

The Duty To Mitigate Damages with specific reference to Insurance Contracts

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Introduction

This article seeks to explore when and if an insured person is bound to a term placing an obligation on the insured to mitigate his/her covered losses. This duty is not always an explicit term of an insurance contract and can often be a tacit term.

Property Insurance Policies

An insurance contract is a reciprocal contract between an insurer and an insured, in terms of which the insurer undertakes to pay the insured an amount of money or its equivalent, in exchange for payment of a price or premium, should the risk, borne by the insurer on behalf of the insured, materialise by the happening of a specified uncertain event in which the insured has an interest (*Lake v Reinsurance Corporation Ltd* 1967 (3) SA 124 (W)).

Property insurance contracts impose a number of obligations on a policy holder, for example the duty to explain the loss, the duty to allow access to inspect the property, and the even the duty to be questioned under oath in regard to the loss. In addition to the above, the contract may stipulate that the policyholder must take reasonable steps to protect his/her property from further damage.

The Duty to Mitigate Damages

This concept is an extension of the duty not to intentionally cause the loss of the property which was insured. The duty to mitigate loss entails that a person who has suffered a loss must take any/all reasonable steps to prevent further damage and loss. For example, should an insured's water geyser burst, a reasonable step for the insured to take in order to mitigate his/her damage is to turn off the water mains in order to prevent further flooding and water damage to the property.

The Extent of the Duty

If the insured suffers a total loss and there is no asset left to protect, the policy holder may be relieved of the duty to mitigate the damage. However, it is not always clear when a total loss has occurred and a policyholder should rather err on the side of caution and take any reasonable steps to prevent or minimise the damages suffered if it is of no risk to his/her health.

Constraints on the duty to Mitigate

The duty to mitigate only imposes on a policyholder an obligation to expend reasonable efforts to mitigate damages, thus the insured does not need to do what is unreasonable or impractical. Furthermore, a policyholder who is financially unable to mitigate the damages is not obliged to mitigate same if it is unreasonable for the expense to be paid by him.

Consequences

If there is a failure to mitigate damage or the claimant is found to have acted recklessly the insurer may not be obliged to cover additional damages caused to the property due to this omission or negligence on behalf of the claimant as this additional damage is seen to have been avoidable.

Recovery of costs when mitigating damages

Should the policy holder incur expenses while mitigating the damages (whilst not acting recklessly or negligently), our law seems to provide that the insurer will be obliged to reimburse the insured, even if the type of loss is not expressly insured against in the insured amount. For example, if an insured's vehicle is damaged in a car accident, it would be reasonable to expect the insured to have the vehicle towed from the accident scene to a place of safekeeping, in order to protect the vehicle from vandalism and theft. The costs of towing the vehicle may be expressly covered (or excluded by) an insurance contract, or the contract might be silent about the point. If the contract is silent about the point then the position in our law is that the duty to mitigate may be inferred, if the construction of the entire contract leads to this conclusion.

Conclusion

In order to mitigate the losses suffered the insured must take all reasonable steps to prevent further damage. This mitigation may be recoverable from the insurer as part of the insured interest if deemed to be reasonable and necessary.