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MINI-DISSERTATION

"THE NEED TO REFORM PROMISSORY WARRANTIES IN SOUTH AFRICAN INSURANCE LAW"

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TABLE OF CONTENTS

1. INTRODUCTION

As a practicing attorney, my insurance sector clients often request that I advise them on whether a policy should respond to a claim, in circumstances where one of their policyholders has not complied with, or has breached, a warranty contained in an insurance policy.

A recent example was where an insured was the holder of a domestic policy in terms of which he enjoyed public liability cover. His dog had bitten a person who had entered his property. The injuries were minor, and the policyholder did not think anything would come of it, and consequently did not notify his insurer of the event. Two years later, a High Court summons was issued against the policyholder for a claim for R1 000 000.00, which claim had arisen as a result of the injuries caused by the dog bite incident. The insurer rejected the claim, as it had not been notified of the event. The insured had therefore breached a promissory warranty contained in the policy, in accordance with which he undertook to notify the insured of a potential claim, should such arise. Notification of the event was a mandatory condition in the policy.[1] (Consideration will also be given in the course of this study to whether a promissory warranty is the same as a condition precedent,[2] or whether such a condition precedent even constitutes a warranty.)

Lawfully, the rejection was valid. In reality, however, the outcome was potentially devastating for the insured. If liability was proven, it would ruin the insured financially. Such a state of affairs seems grossly unfair, as the insured had complied with all the material terms of the policy, more particularly, by diligently paying his premium. He was also an uneducated person who was managing a garden service from his home. He did not possess a legal qualification, and did not have the necessary experience to foresee that such an incident constitutes the type of event envisaged by the insurer as one that could lead to a claim. As the position currently stands, prejudice or the absence thereof to the insurer, is irrelevant and the courts would uphold such conditions entered into," however capricious or unreasonable it may appear to be".[3]

There is a distinction between a so-called 'affirmative' warranty and a 'promissory' warranty. For introductory purposes, however, an 'affirmative warranty' is where a

[1] *Bulldog Hauliers (Pty) Ltd v Santam Insurance Ltd* 1992 (1) SA 418 WLD at 422E-F.
[2] *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 SCA at 493J-494A.
[3] *Sleightholme Farms v National Farmers Union Mutual Insurance Society Ltd* 1967 (1) 15R at 18B-D.

policyholder warrants that a certain state of affairs represents, and at all material times in the past represented, the truth.[4] This warranty is usually made at the inception of a policy, and is what the insurer relies on to issue a policy. A 'promissory warranty', on the other hand, relates to the future,[5] in that the policyholder undertakes to do something, or refrain from doing something, or to ensure that the status quo remains in place.[6]

Much has been written in respect of affirmative warranties, particularly relating to disclosure. Similarly, the courts have agonised over the impact of the breach of such a warranty, and the precarious position it would place a policyholder in, in instances where the breach is not material but still allows an insurer to void the policy.[7] There has also been consequent legislative reform in this regard.[8; 9]

The focus of this study will therefore be on whether promissory warranties have received the same degree of attention and scrutiny by both the courts and the legislature, and whether law reform is necessary in our increasingly consumer protected society.

2. WHAT CONSTITUTES A WARRANTY IN THE CONTEXT OF THE SOUTH AFRICAN LAW OF CONTRACT?

"Spies? Thieves? Assassins?" This was the response of the Goblin King, on being told that there were intruders into his lair under the Misty Mountain, in JRR Tolkien's *The Hobbit*.[10] The King didn't know exactly who or what the unwelcome visitors were, but he knew that they had something in common, in that they must be bad in some way.

A law student, when faced with the law of contract, must surely feel the same bewilderment. "Representations? Conditions? Warranties?" They all have something to do with contracts, but what, exactly? Fortunately, or unfortunately (depending on

[4] Reinecke *et al* (2013) para 15.23.
[5] Nienaber *et al* (2009) para 12.24.
[6] Reinecke supra para 15.24.
[7] *Pillay v South African National Life Assurance Co Ltd* 1991 (1) SA 363D at 370I-J. Although the matter primarily concerned the materiality of a non-disclosure, the truthfulness and completeness of the disclosure was warranted or 'guaranteed' by the policy holder. (See at 364H.)
[8] Rule 21 of the Policy Holder protection Rules (Long-Term Insurance), 2017, gazetted under Government Notice 1407 in Government Gazette 41321, dated 15 December 2017.
[9] Section 53 of the Short-Term Insurance Act 53 of 1998.
[10] Tolkien JRR *The Hobbit* (1937) George Allen & Unwin Ltd, Great Britain.

your point of view), it seems that not only law students are challenged by understanding and distinguishing between these legal concepts. Even esteemed legal scholars appear to grapple with these phenomena. *Christie's The Law of Contract in South Africa* states that "…not all statements made in the course of formation of a contract are necessarily terms, and it may be a matter of some difficulty to decide which are and which are not".[11] These concepts present a challenge to even the most respected jurists. Cameron JA (as he was then) stated as follows: "It may be difficult to determine whether a written provision is intended to embody a promise to do or not to do something, or whether, without itself constituting an undertaking, it merely bears upon what the parties have undertaken".[12]

When parties contract with one another, they make statements to each other. Such statements are intended to persuade the other party. The test is whether the parties intend to stand and fall by such statements. When there is an intention to be bound by the statement, the statement becomes part of the contract. In other words, there are consequences attached to the statement. Perhaps, therefore, the reference to the Goblin King's exhortation is not that irrelevant. He knew that, if the intruders were spies, thieves or assassins, there would be negative consequences for him, as opposed to if the intruders were, for example, merely musicians, traders or travellers passing through his kingdom.

A traveller could, perhaps, be viewed as a mere representation would be in a contract, as he would be of no material consequence to the king. However, an assassin, like a warranty, would be bound to the king through the consequent death of the king, if the assassin's mission was successfully executed. The king would take cognisance of both the traveller and the assassin, but would only attach weight to one.

Therefore, in terms of a contract, a representation does not form a part of a contract, whereas a warranty does.[13]

The test for differentiating between a warranty and a representation is the intention of the parties, in other words, whether or not they intended for the 'promise' or

[11] GB Bradfield *Christie's The Law of Contract in South Africa* (2016) para 5.1.2.
[12] *ABSA Bank v Vera Helena Swanepoel NO* Unreported (246/03) [2004] ZASCA 60 at para 7.
[13] Hutchison *et al* (2017) para 4.2.1.1; Kerr (2002) 148.

'undertaking' to form part of their contract.[14] To be even more specific, the determination lies in whether the 'promise' or 'undertaking' was intended to have contractual effect.[15]

What, then, is the difference between a warranty and an obligation, if any? Selke J in *Petit v Abrahamson (II)*[16] states that "… an undertaking or warranty in this relation denotes a promise which gives rise to a contractual obligation". In other words, the promise is the warranty, and that which has to be done (or refrained from being done) is the obligation. The obligation is the operational part of the promise.[17]

It is also necessary to distinguish a warranty from a condition. A condition is "… a term that qualifies a contractual obligation in such a manner as to make its operation and consequences dependant on whether an uncertain future event will happen or will not happen".[18]

In conclusion, therefore, to assist the law student, the academic, the judge (and the Goblin King), the warranty is the intentional promise or undertaking, the obligation is what physically must be done or not done and the condition is the 'when or whether' the physical obligation must be fulfilled.

Still, whether any of this is of any assistance to the man on the street, remains doubtful!

[14] Ibid.
[15] *ABSA Bank* supra.
[16] 1946 NPD 673 at 679.
[17] ABSA v Swanepoel supra.
[18] Hutchison supra para 10.3.5.

3. PROMISSORY WARRANTIES IN THE CONTEXT OF THE SOUTH AFRICAN LAW OF INSURANCE: A CRITICAL HISTORICAL PERSPECTIVE[19]

As a point of departure for this section, just a reminder, again, that a promissory warranty is an undertaking by the insured to do something, or to refrain from doing something in the future, or to ensure that the status quo is maintained.[20]

One of the earliest South African authorities in relation to a promissory warranty is the matter of *Calf v Jarvis and Others*.[21] In this matter, the insured, a wine merchant in Cape Town, had warranted that he would only keep spirits on the insured premises for the purpose of producing his own wine, and not for retail purposes. Based on this warranty, the insurer granted a reduction of premium. Four months later, the premises burnt down. It was conceded by the insured that he, in addition to using the spirits on the premises for the production of his own wine, had in fact also been selling some of the spirits. The insurer accordingly rejected the claim. The argument by the insured[22] was that the sale of the spirits did not cause or contribute to the spread of the fire, and in fact minimised the insurer's risk, as there were less spirits on the premises as a result of the sale of a portion of the spirits. The insured also argued that the endorsement on the policy was only a representation, and did not constitute a warranty to be written into the policy. The insurer's case[23] relied mainly on English authorities, supported by Dutch and French authorities (both of which affirmed the English position), that once the warranty was inserted into the policy, it became binding, and that if the insured wished to be indemnified, compliance with the warranty was essential. The further argument in the matter was not whether the risk was lessened, but rather whether it was altered. In a counter-argument, the insured's counsel expressed his misgivings about whether the insurer would have objected if they knew spirits were being sold.

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[19] Due to the limitation set on the length of this dissertation, the critical perspective was considered from an indemnity insurance point of view. However, the same challenges arise in the case of non-indemnity and life insurance. In this regard, Nienaber *et al* in their work, *Life Insurance in South Africa*, state in paragraph 28: "The legislative provision removed the sting from affirmative warranties, but brought no relief in the case of promissory warranties".

[20] See Section 1 *Introduction* above.

[21] Supreme Court Cases 1850-1852 (1850) 1 Searle 1 in Van Niekerk JP *Digest of Insurance Law Cases on South African Insurance Law 1828 -1909* (2010).

[22] Ibid 3.

[23] Ibid 4.

The names of the honourable justices presiding over the case were not recorded in the law reports. However, the finding[24] was that, as the warranty was made for purposes of securing a reduction in premium, it became a condition inherent to the policy. Factually, the Court also found that, in view of the fact that the insured was retailing in spirits, it stood to reason that there would have been additional quantities of spirits on the premises. Although it is not explicitly reported in the relevant law report, it could reasonably be inferred that the Court was of the view that this fact influenced the scope of the risk. The Court found that it was not the sale of the spirits that vitiated the policy, but rather the fact that the insured had brought onto, and kept, additional spirits for retail purposes on the premises, in violation of the contract. As such, the Court upheld the insurer's rejection of the claim.

Of importance in this judgment is that the Court deemed the fact that the increased stock on the premises influenced the scope of the risk and also that the inclusion of the warranty influenced the premium payable. As will be seen in some cases to be discussed later in this study, the courts simply considered whether the warranty was breached or not, and accordingly confirmed the right of the insurer to avoid the policy without considering whether the manner of the breach influenced the risk.

In *Kannemeyer N.O. v the Sun Insurance Company*,[25] the matter related to a 'condition precedent', where the insured was required, within 15 days of the insured peril occurring (in this instance, a fire), to render an account for everything that was destroyed. The word 'warranty' did not appear in the judgment, but an 'undertaking' or 'promise' was made by the insured to provide such an account. The court found that the insured was bound by the 'condition'.

Although not discussed in the judgment, this raises the important debate at this juncture of whether the undertaking constituted a condition or a warranty. More specifically, the question arises as to whether, if such undertaking or promise was not given freely, but rather coerced from the insured or insisted on by the insurer as a 'condition', it then constituted a 'promissory warranty'?

By way of illustration, if the insurer were to say, "Unless you promise to furnish me with an account within 15 days of a fire occurring, I will not insure you. Do you therefore

[24] Ibid 5.
[25] 1896 13 SC 451.

undertake or promise to do so?", and the insured, even if he or she does so reluctantly, replies "Yes, I undertake or promise to do so", does that not constitute a promissory warranty? It is submitted that it does, if one were to apply what is said above,[26] in particular, that the condition is the 'when, or 'whether' the physical obligation is to be performed or not' (in this case the 15 days), the warranty is the undertaking to furnish the account, and the obligation is to render the account itself. The argument is made stronger by the fact that an insurance agreement is one reached by consensus,[27] and that the parties enjoy freedom of contract.[28] It is argued, therefore, that a 'condition precedent' and a 'promissory warranty', in the context of undertaking freely to do (or refrain from doing) something in the future in the fulfilment of an agreement, are one and the same thing. A distinction must of course be made with an 'affirmative warranty', which exists prior to the agreement and cannot be the same as a condition precedent.

Of further value in the *Kannemeyer* judgment is the esteemed Schreiner, QC's assertion that "… such a condition is a very penal one and should be construed against the Company".[29]

In *Gordon v Transatlantic Fire Insurance Co*,[30] the insured's obligation to "… furnish all documents, proofs and explanations" after a loss was ruled as being a condition precedent to claiming for a loss, and a failure to do so would render the policy void. In this matter, the claimant incorrectly declared on his application for cover that he kept an 'iron safe' to protect his books in the event of a fire. Such an 'iron safe clause' is an early example of a warranty.[31] Interestingly, in the *Gordon* case, the learned judge did not refer to this undertaking by the insured as a 'warranty', but instead as a 'condition'. In this matter, the 'condition' was an affirmative warranty, as the insured made the declaration that he had such a safe at the time of entering into the policy agreement.

Maasdorp CJ, in the matter of *Silverstone v North British and Mercantile Insurance Co*,[32] was required to decide whether a 'safe and books clause' contained in an

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[26] Section 2, page 6-7 above.
[27] Van Niekerk *et al* (2010) 95 para 6.1.
[28] See *Sacks v Western Insurance Co* 1907 TH 257 at 261, where the Court found that an insured "…cannot be heard to say that he will not be bound by it (the condition). He is free to reject the policy and apply to some other insurer who will be free to accept the risk without such condition".
[29] 1986 13 SC 457.
[30] 1905 TH 146.
[31] Van Niekerk supra 299 para 15.26.
[32] 1907 ORC 73.

insurance slip, which had been pasted into a policy, formed part of such policy. He found that it did. The matter of *Gordon* was cited favourably, but in contrast to the Court in the aforesaid matter, the undertaking to keep the books in a safe was described not as a 'condition', but as a 'warranty'.

Although the word 'promissory' is not referred to in the judgment, it would not be surprising if this were within the Court's contemplation, as the policy wording so eloquently described the insured's duty to "… further covenant and agree to keep such books securely locked in a fire-proof safe". A 'Covenant' may be defined as "… a solemn agreement… a formal agreement or contract in writing",[33] which description endorses the severity of the consequences of breaching such warranty, namely that the relevant policy would be rendered void.

This line of reasoning was continued by Wessels J in *Sacks v Western Insurance Co*,[34] in which matter he differentiated a warranty from other 'conditions' in a policy by determining that a breach of such a warranty would render a policy void.[35] He found the undertaking to keep books in a safe to be a material condition, as well as constituting a 'promissory warranty'.[36] This judgment appears to be the first decision in South Africa in which this term was used. The learned judge also made the distinction between an 'affirmative warranty' and a 'promissory warranty' by referring to the *Gordon* case cited above. It should be noted that the decision was based on the legal position set out in American authorities, as opposed to English authorities.[37] On the strength of these authorities, the Court also passed judgment on whether a breach of warranty affects the entire policy, even though the warranty may only be relevant to one aspect of the policy. In this matter, the warranty only related to loss of stock, and not to damage to, or loss of, buildings. Nonetheless, the Court found that the test relates to whether the insurance contract is divisible or not, and also that the premium was a gross amount and the risk entire.[38; 39] This was inconsistent with the Court's finding in *Calf v Jarvis*, the first decision mentioned under this section, where the Court found that the inclusion of the warranty had an influence on premium.

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[33] *Concise Oxford English Dictionary*, page 330.
[34] 1907 TH 257.
[35] Ibid 259.
[36] Ibid 260.
[37] Ibid 261.
[38] Ibid 262.
[39] See Section 4 below for further discussion.

Papas v General Accident Fire and Life Assurance Corporation Ltd[40] dealt with the interpretation of warranties in insurance policies. The Court confirmed that warranties must be strictly interpreted, and the wording construed in accordance with their plain grammatical meaning. The meaning should not be extended beyond the words constituting such warranties.[41] Also mentioned is the *contra proferentem* rule, as well as the rule favouring an interpretation against forfeiture. This at least demonstrated an early appreciation by the courts that the effect of the enforcement of a warranty by an insurer could have definitive consequences, and as such the relevant warranty had to be properly interpreted. For this Court, the test was how the 'ordinary man' would have understood the warranty.[42]

One of the warranties in the applicable policy reads as follows:

> "On the happening of any loss or damage the insured must forthwith give notice in writing thereof to the Corporation, and must within 15 days after the loss or damage, or such further time as the Corporation may allow in that behalf, deliver to the Corporation a claim in writing for the loss and damage containing as particular an account as is reasonably practicable of all articles of property damaged or destroyed…".[43]

This matter was adjudicated in 1916. It is interesting to note that, even though more than a hundred years have passed since this decision, one would find a very similar warranty under the 'Business Interruption' section in a standard Multi-mark III policy,[44] which reads as follows:

> "On the happening of any damage in consequence of which a claim may be made under this section… and in the event of a claim being made under this section shall, not later than 30 days after the expiry of the indemnity period, or within such time as the Company may in writing allow, at their own expense deliver to the Company in writing a statement setting forth particulars of their

[40] 1916 CPD 619.
[41] Ibid 629.
[42] Ibid 623.
[43] Ibid 621.
[44] The wording referred to was extracted from a 2003 Zurich South Africa Insurance Policy, which policy was in use until the company underwent a name change in 2017 to Bryte Insurance South Africa Limited. Zurich South Africa was formerly known as the SA Eagle Insurance Company. Bryte Insurance South Africa adopted the exact same wording into their commercial insurance policy which is currently in use. Writer can attest to this fact from personal experience, having acted as an attorney for this company since 2001.

> claim… No claim under this section shall be payable unless the terms of this specific condition have been complied with".

Although this is termed a 'specific condition' in the policy, it is clearly a 'promissory warranty'. As such, the 'wolf in sheep's clothing' remains, but this aspect will be discussed in more detail later in this study.[45]

The Appellate Division in *Lewis Ltd v Norwich Union Fire Insurance Co Ltd*[46] appears to be the earliest appellate court decision involving a promissory warranty. The Court in this matter was also required to decide on an 'iron safe clause', and a warranty to maintain a complete set of books.

The most important aspect of this case was that it affirmed the decision in *Sacks v Western Assurance Co*[47] to the extent that a contract of insurance was deemed to be indivisible, and that the consequence of a breach of warranty was the forfeiture of an entire claim.

In this matter, Innes CJ defined that a warranty, "… in the sense in which that term is used in insurance transactions, is a statement or stipulation, upon the exact truth of which, or the exact performance of which, as the case may be, the validity of the contract depends".[48] He confirmed that a warranty requires strict compliance, regardless of whether compliance with the warranty is material to the risk or not.[49] He quoted *Halsbury's Laws of England* as his authority on this point.[50] This seems to put the argument beyond dispute that the South African law of insurance, as far is it concerns the law governing insurance warranties, was directly imported from English Law.

However, the Court could not find English authority on the question of whether the breach of a warranty to maintain a complete set of books, affected the risk in respect of the destruction of fixtures and fittings, which were also insured under the policy and to which no warranty attached. Various American authorities were considered, but no definitive answer was found, as the authorities stood in conflict to each other.

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[45] See Section 4 below.
[46] 1916 AD 509.
[47] See footnote 34.
[48] Lewis supra 515.
[49] Ibid.
[50] Volume 17, paragraph 1062.

The learned judge, to his credit, conceded that this was both a difficult and important question.[51]

Ultimately, the Court determined that the parties, when entering into the contract, had the intention to only enter into one entire agreement, and that the policy was not divisible. Unfortunately, the presiding judge, esteemed as he was, then proceeded to make numerous assumptions, none of which appear to have been based on evidence.

The first was that, although various classes of property under the policy were insured for different amounts, this was done purely for the purpose of limiting liability under each head of loss, and the entire policy was paid for by one gross premium. It appears that no evidence was led that the premium was calculated based on an actuarial calculation of each individual risk, with its own specific calculable premium and that the final premium payable was rather a combined premium of the individual risk premiums, rather than a single indivisible gross premium. Had the Court followed this approach then the outcome may have been more equitable for the policyholder. The finding could then have been that it is equitable to allow the avoidance of the claim for the stock as the assessment of risk and premium was influenced by the warranty (such as was the case in *Calf v Jarvis*), but the assessment of risk and premium for fixtures and fittings was not influenced by the warranty, therefore a breach of the warranty should not disallow a claim for that risk having materialised. If this type of evidence was however not led by the policyholder then a Court is unfortunately left to draw its own conclusions.

The second assumption held that the insurer would be entitled to decline any further dealings with an insured on the basis of the insured's breach of a warranty.[52] This finding almost seems tantamount to passing moral judgment on the character of a policyholder, should he not comply with a warranty. Some may argue that the forfeiture of the right to any indemnification in terms of a policy consequent to the breach of a warranty, was intended to serve as a punitive sanction.[53] This seems inconsistent with the principle that one inevitably insures oneself against one's own negligence and foolishness. Indeed, even in this matter, it was not found that the insured had acted

[51] Lewis supra 518.
[52] Ibid 519.
[53] It is doubtful whether this position would be consistent with the Conventional Penalties Act 15 of 1962, which in section 2 mitigates against an excessive penalty.

with any malice or *mala fides*.[54] If an insured, acts recklessly or carelessly even while knowing he should comply with a valid warranty, such as keeping a set of books, and the warranty has a valid purpose (namely, so that an insurer is able to validate a claim), then the insured can have no complaint. But the converse is also true; if the insurer accepted the risk against premium and the policyholder does not prejudice the insurer when a loss arises, then the insurer can have no complaint.

The learned judge acknowledged the hardship that may arise as a consequence, but maintained that the insured knowingly entered the contract and that it was one contract, and furthermore asserted that the Court could not conjure a 'new' contract for the insured.[55] Regrettably, this judgment set a precedent which still followed to this day, that strict compliance of a warranty is enforceable, regardless if its breach was material to the risk[56].

Maasdorp JA, in a concurring judgment, made an additional point in contending that the books would also have referred to fixtures and fittings.[57] This again constituted an assumption which was seemingly not supported by evidence.

Another example of a decision relating to the so-called 'books warranty' was the matter of *Shames' Trustee v Yorkshire Insurance Co Ltd*,[58] where the Court found the following: "Where an insured bargains to keep books showing a true and accurate record of his business transactions and bargains to keep those records in a fire proof safe… that is exactly what he meant".[59] It seems inequitable that so much emphasis is placed on an insured doing what he or she is required to do in terms of the policy agreement, and that the insurer's liability depends on the insured's fulfilment of such obligations. Take, for example, a scenario where an insurer bargains to pay for a building in the event that it is destroyed by fire, which risk the insurer accepted in return for premium, but who then doesn't have to fulfil the bargain because of the insured's breach of an unrelated warranty? This does not seem right. No doubt an insurer would be quite pleased should it prove that a policyholder has not complied with a given warranty, as the insurer would then save a lot of money pursuant to the fact that it

[54] Lewis supra 517.
[55] Ibid 521.
[56] See the expanded argument of this point under paragraph 5 and on pages 32-34 below.
[57] Ibid 523.
[58] 1922 TPD 259.
[59] Ibid 264.

would not have to keep its side of the bargain. Is this almost intentional and deceptive avoidance by the insurer of its own 'covenant'[60] not worthy of greater condemnation than a lackadaisical policyholder who has neglected to keep proper books? The reality is that insurers do take advantage of warranties, in the knowledge that policyholders will likely not have the financial means to contest rejections or weather out protracted litigation.[61]

The *Shames' Trustee* case does however confirm the principle that a warranty must be interpreted reasonably. In this instance, the degree of precision demonstrated by a storekeeper in a large city in his accounting practices would not be expected of a small-town storekeeper, although the records should still accurately represent the business of the insured.[62]

The same principle of reasonableness, as well as the rule which militates in favour of interpreting a warranty strictly against the insurer, also came under consideration in the Appellate Division in 1924. In the matter of *Norwich Union Fire Insurance Society Ltd v SA Toilet Requisite Co Ltd*,[63] the insurer alleged a breach of warranty by the policyholder, as the latter's books did not show transactions in terms of which stock was transferred between one branch of the insured's business and another. The Court strictly interpreted 'transactions' to mean transactions between the insured and third parties, and it did not encompass how the insured dealt internally with its own stock.[64] The Court in this case also emphasised that the *onus* of proving a breach of warranty is carried by the insurer.[65]

On 7 November 1960, Schreiner JA summarised all of the above authority when delivering the important judgment in *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd*.[66] The matter also concerned the promissory warranty to keep a complete set of books, as well as the manner in which such

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[60] See footnote 33.

[61] Having been in practice for over twenty years, during which I have dealt mainly with insurance work, I can regrettably attest that it is very much the case that insurers (not all, but many) actively look for reasons to avoid their liability. In particular, they invoke non-compliance with 'conditions' which we now know are in fact 'warranties'. In many instances there is no prejudice whatsoever to the insurers, which makes it quite reprehensible that they seek to avoid their liability. Often policyholders face extreme consequences when insurers do not keep their promises. This state of affairs is what motivated me to write this paper.

[62] *Shames' Trustee* 263.

[63] 1924 AD 212.

[64] Ibid 216.

[65] Ibid 225.

[66] 1961 (1) SA 103 (A).

warranties should be interpreted. It is useful to summarise the legal principles in respect of the interpretation of warranties, as confirmed in this judgment:

i) Once a warranty has been interpreted, there should be strict performance in accordance therewith by the policyholder for the insurer to be liable.
ii) The warranty should be interpreted in the same manner as any other term in the policy.
iii) The *contra proferentem* rule should be applied in the case of any ambiguity, as insurance companies should express their intention in clear terms.
iv) The rule so as to interpret against forfeiture finds application, as the object of a warranty is to "… limit the scope and purpose of a contract".[67]

Up to the time of adjudication of this matter, the majority of the case law on this point of law related to a promissory warranty in the form of an 'iron or fireproof safe clause' or a warranty to keep 'proper books'. From this junction onward, there is less authority on the same or similar sets of facts, probably owing to the fact that safes became less prevalent as time went on, bookkeeping records increasingly were preserved electronically, and the state of a policyholder's 'transactions' with third parties could be examined at the hands of other documents, such as bank statements, tax returns, audited financial statements, etc.

One also finds that the word 'condition' is increasingly used in preference to the word 'warranty' in pertinent case law subsequent to the *Kliptown Clothing Industries* judgment. It is therefore worthwhile to pause and again confirm that a 'promissory warranty' denotes "… a statement, the exact performance of which the validity of a contract depends".[68] It is a promise by the insured to do something, or to refrain from doing something, or to ensure that the status quo is maintained.[69]

We already know that a significant portion of South African insurance law is imported from English law, and that what is referred to in English law as 'conditions' (being obligationary terms) are described as 'warranties' in South African law.[70] Therefore,

[67] *Kliptown Clothing Industries* supra 106G.
[68] See footnote 48.
[69] See Section 1.
[70] Van Niekerk *et al* (2010) 190 para 9.29.

when the word ‘condition’ is used, one should determine whether it is in fact a promissory warranty by interpreting the intention of the parties.[71]

Furthermore, what may be expressly termed a ‘warranty’ in a policy may in fact not be a warranty at all, but something else.[72]

By now it is trite law that to qualify as a promissory warranty, the following is required:

i) There must be an undertaking or promise by the policyholder to do or not do something.
ii) There must be strict compliance with such undertaking or promise by the policyholder.
iii) Any failure to comply strictly must be material to the extent that such failure offers the insurer an election to void the policy.[73]
iv) The insurer bears the *onus* of proving the non-compliance.

In other words, if it walks like a duck, swims like a duck and quacks like a duck… it must be a duck!

In *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd*,[74] the respondent insurer sought to repudiate the appellant’s claim for indemnification, on the grounds that the insured had ‘breached’ two of the ‘conditions’ in the policy. The first condition required of the insured to “… give notice in writing to the company as soon as possible after the occurrence of any accident or loss or damage and in the event of any claim”.[75] The second condition was that the insured should “… maintain its vehicles in efficient condition”.[76]

In the case of both conditions, the insured undertook to do something; it was required to strictly comply with the conditions, in the sense that a failure to do so would entitle the insurer to reject the claims; and finally, the Court, in referring to the *Kliptown* matter referred to above, found that the insurer bore the *onus* of proving the breach.[77]

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[71] Van Niekerk *et al* supra 191 para 9.29.
[72] *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 SCA at 495D-F.
[73] *Parsons Transport* supra 493E-H.
[74] 1963 (1) SA 632 (A).
[75] Ibid 638C-E.
[76] Ibid 644B-C.
[77] Ibid 645A-C.

The insured 'got out of jail' in respect of its non-compliance with the first condition, owing to the insurer failing to timeously reject the claim, consequent to which the insurer was estopped from doing so. Moreover, the insurer failed in discharging the *onus* of proving the second breach, as it failed to lead the necessary evidence.

It is submitted, therefore, that in this case, these conditions were in fact 'promissory warranties' although not called so by name in the judgment.[78]

The contention regarding some insurers' seeming aversion to paying claims,[79] as well as the argument relating to the lengths they would go to, to avoid pay-outs (*inter alia* by relying on promissory warranties) are arguably validated by the matter of *Auto Protection Insurance Co Ltd v Hammerstrudwick*.[80] The insurer was the same entity as was involved in the *Resisto Dairy* matter cited above, and the case was reported in 1964. Both were Appellate Division cases, and in both matters the insurer sought to place reliance on a breach of the condition that the insured's motor-vehicle be maintained in an 'effective condition'. Again, the insurer failed in discharging its *onus* to prove a breach of such warranty. The Court followed the judgment in the *Kliptown* matter to the extent that it found that these 'conditions' must be interpreted restrictively.[81] This gave further credence to the notion that these conditions are in fact 'promissory warranties'. Also pertinent in this judgment was the duty on the insurer to clearly state its requirements. The case concerned tyres which were in an unroadworthy condition. The Court questioned the wording of the condition, more particularly, the use of the phrase 'effective condition', and found it to be 'unprecise'.[82] The Court asserted that it was unclear what the reasonable person would have considered 'effective'. It was found that it was incumbent on the insurer to have provided a 'clear expression' of what was required.[83]

In *Gaza v Motor Insurers Association*,[84] it was a requirement in the insurance policy that the insured, must give 30 days-notice to the insurer of intended proceedings against the owner of a motor vehicle, as well as that the insured must deliver to the

[78] In this respect, see the *Gordon* case cited on page 9 above, in which a 'safe clause' was similarly referred to as a condition, whereas in the *Silverstone* case discussed on page 10 above, an equivalent clause was described as a warranty.
[79] See footnote 59.
[80] 1964 (1) SA 349 (A).
[81] Ibid 354C-E.
[82] Ibid 354G-H.
[83] Ibid 360D-F.
[84] 1964 (3) SA 273 (D).

insurer a copy of a summons seven days before expiry of the *dies*, in order for the insurer to file an appearance, was described as a 'condition precedent'. The plaintiff failed to comply with such condition precedent, and the claim was accordingly rejected. (Again, the requirement in question was not denoted as a 'warranty' in the policy.) The Plaintiff tried to convince the Court that the condition to deliver the summons was only a suspensive condition to the operation of the contract, and that only upon the summons being delivered, that there had been substantial compliance with the condition and the contract became operational. The Court was unconvinced, and made the following statement: "There is a clear difference between a condition precedent to the existence of a contract and a promise, the performance of which is a condition precedent to another promise".[85] The word 'promise' came to the fore in this matter. The Court found that the undertaking constituted a promise and that the insured had not kept to it, consequent to which the claim was dismissed. As a side note, the copy of the summons was delivered to the insurer just two days after the *dies* expired. Accordingly, there was absolutely no prejudice to the insurer owing to the late delivery, but this fact was deemed irrelevant, which takes one back to the equity argument[86].

Referring to a number of the above-mentioned legal authorities, including the judgment in the *Auto Protection Insurance v Hammerstrudwick* case, the Court, in the matter of *Aetna Insurance co v Dormer Estates (Pty) Ltd*,[87] had to consider whether there was compliance by the insured with a condition that read as follows: "The insured shall take all reasonable precautions for the safety of the property insured by this policy". As with the above cases, the presiding judge found that he was required to interpret the clause restrictively, and that the consequence of non-compliance was that the insured would forfeit his right to indemnity. The manager of the insured had carried a large amount of money in a wallet in the back pocket of his trousers, as he intended to use the cash to pay staff wages. He knew the button of the pocket was missing, and still went to watch a golf game before returning to pay the salaries. At some point the wallet went missing. The Court applied the 'reasonable person' standard to the manager's

[85] Ibid 276H-G
[86] See the discussion above on page 14-15 in respect of the *Shames Trustees* judgment (footnote 57).
[87] 1965 (4) SA 656 (N).

conduct, and determined that the insured had not taken reasonable precautions. The Court accordingly found in favour of the insurer.[88]

In *Sleightholme Farms (Pvt) Ltd v National Farmers Union Mutual Insurance Society Ltd*,[89] the so-called 'late notification' clause came under consideration, in accordance with which the insured had to give notice to the insurer within 15 days of an 'occurrence'. The dilemma for the insured was that the occurrence was a storm, but the damage which was caused (being tobacco leaves which became wet as a result of the storm) only manifested after expiry of the 15-day notice period. The terms 'warranty' and 'promise' did not appear in the relevant policy agreement. Once again, however, the insured had undertaken to so notify the insurer when entering into the policy, and a failure to do so would result in the insurer being relieved of liability. The Court determined that the provision of such notice was a 'condition precedent' to the insurer's liability. It is argued that this again constitutes a 'promissory warranty'. As in analogous cases discussed above, inequality comes to the fore. The storm occurred in March and the loss was discovered in June of the same year, less than two months later. What prejudice could there have been to the insurer? This was not a factor that influenced the Court. Indeed, the presiding judge found the following: "Apart from special defences – based generally upon public policy – our Courts will always uphold a condition in a contract seriously entered into, however capricious or unreasonable it may appear to be".[90] Surely this principle applies equally to the fact that this was also a contract that the insurer had 'seriously entered into', and that the insurer accepted the risk and took premium for it?

By 1975, the word 'warranty' seems to have fallen well and truly from use, and the term 'condition precedent' was by far the predominant term used to refer to an insured's undertaking to do something. However, in *Pereira v Marine and Trade Insurance Ltd*,[91] Corbett JA asserted the following with regard to a condition in a policy:

> "Despite the use of the words 'condition precedent', it is clear that this condition in truth makes provision not for suspensive conditions but for material terms of the contract; and that, therefore, the breach by the insured

[88] Ibid 661A-B.
[89] 1967 (1) SA 13 (R).
[90] Ibid 18C-D.
[91] 1975 (4) SA 745 (A).

> of the duties of observance and fulfilment referred to therein would entitle the company to repudiate liability to make payment under the authority".[92]

The learned judge used as authority the *Resisto Dairy* and *Kliptown Clothing Industries* judgments which, of course, were based on the earlier 'iron safe and book warranty' cases, where the word warranty was used.

The same conclusion was reached by the Court in *Kali v Incorporated General Insurances Ltd*,[93] namely that use of the words 'condition precedent' do not suspend the operation of a contract where the intention of the parties was that the term should be material, the non-compliance of which would affect the insurer's liability.

In *Schoeman t/a Billy's Garage v Marine and Trade Insurance Co Ltd*,[94] the first hint was given of what could be equitable in relation to matters involving 'warranties' or 'conditions'. The relevant condition required that, in the event of a vehicle insured in terms of the policy breaking down, the vehicle should not be left unattended without precautions being taken to prevent further damage, and should not be driven before the necessary repairs have been effected. The implication was that should the vehicle be driven further without these requirements having been met, any further damage would be at the insured's own risk. The insured's vehicle did indeed break down, temporary repairs were carried out, and on the onward journey the vehicle was damaged. The insurer sought to avoid the claim on the grounds of an alleged breach of the condition. Much debate went into the interpretation of the condition, as well as the exact meaning of 'necessary repairs', and the insured argued that the condition should be interpreted against the insurer owing to the ambiguity which afflicted the condition's wording. The Court, however, found that the crux of the matter was not the interpretation of 'necessary repairs', but instead whether there was causation between the repairs and the 'further damage'.[95] It is so, that the condition contained specific wording between what the insured had to do and the resulting damage, but is there not always damage? Think of the *Aetna* case[96] discussed above, where the sloppy manager lost his wallet containing the large amount of money which was claimed for. There was a failure to comply with the reasonable care condition which caused the

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[92] Ibid 752C-E.
[93] 1976 (2) SA 179 (D) at 180A.
[94] 1976 (3) SA 824 (W).
[95] Ibid 831 F-G.
[96] See footnote 86.

damage, being the lost money. Even though the condition in that matter did not pertinently use the words 'resulting in damage', on reading the case one feels content with the decision, as it was clear that the manager did not take 'reasonable care', which in turn 'caused' the loss, and it was accordingly justified for the insurer to elect to avoid liability. As will be argued at the conclusion of this study, the breach of warranty must be material to the loss. This was clearly not the case in the *Sleightholme* matter, as the insured's failure to timeously notify the insurer had no bearing on the loss. Similarly, not keeping books in a safe has no bearing on the value of a building that burns down.

The aforesaid matter was taken on appeal and cited as *Marine and Trade Insurance Co Ltd v Van Heerden*.[97] The plaintiff in the original matter, Mr Schoeman, had passed away in the interim and had been substituted by the executor of his deceased estate, Mr Van Heerden.[98] It is a pity that the highest court in the land at the time did not further explore the question of causation. Instead, it opted to confine itself to the interpretation of 'necessary repairs'. It was found that the repairs effected by the insured to allow the truck to continue on its journey, did in fact constitute what the reasonable man would have considered as 'necessary repairs', Accordingly, the Court ruled that the insured had discharged his obligations in terms of the condition, and accordingly gave judgment in favour of the policyholder. The question of causation was left open.[99]

Moving into the 1980s, in the matter of *Polycork Flooring Centre (Pty) Ltd v Mutual & Federal Insurance Co Ltd*,[100] the Witwatersrand Local Division, as it was then known, was also required to adjudicate on a 'notification condition' contained in a fidelity insurance policy. The plaintiff was insured against the dishonest acts of its employees. One of its employees had, over a period of months, stolen stock. The claim was rejected on the grounds that the plaintiff had not complied with a condition contained in the policy, namely that the insured "… would within 7 days give notice to the insurer of the discovery of any matter which could give rise to a claim under the policy". The Court turned to American authorities to establish the appropriate interpretation of a 'fidelity policy', as it was of the view that there was no previous legal precedent on this

[97] 1977 (3) SA 553 (A).
[98] Ibid 557C-D.
[99] Ibid 562B-C.
[100] 1981 (1) SA 280 (W).

point of law.[101] This shows how a 'promissory warranty' can become lost in plain sight. This condition still involved an undertaking with which the insured had to comply, failing which the insurer would be entitled to elect to void the policy. After exhaustively considering foreign judgments, the court ultimately turned to a local matter, namely the decision in the *Kliptown Clothing Industries* case, to assist it in making its final decision,[102] which was to interpret the policy restrictively against the insurer and against forfeiture.

In *Imprefed (Pty) Ltd v American International Insurance Co Ltd*,[103] the same Court, in contrast to its approach in the *Polycork Flooring Centre* matter, clearly identified a warranty for what it was, in circumstances where an engineering firm warranted that it would "… maintain its vehicles in efficient condition". The insured had failed to do so, as the vehicle which was involved in the collision had an inoperative handbrake. The Court found that the warranty had been breached, and accordingly ruled in favour of the insured.[104]

A 'notification clause' was also strictly enforced in *Johnson v Incorporated General Insurance Co Ltd*,[105] where the insured failed to immediately notify the police of an incident of theft of goods from a vehicle. The insured's defence was that the vehicle from which the goods were stolen was not in the insured's possession. The Court found nonetheless that the insured's obligation remained.

Incorporated General Insurance was clearly kept busy with litigation in the early 1980's.[106] In this instance, the Appellate Division ruled against them, in circumstances where they had repudiated a claim for jewellery that had been lost. The repudiation was based on the breach of two 'conditions'. The first was that jewellery worth more than R 2 000.00 had to be kept in a safe whilst not being worn or used, and the second was that the insured was required to exercise all 'reasonable precautions'.[107] As authority, the Court applied the *contra proferentem* rule formulated in *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd*.[108] There was

[101] Ibid 281D-E.
[102] Ibid 288C-D.
[103] 1981 (2) SA 68 (W).
[104] Ibid 75H.
[105] 1980 (3) SA 641 (C).
[106] *Price and Another v Incorporated General Insurances Ltd* 1983 (1) SA 311 (A).
[107] Ibid 314E-H.
[108] Ibid 315H.

no use of the words ‘promissory warranty’, but it sounds remarkably familiar, doesn’t it?

The condition of taking “… reasonable precautions for the maintenance and repair…” of a building was examined in *Fulton v Waksel Investments (Pty) Ltd*.[109] The judgment in the *Kliptown Clothing Industries* case*,* amongst others, was again followed in determining that ‘reasonable precautions’ did not amount to an ‘absolute duty’, and that the insurer had failed to discharge its *onus* to prove that the insured had not complied with the policy.[110] The principles at this stage appear to be well and truly entrenched.

Warranties contained in an aviation insurance policy was considered in *Bates & Lloyd Aviation (Pty) Ltd and Another v Aviation Insurance Co; Bates & Lloyd Aviation (Pty) Ltd v Aviation Insurance Co.*[111] The insured warranted that they would “… comply with all air navigation and airworthiness orders and requirements issued by any competent authority”.[112] Reliance was placed on the *onus* test confirmed in the *Resisto Dairy* case, and the Appeal Court found in favour of the insured. The Court also stated quite succinctly that to construe the policy otherwise would be tantamount to the insurer instituting a condition that read something akin to: “I will insure you against your liability for negligence on condition that you were not negligent!”.[113] This is a timely reminder that insurance is exactly there to insure you against your own negligence.

In *Paterson v Aegis Insurance Co Ltd*,[114] the Court was required to interpret an all-risks policy containing a condition that an insured must take ‘all reasonable precautions’. The presiding judge in this matter also mentioned the untenable implication of interpreting a policy to the extent that an insurer’s liability pursuant to a policy against negligence was contingent on the insured not being negligent.[115] This Court also referred to the *Kliptown Clothing Industries* judgment.[116]

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[109] 1986 (2) SA 363 (T).
[110] Ibid At 377A-B.
[111] 1985 (3) SA 916 (A).
[112] Ibid 929H.
[113] Ibid 397A.
[114] 1989 (3) SA 478 (C).
[115] Ibid 482D-F, quoting from *Woolfall & Rimmer Ltd v Moyle and Another* [1941] 3 All ER 304 (CA*)* at 311.
[116] Ibid 483D.

The harsh consequences of an insured's failure to comply with a 'notification clause' again came to the fore in the matters of *Royal Mutual Insurance Co (Pvt) Ltd v Mubaiwa*[117] and *Bulldog Hauliers (Pty) Ltd v Santam Insurance Limited*.[118]

In the *Royal Mutual Insurance* matter, the insured was required to give notice 'immediately' following the occurrence of an accident. The collision in question occurred on 21 December. Notice was only given on 7 January of the following year. The Court found, having placed reliance on the judgment in the *Resisto Dairy* matter, that the insured had not complied with a material term of the contract, and moreover that prejudice was irrelevant.[119] The Court accordingly ruled in favour of the insurer. It is contended that this was a highly inequitable verdict.

The *Bulldog Hauliers* matter centred on a 'Goods in Transit' (GIT) policy. Stock was stolen from one of the insured's motor vehicles, and the ensuing claim was repudiated for a number of reasons. However, in its rejection, the insurer failed to raise late notification of the claim as a ground for repudiation, in circumstances where the policy required for the claim to be submitted within a 30-day period. The insured attempted to raise estoppel when the insured's non-compliance with the condition was eventually raised. The Court found that the insurer had not waived its rights. The issue of prejudice was not addressed by the Court.

For the first time in decades, in *Venter v Certain Underwriting Agents of Lloyds of London*,[120] the Court actually identified a 'promissory warranty' as such. In terms of a domestic policy, the plaintiff had insured household goods which were subsequently stolen. The policy contained two 'conditions', with the first being that the insured warranted that the premises would not be used for commercial purposes. The second condition was a so-called 'time-bar clause', in terms of which the insured was required to issue summons within 90 days of rejection of a claim. The Court found that the 'warranty' regarding use of the premises exclusively as a 'domestic' property, constituted an 'affirmative warranty'. The Court did not address the point of whether the time-bar clause constituted a 'promissory warranty', but found that the insured was barred from instituting action in view of the fact that he had not 'fulfilled his obligation'

[117] 1990 (4) SA 177 (ZH).
[118] 1992 (1) SA 418 (W).
[119] Ibid 180E.
[120] 1994 (4) SA 657 (W).

to do so within the agreed period.[121] It is debatable whether a time-bar clause actually constitutes a 'promissory warranty', as an element of the breach of a promissory warranty is that it entitles the insurer to exercise an election to void a policy. In the normal course of events, by the time a time bar becomes pertinent, the insurer would already have exercised its right to void.[122]

An important judgment for purposes of this discussion is the one delivered in the case of *South African Eagle Insurance Company Limited v Norman Welthagen Investments (Pty) Ltd*.[123] The condition contained in what was termed the 'memo' to the insurance policy, was that the insured, a motor dealership, would keep the keys of all motor vehicles secured in a safe overnight. It is submitted that the word 'memo' referred to what is more commonly known as a 'schedule', which usually accompanies the standard policy wording.

The insured tried to convince the Court that the condition was not a warranty with which the insured was required to comply. Instead, it argued that the condition constituted a pre-contractual misrepresentation that fell within the ambit of section 63(3) of the Insurance Act 27 of 1943 (which was then in effect), and that it was not material to the extent that the insurer was entitled to void the policy. On appeal, the Court found that it was in fact a warranty for a number of reasons. The first ground was the fact that the condition was not contained, for example, in a 'proposal' of insurance which constitutes a pre-contractual document. The Court found that the memo formed part of the agreement.[124] Secondly, in applying the plain grammatical meaning of terms such as 'it is warranted' and 'must', it became clear that such condition was a warranty.[125] The term 'promissory warranty' was not specifically used, but the Court placed reliance on the judgment in *Lewis Ltd v Norwich*[126]*,* which was the first appellate division judgment that ruled that the consequence of a breach of warranty was to forfeit the benefits under a policy[127].

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[121] Ibid 661B-C.
[122] The Court in *IGI Insurance Co Ltd v Madasa* 1995 (1) SA 144 (TkA) found differently, and held that a time-bar clause is a forfeiture clause. The Court in this matter referred to the *Kliptown Clothing Industries* case at 147 C-D. Time-bar clauses are, however, a subject worthy of its own study.
[123] 1994 (2) SA 122 (A).
[124] Ibid 14.
[125] Ibid 12.
[126] 1916 AD 509 at 515.
[127] See page 12 and footnote 46 above.

It is important to note that the Court recognized the argument by the insured that, during the subsequent investigation, the keys were found in the cupboard where they were kept. By implication, the breach of the warranty was deemed to not be connected to the loss. The Court also stated as with section 63(3), perhaps parliament "…should have gone further in protecting insured persons, as has been done in some jurisdictions in the United States of America".[128] It seems that the Appellate Division reluctantly found in favour of the insurer.

In *Global Insurance Co Ltd v Botha's Trucking*,[129] the Court ruled in favour of the insurer to the extent that if a vehicle is unroadworthy, the insurer may reject a related claim. It was found that although statutory provisions regarding roadworthiness assist, they are not binding. It was found that the "… vehicle must be mechanically sound and fit to be used safely in all reasonably expected road and weather conditions in South Africa and be driven by a reasonably proficient driver".[130] The insured had breached the warranty and it was strictly enforced, regardless of whether there was a causal connection between the condition of the vehicle and the incident. It appears, therefore, that the position regarding promissory warranties as we entered the 21st century, remained unchanged. As the learned judge said: "If the insured intends to enjoy the benefits of the policy, he must take steps".[131]

A 'notification clause' was considered in 2001 when the South Eastern Cape Local Division gave judgment in the matter of *Snodgrass v Hart (Santam Ltd, Third Party)*.[132] The Court found that the reason for such clauses is to enable insurers to timeously investigate claims brought by insured parties, so as to protect their interests.[133] The claim was repudiated, as the insurer contended that the insured only gave notice of the occurrence of an 'insured event' when he provided the insurer with a copy of a summons issued against the insured, which was received three years later from a third party passenger injured in the insured event, being a motor collision. The Court found, however, that in view of the fact that the insured cancelled the policy just a few days after the accident, on the probabilities, the insurer was made aware of the accident at that juncture. The Court affirmed the strict *onus* on an insurer to prove the breach of

[128] Ibid 11.
[129] 2001 (4) SA 1347 (T).
[130] Ibid 1349G-H.
[131] Ibid 1349G.
[132] 2002 (1) SA 851 (SE).
[133] Ibid 858G-I.

the relevant term, and that it had failed to convince the Court that such 'notice' actually required informing the insured of a passenger's injuries. Notice of the event, being the accident itself, was sufficient.

In *Thompson v Federated Timbers and Another (Zurich Insurance Company, Third Party)*,[134] in an unreported judgment, Wallis J, as he then was, upheld a notification clause in favour of the insurer. The wording of the clause was a standard wording identical to that in the *Snodgrass* matter. More specifically, the clause read as follows: "On the happening of any event which may result in a claim under this policy… the insured must… (i) give notice thereof to the company…". The wording was that of a Multi-mark III policy.[135] The Court held that there must be a 'subjective appreciation' on the part of an insured that a claim may result.[136] The court found that the insured in this matter should subjectively have appreciated that a claim could be instituted and accordingly ruled in favour of the insurer. What is of importance however is that the court added the valuable qualification that warranties, at least as far as notification clauses were not to be applied regardless, such as was the case in *Royal Mutual Insurance Co. v Mubaiwa* and *Bulldog Hauliers*. In those two cases, and in many before, there was a just a cold calculation of days, and if the insured was out of time, he was out of time, and that was it. This judgment at least levels the playing field somewhat for the insured party, in that it allows an opportunity for the insured to explain his failure to give notice and if there is a basis for the delay such as a subjective appreciation, then the court would look past the failure. It is a pity the judgment was not reported.

However, the outcome in this case was still inequitable. The Court confirmed the justification for the 'notification clause', namely that it would enable timeous investigation by the insurer. In this matter there was already pending litigation and the facts were well recorded. It is submitted that the insurer would have had great difficulty in proving that the delay materially affected its position. The valuable point was made that the insured, in any event, did not know about the cause of action, namely the plaintiff's fall, when it happened, and only became aware of such event a year later, when the insured was notified by the owner of the premises where the incident took

[134] (17408/09, 3984/10) [2010] ZAKZDHC 72.
[135] Ibid 13.
[136] Ibid 5.

place. The insured was the cleaning company tasked with cleaning the premises where the incident took place. The insurer had by that stage already lost the "… most favourable position to investigate".[137] Furthermore, Professor JP van Niekerk justly points out whether an insurer, should it have received timeous notice, would necessarily have reacted promptly and investigated the 'event', as opposed to waiting to see if a claim was actually instituted by an injured third party.[138] This gives credence to the argument that many insurers (although not necessarily all), will hide behind promissory warranties to evade liability, even while knowing that they have not suffered any material prejudice.

Promissory warranties came under consideration by the Appellate Division in *Parsons Transport (Pty Ltd v Global Insurance Company*.[139] The insured neglected to pay the agreed premium, although they had already been held on cover. The insurer consequently instituted action against the insured for payment of the premium. It was accepted that payment of a premium is a promissory warranty,[140] and that it was not a condition precedent to the insurance contract becoming operative, as in this case there was already cover from before the date on which the premium became due.

The most recent reported case dealing with a promissory warranty, although not termed as such, is *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd*.[141] The insured had 'warranted' that it would comply with the provisions of the South African Merchant Shipping Act and the regulations thereto.[142] Even though termed an "MSA Warranty", it was in fact a promissory warranty. Such warranty constituted a material term requiring strict compliance, failing which the insurer could invalidate the contract.[143] This was the argument advanced by the insurer.

Interestingly, Wallis JA was critical of the hundred-year-old view, decided in *Lewis Ltd v Norwich,* and found that:

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[137] Van Niekerk JP Juta's Insurance Law Bulletin (2011) 16.
[138] Drawing on my 20 years in practice, I can confidently attest that this is the case more often than not. There are costs associated with an insurer investigating a claim through the appointment of an assessor or an attorney, and this is not done before the claims stage, unless the value of the potential claim is considerable.
[139] 2006 (1) SA 488 (SCA).
[140] Ibid 9 para 8.
[141] 2016 All SA 730 (SCA).
[142] Ibid 5 para 5.
[143] The judgment referred to *Lewis Ltd v Norwich Union Fire Insurance Co of SA Ltd* 1916 AD 509 at 514-515, presumably where Innes CJ said: "Now a warranty, in the sense in which that term is used in insurance transactions, is a statement or stipulation upon the exact truth of which, or the exact performance of which, as the case may be, the validity of the contract depends." This was Mutual and Federal's contention.

> "Those contentions adopted an extreme view of what was required from the insured in order to comply with a warranty. I am by no means satisfied that it was a correct view. Such warranties are to be construed favourably towards the insured because of their impact upon the liability of the insurer. In other words, they are to be given a practical and business-like construction in the light of the purpose of the clause and the insurance policy. They are therefore not lightly to be construed as invalidating cover on grounds unrelated to the loss."

As will be argued at the conclusion of this research paper, the task of both the trial and the appeal court would have been so much simpler had they been armed with legislation that stipulates that non-compliance with a promissory warranty will only lead to forfeiture if such non-compliance is material to a claim under a policy. The court could then simply have made a ruling, based on an objective factual investigation through the eyes of the reasonable person, as to whether non-compliance with the warranty materially influenced the claim and/or loss, and through the eyes of a reasonable insurer whether the breach factually prejudiced the insurer. Instead, the Court, being hamstrung by precedent, was required to undertake an elaborate process of policy interpretation in order to adjudicate the matter. The learned judge, in fact, said as much, in so many words: "That points towards a construction of the warranty that it applies when the breach of regulations is materially connected to the loss".[144] The Court determined that a normal construction would be 'harsh'. As the insured was, however, protected by the so-called 'Inchmaree clauses'[145] contained in the policy, the Court regrettably did not find it "… necessary to develop the enquiry further".[146]

As far as could be ascertained, this was the last judgment dealing with a promissory warranty, and although the Court was critical of the construction of warranties, it stopped short of developing the law on this question.

The conclusion, therefore, is that the current legal position from a legal authority perspective[147] remains unchanged. A promissory warranty is a material term with which an insured must strictly comply, if it survives the *contra preferentum* test and the

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[144] *Viking Inshore Fishing* supra 14 para 25.
[145] Ibid 15 para 26, and a topic definitely worthy of its own study!
[146] Ibid.
[147] The Legislative position is dealt with below in Section 6.

rule interpreting against forfeiture. Actual prejudice to the insurer and causation to loss are not required.

4. EXAMPLES OF PROMISSORY WARRANTIES IN A MODERN-DAY POLICY[148]

Not only are promissory warranties enforceable, but there are also many types of them that remain in use today.

Many of the judgments from the early 1990s relate to the Multi-mark policy wording which has become an industry standard in both personal and commercial policies.[149] These continue to be in daily use, although often modified by insurers, underwriters and even brokers under binder agreements.

Drawing on Nestadt JA's judgment in *South African Eagle Insurance Company Limited v Norman Welthagen Investments*,[150] if one considers words such as 'it is warranted' or 'must', these warranties are of 'mandatory effect'.

As an example, a current domestic policy was considered.[151] The policy comprises 66 pages. Although the word 'warranty' does not appear, the term 'condition' appears nine times, 'conditions' 40 times and 'must' no less than 80 times!

Some of the promissory warranties extracted include the following (the list is by no means exhaustive):

i) You must pay your premium.
ii) You must take all reasonable precautions.
iii) You must inform us of any event that could give rise to a claim.
iv) You must give full details within 30 days.
v) You must allow us to enter the premises where the event took place.
vi) You must advise us immediately of any change of risk.

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[148] It should be noted that not much authority could be obtained to contextualise or support the content presented in this section. Accordingly, such content, including the points raised and the contentions advanced, were essentially based on, or drawn from, my experience of dealing on a daily basis over a twenty-year period with such policies, in the course of services performed for at least ten different local insurers.
[149] See *Parson's Transport (Pty) Ltd v Global Insurance Company Ltd* 2006 (1) SA 488 (SCA); *Thompson v Federated Timbers & Another* (17408/09, 3984/10) [2010] ZAKZDHC 72.
[150] 1994 (2) SA 122 AD at 129.
[151] My own Santam personal household policy was scrutinised for this purpose.

vii) You must obtain our permission before removing fallen trees.
viii) You must ensure that the property contained in the schedule is at current valuation.
ix) You must obtain a full itemised invoice and send it to us before any repairs are undertaken.
x) The caravan or trailer must be insured under this policy to claim for goods stolen from such caravan or trailer.
xi) You must obtain written consent before incurring any costs or expenses.
xii) You must undergo any legal examination we require.

Matters are compounded by the fact that these warranties have all been drawn from the standard policy wording. As was the case in the *South African Eagle Insurance* case referred to above, warranties are often contained in the 'memo' or schedule of insurance. For example, the domestic policy used as an example does not contain a burglar bar or alarm warranty, but the schedule (as is often the case) may be endorsed with one or more of a variety of warranties, such as a warranty which requires an insured to have a burglar alarm in place, or which requires fitting a vehicle with a tracking device. For an insurance lawyer, dealing with such a multitude of warranties is challenging. For the man on the street, this represents a nightmare scenario.

We therefore know that at a practical level, policies may contain a host of promissory warranties, although they may not be explicitly identified as such. We also now recognise that courts will strictly enforce these 'wolves in sheep's clothing'. The pertinent question now is, is this fair and equitable?

5. UNFAIR/INEQUITABLE CONSEQUENCES OF THE ENFORCEMENT OF PROMISSORY WARRANTIES

The earliest example of how the strict enforcement of a promissory warranty may result in an unfair outcome, was the *Sacks v Western Insurance Co* matter.[152] In this case, both stock in trade and buildings were insured under a fire policy. The relevant policy contained a 'fire safe clause' which required that the books of the business be kept in a safe. The rationale for such a clause was quite valid, namely that proper proof

[152] 1907 TH 257. Also see the discussion on page 10 and footnote 34 above.

could be provided of the insured's stock on hand in the event of a fire; otherwise, the insurer would be at "… the mercy of the memory and the honesty of the insured". But it could be argued persuasively that such rationale had no bearing on the damage sustained to the building. The Court's reasoning was that the contract was indivisible, and that a gross premium was levied. Did this not constitute flawed reasoning? Is an insurance contract not divisible between the various interests that are insured? A business has various interests that can be insured, such as buildings, fidelity, liability, and so forth. You cannot divide a car, but you can separate the asset and its use by, for example, including car-hire cover. As for the Court's finding regarding the gross premium argument, it should be noted that the risk was greater with stock loss due to uncertainty, as opposed to the building, which had a fixed value. Why can an insurance contract not be divisible where numerous risks are transferred and considered separately. These aspects are all taken into account actuarially when the premium is calculated. A such, the reference to "gross" premium[153] was arguably incorrect, but yet still forms a legal basis for rejection of claims.

It is surely inequitable to permit the voidance of an entire policy in circumstances where the value of the stock in trade may have been worth only a fraction of the building destroyed by a peril. Just as the insured was at liberty to choose a different insurer if he was not agreeable to inclusion of the warranty, the insurer had the choice not to accept the risk in question. It is conceded that the insurer could validly argue that the insured was aware of the warranty and accepted it. But why did the law make no allowance for the insured to argue, for instance, that the insurer was aware of the building but nonetheless accepted the transfer of the risk and collected premium, and to further argue that the insurer asked for no warranty in respect of the building? For example, the insurer did not require that a fire plan be in place, nor did it specify a minimum number of fire hoses and extinguishers which had to be in place, or require for approved building plans to be in place. Could the insurer justifiably object to such an argument by the insured if it did not ask for a warranty in respect of these requirements before accepting the risk? Could it ever be equitable for an insurer to be absolved from paying for an insurable interest that it accepted, on the grounds that an

[153] Ibid 262.

insured failed to comply with the requirements set for cover for an entirely different insurable interest?

The 'indivisibility argument' was followed in *Le Riche v Atlas Insurance Co*,[154] where the owner of a store instituted a claim following a fire, for both stock loss and damage to the relevant building. The insured was unable to properly substantiate his stock loss claim, on the grounds that he had breached a warranty contained in the policy which required the keeping of a proper and complete set of books. The learned judge, in reaching his decision, put great store in the fact that the warranty contained the following words: "No amount shall be payable under this policy unless the terms of this condition have been complied with".[155] It is also significant to note, from an equity point of view, that the Court determined that only a reasonable standard of bookkeeping was required so as to enable the insurer to ascertain what the stock value was at the time of the loss.[156] The 'most approved' style of bookkeeping was not required. Regrettably for the insured, they fell short of even the accepted standard, and were found to have been casual and careless in their approach.[157] The Court found that the warranty had been breached, and ostensibly followed the *Sacks* judgment in that it determined that the insurance policy was indivisible, and accordingly that the entire claim had been forfeited. The following extract from the judgment strikes a chord:

> "It may well be that the company would have acted fairly and reasonably in trying to meet the Plaintiff, by making him some offer; but it is presumed that it knows its own business best. At all events, it is entitled to rely on the strict terms of its warranty and of its conditions, whatever may be considered the hardship to the plaintiff".[158]

Why it is said that the passage is poignant, is that the words, "… the company would have acted fairly and reasonably …", which were spoken more than a 100 years ago, bears a remarkable resemblance to Rule 1(3)(a) of the 2018 Policyholder Protection Rules,[159] which stipulates that: "An Insurer must … in any engagement with a policyholder, and in all communications and dealings with a policyholder, act

[154] 1913 CPD 697.
[155] Ibid 701.
[156] Ibid 706.
[157] Ibid 707.
[158] Ibid.
[159] These rules came into effect on 1 January 2018, under Government Notice 1433, in Government Gazette 41329, dated 15 December 2017.

honourably, professionally and with due regard to the fair treatment of the policyholder".

Therefore, one could quite reasonably argue that this sense of inequity and expecting insurers to do the right thing has been there for more than a century. This sense was indeed forcefully expressed by the Appellate Division as recently as 2016, when judgment was given in *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Company*.[160] Yet the position on this point of law was still not judicially developed.

Academia has also weighed in on this matter. Professor JP Van Niekerk authored an article in 2010 entitled "The requirement of a causal link between the insured's breach of a term in the insurance contract and the insured's loss: An 'attractive feature' of the South African insurance law?".[161] He quotes *Colinvaux*, who refers to what is deemed in English law to be, "… the draconian effects of a warranty'.[162] That sounds about right!

Professor van Niekerk also demonstrates that, although the position in English law remains unchanged (or so it was at the time of writing his article), most states in the United States, for example, now require a causal link between a breach of warranty and loss.[163] Other countries with comparative requirements for a causal link include Norway, Venezuela and most modern European legal systems.

He also considered South African common law and draws a distinction between English law, on which our courts have based their approach to the enforcement of warranties, and Roman Dutch law. The latter, as opposed to English law (and by extension therefore, South African law), does require a causal link.[164] Professor van Niekerk therefore concludes that the causal requirement does already form part of our common law, and although it would be ideal if the introduction of such a requirement could form part of legislative reform, this may not be necessary, and a court could pronounce on this. That has not happened to date.

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[160] See page 26 and footnote 137.
[161] 2010 SA Merc LJ 259.
[162] Ibid 264.
[163] Ibid.
[164] Ibid 269.

South African Insurance Law,[165] which is commonly viewed as one of the leading works (if not the pre-eminent text) on insurance law in South Africa, moreover concludes:

> "As regards Insurance warranties, therefore, reform is far from complete. However, one can only hope that when such further reform is undertaken, it is done in conjunction with the law relating to misrepresentation and with the general principles of the South African Law of Contract."

The Ombudsman for Short Term Insurance has recognised the inequity inherent to the situation, and following on publication of Professor van Niekerk's above article in its official newsletter[166] in 2010, this Office began to rule that the breach of a promissory warranty must be material to a loss.[167] We know, however, that the Ombudsman has limited jurisdiction in this regard, and that the dissatisfied party can still turn to a court of law to pursue its legal remedies.[168]

Personally, it is believed that any party who enters into a contract must be bound by it if such contract is fair and valid. The cornerstone of an insurance contract is that an insurer enters into an insurance agreement, and undertakes the transfer of a risk which is a fear to the policyholder and takes premium in return. Does this not constitute an almost sacred undertaking to someone, which is tantamount to one saying, "don't worry, I will protect you"? Is the breach of such an undertaking not far more profound than the breach of any warranty by an insured party, particularly bearing in mind that an insured, after all, insures against his or her own negligence?

It is conceded unreservedly that, should an insured knowingly and wilfully impede, by breaching a promissory warranty, an insurer's efforts to keep its undertaking to indemnify, the insured should bear the consequences. Under any other circumstance it should be intolerable.

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[165] Van Niekerk (2013) 180 para 15.113.
[166] "The Ombudsman's briefcase" December 2010, https://www.osti.co.za/media/1142/2010-osti-newsl_dec.pdf.
[167] See, for example, the ruling in a matter between Mrs R and Oakhurst insurance company, where a claim was submitted for the loss of a bracelet. The policy contained a promissory warranty that jewellery, when not worn, must be in a safe. The ombudsman ruled in favour of the insurer, as the bracelet, at the time of its loss, was neither being worn, nor stored securely in a safe, and the failure to comply was deemed material to the loss. https://www.osti.co.za/media/1236/osti-briefcase-3rd-edition-2017.pdf.
[168] Millard D *Modern Insurance Law* (2013) 155.

6. LEGISLATIVE INTERVENTION

It is therefore submitted that this study has demonstrated that by 18 March 2016, on which date judgment was given in the *Viking Inshore Fishing* matter, Courts had expressed dissatisfaction for a hundred years, academia had spoken and the 'watchman', the Ombudsman, had also weighed in on the question of legal reform in respect of promissory warranties. But had the legislature taken these views to heart?

This research paper has confined its scope to promissory warranties, but it is important at this juncture to mention the substantial legislative reform that has taken place in respect of 'affirmative warranties' and material non-disclosures. This culminated in the promulgation of section 53(1) of the Short-Term Insurance Act (STIA).[169] This section has been extracted and included below for ease of reference, as it will be referred to later in this study:

53. Misrepresentation and failure to disclose material information

(1)(a) Notwithstanding anything to the contrary contained in a short-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2) –

(i) the policy shall not be invalidated;

(ii) the obligation of the short-term insurer thereunder shall not be excluded or limited; and

(iii) the obligations of the policyholder shall not be increased,

on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof.

[169] Act 53 of 1998. The same wording was contained in section 59 of the Long-Term Insurance Act 52 of 1998. Section 59 was repealed in 2018. The provision relating to misrepresentation after repeal was incorporated almost verbatim as Rule 21 of the Policyholder Protection Rules (Long Term Insurance, 2017, promulgated under Government Notice 1407 in Government Gazette 41321 dated 15 December 2017, which came into effect on 1 January 2018.

> *(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.*[170]

There have been substantial recent changes to insurance legislation in South Africa, with the promulgation of the New Insurance Act 18 of 2017, two comprehensive sets of new Policyholder Protection Rules (both for short-term and long-term insurance), as well as significant amendments to the existing STIA and the Long-Term Insurance Act (LTIA).

Careful scrutiny of both the voluminous new legislation and the amendments to the prevailing laws, has revealed that, regrettably, no reform of the existing position in respect of promissory warranties has taken place.

In respect of Policyholder Protection Rules, Section 55(1)(a) of the STIA and Section 62(1)(a) of the LTIA both hold that:

> "… the Authority may prescribe rules aimed at ensuring for the purpose of policyholder protection that policies are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of parties and in the public interest generally".

It has already been amply illustrated that the consequences of a policy being voided based on the breach of a promissory warranty, can be devastating for a policyholder. It has also been demonstrated that each of the courts, the Ombudsman and academia have expressed their dissatisfaction with the harsh outcome of the rejection of claims. Therefore, 'public interest' as quoted in section 55, has been provoked.

None of the terms 'promissory', 'warranty', 'warrants', 'warranted', 'condition precedent' or 'forfeiture' appear in either the Policyholder Protection Rules (Short-

[170] There is a note in the STIA that reads that section 53 is repealed by section 72, read with Schedule 1 of Act 18 of 2017, with effect from a date to be published. However, this section still appears to form part of the STIA, as there is no corresponding rule that has been published in the Policy Holder Protection Rules (Short Term Insurance), 2017. Even though the position remains unclear, this paper has been written on the premise that section 53 of the STIA, or a corresponding rule, remains operational.

Term Insurance) ("STIA PPR") or the Policyholder Protection Rules (Long-Term Insurance) ("LTI PPR"), nor does any type of rule feature which protects policyholders from the unfair consequences of a policy being voided, in circumstances where there is no causal link between the failure to comply with a term of a policy and the loss or damage sustained; or where such failure or breach causes no prejudice to the insurer, alternatively is immaterial to the loss.[171]

It must be acknowledged that both the STIA PPR and the LTI PPR ("the Rules") are dedicated to 'treating customers fairly', and are noble in their intention. Yet, by the same token, it has surely been a fundamental precept of society since times immemorial that we should treat others fairly, but as this contentious matter demonstrates, we abide selectively by this principle. The reality is that insurers are not suddenly going to become conscionable simply because they have a blanket obligation to do so. If insurers (not necessarily all, but most!) have a legal basis to avoid claims, which they still do in respect of warranties, they will continue to do so.[172]

The Rules address a multitude of aspects with a view to making life easier for policyholders, such as disclosure, product design, premium, amendments, claims and complaint procedures. Any policyholder can live with minor difficulties such as claim delays, unreasonable excesses and even underinsurance, but forfeiture can be devastating.

The Rules and the new Insurance Act have introduced many commendable changes and additions, but they have failed to address this critical aspect. It must therefore be concluded that further legislative reform in respect of promissory warranties in South African insurance law, is still incomplete and necessary.

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[171] The Rules were carefully scrutinized by writer when compiling a research assignment to comply with the criteria for MRL 802, in partial fulfilment of the requirements to achieve the LLM in Insurance Law and Governance. The assignment was entitled: "The effectiveness of the 2018 Policy Holder Protection Rules in terms of the Short-Term Insurance Act 53 of 1998 to effectively regulate market-conduct in the non-life insurance industry – three case studies", and submitted on 4 November 2019.

[172] This observation is again drawn from practical experience, specifically instances where writer has been requested by his insurance clients on at least three occasions during the past twelve months alone, to consider whether late notification and/or the failure to take reasonable care by a policyholder would constitute grounds to avoid their obligations. There was not a single instance where the insurer was prejudiced by such non-compliance. In two instances, the failure to notify was primarily caused by the fact that the country was subject to a "hard lock-down" owing to the COVID-19 pandemic!

7. COMPARATIVE LAW

7.1 THE CONSUMER PROTECTION ACT[173]

One example of local legislation that appears to be on the right path is the Consumer Protection Act ("the CPA"). The CPA itself does not pertinently deal with promissory warranties in the context contemplated in this study.

However, section 49 of the CPA does stipulate that "… any notice to consumers or provisions of a consumer agreement that purports to limit in anyway the risk or liability of the supplier or any other person, must be drawn to the attention of the consumer in a manner or form that satisfies the formal requirements".[174]

The formal requirements are that those provisions must be written in plain language;[175] they must be drawn to the attention of the consumer in a conspicuous manner, so as to likely draw the attention of an ordinary alert consumer,[176] and this must be done at the earlier time before the consumer enters into the agreement or is required to offer consideration for the agreement;[177] and finally, a consumer must be given an adequate opportunity to receive and comprehend the provision.[178]

Section 52 of the CPA also provides a strong remedy to consumers in that, should a supplier fail to satisfy the requirements of section 49, a court would be empowered to sever or alter such a limiting provision, to declare it null and void, to declare the entire agreement void, or to make any other order as may be just and reasonable.[179]

There are no similar requirements in the Rules, nor are the courts similarly empowered. As already demonstrated, even in a simple domestic policy, there are a multitude of promissory warranties that could 'limit the liability' of the insurer, and they are scattered throughout standard policy wordings and insurance schedules, without any specific attention being drawn to such provisions or requirements. These policy documents and schedules also easily exceed fifty pages; they are often very difficult

[173] Act 68 of 2008.
[174] Section 49(1)(a).
[175] Section 49(3).
[176] Section 49(4)(a).
[177] Section 49(4)(b)(i)&(ii).
[178] Section 49(5).
[179] Section 52(4)(a)&(b).

to understand (even to an educated person); and, particularly in a South African context, they are typically written in a policyholder's second or third language.

That is why the CPA is so effective. It cautions the supplier, "if you want to duck and dive, you can do it, but before you do it, and before you take his or her money, you need to tell the consumer that you intend to do it!".

This is a critical reform missing in South African insurance legislation.

7.2 THE INSURANCE ACT OF 2015 (UK)[180]

The Insurance Act of 2015 ("the UK Insurance Act") brought about considerable renewal to insurance law in the United Kingdom, reforming their legislation that was more than a century old and was based primarily on marine insurance (which was even older).[181]

Until the UK Insurance Act came into operation, under United Kingdom law, as is the case in South African law, a breach of warranty or other terms by a policyholder allowed an insurer to be completely discharged from liability, even if the policyholder remedied the breach.[182]

Sections 9 and 10 of the UK Insurance Act provides for relief in respect of warranties relating to representations (specifically the breach of such warranties), and abolishes any rule of law to the effect that a breach of an express or implied warranty results in the discharge of an insurer's liability.[183]

The insurer will have no liability if the warranty is breached and the breach has not been remedied.[184] However, if the breach is remedied, or if the insured ceases to be in breach, or if the warranty ceases to be applicable to the circumstances of the contract, then the earlier non-compliance with the warranty is not enforceable.[185]

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[180] https://www.legislation.gov.uk/ukpga/2015/4/pdfs/ukpga_20150004_en.pdf. Received Royal assent on 12 August 2016.
[181] Clyde & Co. "Insurance Act 2015 Shaking up a century of insurance law. June 2016. Page 1. https://www.clydeco.com/clyde/media/fileslibrary/Admin/CC010256_Insurance_Act_2015_26-07-16-web.pdf
[182] Explanatory notes to the Insurance Act 2015 provided by HM Treasury. Page3. http://www.legislation.gov.uk/ukpga/2015/4/pdfs/ukpgaen_20150004_en.pdf
[183] Section 10(1).
[184] Section 10(2).
[185] Section 10(3)-(5).

Section 10(6) may be applicable to a promissory warranty, as it stipulates the following:

> "A case falls within this subsection if – (a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or condonation is to be fulfilled, or something is (or is not) to be the case, and (b) that requirement is not complied with".

Section 11, which deals with 'Terms not relevant to the actual loss', seems to have greater bearing on this discussion. The effect of Section 11 is that an insurer may not exclude, limit or discharge its liability[186] if an insured is able to show that the non-compliance could not have increased the risk of the loss or the circumstances under which it occurred.[187] Section 11(4) provides that this section also refers to the previous section (namely section 10) relating to 'breach of warranty'.

The example used in the explanatory notes is that of a house in respect of which the insured warranted that he had a burglar alarm at the premises, even though this was not the case; the insurer cannot avoid liability if the house is then damaged by a flood.[188]

A criticism that has been raised is that section 11(1) limits terms to those that, if complied with, would reduce the risk in respect of 'loss of a particular kind', 'at a particular location', or 'at a particular time'. The criticism holds that it may not bring about relief for an insured in respect of procedural warranties or terms, such as notification clauses.[189]

It is submitted that, even though reform in the United Kingdom is still incomplete, the UK Insurance Act is likely to 'save a lot of tears'.

8. PROPOSAL

After all the hefty criticism that has been raised, it is fair to ask if there are any constructive contributions forthcoming from this research paper.

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[186] Section 11(2)
[187] Section 11(3). This seems to be very much in line with Professor Van Niekerk's proposal of a requirement for a causal link between a breach and the loss. See footnote 160 in this regard.
[188] Paragraph 92. Page 14 of the Explanatory notes. See footnote 182 above.
[189] Clyde & Co supra16. See footnote 181.

Further legislative reform is proposed.

To this end, it is proposed that we take, as a first step, that which we already have and which seems to largely be working well, namely section 53(1) of the STIA and the identically worded Rule 21.1 of the LTI PPR.

The following draft wording is accordingly proposed.

First, it is suggested that a definition of 'mandatory condition', or a similar term be included, which could be defined along the following lines:

"A term, condition, undertaking, affirmative or promissory warranty under which the policyholder is required to do or not to do something, either at an ascertainable time, or for the duration of the policy, the failure of which may lead to a forfeiture of the policyholder's right to indemnification under the policy."

Furthermore, the inclusion of provisions with the following wording is proposed:

(1)(a) Notwithstanding anything to the contrary contained in a policy of insurance,

(i) the policy shall not be invalidated;

(ii) the obligation of the insurer thereunder shall not be excluded or limited;

(iii) the policyholder's right to indemnification be forfeited,

on account of any non-compliance of any mandatory condition contained in the policy, unless such non-compliance shall have materially caused or failed to materially reduce a risk insured against.

(b) The non-compliance shall be regarded as material if a reasonable, prudent person would consider the non-compliance as having materially affected or caused the risk to materialize and that a reasonable, prudent insurer would have been materially prejudiced by such non-compliance or loss.

(2) In order for an Insurer to rely on non-compliance of a mandatory condition, such mandatory condition –

(i) had to be brought to the attention of the policyholder in a conspicuous manner and form so that it was likely to attract the attention of an ordinarily alert policyholder, having regard to the circumstances; and

(ii) before the earlier of the time at which the policyholder either enters into the insurance agreement or is required to make payment of a premium in terms of such agreement.

The reason for proposing that the wording be based on the existing wording in the relevant legislation,[190] is that such wording has already been judicially considered, and legal authority already exists which could govern and limit future disputes.[191] It would also be premised on the same equity principles that characterise the existing law, in that it features a 'double test', namely that objectively, the reasonable person must be satisfied that the breach materially relates to the loss, and subjectively, that the insurer is in fact prejudiced.

Insurers will not sell less policies if such legislation were introduced, and it is unlikely in view of the competition in the market place, that premiums would be significantly influenced. What will happen, though, is that insurers will dispute fewer claims, and pay more claims, than they had bargained to do. Provided they make sure that a policyholder knows what he or she has to do in accordance with the terms of a policy, the insurer would still be able to manage its risk and hold an errant policyholder accountable.

9. CONCLUSION

It is actually inconceivable that the reform contemplated in this study did not take place between 2016 and 2018. All the stars seem to have been aligned. The *Viking Inshore Fishing* judgment had been given, there were authoritative academic articles on the matter, the Ombudsman had intervened and (very importantly) there were sweeping changes to the United Kingdom laws governing warranties, on which our legal

[190] Section 53(1) of the STI and section 49 of the CPA.
[191] All the cases listed in this study may add value, also in addition to cases that scrutinized section 53 in particular, such as *Mahadeo v Dial Direct Insurance Ltd* 2008 (4) SA 80 (W), *Regent Insurance Co Ltd v King's Property Development (Pty) Ltd* 2015 (3) SA 85 SCA and *Bruwer v Novarisk Partners* 2011 (1) SA 234 (GSJ).

principles relating to warranties are based. All of this occurred prior to 2017, when our new legislation was enacted. Why would this be?

Surely, the legislature, Prudential Authority and the Financial Service Conduct Authority (FSCA) must have been aware of all the relevant authority and the need for such reform.

For some reason, there seems to be a reluctance to interfere with the contractual freedom of parties.

Even the highest court in the land, in *Barkhuizen v Napier*,[192] appears to have missed an opportunity to address, or at least avoided to speak decisively on, the notion that non-compliance with a term in an insurance contract should be material to the resulting forfeiture. Why, in that matter, was the policyholder required to give reasons as to why he didn't comply with the time bar? Why wasn't the insurer required to demonstrate that non-compliance was material to the extent that it had prejudiced the insurer by, for example, causing financial hardship?

The people have spoken. It is clear, and has been for some time, that reform in respect of promissory warranties in the South African law of insurance is necessary. However, someone will have to 'get their hands dirty', like Didcott J did in *Pillay v South African National Life Assurance Co Ltd*.[193] The sense is that this is a task for the FSCA, which body is ultimately charged with overseeing market conduct.

As long as these reforms remain outstanding, insurers will continue to get away with the unconscionable on a daily basis. The cost of this, in terms of tears and pain, is very real.

[192] 2007 (5) SA 323 (CC).
[193] 1991 (1) SA 363 (D).

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AD	Appellate Division
JILB	Juta's Insurance Law Bulletin
LTI	Long-term insurance
LTIA	Long-Term Insurance Act
PPRs	Policyholder Protection Rules
SA Merc LJ	South African Mercantile Law Journal a
STI	Short-term insurance
STIA	Short-Term Insurance Act

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