to have been submitted, and a building assessor would have been appointed to verify the damage before a liability assessor is appointed to verify and quantify the claim*;"

17 The paragraph numbered 3 on the second page of the determination which reads as follows:

"*3. It is further important to note that, but for the wall collapsing, the claim would not have arisen, the deceased would not have died [sic] to the injury, and a summons would not have been served. Therefore, the rejection of the claim for the wall damage is the starting point, and since this was rejected, then public liability claim cannot be approved."*

and in our view thereby accepting that none was lodged by the applicant which appears to be the case on a conspectus of the evidence).

(v) But for the wall collapsing the deceased would not have died due to the injuries.

(vi) It was not reasonable to report the claim three years after the incident which led to the claim.[18]

The reconsideration application

26. Old Mutual opposes the application.

27. The grounds for opposing the application are listed in the affidavit[19] filed by Old Mutual in response, and opposition, to the application for reconsideration. They are the following:

(i) The late notification of the incident and the late submission of the claim.

(ii) The applicant had failed to take all reasonable steps and precautions to safeguard the insured property and to prevent and minimise accidents, loss, damage or liability.

(iii) The applicant failed to notify Old Mutual during the period of cover and when renewing the policy of an alteration in risk caused by the wall and the

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18 The paragraph numbered 2 on the second page of the determination.

19 Captioned "*The First Respondent's Written Submissions*."

failure constituted a breach of clause 2 of the General Conditions and Exceptions of the Policy.[20]

(iv) The applicant failed to advise Old Mutual of the inquest that was held.[21]

28. We fail to see how or why a claim for damage to the wall, or the applicant's failure to claim therefor, is relevant to the applicant's public liability claim against Old Mutual. We also fail to see the relevance of the death of the tenant's fiancé. The applicant did not submit a claim to Old Mutual relating to her death (but rather for the potential liability to the third party who was injured).

The Ombud's power to decline to entertain a complaint

29. The first substantive paragraph in the Ombud's determination refers to section 27(3)(c) which empowers the Ombud to determine on reasonable grounds that amongst others it is more appropriate that the complaint be dealt with by a court and decline to entertain the complaint.[22]

30. Despite commencing the letter with a reference to section 27(3)(c), a determination appears not to have been made in terms thereof. Had the determination been one in terms of section 27(3)(c), there would have been no point in advancing further reasons for not upholding the complaint. The reference to the power in section

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20 This is one of the two additional grounds.

21 This is the second additional ground.

22 It reads:

"*Section 27 (3) (c) of the FAIS Act provides that the Ombud may on reasonable grounds determine that it is more appropriate for a complaint to be dealt with by a Court and thus decline to entertain the complaint."*

27(3)(c) is however telling. The Ombud recognised that it was not suited to decide the complaint because of a disputed factual issue, namely whether the applicant had failed to maintain the wall in a good state of repair and thereby breached the obligation in clause 4 of the General Conditions and Exceptions of the Policy to "*take all reasonable steps and precautions to safeguard the insured property and to prevent and minimise accidents, loss, damage or liability*".

31. Had the Ombud simply declined to entertain the claim on the basis that it would be more appropriate for a court to entertain the claim, that would be the end of the matter. But the Ombud does not seem to have done so (although this is not clear). The Ombud went on to state further reasons for its 'decision'.

Recourse is to a court of law because the Short-Term Insurance Ombud has no jurisdiction over public liability insurance complaints

32. The Ombud appears to hold the view that in the absence of a recognised industry ombud scheme, a court of law is the only available recourse for the resolution of a complaint relating to public liability insurance.

33. The Ombud does not explain why the Short-Term Insurance Ombud does not investigate "public liability" matters.[23] Assuming that this is in fact the case, then the Ombud overlooked the provisions of amongst others (i) section 14 of the

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[23] According to the FAQ section on the Short Term Ombud's website, the Short-term Ombud does not have the jurisdiction over complaints relating to third party claims such as public liability. The Ombud's terms of reference on its website are not helpful.

Financial Services Ombud Schemes Act, Act No 37 of 2004 ("**the Ombud Schemes Act**"); (ii) the Ombud Schemes Act was repealed by the FSR Act with effect from 31 May 2021 (being a date after the applicant's complaint was submitted to it); (iii) the Ombud for Financial Services Providers was the statutory ombud in terms of the Ombud Schemes Act and had the obligations imposed by section 14 thereof, (iv) the provisions of section 211 and 212 of the FSR Act and the designation/s issued by the Ombud Council in terms of section 211(1)(a) thereof. We were not addressed on these issues and in view of our decision on the application for reconsideration, it is not necessary for us to consider whether the Ombud's view that the Short Term Ombud did not have jurisdiction over the complaint is correct or not.

The consequences of the applicant's failure to report the incident to Old Mutual in terms of clause 7(a) of the policy

34. Whilst it is far from clear from the Ombud's determination, the Ombud appears to have accepted Old Mutual's argument that the applicant had breached clause 7(a) of the General Conditions and Exceptions of the Policy, and it was therefore entitled to reject the claim. (We say this with caution, as, once again, the determination is entirely unclear, stating that it is not reasonable to report a claim after 3 years[24] and that a claim ought to have been submitted for the damage to the wall.)

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[24] Old Mutual contended that "*it was not reasonable for an insured…to report a claim more than one month after the incident which may lead to a claim*"

35. Clause 7(a) provides as follows:

> "*7. Claims*
>
> *(a) Notice*
>
> *The insured shall on the happening of any event which may result in a claim under this policy at their own expense give notice thereof to the company as soon as reasonably possible and provide particulars of any other insurance covering such events as are hereby insured and shall as soon as practicable after the event or such further time as the company may in writing allow, submit to the company a claim in writing and give the company such proofs, information and sworn declarations as the company may reasonably require."*

36. This clause imposes upon the applicant the obligation to notify Old Mutual "*as soon as reasonably possible*" of "*any event which may result in a claim under the policy*".

37. The "***event** which may result in a claim*" (our emphasis) as provided for in clause 7(a) of the General Conditions and Exceptions of the Policy was the collapse of the wall and the injury to the third party.[25] It was this event that the insured was required, in terms of the Policy, to notify Old Mutual of.

38. Clause 7(a) requires that the notice is given "*as soon as reasonably possible*". An insured cannot postpone notification to the insurer until a third-party has made a claim against the insured.[26]

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25 Snodgrass v Hart (Santam Limited Third Party 2002 (1) SA 851 (SE) at 859 -860; Thompson v Federated Timbers & Another [2010] JOL 26571 (KZD) par [22])

26 Thompson v Federated Timbers & Another *supra*.

39. Where an insurer wishes to disavow liability on the basis of a breach of a term of an insurance policy, the onus rests upon it to prove the breach; [27] the insured does not have to prove that it did not breach the term.

40. Whether Old Mutual has discharged the onus to prove a breach of clause 7 (a) is a factual enquiry. The question is thus whether Old Mutual has proven that the applicant had not given notice of the incident as soon as it was reasonably possible for it to do so in the circumstances; conversely, the question is whether Old Mutual has proven that it was reasonably possible for the applicant, in the prevailing circumstances, to have given notice earlier than 15 February 2019. And that in the circumstances it was reasonably possible for the applicant to have notified Old Mutual no later than a month after the incident.[28]

41. As to whether Old Mutual acquitted itself of the onus, the decision in Thompson v Federated Timbers & Another is instructive. Wallis J (as he then was) was confronted with a clause in the same terms as clause 7(a) of the General Conditions and Exceptions of the Policy. He found that:

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[27] Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA (A) at 645A where Hoexter JA held that "… *if an insurer denies liability in a policy on the ground of a breach by the insured of one of the terms of the policy, the onus is on the insurer to plead and to prove such breach*". See also Commercial Union Assurance Co of South Africa Ltd v KwaZulu Finance and Investment Corporation and Another 1995 (3) SA 751 (A) at 756H.

[28] In its response to the Ombud the applicant contended that it was "*not reasonable for an injured [that] was not injured himself to report a claim more than a month after the incident which may lead to a claim."*

"*The requirement that the notification be made so soon as reasonably possible must mean so soon as is reasonably practicable in all the circumstances. The enquiry is a factual one. And the answer will depend upon the circumstances of each particular case*."**.**[29]

42. There is no evidence why in the circumstances of this particular incident, it was reasonably possible for the applicant to have notified Old Mutual of the incident earlier than it had done. (Whether this is due to the Ombud not in fact investigating or for some other reason, we do not know). In correspondence to Old Mutual following the rejection of the claim, the applicant claimed amongst others that (i) the tenant had not mentioned the possibility of a claim against the applicant; (ii) the third party had not had previous contact with the applicant.[30] In a letter[31] sent to the Ombud after the determination had been made, the applicant stated that (i) despite being insured, it has often carried small losses and is not in the habit of claiming for smaller losses; (ii) its representatives were not aware of the extent of the third party's injuries; and (iii) they did not know that the third party would make a claim.

43. In its response to the application for reconsideration, and against what the applicant claimed, Old Mutual argued that *"[t] the severity alone of the incident should have prompted the applicant to act in compliance of the policy in both (i) notifying us as insurer of the incident and (ii) submitting details of the claim to us*". The same argument was raised in the heads of argument delivered by Old Mutual's counsel in

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29 p. 5 par [8]

30 Letter dated 10 April 2019.

31 Dated 9 June 2021.

the proceedings before us. It was submitted therein that "…*the incident was of such a severe nature that the usual academic questions of what is considered reasonable expectations, of a potential claim in the circumstances, become moot.*" Apart from this not having been asserted in Old Mutual's response to the Ombud, these arguments are not evidence. Old Mutual led no evidence to prove the breach and has accordingly not proven that the applicant acted in breach of clause 7(a).

44. In our view, on what is before us as well as what was before the Ombud, Old Mutual has not discharged the onus resting on it that it was exempt from liability.

45. We should say something about the submissions before us. In his oral submissions Old Mutual's counsel sought to persuade us that (i) amongst others clause 7(a) constituted what in the context of insurance contracts is loosely referred to as a "condition precedent"; (ii) that it was inserted for the benefit of the insurer; and (iii) the failure to comply therewith entitled Old Mutual to avoid the policy. It is not clear to us from the heads of argument whether Old Mutual was contending that clause 7(a) is a condition that the applicant must meet before Old Mutual becomes liable under the Policy or whether the "*positive obligation*"[32] on the insured to take certain steps constitutes a term of the policy and its breach entitles an insurer to repudiate the claim.

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[32] Par 36 of Old Mutual's heads of argument.

46. It is a misnomer to refer to a clause such as clause 7(a) as a condition precedent. The then Appellate Division in amongst others Resisto Dairy and Perreira v Marine and Trade Insurance Co Ltd [33] found that a clause such as clause 7(a) is not a condition precedent as understood in our law; it does not suspend the operation of the policy. Such a provision is an undertaking by the insured and therefore a term of the agreement.

47. The difference between a condition and a term of a contract and the onus of proof in regard to both, is clearly and simply articulated by Hoexter JA in Resisto Dairy as follows:

> *"In our law the fulfilment of a true suspensive condition must be pleaded and proved by the person who is relying on the contract, but the breach of a term in the contract must be pleaded and proved by the person who relies on such a breach as a ground for repudiating liability under the contract*". [34]

Section 27(3)(a)(i) and (ii) of the FAIS Act

48. While the Ombud did not expressly reject the complaint on the basis that section 27(3)(a)(i) read with (ii) of the FAIS Act precluded it from investigating the complaint, it is not clear to us whether its finding (although expressed as a submission) "*that it is not reasonable to report a claim 3 years after the incident which led to the claim*" was based on this provision in the FAIS Act. We address the section below assuming this to be the case.

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33 1975(4) SA 745 (A).

34 644G-H.

49. Section 27(3)(a) provides as follows:

> "*(3) The following jurisdictional provisions apply to the Ombud in respect of the investigation of complaints:*
>
> *(a)(i) The Ombud must decline to investigate any complaint which relates to an act or omission which occurred on or after the date of commencement of this Act but on a date more than three years before the date of receipt of such complaint by the Office.*
>
> *(ii) Where the complainant was unaware of the occurrence of the act or omission contemplated in subparagraph (i), the period of three years commences on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first."*

50. Section 27(3)(a)(i) sets a jurisdictional fact before the Ombud can assume jurisdiction over a complaint. The jurisdictional fact is that the complaint must not relate to an act or omission which occurred more than three years before the date of the receipt of the complaint by the Ombud. The Ombud and Old Mutual peg the date of the incident as the date of the commencement of the three-year period referred to in section 27(3)(a)(i). In our view they both misconstrue the "*act or omission*" referred to in section 27(3)(a)(i) as "*the happening of [the] event which may result in a claim under [the] policy*" (clause 7(a) of the General Conditions and Exceptions of the Policy).

51. The "*act*" or "*omission*" referred to in section 27(3)(a)(i) and (ii), must be identified with reference to the FAIS Act and not the insurance policy. The answer is found in the definition of "*complaint*" in section 1 of the FAIS Act.

52. "*Complaint*" is defined therein as:

> *"…a specific complaint relating to a financial service rendered by a financial services provider … to the complainant …, and in which complaint it is alleged that the provider …*

(a) has contravened or failed to comply with a provision of [the FAIS Act] and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;

(b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or

(c) has treated the complainant unfairly."

53. The complaint which the Ombud is required to investigate relates to an act or omission not by the insured, but by the financial services provider. The reference to an act or omission in section 27(3)(a)(i) is not a reference to the event which may result in a claim under this policy, nor is it a reference to an act or omission on the part of the insured, in this case the applicant. It is a reference to an act or omission committed by Old Mutual.

54. In our view the "act" or "omission" referred to in section 27(3)(a)(i) and (ii) is the act or omission which is related to the "complaint" as defined in the definition section of FAIS. In this case, the act would be the rejection of the applicant's claim by Old Mutual.

55. The reliance on section 27(3)(a)(i) and (ii) by the Ombud is consequently misconceived.

The finding that it is not reasonable to report a claim three years after the incident

56. The Ombud stated "*that it is not reasonable to report a claim 3 years after the incident which led to the claim*". To find something to be reasonable or unreasonable is a conclusion drawn from the facts of a particular case. We cannot

understand how the Ombud came to so conclude without evidence on what would or would not constitute a reasonable period in the circumstances.

Prescription of claim against Old Mutual in terms of the Prescription Act, Act No 68 of 1969

57. Insofar as it may have been Old Mutual's case before the Ombud, in addition to the argument that section 27(3)(a)(i) deprives the Ombud of jurisdiction, that the claim had become prescribed in terms of the Prescription Act, Act No 68 of 1969 ("**the Prescription Act**"), we deal with this argument. In its letter dated 11 September 2019 to the Ombud, Old Mutual states in paragraph 3 under the heading "**Our decision**" as follows:

> "*The claim was in fact reported to us on the 15th February, 2019 after the matter had not only become time-barred but had prescribed on the 10th January, 2019. The summons served were served [sic] on the client which keeps the claim against the client from prescribing but not the claim against us which arises from the insurance policy. The relevant rule in terms of the FAIS Act follows hereafter.*
>
> *Section 27(3)(a)(ii)*
>
> *…*"

58. The statement that the claim against Old Mutual prescribed on 10 January 2019, which is three years after the wall collapsed, suggests that Old Mutual relies on the provisions of the Prescription Act for its argument that the applicant's claim against it has prescribed; and not on the provisions of clause 7(f)[35] of the General Conditions and Exceptions of the Policy.

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[35] Clause 7 (f) reads as follows:

59. However, Old Mutual's assertion that the applicant's claim against it has prescribed arises from its failure to identify and appreciate when the debt to the applicant fell due. That is the date when prescription commences to run.[36]

60. Old Mutual's liability as described by Ponnan JA in Magic Eye Trading 77 CC t/a Titanic Trucking and Another v Santam Limited and Another[37] "*is dependent on the outcome of an uncertain future event, namely a finding by a court holding [the insured] liable to [the third party] in a specified amount. It is no more than a contingent claim at this stage*."

61. Corbett JA (as he then was) laid down the principles as to when an insured's claim against the insurer arises where the insurer indemnified the insured against loss or damage for which he may become legally liable to pay to a third party. They are the following:

> "(*1)The words "any claim", appearing in the opening portion of the condition reading "In the event of the company disclaiming liability in respect of any claim...", refer to a claim for indemnification by the insured in terms of the policy and do not include claims by third parties upon the insured in respect of which the insured is entitled to claim indemnification under the policy.*
>
> *(2)That such claim for indemnification must be for a fixed or specific amount and that, therefore, where the claim arises from the insurer's undertaking to indemnify the insured against liability*

> *"(f) Prescription*
>
> *(i) [Old Mutual] shall not be liable for any loss or damage (other than a claim under the ..., Personal accident, ... sections…) after the expiry of 24 (twenty- four) months from the occurrence of loss or damage unless the claim is the subject of a pending court action or arbitration or unless the claim is in respect of the insured's liability against a third party.*
>
> *(ii) …"*

36 Section 12(1) of the Prescription Act.

37 (775/2018) [2019] ZASCA 188 (10 December 2019).

incurred to a third party (i.e., under sec. II of the present policy) no claim can exist until such liability has been determined, either by agreement or by legal process.

(3)That the disclaimer by the insurer, from which the period of three months allowed for the institution of action commences to run, must follow on a claim by the insured of the character described in (1) and (2) above. The condition does not admit of a general disclaimer of future claims at a stage when a precise claim in a fixed amount has not, and cannot, be made by the insured." [38]

62. The applicant's claim did not arise (and the debt did not fall due) on the day the wall collapsed as Old Mutual seems to contend. It will only arise once its liability to the third party in a fixed amount has been established. The applicant's claim against Old Mutual has not prescribed under the Prescription Act.

The applicant's alleged breach of clause 2 of the General Conditions and Exceptions of the Policy

63. Insofar as the argument that the applicant breached clause 2 of the General Conditions and Exceptions of the Policy which required the applicant to notify Old Mutual immediately in writing "*... of all alterations in the risk and variations in sums insured and any other changes and obtain [Old Mutual's] acknowledgement of such notification and confirmation of cover under this policy ...*" is concerned, Old Mutual has not shown that the breach of the clause results in the applicant forfeiting the right to claim compensation or an indemnification. In any event, we are not persuaded that clause 2 imposes upon the insured the obligation to notify the insurer that the wall was in a state of disrepair. Old Mutual has not shown that the state of the wall changed since the policy was issued or renewed from time to time.

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38 Perreira v Marine Trade Insurance Co Ltd.

Clause 7(d) of the General Conditions and Exceptions of the Policy

64. Turning to clause 7(d) of the General Conditions and Exceptions of the Policy, again Old Mutual has not shown that the breach of the clause imposing an obligation upon the insured to notify Old Mutual of an impending inquest "*... in connection with the event giving rise to the claim ...*" [39] results in the applicant forfeiting the right to claim compensation or an indemnification. In any event, we are not persuaded that clause 7(d) of the General Conditions and Exceptions of the Policy applies in this case. The claim does not arise from the death of a third-party; it arises out of bodily injury sustained by the third-party. An inquest is aimed at determining the cause of death. The cause of the death of the fiancé was irrelevant to the third party's claim for bodily injury. It is coincidental (and not relevant) that the same event also resulted in the death of a person.

65. In summary, we are consequently of the view that (i) Old Mutual failed to discharge the onus that the applicant had breached clause 7(a) of the General Conditions and Exceptions of the Policy and that it was justified in repudiating the applicant's claim; (ii) the applicant's claim for compensation or an indemnity was not forfeited for the failure to comply with clause 2, 4, 7(a) or 7(d) of the General Conditions and Exceptions of the Policy; (iii) the act or omission referred to in section 27(3)(a) is not the event which gives rise to a claim for damages or an indemnification; (iv) no

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[39] Clause 7(d) of the Terms and Conditions of the Policy.

factual basis existed to conclude that it is unreasonable to report a claim three years after the incident giving rise to the claim happened; (v) the applicant's claim for compensation had not prescribed in terms of the Prescription Act when it was submitted to Old Mutual nor when the complaint was submitted to the Ombud; (vi) clause 7(f) of the General Conditions and Exceptions of the Policy do not preclude the applicant's claim for an indemnification; (vii) the disputes of fact relating to the state of repair/disrepair of the wall render it more appropriate that the complaint is dealt with by a Court.

66. There remains one issue which we must mention. In his ruling granting to the applicant leave to apply for the reconsideration of the Ombud's determination, the Deputy Chairperson of the Tribunal invited the FAIS Ombud to explain (a) why it took two years to finalise this matter; (b) whether section 211 of the FSR Act was considered; and (c) what does the death of the deceased, as noted in paragraph 3 of the decision, who is not the complainant, have to do with the matter? Additionally, an assurance was sought by the Deputy Chairperson that the full record has been filed. None of this happened. Nor, has the Tribunal been afforded the courtesy of an explanation for the Ombud's failure to respond to the questions put by the Deputy Chairperson. It is disquieting, to say the least, that the FAIS Ombud did not consider it necessary or important to respond to the questions posed by the Deputy Chairperson. The questions in paragraph (b) and (c) relate to the merits of the

Ombud's determination and may have assisted us in the adjudication of this application.

ORDER

In the circumstances:

(a) The Determination dated 14 May 2021 is set aside.

(b) The matter is remitted to the Ombud for further consideration.

Signed on behalf of the panel by the panel chair at Pretoria on 28 November 2022

SK Hassim SC