The Insurer's obligations in relation to the rights of third parties with specific reference to Life and motor-vehicle insurance policies.

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Extension clauses in Motor-Vehicle Insurance Policies

The standard extension clause will contain a declaration to the effect that the insurer will not only indemnify the insured against liability to third parties, but also any person who drives or uses the insured motor-vehicle with the consent of the Insured.

Scope of the extension Clauses

This is the area that has posed some considerable difficulty, particularly to the extent that it affects the Insurer's subrogation rights against the authorised driver where such driver has wrongfully caused bodily injury to or the death of the Insurer or damage to his property, including the insured motor vehicle.

Generally, the scope of the extension clause will depend on the policy wording, bearing in mind that in establishing the true meaning of the extension clause, words used in the policy must be given a meaning in their plain, ordinary and popular sense.[1]

Should it occur that two interpretations are equally reasonable, as a matter of law, the one that is more favourable to the Insured ought to be adopted.[2]

Therefore, the plain question that is associated with the scope of the extension clauses is whether or not the authorised driver is indemnified against claims arising from bodily injury to or the death of the insured or damage to the insured's property arising from his (the authorised driver)'s negligence?

The Law

The question arose in the case of ***Croce V Croce*** (*Supra*).

Facts

Defendant, driving the car with Plaintiff's permission, and with the knowledge of the indemnity extended to permitted drivers under the extension clause, of which he had been informed by the plaintiff, negligently damaged the car to the extent that it needed to be replaced. Thereafter, the Plaintiff undertook that any claim which the plaintiff had against the defendant would be preferred against the Insurer. The insurer indemnified the plaintiff under the policy of insurance concerned. Having done that, the insurer, using the

[1] Quick V Goldwasser 1956 (2) S.A 525 @535

[2] Croce V Croce [1940] TPD 251 @ 262 (citing Digby V General Accident, Fire and Life Assurance Corporation Limited (1940 1 K.B 514)

name of the insured, sued the Defendant for damages. The Defendant pleaded that he was indemnified under the extension clause. He argued that the Insured was entitled and bound to claim and receive from the insurer such damages on Defendant's behalf and was therefore not entitled to recover from the Defendant.

The extension clause concerned provided in material terms as follows;

a) Section II headed " Liability to third parties" indemnified the insured in the event of an accident caused by or through or in connection with such car against "all sums , including claimant's costs and expenses, which the insured shall be legally liable to pay in respect of
    i) Death or bodily injury to third parties (with certain exceptions).
    ii) Damage to property other than property belonging to, held in trust by, or belonging to a member of the insured's household"
b) An extension clause forming part of Section II provided: *"In terms of and subject to the limitations of and for the purposes of this section, the company will indemnify any person who is driving such motor car on the insured's order or with his permission"* (subject to limitation)

The Decision

The Court determined that on a true construction the terms of the extension clause included an indemnity to the Defendant in respect of the damage he inflicted on Plaintiff's car. In this case, the Supreme Court of South Africa held that the driver was entitled to indemnity in respect of the insured's vehicle. However, it must be noted that the court did not at all investigate the relevance of the express exclusion of the property belonging to the insured from cover under section II of the policy.

It is mainly because of that reason that the conclusion of the Supreme Court of South Africa in the *Croce (Supra)*case was departed from in the case of *Quick V Goldwasser 1956 (2) SA 525 (SR)*

Quick V Goldwasser

In this case, the policy of insurance concerned provided under Section I that the insured would be indemnified against loss of or damage to any motor vehicle described in the schedule. Under Section II, which was headed "Liability to third Parties", the insurer undertook to indemnify the insured in the event of any accident caused by or through or in connection with any motor car described in the schedule against all sums including claimant's costs and expenses which the insured would become legally liable to pay in respect of (i) death of or bodily injury to any person excluding death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment, (ii) damage to property other than property belonging to the insured or held in trust by or in the custody or control of the insured. The policy further provided that in terms of and subject to the limitations of and for the purposes of this section *"(1) the*

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company will indemnify any person who is driving or using such motor car on the insured's order or with his permission provided (a) that such person is not entitled to indemnity under any other policy;"

The insured had given her car to the Respondent to repair and authorised him to drive in the course of effecting such repairs. An employee of the Respondent, while driving the car in the course of his employment, had been involved in an accident which had been due to his negligence. The car was damaged. Having indemnified the insured, the insurer exercised its subrogation right and sued the driver in the insured's name to recover damages arising from the damage to the insured's car.

The Decision

After acknowledging that *"The law in this regard is extremely confused as different judges have taken different views in interpreting insurance policies similar to the one now under consideration",*[3] the Rhodesian High Court overturned the ***Croce*** decision and determined that on a true construction of Section II of the policy concerned, the insurer did not intent to give any cover for claims made by third parties arising out of the damage caused to the property of the insured. The basis of the decision was that "*The motor car in question is the property of the insured and therefore it seems to me that sub-para (ii) of sec.II excludes damage to such car from the indemnity given to the authorised driver by the indemnity clause"*[4]

From the ***Quick*** decision, the position of the law is that where the standard extension clause expressly excludes from cover damage to the property of the insured, and Insurer who has indemnified the insured will be entitled to recover damages from the authorised driver concerned. Such driver cannot claim an indemnity under the extension clause.

Claims arising from bodily injury of, or the death of the insured.

In respect of claims arising from bodily injury to, or the death of the insured arising from the negligence of the authorised driver, the scope of the extension clause was scrutinised in the case of ***Horne V Newport-Gwilt and Another***[5]

Horne V Newport-Gwilt and Another

Plaintiff claimed damages sustained when her car being driven by the first defendant with her permission was involved in an accident. She averred that upon a true construction of section II clause 1 read with condition 7 of her policy of insurance with the second defendant, she was entitled to claim for and on behalf of the first defendant against the insurer whatever amount, including costs, the first defendant might be ordered to pay the Plaintiff. Section II clause 1 read as follows; *" The company will indemnify any person*

[3] Page 528
[4] Page 529
[5] 1961 (3) S.A 342 (SR)

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who is driving or using such motor car on the insured's order or with his permission, provided (a) that such person is not entitled to indemnity under any other policy; (b) that such person shall as though he were the insured observe, fulfil and be subject to the terms and conditions of this policy…(c) that such person has not been refused any motor insurance" Condition 7 provided that *"unless otherwise expressly stated by endorsement hereon nothing contained herein shall give any rights against the company to any person other than the insured…..The extension of the company's liability in respect of any person other than the insured shall give no right of claim hereunder to such person, the intention being that the insured shall in all cases claim for and behalf such person and the receipt of the insured in any case shall absolutely discharge the company's liability hereunder"*

The insurer excepted to the claim, arguing mainly that upon a true construction of the policy, it was not liable in law to indemnify the first Defendant in respect of bodily injury suffered by herself.

The Decision

The court determined that the extension clause did purport to provide an indemnity against liability of the authorised driver towards the insured for personal injury to the latter. Reliance was placed on the earlier decision in the case of *"**Digby V General Accident Fire and Life Assurance Corporation Ltd***[6] in which the court, interpreting an identical clause, remarked that; "*The authorised driver is to be indemnified "in like manner" to the policy-holder, not merely against such claims as could be made against her. In my view, the true reading of sub-sec (3) is that, just as the policy-holder is to be indemnified against any claim made on her by a person other than herself, so the authorised driver is to be indemnified against any claim made on him by a person other than himself.*[7]

Summary

In respect of claims arising from damage to the insured's property (including the insured motor-vehicle), the standard extension clause has been construed as not providing indemnity to the authorised driver in respect of damage to such property arising from the driver's wrongful action while driving the insured motor vehicle. This position is premised on the basis that the standard extension clause expressly excludes such property. An insurer exercising its subrogation rights will therefore be entitled to recover damages against the authorised driver in respect of damage to the insured's property. But then, it has to be emphasised that the construction to be accorded to such clause will depend on the precise wording of the clause concerned.

In respect of bodily injury to, or death of the insured arising from the driver's negligence while driving the insured motor-vehicle, the position is that the driver is indemnified

[6] 1943 A.C 121

[7] Page 144 (per Lord Porter)

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against claims arising from such bodily injury or death. The basis of that position appears to be that such driver enjoys the same extent of cover as the insured himself, which cover was construed to include claims made against him by any other person except the driver himself.

The Insurer's obligations in respect of third party beneficiaries under Life Policies

The scope of this discussion is to look into the obligations of the insurer towards a third party beneficiary nominated for proceeds as opposed to one nominated for ownership in respect of non-indemnity policies of insurance, with specific focus on the payment of the proceeds of the policy concerned. The problem associated with discharge by the insurer of such obligations usually arises in instances where there is doubt as to whether at the time that the payment to the third party nominated beneficiary falls due, the nomination had been revoked or not.

It is imperative therefore that the principles relating to the revocation of nomination be examined.

Revocation of nomination

Subject to the express provisions of the policy concerned, revocation of nomination can either be by express words or by conduct. It is a unilateral decision of the insured duly conveyed to the insurer and can take place any time prior to the due acceptance of the nomination by a beneficiary.

Revocation by conduct

The South African case of ***Hees NO V Southern Life Association Ltd***[8] lays down the principle that a subsequent marriage in community of property is not considered to constitute a revocation by conduct of a prior nomination in favour of another person.

A bequest of the specific policy may, depending on the facts, be construed as constituting revocation of the nomination by conduct. This is the position adopted by the court in the case of ***Wolmarans En' Ander V Du Plessis En Andere***[9] where the Applicant's son had taken out two life insurance policies with the second Defendant. The insured had nominated the first Respondent who was his wife as the beneficiary under the policies. Clause 4 of the nomination documents provided that *"The policy holder can revoke the nomination without the consent of the beneficiary(ies) by giving written notice thereof to the head office of the insurer before the death of the life insured."* Years later, the insured in his will left the policies concerned to his parents, without having formally revoked the prior nomination in terms of clause 4 of the policy. The insured had divorced his wife two months before executing the will. Upon his death, both the Applicants claimed the proceeds of the policies from the insurer.

[8] 2001 (1) S.A 943(W)
[9] 1991 (3) SA 703 (T)

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The Decision

The court determined that the interpretation that had to be given to clause 4 of the nomination document in the context of other provisions thereof and of the policies was decisive. The intention disclosed thereby was not that the policyholder could only revoke the nomination if the insurer was given written notice thereof before the death of the insured; it was a method which the parties contemplated could be adopted if the insured wished to revoke the nomination. The Court further determined that the parties had not intended that revocation by means of a will of the insured was to be excluded, even if that revocation only came to the notice of the insurer after the death of the insured.

Surrender of policy with a nominated beneficiary

The surrender of a policy with a beneficiary nomination is a form of revocation by conduct.[10] However, such revocation can only occur prior to the acceptance of the nomination by the beneficiary. Once the beneficiary has accepted the nomination, the beneficiary's right to the proceeds supersedes the right of the insured. The right to apply for the surrender will then, only be exercisable by the beneficiary.

Express revocation of nomination

The formalities that ought to be observed in order to perfect the revocation of nomination of a beneficiary are usually provided for in the policy concerned. The failure to observe those formalities might mean that the purported revocation will be of no force and effect, and the insurer may be obliged to pay the proceeds to the nominated beneficiary. Those formalities almost invariably include that a notice of revocation be given in writing and that it must reach the insurer before the death of the life insured.[11]

Some Insurance authors[12] suggest that the requirement of formal notice should be construed as being in favour of the insurer and not as a substantive requirement in favour of the nominated beneficiary. It is simply inserted for the sake of proof. That suggestion is sound and accords with the basis of the court's decision in the *Wolmarans* case *(supra).* In fact, the Wolmarans case (supra) lays down the principle that an insurer is free to waive formal notification.

When called upon to make a decision in relation to whether or not to accept the insured's revocation of nomination, as a matter of principle, preference should be given to the insured's true intention rather than the prescribed formality.[13]In the event of competing claims, the insurer will be well advised to withhold payment and institute procedural measures, which may include obtaining a court order for directions.

[10] MFB Reinecke (etal)-South African Insurance Law at page 441
[11] Hees NO (Supra)
[12] Reinecke etal (Supra) at para 19.103
[13] Hees NO (Supra) at page 708E

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It is also critical for the insurer to understand that as a basic principle, the right to revoke the nomination of a beneficiary is not only restricted to the policy-holder, but may extent to his successors in tittle, except the executor of his estate.[14] Such successor will ordinarily include a Curator (if he is insolvent), a nominee who accepts nomination for ownership, or a cessionary if he cedes.

Summary

Before venturing to pay in terms of a life insurance policy with a nominated third party beneficiary, an insurer is obliged to ensure that the beneficiary nomination is valid in the sense that it has not been revoked at the time of acceptance by the nominee. Where a willingness to revoke the nomination has been exhibited by the policyholder or his successor in tittle, the insurer ought ensure that revocation is valid, bearing in mind also that preference ought to be given to the insured's true intention, rather than the prescribed formalities of revoking the nomination. It is imperative that the insurer must discharge the obligations highlighted because a payment to a party who is not the truly intended beneficiary may not discharge the insurer's debt under the policy concerned.

[14] Reinecke etal at para 19.107

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