THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 32/2015

In the matter between:

RENASA INSURANCE COMPANY LIMITED **APPELLANT**

and

CHRISTOPHER BRIAN WATSON **FIRST RESPONDENT**

FLASHCOR 201 CC **SECOND RESPONDENT**

Neutral citation:	*Renasa Insurance Company Limited v Watson* (32/2014) [2016] ZASCA 13 (11 March 2016)
Coram:	Ponnan, Tshiqi, Saldulker and Mbha JJA and Fourie AJA
Heard:	22 February 2016
Delivered:	11 March 2016

Summary: Insurance policy – alleged fraudulent claim – arson – insurer failing to discharge onus of proving that insured was the arsonist or that insured is precluded from claiming loss due to his failure to take reasonable steps and precautions to prevent the loss.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Savage AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Fourie AJA (Ponnan, Tshiqi, Saldulker and Mbha JJA concurring):

[1] This appeal has its origin in a fire that erupted during the morning of 10 January 2011 in industrial premises in Elsies River, Cape Town (the premises) owned by the second respondent, Flashcor 201 CC (Flashcor). The premises were let to the first respondent, Mr C B Watson (Watson), who conducted a print finishing business from the premises under the name and style of Canterbury Coaters.

[2] The appellant, Renasa Insurance Company Limited (Renasa), is an insurer which had insured Watson and Flashcor, with inception from 1 October 2007, under a written short-term insurance policy against loss or damage caused by, inter alia, fire. In terms of the latest annual policy renewal undertaken on 20 October 2010, Renasa indemnified Watson as the sole proprietor of Canterbury Coaters against the loss or damage of plant, machinery and stock suffered as a consequence of fire for an agreed insured sum of R17 545 871. In addition, Renasa insured Flashcor against the loss of or damage to the buildings on the premises as a consequence of fire for an agreed insured sum of R640 001-91.

[3] Pursuant to the fire of 10 January 2011, Watson and Flashcor lodged claims with Renasa under the insurance policy for payment of the amount of R17 545 871 for the loss or damage caused to the plant and machinery, and R640 001-91 for the damage to the building, respectively. Renasa, however, repudiated the claims with the result that Watson and Flashcor instituted action against Renasa in the Western Cape High Court, Cape Town, for payment of the amounts claimed under the insurance policy.

[4] The matter first came before Davis J who dealt with the issue of Watson's locus standi. Renasa contended that Canterbury Coaters was in fact a partnership between Watson and Mr P Hampson (Hampson), but after hearing evidence Davis J held that, although Hampson had made an investment in the business, Canterbury Coaters was at all material times a sole proprietorship owned by Watson.

[5] It was subsequently agreed by the parties and ordered by the court below in terms of Uniform rule 33(4), that the issue as to Renasa's liability to make payment of the claims would be adjudicated first, with the issue regarding the quantum of the claims to stand over for later determination, if necessary. The trial then proceeded before Savage AJ. After hearing evidence the trial judge held in favour of Watson and Flashcor, declaring Renasa to be liable for such loss as they may prove they have suffered as a consequence of the damage caused by the fire. Renasa now appeals, with the leave of the court a quo, against the whole of this order.

[6] Renasa's repudiation of the claims under the policy and its defence in the court a quo and on appeal, was based on two provisions, pleaded in the alternative, under the General Conditions of the insurance policy. These are clauses 8 and 5, respectively.

[7] Clause 8 of the General Conditions provides that:

'8. Fraud

If any claim under this policy is in any respect fraudulent or if any fraudulent means or devices are used by the insured or anyone acting on their behalf or with their knowledge or consent to obtain any benefit under this policy or if any event is occasioned by the wilful act or with the connivance of the insured, the benefit afforded under this policy in respect of any such claims shall be forfeited.'

[8] Clause 5 of the General Conditions reads as follows:

'5. Prevention of Loss

The insured shall take all reasonable steps and precautions to prevent accidents or losses.'

[9] In paragraph 9.3 of its plea Renasa denied liability to indemnify Watson and Flashcor under clause 8 on the basis that:

'9.3.1 On or about 10 January 2011 the first plaintiff [Watson] acting alone and/or in his capacity as a member of the second plaintiff [Flashcor], alternatively, parties unbeknown to the defendant [Renasa], but on the instruction, and with the first and/or second plaintiff's knowledge and consent, and with their connivance, set fire to the immovable property and the movable equipment situate thereon, with a view to fraudulently obtaining a benefit under the policy to which the insured would ordinarily not be entitled to.

9.3.2 Accordingly, in terms of clause 8 of the policy, any claim which either the first and/or the second plaintiffs may have been entitled to, is forfeited.'

[10] In its trial particulars, Renasa alleged that the fire was ignited by Watson and/or those instructed by him on 10 January 2011 between 08h00 and 09h00. Renasa futher placed reliance on the 'deliberate participation of the plaintiffs in some manner in the happening of the fire at the property' in breach of General Condition 8 of the policy, and 'on any and all acts and representations of the plaintiffs, which were calculated to conceal or otherwise to prevent the detection of the plaintiffs' deliberate participation in some manner in the happening of the fire.'

[11] In the alternative, Renasa pleaded that the plaintiffs had breached clause 5 of the General Conditions of the policy, in that:

‘9.5.1 It was an express, alternatively implied, further alternatively tacit term of the policy that:

9.5.1.1 The first and second plaintiffs were obliged to take all reasonable steps and precautions to prevent the fire, and losses sustained in consequence thereof.

. . .

9.5.2 In breach of the aforegoing and aware that the premises, and the goods situate thereon were subject to a fire risk on 10 January 2011, the plaintiffs failed to take any or all reasonable steps and precautions to prevent the fire, and losses sustained in consequence thereof, in circumstances where had the first and/or second plaintiff done so, a fire would have been avoided.

9.5.3 In the premises, defendant is not obliged to pay plaintiffs the sum claimed or any portion thereof.’

[12] In its trial particulars, Renasa alleged that the steps that Watson and Flashcor ought to have taken to prevent or avoid the fire were: not to leave the property unattended, ensure that the accelerants deployed therein for the purposes of setting fire thereto were not ignited, secure the property to prevent access by an intruder, direct employees to remain in attendance to deter an intruder from gaining access to the property, summon the fire department and discontinue the electricity supply to the premises.

[13] It was common cause that Watson and Flashcor established prima facie that their claims fell within the ambit of the promised protection offered by the policy. Therefore, Renasa as the insurer bore the onus of establishing its right to repudiate their claims for the reasons pleaded by it. See *Commercial Union Assurance Company of South Africa Ltd v Kwazulu Finance and Investment Corporation and another* 1995 (3) SA 751 (A) at 756H-I; (414/93) [1995] ZASCA 63 (30 May 1995).

[14] Turning firstly to the defence based on clause 8 of the General Conditions, Renasa had to prove on a balance of probabilities that Watson acting alone, or parties unbeknown to Renasa acting on the instructions of Watson and/or Flashcor, and with their knowledge, consent and connivance, set fire to the premises in order

to fraudulently obtain a benefit under the policy. As was reiterated by the trial judge, it is not for Watson or Flashcor to disprove Watson's guilt as an arsonist, nor that someone else set fire to the premises. Savage AJ concluded that, upon a conspectus of the evidence as a whole, Renasa had failed to discharge the onus of showing that Watson deliberately set fire to the premises, or that others with his and/or Flashcor's knowledge and consent did so. Renasa contends that, in so finding, the trial judge misdirected herself in material respects.

[15] As relevant background it is necessary to set out in some detail the events of 10 January 2011 leading up to and following the eruption of the fire. Watson, who resided on a farm in the Piketberg district, 120 kilometres from the premises, left his residence in the early hours of the morning of 10 January 2011. The reason for his early departure was to ensure that he would be at the premises when the workforce arrived for the new work year after the end of year holidays. It was established by means of a tracking device in the vehicle driven by Watson that he had arrived at the premises at 06h19. He had a set of keys which allowed him entry to the premises. He says that he experienced some difficulty in unlocking and opening the outer perimeter gate whereafter he found the main door to the premises unlocked.

[16] Watson described how he then entered the premises through the front door and established that the burglar alarm and CCTV system had been disarmed. Upon entering he immediately smelt petrol and when he entered the factory area of the premises, there was a strong odour of petrol everywhere. He was met by a carefully constructed arson scene with a number of plastic drums filled with petrol strategically suspended from the cable trays above the printing and other machines in the factory area. Mr Leon Niemand, a specialist fire investigator who testified on behalf of Renasa, described the modus operandi employed as one where the tops and doors of the machines were left open and the hanging drums were positioned more or less horizontally by stringing them together with fishing gut fed through holes drilled in the bottom of the drums. This prevented the fuel in the drums from spilling, but once the gut would part the drums would swing into a vertical position and spill the fuel onto the fire thereby destroying or damaging the printing and other valuable machines.

[17] Watson testified that he had also noticed that the boot of his Audi TT RS Quattro sports car, which he had parked in the factory area on 7 January 2011, was open. On closer examination he found a fuel-drenched cloth in the boot of the car. I should add that this sports car was less than a year old and was clearly a prized possession of his.

[18] According to Watson he was in a state of shock while surveying this surreal scene. He established that the electricity supply to the machines had been cut by switching off the electrical circuit breakers. He then decided to alert the police and found their emergency number (10111) in the telephone directory. His telephone records confirm that he phoned the emergency number at 06h32 and members of the Elsies River Police Station were despatched to the scene. Watson went outside to await the police who arrived at the premises at 06h45. Constables Sampson and Petersen were the police members who attended the scene after they had received notice of the complaint at 06h34. They entered the premises with Watson and surveyed the well-constructed arson scene in the factory. They found no one else on the premises nor any evidence of forced entry. They confirmed that the burglar alarm and CCTV system had been disconnected.

[19] The police witnesses also confirmed that Watson's sports car was parked in the factory area with its boot open. They thought that paraffin had been poured in the car while Watson was of the view that it was diesel. After conferring, the constables informed Watson that they did not want him to remain at the premises and asked him to follow them to the police station to open a criminal case docket. Watson and the police left the premises and he locked the door and security gate. The tracker device in his truck recorded him leaving the premises at 07h00 for the nearby Elsies River Police Station where he arrived at 07h03.

[20] Upon leaving the premises, Constables Sampson and Petersen took no steps to secure the scene nor did they ask Watson to arrange private security to do so. They did not cordon off the premises or the building and apparently made no attempt to notify the fire brigade or any other emergency services of the potential fire threat.

[21] At the police station Watson was kept waiting for a while before a policewoman with a poor command of English took his statement. She warned him not to re-enter the premises as the forensic division of the police would contact him to take fingerprints. He called an employee, Ms Ravenscroft, and instructed her to advise the other employees that they should go home. This she did, except that she could not succeed in contacting one person, Mr George Mpumalani, an employee who was still on his way to work.

[22] Watson then returned to the premises where he arrived at 08h11. He sat outside in his truck and soon thereafter Mr Mpumalani arrived. Watson advised him that there would be no work that day. Watson's understanding was that the police were now in control of the scene and would contact him when they needed access to the premises. He had faith in the police to disarm what he described as the 'bomb' at the premises and believed that they would do what was necessary. He was very distraught and needed to talk to someone, so he decided to visit friends in Claremont with whom he normally stayed when he was in Cape Town. He left the premises at 08h19 and arrived at his friends' house in Claremont at 08h44. This was confirmed by Ms Jessica Gaine who testified that, upon his arrival, Watson was very distressed. While Watson was there he received a telephone call from his business associate, Hampson, to say that the building on the premises was on fire.

[23] Watson returned to the premises where he arrived at 09h33. By then the fire had been extinguished by members of the fire fighting services which had been called to the scene. Mr Mark Bywater of a neighbouring business noticed smoke coming out of the roof of the factory building on the premises and he used a forklift truck to remove the motorised steel gate so that the fire department could gain

access to the premises. Bywater testified that he telephoned Hampson, with whom he was acquainted, to advise him of the fire, but upon breaking the news to him, Hampson seemed rather unconcerned. He said that he thought that Hampson would have acted a little more shocked, but he did not. When, during cross-examination, Bywater was asked about Hampson's reaction he said that 'he was about as calm as you are now'.

[24] Mr Albertus Hanekom of the fire department testified that the call reporting the fire had been received at the fire station at 09h02 and they responded immediately arriving at the premises at 09h10. They had to force the office door open to gain entry to the premises, whereupon they discovered the fire in the factory section. He gained the impression that there were multiple fires and he noticed that all the 25 litre plastic drums that had apparently been hanging from ropes suspended from the cable trays, had by then dropped to the floor spilling fuel onto the fire. He immediately suspected arson and upon extinguishing the fire, the premises were handed over to Warrant Officer Nimb of the SAPS who arrived on the scene at 10h50.

[25] Warrant Officer Nimb formed the opinion that access to the scene was gained by a person who had a key to the premises. It was clear to him that the motive was arson and his impression was that there had been several separate fires on the scene. He was unable to say how these fires were caused nor was he able to say whether the fires were started manually or by means of a delay device. He confirmed that Watson's Audi sports car was parked in the factory area with an open boot, in which there was a white cloth which smelt strongly of diesel. The premises were cordoned off by the police, although Watson did testify that at the initial stage the scene was crawling with people, estimating there to have been at least 30 people inside the premises. In the days after the fire the scene was visited by a number of expert witnesses, almost exclusively at the request of Renasa. I will in due course refer to their evidence and the conclusions drawn by them from what they observed at the scene.

[26] Against the above background, it was common cause between the parties that the fire was as a result of arson. What Renasa set out to prove through their witnesses is that Watson was the arsonist. This necessarily involved establishing how, on the probabilities, Watson would have initiated the fire. As emphasised by Van Blerk JA in *Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Beperk* 1974 (2) SA 450 (A) at 451A-B:

'Die bewyslas het deurgaans by die respondent [the insurer] berus om 'n brandstigting te bewys en dat appellant [the insured] die huis aan die brand gesteek het. Die brandstigting en die identiteit van die brandstigter is onderling afhanklik van mekaar. Alhoewel daar nie 'n plig op die respondent gerus het om deur getuienis alle moontlike oorsake van die brand uit te skakel nie . . . moet hy die hof oortuig dat sy verduideliking van hoe die brand ontstaan het die korrekte een is . . . op grond dat dit die mees aanneemlike en waarskynlikste is. . . .'

[27] With regard to the discharging of the onus on a balance of probabilities Holmes JA said the following in *Ocean Accident and Guarantee Corporation Limited v Koch* 1963 (4) SA 147 (A) at 159B-C:

'As to the balancing of probabilities, I agree with the remarks of Selke J in Govan v Skidmore 1952 (1) SA 732 (N) at p 734, namely

". . . in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, 3rd ed, para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one."'

[28] Renasa's witnesses were unable to provide any clarity as to how the fire started, and in particular, whether it was started manually or by means of some delay device. Ms A Burger (Burger), Renasa's primary fire expert and investigator agreed that she could establish no cause and no origin for the fire and that she was able to point to a range of possible causes only. She testified that there were 'separate areas of fire where there is burning'. She readily conceded that there was a multitude of possibilities as to how and where the fire started. Therefore she could not present the court with a probable cause or the origin of the fire. She was unable to locate a delay device, although she agreed that one would normally expect a fire investigator

to find such a device had it been used to ignite the fire. She added, though, that in one per cent of cases a delay device may not be found and that this could be one of those cases.

[29] It appears from the evidence of Burger that Renasa had placed some limitations on her investigation as to the cause and the origin of the fire. For example, she was only allowed to test two samples taken from the areas where severe localised fire damage was observed, whilst she agreed that the better way of doing it would have been to have sifted through the burnt material in search of evidence of a delay device. Be this as it may, the fact of the matter is that Burger was unable to make any meaningful contribution in determining the probable cause or the origin of the fire.

[30] Mr G B Vincent (Vincent), an independent loss adjuster, who was one of the first on the scene on behalf of Renasa, testified that there were about nine ‘different manual points of ignition’, but qualified this statement by adding ‘when I say manual ignition I am saying manual ignition as against spontaneous combustion’. During cross-examination he explained that his understanding of ‘manual’ is that it involved someone being there to light the fire. However, Vincent by his own admission is not a fire expert and his ‘opinion’ as to the manner of ignition of the fire amounted to no more than ‘in my mind at that stage they [the points of ignition] must have been manual’.

[31] Mr I R Mumford (Mumford), an industrial engineer who testified on behalf of Renasa, also speculated as to how the fire could have started, explaining that electricity could have been the source to ignite a fire, eg by using a heating coil, but added that there was no evidence that electricity was used to start this fire. Mumford alluded to internet articles regarding delay devices used to ignite fires, but readily conceded that he could not provide meaningful assistance as he is ‘definitely not a fire forensic expert’.

[32] In the result the trial court found itself in a situation where, on the evidence, there appeared to have been multiple points of ignition, or 'seats' of fire as suggested by Burger, that were isolated from any electrical or heat source that could act as the medium for ignition. None of Renasa's witnesses, including Warrant Officer Nimb, could explain how, on the probabilities, all these fires were ignited and whether ignition was manual or by means of a delay device.

[33] This notwithstanding, counsel for Renasa submitted that Renasa had proved that ignition was not manual, but by means of an unknown and unlocated delay device and that Watson was the arsonist who set the device. To this end counsel employed a process of inferential reasoning by submitting that, apart from Watson, 'there is simply no-one else who would have used such a device in order to ignite the fire' and the fact that no delay device was found 'is testimony to the ingenuity of the arsonist ─ and there was no-one who had shown more ingenuity during the course of this trial than Mr Watson'. These are self-serving submissions unsupported by the evidence. Moreover, the reasoning is circuitous. Significantly too, it was never put to Watson how he is alleged to have started the fire, whether manually or by means of a delay device, nor when he is alleged to have ignited the fire.

[34] Above all Renasa was faced with the improbability ─ indeed the illogicality ─ as to why, if Watson was the arsonist who had carefully prepared the scene and was ready to set the tinderbox alight, he would summon the police thereby thwarting his intention to burn down the factory. Counsel for Renasa submitted that this was a calculated move on the part of Watson, which he described as 'a bold move to create an alibi' and that had the police not left the scene, Watson could 'have loudly proclaimed to the world that [he] had saved his premises'.

[35] I must confess that the logic of this submission escapes me. As held by the court a quo, if Watson was the arsonist, he would then have had to gamble on the

fact that the police, once called, would either not arrive or would act contrary to their duties and standing orders by leaving the scene unsecured. To my mind, one would ordinarily expect the police, when summoned to a scene of this nature, to take the necessary steps to manage the scene and prevent the flammable liquid from being ignited. The phone call to the police would therefore effectively have thwarted his carefully planned operation to burn the factory down. Such behaviour would, in my opinion, make no sense and it rather shows that Watson was not the arsonist. I should also add that it was not put to Watson in cross-examination that he called the police in order to create an alibi for himself.

[36] There is the further strange conduct on the part of Watson, if he was the arsonist, to park his Audi in the building with the intention of having it destroyed by the fire. The evidence shows that he could have sold the vehicle, had he chosen, in the market for virtually the same price that he had paid for it, yet he rather took the risk that the insurer of the Audi (not Renasa) may not compensate him for the damage to the vehicle. Had he been short of funds he could have sold it for close to R700 000 as testified to by the sales manager of the Audi Centre, Claremont, Cape Town. I should mention that, immediately upon being paid out by his insurer, Watson purchased a similar vehicle. In view of the above, I agree with the conclusion of the trial judge that the inference that Watson started the fire and placed his beloved Audi on the scene is not the more plausible. Quite the contrary, it is in fact illogical and untenable.

[37] Counsel for Renasa placed much store on what he described as Watson's powerful motive to commit the arson. He submitted that the financial evidence showed that the business of Canterbury Coaters was in decline, was unlikely to survive and at best for Watson was barely profitable. He also emphasised that should the claim succeed almost the entire, very large, windfall generated by the fire would accrue to Watson. He was therefore the one person who could possibly have benefited from the fire.

[38] This submission is largely based upon the evidence of Ms D Ladopoulos (Ladopoulos), an accountant who testified on behalf of Renasa. An analysis of her evidence, however, shows that the dark picture which she sought to depict of the business of Canterbury Coaters, was based on a forward-looking viability analysis, coupled with her prediction that at some point in the future the business would run into financial difficulty, which would only be deferred by funds derived from the sale of the stock and the Audi vehicle. However, it does not appear to me that the financial evidence as a whole justified this bleak prognosis, particularly when one has regard to the concessions made by Ladopoulus during cross-examination.

[39] Ladopoulos conceded that, as at the date of the fire, Watson was factually solvent with a nett asset value of approximately R5 million, having assets of approximately R6,5 million and liabilities of approximately R1,5 million. She further accepted that, at the time of the fire, Watson had access to funds of R1,4 million, made up of the balance in his bond account, cash at the bank, stock in the factory and the Audi.

[40] This resulted in the further concession by Ladopoulos that there were no indications of commercial insolvency on the part of Watson at the time of the fire. All of his staff had been paid, he had taken healthy drawings from the business, was the proud owner of a new Audi TT sports car, was living on a beautiful farm and had no liabilities, save for a modest bond account. Nor did he have any creditors of note demanding payment from him. In addition, independent evidence showed that a large order had been placed with Canterbury Coaters to commence in January 2011, which could not be proceeded with due to the damage caused by the fire. To this I should add that Watson’s accountant, Mr Swanepoel, testified that he did not regard the business as being in any financial trouble at the time.

[41] In my view, the financial evidence presented by Renasa falls well short of proof that Watson had a motive to burn the factory down due to the precarious financial position of the business. On the contrary, I am in agreement with the trial

court that Ladopoulos failed to take sufficient account of the overall financial position of Watson over a number of years and that she placed insufficient emphasis on the fact that he was not trading in insolvent circumstances. The conduct of Watson following the fire, by being prepared to settle for second hand machines as he was keen to get his factory up and running, also does not fit the profile of an arsonist who was facing financial ruin or motivated by financial gain.

[42] Finally, in this regard, I agree with the submission on behalf of Watson, that it is difficult to accept that a commercially solvent businessman with a nett asset value of R5 million, including a paid-up vehicle with a marketable value of R690 000, cash in the bank of R120 000, a debtors' book of R560 000 and stock worth R270 000, as well as a large order waiting to be completed early in the new year, would resort to complex fraud and arson, rather than simply liquidating some of his assets, if he thought he was in need of funds.

[43] It should be borne in mind that the trial judge found Watson to be a credible witness. She had the opportunity of assessing Watson's credibility as a witness over a period of seven days, which included four and a half days under cross-examination while he was unrepresented. Counsel for Renasa submitted that the judge a quo had misdirected herself in accepting Watson's evidence. However, in her closely reasoned judgment the trial judge carefully considered all the facts and circumstances relevant to the reliability of Watson as a witness, and I find no room for interfering with her finding in this regard. As held by the court a quo, Watson was certainly argumentative, cautious and wary of being misinterpreted. I should add that he was also rather verbose in answering questions, particularly under cross-examination. However, this does not necessarily indicate a lack of honesty on his part, but rather appears to be, as held by the court below, 'the conduct of a man who had risked much in running a high court trial against an institutional opponent in circumstances in which it was clear that Renasa had from early on fingered him as the culprit'.

[44] The trial judge concluded that the fire was probably ignited manually and that the use of a delay device could be excluded as no such device was found. As recorded above, Renasa contends that the trial court ought to have found that Watson was the arsonist who started the fire by means of a delay device. As I understood Renasa's case, Watson would have ignited the fire by means of a remote delay device after departing from the premises at 08h19, but not later than 09h02. In fact, it was submitted on behalf of Renasa that it was inconceivable that an arsonist would have risked manually igniting the fire during this critical period (08h19-09h02) on Monday 10 January 2011, the first day of work, in broad daylight with people around, especially also after the police had already attended the scene. According to Renasa the fire could only have been ignited by means of a delay device.

[45] However, the difficulty facing Renasa is the lack of a factual basis for the drawing of an inference that a delay device was used to ignite the fire and that Watson was the arsonist. There is simply no evidence (whether direct or circumstantial or any other probative material) as to how the fire started (the source of the ignition); where the fire started (the point(s) of ignition or fire origin) and at what time it ignited. In the absence of proof of these crucial elements, the trial court correctly held that, in weighing the cumulative effect of all the proven facts, Renasa had not discharged the onus of showing that Watson deliberately set fire to the premises, or that others with his knowledge or consent did so. It follows that the court a quo correctly dismissed Renasa's defence based on clause 8 of the General Conditions of the insurance policy.

[46] This brings me to Renasa's alternative defence based on clause 5 of the insurance policy. It immediately strikes one that the factual premise of this defence is wholly at odds with that of the main defence based on clause 8. In the case of the latter, Renasa contends that Watson was the arsonist who ignited the fire by means of a delay device. The alternative defence, however, is based on a factual premise that the fire was ignited manually by an unknown arsonist who had no connection with Watson, and Watson is said to have been at fault by failing to take reasonable

steps to prevent the arsonist from so doing. As recorded earlier, the critical time when Watson was supposed to have taken these steps was between the time of his departure from the premises at 08h19 and 09h02.

[47] The case law dealing with the interpretation of provisions in insurance contracts similar to clause 5, was considered by the full court in *Santam Limited v CC Designing CC* 1999 (4) SA 199 (C). It concluded that a clause of this nature should not be construed as an exclusion of liability where the loss was caused merely by the negligence of the insured, but that proof of recklessness is required. The court a quo, relying on this judgment of the full court, held that Renasa failed to prove recklessness on the part of Watson and that the alternative defence could accordingly not succeed. Counsel for Renasa submitted that the bar was set too high by requiring Renasa to prove recklessness on the part of Watson.

[48] In view of the conclusion that I have reached on the alternative defence, it is not necessary to consider whether or not the full court in *Santam Limited v CC Designing CC*, and accordingly the court a quo too, correctly interpreted clause 5. Having regard to the wording of clause 5, it is at the very least clear that to require an insured to take steps to prevent a loss, proof of foreseeability of loss eventuating is required. This would require proof that the reasonable person in the position of the insured would have foreseen the reasonable possibility of the loss eventuating and would therefore have taken reasonable steps to prevent same.

[49] As recorded earlier, Renasa itself contends that it is inconceivable that an unknown arsonist would have risked manually igniting the fire during this critical period. This proposition was put to Watson during cross-examination and he agreed with it, as appears from the following extract of the record:

‘. . . it is inconceivable, and I put it that high, that he [the arsonist] would have done it on the first day of work . . . between 8:30 and 9:30 ─ I would say it is inconceivable that anybody would do that. I totally agree with you.’

[50] It therefore became common cause that a reasonable person in the position of Watson would not have foreseen, as a reasonable possibility, that an unknown arsonist would have attempted to manually ignite the fire after Watson's departure from the premises. It accordingly follows that a reasonable person would not have foreseen, as a reasonable possibility, that his or her conduct in leaving the premises unattended during this period, would cause loss to eventuate by virtue of the fire being ignited manually by an unknown arsonist. Therefore, in these circumstances, Watson could hardly have been required to take steps to guard against loss caused by an eventuality which was inconceivable. I accordingly conclude that the alternative defence of Renasa also had to fail.

[51] In the result the appeal is dismissed with costs.

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P B FOURIE
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:	R W F Macwilliam SC Instructed by: Everinghams Inc, Cape Town Webbers, Bloemfontein
For Respondent:	A D Brown Instructed by: De Klerk and Van Gend Inc, Cape Town McIntyre and Van der Post, Bloemfontein