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AN APPRAISAL OF THE RECOMMENDATIONS OF THE LAW DEVELOPMENT COMMISSION ON MISREPRESENTATION IN INSURANCE LAW

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The Law Development Commission of Zimbabwe,¹ whose terms of reference were to investigate the application of the duty of disclosure and warranties in insurance law, concluded that the law obtaining to warranties was unsatisfactory. This finding was not surprising. What was disconcerting, however, was the recommendation that Zimbabwe adopt as a model for reform, the South African amendment.²

THE ZIMBABWEAN LAW ON INSURANCE WARRANTIES

Although the common law of Zimbabwe is Roman-Dutch, in insurance law, English law prevails by operation of sections three and four of the General Law Amendment Act³. In accordance with English insurance law, warranties have acquired a specialised meaning, synonymous with conditions.⁴ Warranties create conditions precedent to the incidence of liability of the insurer in the orthodox sense, require strict, exact and literal compliance and *ipso iure* provide a right to resile upon breach.⁵

This article seeks to critically analyse the proposal by the Law Development Commission in the light of selected cases in Zimbabwe.

THE DEFECTS IN THE LAW OF THE ZIMBABWEAN INSURANCE WARRANTY

Briefly, from Zimbabwean case authority, the shortcomings in the law are that:-

1. Insurers are entitled to demand strict compliance with a warranty which is not material to the risk. The prime example are procedural warranties relating to the claims process,

* I am indebted to Mr. Lovemore Madhuku, Lecturer, Faculty of Law, for his pertinent comments and recommendations on an earlier draft of this exposition. However, all mistakes or inaccuracies are mine.

1. "Proposed Amendment to the Law of Insurance" Report No. 29, September 1993, at p 5.
2. See the Insurance Amendment Act No. 29 of 1969, section 19 of which added Section 63(3) to the Insurance Act 27 of 1943. (S.A.).
3. [Chapter 8:07]. The material part of section three prescribes that: "In any suit, action or cause having reference to questions of *fire, life and marine assurance* ... the law administered by the high court of justice of England ... so far as the same is not repugnant to, or in conflict with any Act shall be the law to be administered in Zimbabwe by the Supreme Court, the High Court or other competent court". Section four prescribes that: "Nothing in sections two and three contained shall have the effect of giving force in Zimbabwe to any statute passed by the Parliament of the United Kingdom after the 11th September 1879."
4. G. Smith, "Warranties in an Insurance Policy" *JBL*. 1961; 80.
5. Reinecke & Van der Merwe, *General Principles of Insurance*, 1989 at para 161.

requiring notice of loss "immediately" or within a specified period or prescribing that action on a repudiated claim be brought within a specified time; details of the form-filling required or proof of loss, expressed as 'conditions precedent'. The subject matter of these warranties is extraneous to premium computation since premium rates vary with the kind of risk undertaken (including risk minimisation precautionary measures), not with the kind of proof furnished.⁶ These warranties are also intrinsically extraneous to the risk insured against — failure to notify a loss will not precipitate the damage to property in indemnity insurance or demise of the life insured in long-term insurance. Zimbabwean law is replete with reliance on such warranties, the most notable illustration being *Sleightholme Farms (Pvt) Ltd v National Farmers' Union Mutual Insurance Society Ltd*⁷ wherein, the insured failed to comply with a condition precedent prescribing that "On the happening of any occurrence giving rise to ... loss, damage and/or liability ... the insured ... shall forthwith give notice thereof to the Society and shall within 15 days of the occurrence or such further time as the Society may in writing allow ... deliver to the Society-

- (a) a claim in writing for indemnity in respect of the occurrence, containing such particulars and such proofs of such claim as the Society may reasonably require.

In March 1965, a storm damaged and entered a building containing Virginia tobacco, causing damage to a quantity of the leaf. The occurrence had given rise to no visible damage within the period of 15 days and no amount of vigilance could have enabled him to observe damage or to forecast its likelihood. He only became aware that damage had been sustained as a result of a storm in June 1965, and immediately notified the insurers. The Court nevertheless precluded indemnification for failure to supply a claim and particulars of loss within 15 days of the occurrence, holding that there was no basis in our law which prohibits a court from enforcing a condition precedent if it is capricious or unreasonable. Impossibility of compliance was no defence and, the fact that compliance with a condition may be impossible in many or most instances did not render it incapable *sub materia*, of being a condition precedent.⁸

2. Insurers are entitled to reject a claim for any breach of even a material warranty, no matter how irrelevant the breach may be to the loss. In other words, there is no need to establish a causal connection between breach of warranty and the loss that materialises. Thus, in *Van Huysten v Pearl Assurance Co. Ltd*.⁹ Blagden ACJ held that the breach of a condition precedent requiring maintenance of the vehicle in efficient condition (use of an extremely worn tyre) disposed of the case even though the breach had nothing to do with the claim. The learned judge, however, lamented:-

Now because of the unroadworthy condition of one tyre, which it is not suggested contributed to the cause of the accident in any way ... the defendant company were perfectly entitled to repudiate liability. But on the wider aspects of morality and fair dealing and on the special facts of the present case I think their decision to repudiate

6. EW Patterson, "Supervening Impossibility of Performing Conditions in Insurance Policies." 22 Col. LR (1922); 613 at 625.
 7. 1966 RLR 466.
 8. *Ibid.* at p. 473.
 9. 1963 R & N 822.

is open to criticism as not being quite in accordance with reputable insurance principles.¹⁰

In *Kelly v Pickering and Another*,¹¹ a motor policy was avoided for breach of warranty that the insured suffered no physical or mental disability where he failed to disclose that he was a *suspected* epileptic; although medical tests conclusively established that he had never been an epileptic. In *Petreas & Co v London & Guarantee Accident Co*,¹² liability was evaded where the insured mistakenly warranted that the tobacco was "the property of the proponents therein", whereas a proportion did not belong to the firm, but to the members individually; stored as security for moneys owing by the partners to the firm. In all three cases, the contentious breach of warranty did not instigate the loss. Thus, the worn tyre and the suspicion of (what transpired to be non-existent) epilepsy did not cause and were totally unrelated to the traffic accident and the misdescription of the proprietary interest did not ignite the fire which destroyed the insured crop.

3. It is no defence that a breach of warranty has been remedied before loss.¹³
4. Warranties entitle insurers to repudiate the policy for objectively inaccurate statements of fact even though matters warranted were beyond the insured's knowledge or means of knowledge (see *Sleightholme Farms (Pvt) Ltd v National Union Mutual Insurance Society Ltd* 1966 RLR. 467).
5. The all-or-nothing nature of the requirements for compliance, whereby non-compliance with even a minor aspect of a warranty entails avoidance of the entire policy; since partial compliance with the terms of a warranty will not entitle the insured to proportionate recovery to the extent of such compliance.¹⁴
6. There is no need to establish that the insurer was prejudiced. Thus, in *Royal Mutual Insurance Co. (Pvt) Ltd v Mubaiwa* 1989 (1) ZLR 142, the Court rejected as irrelevant the contention that the insured was entitled to succeed since the delay in notifying the accident (in breach of a condition precedent) caused no financial prejudice.
7. Since *bona fides* of the insured are irrelevant to the consideration of whether a breach has occurred, the law is capable of leading to abuse, since breach may entitle repudiation of liability as against an honest and at least remarkably careful insured. Thus, in the *Petreas*, *Sleightholme Farms* and *Pickering* cases, the claims were genuine and devoid of suspicion of fraud or impropriety. In all cases, the judges took cognisance of, alluded to any yet felt constrained to disregard the fact that the insured were men of integrity who had not calculatingly transgressed so as to deceive the insurer. The breaches of the warranties had occurred due to *bona fide* oversight or even venial innocent error.

10. per Blagden ACJ, *ibid* at pp. 831-832.

11. 1980 ZLR 61.

12. 1925 SR 90.

13. See *De Hahn v Hartley* 1 TR 343.

14. *Oblowitz Bros. v Norwich Union Fire Insurance Society Ltd* 1924 CPD 349.

HISTORY TO THE AMENDMENT OF THE COMMON LAW WARRANTY IN SOUTH AFRICAN INSURANCE LAW

The case which starkly highlighted that some insurers did not abide by moral principle¹⁵ and did avail themselves of a technical defence to defeat an honest claim, necessitating change to the law, was *Jordan v New Zealand Insurance Co. Ltd.*,¹⁶ involving comprehensive motor insurance, wherein the insured warranted that his age next birthday would be 22, whereas the correct answer should have been 23. Munnik J dismissed the contention that the incorrectness of the answer was immaterial and the statement so close to the truth as to be substantially true; holding:-

There was no room for the doctrine of substantial performance ... Partial compliance with the terms of a warranty will not entitle the insured to recover to the extent of such compliance ... Mr. Smalberger in conclusion pointed out the hardships which will be suffered by insureds who made careless and in this case probably irrelevant mistakes, if respondent's contentions were upheld. While I have a great deal of sympathy with the plaintiff I cannot in the words of Lord HALDANE in Dawson's case allow "hard cases to make bad law" ... Considerations of hardship are unfortunately for the applicant entirely irrelevant¹⁷

Outrage emanated from various legal writers¹⁸ since the incorrectness of the age was trivial and in no way contributed to either the risk (increased age, in fact, proving to indicate reduced risk in motor insurance) or loss.

With this precedent serving as the object for reform, the South African legislature modified the law on the 25th of April 1969, via the Insurance Amendment Act,¹⁹ section 19 of which added Section 63(3) to the Insurance Act 27 of 1943, providing:

Notwithstanding anything to the contrary contained in any domestic policy or any document relating to a domestic policy, any such policy issued before or after the commencement of this Act shall not be invalidated and the obligation of an insurer thereunder shall not be excluded or limited ... on account of any representation made to the insurer which is not true, whether or not such representation has been warranted to be true, unless the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said policy at the time of issue, reinstatement or renewal thereof.

The prime object of the enactment is manifest — policyholder protection against spurious repudiations based on inconsequential inaccuracies or trivial misstatements in insurance proposals, since:-

15. This 'moral principle' is clearly explained by Preston and Colyvaux, *Law of Insurance* 2nd Edition (London, Sweet and Maxwell), 1990 at pp 106-107. It is that, although the warranty exists for all practical purposes in its original form, and that the practice [of rendering all contracts of insurance subject to warranty clauses] might operate unfairly to the insured, legislation has proved unnecessary as no reputable [English] insurer will normally rely on a purely technical defence to meet an honest claim, and insurers will generally accept counsel's opinion on its merits as opposed to technical considerations.

16. 1968 (2) SA 238.

17. at p 243.

18. See PQR Boberg, "Trumping an Insurance Warranty" 86 *SALJ*, (1969), 335 to 339. A. Chashalson, "Comment on Recent Cases" *Annual Survey of South African Law*, 1968, 285 to 286.

19. No. 29 of 1969.

Legislation was compiled to strip insurance warranties of much of their beneficial effect for insurers.²⁰

An insurer's contractual right to repudiate liability on the ground of the untruth of a representation, whether elevated to a warranty or not, and in spite of anything to the contrary in the policy or document relating to the policy,²¹ was curtailed²² by converting warranties into representations which only entitle repudiation if the representation 'materially affected the assessment of the risk' at the time the policy was issued, reinstated or renewed. The insurer has to prove a probability, as apparent from the use of the words 'likely'. The onus to prove the elements bringing its repudiation within the qualification to s63(3) rests on the insurer. Protection was enhanced by retrospective effect, incorporating policies already in existence.

THE EFFECT OF SECTION 63 OF THE SOUTH AFRICAN INSURANCE ACT IN PRACTICE AND LESSONS FOR ZIMBABWE

Initial reactions were optimistic, as clearly discernible from the following extract:-

The words in the section "whether or not such representation has been warranted to be true" mean that the word "warranty" has lost its magic. The mere conversion of a representation into a warranty . . . will not relieve the insurer of the burden of proving materiality . . . warranties are no longer the shield of insurance companies they once were . . .²³

However, the judicial summation has, to a large extent, secured a reversion to the law *ante* the amendment and rendered illusory the apparent protection enshrined in the Amendment and the decision formulated and explained by the Appellate Division in *Mutual & Federal Insurance Co. Ltd v Oudtshoorn Municipality*²⁴ and *President Versekeringsmaatskappy v Trust Bank van Afrika*,²⁵ which coined the test of materiality premised on the objective criterion of the *bonus paterfamilias*. This regression has been imputed to *Qilingele v South African Mutual Life Assurance Society*,²⁶ which has elicited

20. Reinecke & Van der Merwe *General Principles of Insurance*, 1989, at para 162.

21. The parties cannot contract out of its provisions by inserting a clause rendering a warranty enforceable irrespective of materiality. This follows from the opening words "notwithstanding anything to the contrary contained in the policy ... or any document relating to such policy".

22. per Vivier JA: *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 at 376.

23. Sententia "Warranties and Life Policies", 1973 BML 21 at 22.

24. 1985 (1) SA.

25. 1989 (1) SA 208 (A) at 216D-G.

26. 1993 (1) SA 69 (A). The facts of the case are, briefly, that the insured applied for life insurance. One of the questions in the application form required prospective insureds to state whether any other application for insurance on their lives was pending or contemplated. The insured's broker answered 'no', although the insured had in fact applied on the same day for cover with two other life insurers. The application form contained a note that statements in the application constituted warranties. The insurer contended that the incorrect answer was material to the assessment of the risk and denied liability under the policy. The insured acknowledged that the answer was incorrect but argued that the insurer had to show that the incorrect statement was material in the eyes of the reasonable man and that it had failed to do so because the expert evidence (from actuaries) adduced was misdirected and irrelevant. The insured's argument was founded on the judgement in *Mutual & Federal Insurance Co. Ltd. v Oudtshoorn Municipality* 1985 (1) SA 419.

most castigation from academic and other quarters than any other South African insurance-law decision.²⁷

There are multiple facets to the judicial implementation of section 63, such as the differentiation between the 'common law duty to disclose material facts' and misrepresentation, enunciated in *Qilingele*;²⁸ and the test to determine the materiality of misrepresented facts.²⁹ The controversy inherent in the *Qilingele* decision and an indicator that it may be legally unsound and unjust is the fact that, in *Pillay v South African National Life Assurance Co. Ltd.* 1991 (1) SA 363 (decided prior to *Qilingele*), the Court expressly applied the *Oudtshoorn Municipality* test to determine the materiality of the positive representations made in that case (see at 367A-D) and held, albeit obiter, that the requirement of materiality introduced by s.63(3) did not in essence differ from the requirement of

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27. See L. Davids, "Disclosure and Insurance Warranties" 21 *Juta's Business Law*, (1994), 12; P. Bracher, P. "Material Misrepresentations in Insurance Law: Conclusions are Incorrect" *De Rebus* 1995, 472; P. Havenga, "Why Sue the Insurer? Sue the Broker" 2 *Juta's Business Law* (1994), 22; P. Havenga, "The Materiality of Representations and Non-Disclosures in Insurance Contracts" 7 *The South African Mercantile Law Journal* (1995), 90; P. Havenga, "The Test For Materiality in Insurance Law: Another Look at *Qilingele v South African Mutual Life Assurance Society*" 10 *The South African Mercantile Law Journal* (1998), 251; L. Madhuku, "The Up-and-down Fortunes of the Insured: Is There a Distinction Between Misrepresentation and Non-Disclosure?" 111 *South African Law Journal*, (1994), 477; J. Scholtz, "Materiality of a Misrepresentation or Non-Disclosure: 'Material' Differences Between South African and English Law" *De Rebus* 1995, 304; J. Scholtz, "Misrepresentations and Non-Disclosures: Appellate Division Endorses 'Unfortunate' Distinction" *De Rebus* 1996, 76; W.G. Schulze, "Beware of the Insurance Broker!" 32 *Codicillus* (1991); 13; C. Visser, "Insurance Law" *Annual Survey of South African Law* 1993; 462; C. Visser, "Misrepresentations in Insurance Applications" 2 *Juta's Business Law*, (1994), 184.
28. Which held that the test of materiality based on the opinion of the *bonus paterfamilias* as per *Oudtshoorn Municipality* 1985 (1) SA 419 applies only to cases where the insurer denies liability because the insured has failed to disclose facts. It does not apply to a case where the insurer denied liability because the insured made untrue (positive) representations and did so by way of a warranty. Such misrepresentation cases fall under section 63(3). This distinction, however, is incompatible and in conflict with the general principles of the Roman-Dutch law of delict whereunder non-disclosure and misrepresentation are, in essence, two sides of the same coin: Misrepresentation, being a type of delict takes two forms: by commission (where the applicant makes an untrue material statement) and by omission (failing to disclose a material fact) (see Joubert, *The Law of South Africa*, at p 105, where he classifies misrepresentation in insurance contracts into misrepresentation *per commissionem* and misrepresentation *per omissionem*. This unfortunate distinction in *Qilingele* was endorsed and applied in *Thevon v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A).
29. See the judgement of the learned Kriegler AJA, who delivered the unanimous judgement in the *Qilingele* case. It was held, in assessing the materiality of a misrepresentation or breach of warranty falling under section 63(3), the evidence of the particular insurer is not only relevant, but may prove to be crucial. Thus, a subjective particular insurer test was introduced. The Court explained at 75G-H that the exercise is a simple comparison between two assessments of the risk undertaken: "The first is done on the basis of the facts as distorted by the misrepresentation. Then one ascertains what the assessment would have been on the facts truly stated. A significant disparity between the two meets the requirement of materiality contained in s 63(3) of the Act." The Court stressed that "whether such criterion is reasonable is beside the point, the enquiry being directed at respondent's assessment of the risk" (see at 76B). In contradistinction, under the common law of non-disclosure, the test of materiality is the objective test of what the reasonable man would perceive as material. This subjective test for materiality has been proclaimed to be a giant step backwards, unjustifiable and incompatible with the general principles of Roman-Dutch common law (*Visser op cit* at 185, *Madhuku op cit* at 479 and *Havenga op cit* at 91). Again, in the recent decision of *Clifford v Commercial Union* 1998 (4) SA 150, the subjective test was criticised, the learned judge suggesting that the test should be the same in both cases.

materiality as it then existed at common law (see at 361I-367D), assuming that the *Oudtshoorn Municipality* test was the only test for materiality in insurance law. The *Qilingele* distinction has alternatively been described as unconvincing, bizarre, confusing and illogical.³⁰ The use of a subjective test to determine materiality, moreover, is incompatible with the general principles of Roman-Dutch common law.³¹ This South African law has been further exacerbated by the decision in *Espach v Lloyds of London*³² wherein the court distinguished between a breach of a duty to disclose at common law (at 616) and a breach of a duty to disclose which amounts to a breach of contract, holding that the materiality of a misrepresentation as well as a non-disclosure which were warranted to be true are assessed on the basis of the subjective particular insurer test. The materiality of a non-disclosure made under the common-law is assessed on the basis of the reasonable man test. These findings, however, comprise an interpretation of the statute, and, even if Zimbabwe did enact a duplicate replica of section 63 of the South African Insurance Act, such interpretations would not be binding in Zimbabwe as an aid in the interpretation of the Zimbabwean statute albeit *in pari materia* since enunciated by a different legislature.³³ What is pertinent for purposes of this exposition, is the diction of section 63 *per se*.

Relating to the substance of section 63, firstly, and foremost, as conclusively held by the learned Nestadt JA in *South African Eagle Insurance Co. Ltd v Norman Welthagen Investments (Pty) Ltd*,³⁴ the words 'on account of any representation' are indicative of the fact that the Act deals only with statements as to facts already in existence and not future intentions. The requirement that the warranty be founded on an underlying representation (a pre-contractual statement as to some fact or state of facts made prior to or at the time of completion of the contract, which does not become part of the contract but is collateral thereto) is thus central to the operation of section 63(3). Accordingly, where the language of a warranty does not contain either a statement of fact or a representation as to future conduct but is in the nature of a contractual undertaking, the provisions of that section are of no avail and the warranty will retain its common law effect.

Since the law relating to warranties is reached only "obliquely" in so far as section 63 is strictly confined to warranties based on antecedent representations (affirmative warranties), within the Zimbabwean situation, the South African amendment would have been inapplicable in the *Van Huysten* case which was founded on a promissory warranty. This submission is substantiated by *Labuschagne v Fedgen Insurance Ltd*,³⁵ wherein, since the maintenance in efficient condition warranty enjoined positive rectificatory action and was in the nature of a promissory warranty, the amendment could not be invoked; and *Waksal Investments (Pty) Ltd v Fulton*,³⁶ where the section was not applied to a condition enjoining

30. See L. Madhuku, "The Up-and-down Fortunes of the Insured: Is There a Distinction Between Misrepresentation and Non-Disclosure?" *South African Law Journal*, 111 (1994); 447 at 480; C Visser, "Misrepresentations in Insurance Applications" *Juta's Business Law*, 2 (1994); 184 at 185; Reinecke & Van der Merwe *General Principles of Insurance* (Butterworths, Durban), 1989 at 773-774.

31. See Reinecke & Van der Merwe *General Principles of Insurance*, 1989 at p 774.

32. 1996 CLR 603 (W).

33. See the comments by Spenser Wilkinson CJ in *Monteiro v Acme Construction Company* 1960 R & N 257 (Ny) at 260.

34. 1994 (2) SA 122.

35. 1994 (2) SA 228.

36. 1985 (2) SA 877.

taking all reasonable precautions for the maintenance and safety of the property and keeping it in a proper and efficient state of repair.

Moreover, since future compliance with a warranty is usually only enjoined by promissory warranties, the Zimbabwean problem no. 3 will remain omnipresent. Since promissory warranties fall outside the parameters of section 63, the fact that breach of warranty had been rectified at the time of loss will nevertheless not salvage Zimbabwean policies from vitiation.

Secondly, the amendment could not be held to apply to time notification conditions because the subject-matter is not a representation but an undertaking to do something. Thus, in *Santam Insurance Ltd v Cave T/A The Entertainers*³⁷ involving loss by burglary, successful reliance was placed on non-compliance with a condition precedent requiring "any difference as to the amount of any loss" to be referred to arbitration and that action be commenced within three months after disclaimer or the award of the arbitrator. The amendment would thus exert no influence on the outcome of the decision arrived at in the *Sleightholme* case.

Thirdly, the section does not require causal connection between the misrepresentation and the loss as per *Waksal Investments (Pty) Ltd v Fulton*, where the learned Nesdaft J acknowledged that the clause enjoining positive rectificatory action:-

was a warranty and that, if it was breached, defendant was, irrespective of causation, entitled to repudiate liability under the policy.³⁸

Thus, in *Qilingile v South African Mutual Life Assurance Society*,³⁹ confirmed on appeal in *Qilingele v South African Mutual Life Assurance Society*,⁴⁰ Kriegler AJA held the insurer was entitled to avoid the policy for breach of warranty that no other application for insurance on his life was pending or contemplated although the failure to disclose previous applications for insurance in no conceivable manner contributed to his demise due to multiple stab wounds five weeks later. In *Labuschagne v Fedgen Insurance Ltd*,⁴¹ the innocent misrepresentation of the model of the insured vehicle did not cause its loss by theft. The section thus offers no reprieve to Zimbabwe's problem 2.

Fourthly, the section has obviated the distinction between *bona fide* and innocent misrepresentations: Provided a misrepresentation was material; even if innocently and inadvertently made, the contract may be avoided. Thus, in *Labuschagne v Fedgen Insurance Ltd*, the Amendment proved of no avail to alleviate the lot of the insured whose innocent misrepresentation eventuated from circumstances beyond his control (the insured having been duped by the car salesman who was equipped with false registration documentation, into believing that the vehicle purchased was new — a 1989 model, whereas it was a 1986 model.) Conversely, if a misrepresentation was *mala fide*, provided it was not material, the contract will be indefensible. Thus, although *prima facie* section 63 would apply to the *Pickering* and *Petreas* Zimbabwean cases (wherein both warranties were founded on

37. 1986 (2) SA 48.

38. *supra* at p 883.

39. 1991 (2) SA 399 (W).

40. 1993 (1) SA 69.

41. 1994 (2) SA 228.

representations), it is conceivable that the materiality of the misrepresentations would be established using the 'reasonable insurer' test (or even the 'reasonable insured' test for that matter;) and since section 63 does not prescribe proof of causal connection between breach of warranty and loss or that the misrepresentation be *mala fide* or at least grossly negligent, it is more than probable that the outcome in these cases would remain constant even if section 63 were applied. It is thus apparent, that legislation requiring causal connection *in addition to* materiality would be more efficacious.

Fifthly, section sixty-three has not incorporated any provision providing for proportionate recovery commensurate with the actual risk underwritten so that the all-or-nothing attribute of the law persists impervious.

Sixthly, prejudice appears to be an irrelevant cogitation so that in *South African Eagle Insurance Co. Ltd v Norman Welthagen Investments (Pty) Ltd*, a multi-peril motor insurance policy was avoided for breach of a warranty that:-

warranted that all vehicles left in the open must be locked at all times out of business hours and all keys must be removed and kept in a locked safe

when instead they were retained in a cupboard in the insured's (locked) premises. This notwithstanding that since this transgression did not materially affect the assessment of the risk, the insurer could not be construed as having suffered prejudice by the breach.

Seventhly, impossibility of compliance is no defence. The only issue is materiality or otherwise of the representation. Thus, in *Labuschagne*, the fact that the insured was the innocent victim of circumstances and had been misled into believing that the vehicle purchased was brand new whereas it was two years old, was of no consequence.⁴² In *Waksal Investments (Pty) Ltd v Fulton*,⁴³ the fact that the latent nature of a roof defect prevented the insured from becoming aware of the need to repair, did not absolve him from breach of warranty to attend to the maintenance and safety of the property.⁴⁴ The section would thus be of no avail within the Zimbabwean context of the *Sleightholme* case.

In conclusion, South African insurance companies may no longer repudiate liability under a motor vehicle policy because the insured has given his age as twenty-two years when he was in fact 23 years old. This *per se*, however, represents no improvement on the Zimbabwean law, since, already, section 52 of the Insurance Act [Cap 24:07] provides for a proportionate recovery calculated by reference to the true, as opposed to the mis-stated age of the proposer at the time of the proposal in life insurance. This principle of proportionality is not confined to life insurance and is also extended to funeral policies.⁴⁵ As regards warranties, it cannot yet be said that full clarity has been reached; and:-

42. Although Marais, J, conceded that; in all probability, if the correct facts had been given the risk would have been assumed, and implored the insurer as a matter of ethics and common decency, as opposed to law, to give earnest consideration to tendering a gratuitous payment to the insured (who had acted in good faith) an amount equivalent to the actual value of the Mercedes Benz; as occurred in *Santer v Poland* [1924] 19 LiLR 29 (KB).

43. 1985 (2) SA 877.

44. Although the Court salvaged the policy by reliance upon the *contra proferentum* and related rules.

45. See section 58 of the Insurance Act which provides that, where a funeral policy was issued on the basis of an incorrect statement of the age of the person whose life is insured, the benefits under the policy shall not be affected thereby, but the premiums payable under the policy from the date on

Nevertheless, insertion of warranties into policies remains favourable to insurers.⁴⁶

It can only be surmised that the parliamentary committee tasked with the amendment focused their efforts in too confined a manner so that the paramount concern was to eradicate the possibility of the perpetuation of the *Jordan* decision. Analysis of other factual scenarios involving promissory warranties appear to have been overlooked. This truism is clearly conceded by Ntsaluba when he affirms:-

The change brought about by s 63(3) is that materiality is now required for a reliance on breach of warranty ... The other features of insurance warranties, however, remain unaffected. Only materiality was introduced to warranties.⁴⁷

It is unfortunate that section 63(3) does not go far enough even on this single target of materiality since it is evident from the *Labuschagne* decision that the insurer's option to cancel is not restricted to where it would not have accepted the risk at all.

CONCLUSION

It cannot be controverted that, due to substantive inadequacies whereby, in practice the change in the law relating to insurance warranties are far less drastic than might *prima facie* appear to be the case, section 63(3) has not fully redressed the balance of bargaining power between insurer and consumer.⁴⁸ The South African amendment would, if incorporated into Zimbabwean law, provide an infrequent and insignificant rectificatory effect on the law, if at all. In this regard, it is salient that the section has been subjected to a myriad of stricture: see *Pillay v South African National Life Assurance Co. Ltd* wherein the learned judge considered the outcome harsh and inequitable and suggested an amendment of the subsection, proposing two alternatives;⁴⁹ *Gordon & Getz on the South African Law of Insurance* 4th ed (1993); MFB Reinecke & SWJ van der Merwe *General Principles of Insurance* (1989) para 168; and the *Report of the Commission of Inquiry into the Winding-up of the Short-term Insurance Business of the AA Mutual Insurance Association Limited (the Melamet Report)* (RP 82/1988) para 10.1 at 218. Moreover, the Long-term Insurance Bill 78 of 1997 and the Short-term Insurance Bill 79 of 1997 have been contrived to clarify the legal chaos ensuing from section 63(3).

With this hindsight knowledge, it is fortunate (only in this instance), that the wheels of legislative change turn slowly in Zimbabwe, so that the Commission's recommendations,

which the person became insured shall be deemed to be those which would have been required had the age been correctly stated, and the insurer liable under the policy shall be entitled to recover from the owner of the policy any resultant shortfall in the premium actually paid; or, refund to the owner of the policy any resultant over-payment of premiums.

46. Reinecke & Van der Merwe *General Principles of Insurance*, 1989, at para 162.

47. M.T. Ntsaluba, "A Critical Evaluation of the Insurer's Remedies Arising from Misrepresentation and Breach of Warranty" *SA Merc LJ* 8 (1996); 331 at 345.

48. A. Borrowdale, "Non-Disclosure and Breach of Warranty in Insurance Law" *MB* 1981; 143 at 145.

49. *Supra* at 371C. The learned judge suggested that a proviso could be introduced to entitle and limit an insurer to deduct from the proved claim the additional premium it would have charged throughout the currency of the policy had the true facts been known at the time of issue of the policy; or the French 'proportionality rule' could be adopted, in terms of which the insurer has to pay the proportion of the proved claim which the premium actually paid bears to the one it could have levied had it been in possession of all material facts.

albeit duly submitted to the Minister of Justice, Legal and Parliamentary Affairs,⁵⁰ have not yet come to fruition. It is humbly submitted that the Commission erred in exhorting the South African amendment, and would be best advised to retract the proposal and reconsider alternative options for reform. The most antonymus starting point would be recourse to the legislation of the jurisdiction renowned as the most progressive in insurance law, namely Australia, which has infused the concepts of proportionality (pioneered by the French legal system)⁵¹ and causation and relegated the warranty and condition precedent to liability to the niche of a representation.⁵²

50. In terms of the Law Development Commission Act [Chapter 1:02].

51. Article L 113-9 of the Code Des Assurances provides that where a policy may be avoided due to a material warranted misrepresentation, instead of avoiding the claim completely:-

If the insured is in breach of the obligation ... because he fails to disclose all material circumstances known to him or because he disclosed "them inaccurately (but has not in either case acted fraudulently), the insurer does not automatically have the right to repudiate the contract of insurance". Instead, the insurer is bound to pay that proportion of the loss which the premium paid bears to that which would have been payable if the risk had been completely and accurately described. This 'notional premium' is determined on equitable principles by the Court; facilitated by the comprehensive system of tariffs for premiums, corresponding to the risk to be insured against.

52. See s. 24 of the Insurance Contracts Act, 1984. See also Francis Marks, & Audrey Bella *Guidebook to Insurance Law in Australia* 2nd Edition, (1987.) Kelly & Ball *Principles of Insurance Law in Australia and New Zealand* (1991); K Sutton, *Insurance Law in Australia*, 2nd Edition (The Law Book Company, Ltd), 1991.



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