Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**
Circulate to Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case Number:	2279/2021
Heard:	27 and 28 February 2024
Argued:	03 June 2024
Delivered:	02 August 2024

In the matter between: -

NJK BOERDERY CC **PLAINTIFF**
(REGISTRATION NUMBER 2006/112561/23)

and

SAFIRE INSURANCE COMPANY LTD **DEFENDANT**
(REGISTRATION NUMBER 2000/027673/06)

JUDGMENT

Stanton J

INTRODUCTION: -

[1] In this matter, the plaintiff who farms with pecan nuts in the Northern Cape, instituted an action against the defendant, a registered short term insurance company, for payment of the amount of R9 626 640,00, together with interest and costs.

THE PLEADINGS: -

[2] According to the particulars of claim, the plaintiff's cause of action is: -

2.1 During November 2020 the plaintiff, as the insured, took out an insurance policy with the defendant with policy number 20-21-00231 and a written insurance agreement was concluded (*"the insurance agreement"*) in terms of which the defendant was *inter alia* obliged to provide insurance cover to the plaintiff and to indemnify the plaintiff against loss and damage to the plaintiff's pecan nut crop on the farm Nuwejaarskraal, Prieska ("*Nuwejaarskraal*") in the event of such loss and damage being caused by the mechanical action of a hail strike;

2.2 On 17 November 2020 and 17 March 2021 hailstorms occurred on Nuwejaarskraal and the mechanical action thereof caused serious and extensive damage to the plaintiff's pecan nut crop;

2.3 The defendant was notified of the hailstorm of 17 November 2020 whereafter the defendant appointed assessors to determine the plaintiff's damage;

2.4 Although not stipulated in the insurance agreement, the assessment process for the determination of damage involves the following: -

2.4.1 The assessor identifies sample trees and then counts the hail-damaged nuts that were dislodged from the sample trees. This process is repeated over a number of weeks because more hail damages nuts fall from the trees as time passes (*"the preliminary assessment"*); and

2.4.2 A week prior to the crop being harvested, a final assessment is done by shaking the trees to dislodge all the nuts. The commercially unmarketable nuts (for reasons other than hail damage) are separated from the hail-damaged nuts and the

commercially saleable nuts. The totality of the hail-damaged nuts is then divided by the insured yield to determine the total percentage of damage ("*the final assessment*");

2.5 The preliminary assessment commenced on 20 November 2020 and continued on 02 December 2020, but was interrupted by severe rainstorms that occurred on 08 December 2020, which resulted in almost all of the pecan nuts becoming dislodged and washed away, making it impossible to apply and complete the assessment process as the nuts could not be linked to a specific sample tree;

2.6 As a result, the defendant's regional manager, Mr Ivan Myburgh, and the defendant's elected assessors postponed the assessment to a date one week prior to harvesting, which decision was communicated and accepted by the defendant's technical manager;

2.7 The postponement of the final assessment was done in terms of clause 2E of the claims procedure of the policy that reads: -

"Die Assessor mag, na goeddunke, die finale beoordeling van enige beskadigde Vrugte uitstel tot sodanige tyd dat die verlies aan die opbrengs akkuraat bepaal kan word.";

2.8 When the hailstorm of 17 March 2021 occurred, the defendant's assessors and regional manager once again decided not to adopt the normal assessment procedure, but to deal with the hail damage in respect of that hailstorm together with and on the same basis as was elected in respect of the 17 November 2020 hailstorm, namely postponing same to one week prior to harvesting;

2.9 On 11 June 2021, approximately one week before the harvest, the defendant's assessors assessed the percentage of the plaintiff's damage as follows: -

2.9.1 Block 2002: 59%

2.9.2 Block 2004: 82%;

2.9.3 Block 2006: 46%; and

2.9.4 Block 2013: 59%;

("*the damage report*")

2.10 Based on the defendant's assessors' assessment, the plaintiff's damage as a result of the hailstorm amounted to R9 626 640,00, (inclusive of VAT) calculated as follow: -

2.10.1 Block 2002: 59% damage less 20% excess = 39%
39% x R432 000,00 (insured value) = R1 684 800,00

Plus

2.10.2 Block 2004: 82% damage less 20% excess = 62%
62% x R7 920 000,00 (insured value) = R4 910 400,00

Plus

2.10.3 Block 2006: 46% damage less 20% excess = 26%
26% x R5 040 000,00 (insured value) = R1 310 400

Plus

2.10.4 Block 2013: 59% damage less 20% excess = 39 %
39% x R1 200 000,00 (insured value) = R468 000,00; and

2.11 The defendant breached the insurance agreement in that it refused to indemnify and pay the plaintiff the amount of R9 626 640,00.

[3] According to the defendant's plea: -

3.1 The defendant's insurance agreement is constituted by: -

3.1.1 The application for insurance;

3.1.2 The quotation for insurance;

3.1.3 The policy document;

3.1.4 The schedule of insurance; and

3.1.5 The defendant's prescribed hail assessment procedure document for pecan nuts, attached to the plea as annexure P3 ("*the defendant's hail assessment procedure document*");

3.2 The material express terms of the insurance agreement were, *inter alia,* that: -

3.2.1 The defendant undertook to insure the plaintiff's pecan nut crop on the terms and conditions set out therein against certain risks, including the risk of hail damage;

3.2.2 The plaintiff acknowledged that it was conversant with the terms and conditions of the insurance agreement;

3.2.3 The plaintiff acknowledged that the defendant's liability to indemnify the plaintiff for damage to its pecan nut crop is to be determined as provided for in the defendant's hail procedure document;

3.3 The damage report does not correctly reflect the plaintiff's hail damage as provided for in the insurance agreement in that it does not record a calculation of the applicable percentage damage as provided for in the defendant's hail assessment procedure document; but records a calculation of the applicable percentage damage as the percentage

difference between the sum insured and the yield derived from the tree at harvest time;

3.4 The correct assessment of the plaintiff's hail damage assessed in accordance with the provisions of the defendant's hail assessment procedure is: -

3.4.1 Block 2002: 19,6% damage, with the resultant damage percentage for purposes of indemnity of 0%;

3.4.2 Block 2004: 25,1% damage, with the resultant damage percentage for purposes of indemnity of 5,1%;

3.4.3 Block 2006: 23,5% damage, with the resultant damage percentage for purposes of indemnity of 3,5%; and

3.4.4 Block 2013: 0% damage, with the resultant damage percentage for purposes of indemnity of 0%;

3.5 The plaintiff is accordingly only entitled to be indemnified in terms of the insurance agreement in the sum of R580 200,00, which amount the defendant tendered in its plea.

[4] In replication, the plaintiff denies that the defendant's hail assessment procedure document formed part of the insurance agreement. In amplification, the plaintiff pleads that: -

4.1 According to the schedule of insurance, the date of acceptance of the policy is 21 October 2020 and the date on which the insurance cover commenced was at 08:00 on 28 October 2020; and

4.2 The defendant's hail assessment procedure document is dated 19 November 2020, after the commencement of the insurance agreement.

[5] In its rejoinder, the defendant pleads that: -

5.1 The defendant's hail assessment procedure document was generated on 19 November 2020, but was already in force at the inception of the insurance agreement; and

5.2 Alternatively, and in the event that this Court finds that the defendant's hail assessment procedure document does not form part of the insurance agreement, that no enforceable insurance agreement was concluded as an agreed assessment procedure is a *sine qua non* for an enforceable insurance agreement.

[6] It is not in dispute between the parties that: -

6.1 Prior to the commencement of the insurance agreement, the plaintiff had its insurance for hail damage to its pecan nut crop with Old Mutual Insure, which ceased its insurance for hail damage during the middle of 2020;

6.2 The defendant commenced its insurance for hail damage on 01 October 2020;

6.3 The parties concluded the insurance agreement, which agreement commenced on 28 October 2020;

6.4 The plaintiff complied with its obligations in respect of the policy and timeously and had in full paid the insurance premium to the defendant;

6.5 The plaintiff notified the defendant of the hail events that took place on 17 November 2020 and 17 March 2021 respectively; and

6.6 The defendant appointed Messrs DW Nel, JD Koegelenberg and GP Nel to assess the plaintiff's damage.

THE ISSUE FOR DETERMINATION: -

[7] The issue for determination is crisp, namely whether the hail assessment procedure as pleaded and testified to by the plaintiff and its witnesses formed part of the insurance agreement, or whether the defendant's hail assessment procedure document as pleaded and testified to by the defendant's witnesses formed part of the insurance agreement.

THE PLAINTIFF'S EVIDENCE: -

Mr L Louw: -

[8] Mr Louw, the member of the plaintiff and the farmer, testified during his examination in chief that: -

8.1 Prior to the commencement of the insurance agreement, the plaintiff was insured for hail damage to its pecan nut crops with Old Mutual Insurance ("Old Mutual"), but Old Mutual discontinued its insurance of hail damage during or about middle 2020;

8.2 The defendant commenced its insurance for hail damage on 01 October 2020;

8.3 Mr JM du Plooy, a broker at Hantie du Plooy Makelaars, contacted him and proposed as a new insurer for hail damage either the defendant or Agrisure. On or about 20 October 2020, Mr Du Plooy explained the defendant's assessment procedure to him and confirmed that in the event of hailstorms, more than one preliminary assessment and a final assessment, a week prior to harvesting is conducted. Mr Du Plooy also explained that the defendant's insurance cover includes a 'wash away clause, similar to the Old Mutual insurance policies;

8.4 The 'wash away clause' comes into operation in the event of heavy rainfall that washes the pecan nuts away, making it impossible to

assess the damage, in which event the assessment is postponed to the end of the season, about a week prior to harvesting;

8.5 Mr Du Plooy contacted Mr I Myburgh telephonically in his presence and Mr Myburgh confirmed that the defendant's assessment procedure is identical to that of Old Mutual; and that it also includes a 'wash away clause';

8.6 A different assessment procedure than the one explained by Mr Du Plooy, and confirmed by Mr Myburgh, would have been a "deal breaker"; and for that reason, he decided to conclude the insurance agreement with the defendant and not with Agrisure;

8.7 He agreed to the excess of 20% and to pay the higher annual insurance premium of R641 257,85 as a result of the fact that the assessment procedure included a 'wash away clause';

8.8 The insurance agreement: -

8.8.1 Commenced on 21 October 2020;

8.8.2 Provided insurance cover to the plaintiff from 28 October 2020;

8.8.3 The value of the pecan nuts insured was R18 480,000,00;

8.8.4 The plaintiff agreed that 20% excess would be subtracted in respect of an insurance claim;

8.8.5 Consists of page 1 to 22 of Exhibit A; and

8.8.6 Does not contain the assessment procedure as explained to him by Mr Du Plooy;

8.9 After the hailstorm of 17 November 2020, he contacted Mr Myburgh, who with the other assessors appointed by the defendant, attended

Nuwejaarskraal, marked the sample trees and conducted a preliminary assessment. A second assessment was conducted early in December 2020, but after the heavy rainstorm of 08 December 2020, Mr Myburgh confirmed that the assessment would be postponed to a week prior to harvest in accordance with the 'wash away clause';

8.10 A second severe hailstorm occurred on 17 March 2021, whereafter he again contacted Mr Myburgh, who informed him that the assessment would be postponed to a week prior to harvest in accordance with the 'wash away clause';

8.11 On 06 November 2021, one week prior to the harvest, Messrs Myburgh, DW Nel, GP Nel and JD Koegelenberg, the appointed assessors, attended to the assessment at Nuwejaarskraal.

8.12 The assessment entailed that the pecan nuts were separated after the trees were shaken and that only hail-damaged nuts were weighed. Thereafter the data was fed into the tablets provided by the defendant and the defendant's software calculated the plaintiff's damage;

8.13 According to the assessors' assessment, they determined the percentage of the plaintiff's damage as follows: -

8.13.1 Block 2002: 59%;

8.13.2 Block 2004: 82%;

8.13.3 Block 2006: 46%; and

8.13.4 Block 2013: 59%;

8.14 The percentage of damage equated to a loss, and accordingly a claim, of R9 626 640,00 (inclusive of VAT);

8.15 The defendant rejected the plaintiff's claim and offered to pay the plaintiff an amount of R2 575 347.56 whereafter the plaintiff filed an internal appeal. The outcome of the internal appeal was that the defendant agreed to pay the plaintiff an amount of R2 060 278,05 on condition that the offer was accepted before 18 October 2021, failing which the offer would be reduced to R580 200,00;

8.16 He received the insurance agreement that consisted of pages 1 to 22 from Mr Du Plooy; and

8.17 The document titled "Haeltaksasieprosedure: Pekanneute", attached to the defendant's plea, did not form part of the insurance agreement; and that a copy thereof was never provided to him. He added that this document was "opgedateer 19 November 2020", after the commencement of the insurance agreement and after the first hailstorm occurred.

[9] When cross-examined, Mr Louw conceded that the Old Mutual policy is identical to the defendant's document titled "Haeltaksasieprosedure: Pekanneute", save for the introduction thereto and that it does not contain a 'wash away clause'. He nevertheless adamantly persisted that the summary of the Old Mutual pecan nut assessment procedure includes the 'wash away clause'; and that this policy was taken over by the defendant.

Mr JM du Plooy: -

[10] Mr Du Plooy, the plaintiff's broker, during his examination in chief: -

10.1 Corroborated Mr Louw's evidence that: -

10.1.1 Old Mutual Insurance stopped its hail damage cover during 2020;

10.1.2 He contacted Mr Myburgh telephonically and Mr Myburgh confirmed that the defendant took over Old Mutual's hail cover

procedure and that the assessment would be dealt with in the same manner as done by Old Mutual;

10.1.3 The plaintiff did not choose Agrisure as its policy did not include a 'wash away clause'; and

10.1.4 The insurance agreement consisted of pages 1 to 22 and was provided by him to the plaintiff;

10.2 Furthermore testified that: -

10.2.1 He has been a broker for 23 years and during that time he dealt with Old Mutual on various occasions;

10.2.2 The defendant arranged a training session for brokers at his office in Hopetown, during which training session, Messrs Myburgh and P Delport, the defendant's head technical manager, thoroughly explained the defendant's assessment procedure to the attendees;

10.2.3 With reference to the Old Mutual summary document, both Old Mutual's and the defendant's hail assessment procedure included a 'wash away clause';

10.2.4 Mr Myburgh informed the attendees that the defendant will conduct its assessments in accordance with the Old Mutual summary document; and Mr Delport who was in attendance, did not interject or differed from Mr Myburgh;

10.2.5 He completed the application for insurance cover on the plaintiff's farm, but the insurance document was finalised and generated at his office;

10.2.6 The defendant's hail assessment document was not included in the document provided to him by the defendant; and he accordingly did not provide the plaintiff with a copy thereof;

10.2.7 The defendant's hail assessment procedure document reflects that it was updated on 19 November 2020 and that it would be a fair assumption that it was not available during October 2020;

10.2.8 He only became aware of the defendant's hail assessment procedure document after the litigation between the parties had commenced; and

10.2.9 He has during his career dealt with many claims arising from washed away pecan nuts, which claims have always been paid out.

[11] Mr Du Plooy, when confronted with the defendant's version during cross-examination: -

11.1 Persisted that the defendant's hail assessment procedure document did not form part of the insurance agreement and that the date of 19 November 2020 confirms that same was not available during October 2020;

11.2 Confirmed that the brokers who attended the training session in Hopetown were trained in accordance with the Old Mutual summary. During the training seminar, he specifically asked if the defendant would conduct its assessment in accordance with the Old Mutual summary and it was confirmed by Mr Myburgh, with reference to the Old Mutual summary document, that "this summary is what we are going to do."; and

11.3 Testified that the insurance agreement confirmed that the primary risk insured against is defined in the insurance agreement as *"Die sigbare en takseerbare skade aan Versekerde Oeste veroorsaak deur die*

direkte meganiese aksie van hael."; and that the visible nuts were taken into consideration in the assessment of the plaintiff's damage.

Mr GP Nel: -

[12] Mr Nel, the defendant's head assessor for the past 3 years, testified during his examination in chief that: -

12.1 He has been an assessor for 20 years;

12.2 He and Messrs DW Nel, K Botha and Myburgh attended Nuwejaarskraal on 20 November 2020 and 02 December 2020, but the assessment could not be completed as a result of the rainstorm that occurred on 08 December 2020, washing the pecan nuts away. The assessment was accordingly postponed to one week prior to harvest;

12.3 If nuts are not washed away, a third and fourth pickup is done;

12.4 He conducted the same wash away assessment procedure at Agricola, Mutual and Federal, Old Mutual and while he was employed by the defendant;

12.5 On 11 June 2021, the defendant's appointed assessors, Messrs GP Nel, DW Nel and JD Koegelenberg attended to the final assessment at Nuwejaarskraal in the company of Messrs Myburgh and Louw;

12.6 The postponement of the plaintiff's assessment was done in accordance with the insurance agreement that stipulates that *"Die Assessor kan, na goeddunke, die finale beoordeling van enige beskadigde Vrugte uitstel tot sodanige tyd dat die verlies aan die opbrengs akkuraat bepaal kan word."* as the pecan nuts could not be counted;

12.7 The relevant figures and weight of the pecan nuts were fed into the defendant's tablets and the software installed thereon calculated the plaintiff's percentage of damage per orchard as follows: -

12.7.1 Block 2002: 59%;

12.7.2 Block 2004: 82%;

12.7.3 Block 2006: 46%; and

12.7.4 Block 2013: 59%;

12.8 The Old Mutual 'wash away clause', as set out in the Old Mutual summary document, was applied by the defendant in two previous instances where he attended to the assessment of pecan nuts that had been washed away;

12.9 The Old Mutual summary document contains a 'wash away clause' whereas the Old Mutual hail damage assessment document does not;

12.10 He compiled the document that was used for the training of the defendant's 24 assessors in the Northern Cape Province and the Free State Province in Douglas. This document sets out the procedure used in the assessment of hail damage to pecan nuts and includes the procedure when nuts have been washed away. The defendant used Old Mutual's assessment procedure as the insurance agreement did not contain an assessment procedure;

12.11 Messrs Myburgh, B Kruger and DW Nel were present at the training session;

12.12 He trained the assessors in the assessment of hail damage, which training included the assessment in the event of the wash away of pecan nuts. None of the defendant's employees present at the training session corrected him when he explained the 'wash away clause';

12.13 He used the defendant's software programme to calculate the percentage of damage as set out in the damage report and the particulars of claim.

[13] When cross-examined, Mr Nel: -

13.1 Confirmed that the Old Mutual summary document was attached to the Old Mutual assessment procedure document; and that this process was always followed;

13.2 Conceded that the Old Mutual assessment procedure document does not contain a 'wash away clause', but insisted that the 'wash away clause', as set out in the Old Mutual Summary document, is used when pecan nuts are washed away by rain and that it was never a problem in the past;

13.3 It came to his knowledge for the first time during June 2022 that washed away nuts would no longer be assessed or insurable; and

13.4 He is aware of a claim of R8 000 000,00 that was paid by the defendant to a farmer in Hartswater whose pecan nuts were washed away.

Mr I Myburgh: -

[14] Mr Myburgh testified during his examination in chief that: -

14.1 During 2020 he was employed by the defendant as its technical manager for the Northern Cape Province; and on 01 August 2020 he was the defendant's most senior official in the Northern Cape Province;

14.2 Before 2020 he was employed by Old Mutual as its regional technical manager;

14.3 He was the manager of 20 of the defendant's assessors whom he trained in the assessment of hail damage. He also trained the agents who brokered the insurance agreements;

14.4 He attended the training seminar in October 2020, but could not present the training as he was ill. Mr GP Nel conducted the training on his behalf after Mr GP Nel made the handwritten notes in his presence and they discussed the procedure;

14.5 He confirmed that the 'wash away clause' was an Old Mutual product, not followed by other insurance companies, but which gave Old Mutual an advantage in the insurance market. He added that farmers were willing to pay double the insurance premium for this insurance;

14.6 The Old Mutual summary document was attached and formed part of the Old Mutual insurance agreement; and that the defendant took over Old Mutual's assessment procedure;

14.7 He conceded that the Old Mutual insurance agreement does not contain a 'wash away clause', but insisted that it had to be included and he does not know why it was excluded, save to state that he handed his whole taxation file, including the Old Mutual insurance agreement and the Old Mutual Summary document, to Mr B Kruger;

14.8 Messrs Kruger, DF Nel and P Douglas were present at the training seminar where he explained the 'wash away clause' and none of them corrected him or objected thereto;

14.9 He informed Messrs Kruger and Douglas after the severe rainstorm of 08 December 2020 and the hailstorm of 17 March 2021 that the assessment would be postponed to 2 weeks before the harvest; and he also provided them with a video footage. Neither objected to the postponement of the assessment, which he also confirmed was in accordance with the insurance agreement;

[15] When cross-examined, Mr Myburgh: -

15.1 Explained that the defendant used the Old Mutual assessment procedure, including the summary containing the 'wash away clause', as it did not yet have an assessment procedure;

15.2 Reiterated that the defendant's insurance policy was more expensive as a result of the inclusion of the wash away procedure;

15.3 Could not explain why the 'wash away clause' is not stipulated in the defendant's insurance agreement, but insisted that it was done in practice, as instructed by Mr B Kruger;

15.4 Conceded that neither the defendant's nor Old Mutual's insurance agreement contains a 'wash away clause', but he insisted that the Old Mutual Summary document was included in the Old Mutual agreement; and also sold to the farmers as part of their insurance cover; and

15.5 The defendant's insurance policy was not yet in existence during October 2020 and when the training sessions took place on 09 and 10 November 2020.

THE DEFENDANT'S EVIDENCE: -

Mr G Smallbones: -

[16] Mr Smallbones, employed as the defendant's technical support specialist during 2020, testified that: -

16.1 A part of his role was to attend to re-insurance, which is critical as the risk is then transferred to larger insurance companies;

16.2 He was also involved in the compilation of the insurance documents, which included the production of the documents, scanning and saving

same and putting them on the internal server. These documents are stored as 'PDF documents' and can therefore not be altered;

16.3 The Old Mutual insurance agreement, given by Mr Myburgh to Mr Kruger, formed the principal source document for the defendant's insurance agreement; and the wording of the Old Mutual insurance agreement was not amended; and

16.4 As at 01 October 2020, the wording of the defendant's insurance pro forma insurance agreements had been finalised, but the assessment procedure was not yet finalised;

16.5 The defendant provided the assessors with the tablets on which the defendant's software was installed; and

16.6 The defendant calculated the damage of R580 200,00 by using the sum of the hail-damaged nuts over the insured yield.

[17] When cross-examined, Mr Smallbones: -

17.1 Testified that he only became aware of the 'wash away clause' during July 2021;

17.2 Explained that the date of 19 November 2020 on the defendant's hail assessment procedure document reflects that the document was updated for the last time on 19 November 2020;

17.3 Testified that the defendant's hail assessment procedure document was only available for distribution in its final format during November 2020;

17.4 Could not confirm how many previous versions of the defendant's hail assessment procedure document existed before 19 November 2020; and that the 'wash away clause' could have been contained in a previous version;

17.5 Confirmed that the defendant's insurance agreement consists of *"Hierdie polis en die ingevulde en Ondertekende Aansoek om Vrugteversekering, Ondertekende kwotasie vir Vrugteversekering, Polisskedule, Skuldooreenkoms en GPS-plaaskaart met koördinate moet as een kontrak saamgelees word"*; and that the assessment policy is not included in the definition. He conceded that the defendant's written insurance agreement is reflected on pages 1 to 22;

17.6 Agreed that clients could accept what Mr Myburgh informed them of as he was the "defendant's face in the Northern Cape";

17.7 Testified that Mr Myburgh was found guilty at a disciplinary enquiry and dismissed as a result of the fact that he failed to follow the defendant's hail assessment procedure;

17.8 Confirmed that the defendant did not re-insure claims, but would have done so in the event that the 'wash away clause' was included in its insurance agreement; and

17.9 Conceded that it could be expected that Messrs Kruger and Douglas should have corrected Mr Myburgh and explained to him that the 'wash out clause' is not contained in the defendant's insurance agreement.

Mr B Kruger: -

[18] Mr Kruger testified during his examination in chief that: -

18.1 The defendant's crop insurance business was initiated by Old Mutual closing its crop insurance;

18.2 The Old Mutual insurance agreement was the source document for the defendant's insurance agreement, which was provided to him by Mr Myburgh in hard copy;

18.3 The defendant's hail assessment procedure document was uploaded on the system before 19 November 2020;

18.4 He only became aware of the Old Mutual summary document that included the 'wash away clause' on 21 June 2021, whereafter he communicated to Messrs Myburgh and Delport that the 'wash away clause' is not in accordance with the defendant's hail assessment procedure; and that the defendant is not re-insured and therefore would have to stand in for the full amount of any claims; and

18.5 He could not recall whether the 'wash away clause' was discussed at the training session as he was not there for the whole time, but if it was discussed in his presence, he would not have left it there. He could also not recall whether the 'wash away clause' was discussed at the meeting in Douglas.

[19] When cross-examined, Mr Kruger stated that he cannot dispute, as a result of him not being in full attendance, that Mr Myburgh discussed the 'wash away clause' at the training sessions. He conceded that he received the photographs and video footage of the rainstorm on the plaintiff's farm and that Mr Myburgh informed him that the assessment would be postponed until harvest time. He only learnt that the 'wash away clause' was also used at Bullhill Pecans during 2020 and June 2021. He conceded that the defendant's previous versions of the assessment procedure could have contained a 'wash away clause', but that he is unaware of the content of the previous versions. He accepted that the plaintiff was entitled to assume that if Mr Myburgh informed Mr Louw that the defendant also had a 'wash away clause', it would indeed be in the defendant's insurance agreement.

Mr P Delport: -

[20] Mr Delport testified during his examination in chief that: -

20.1 During 2020 he was the defendant's head technical manager who oversaw the defendant's hail assessment procedure and the training of assessors in respect of the defendant's assessment procedures;

20.2 Farmers do not have insurance cover for washed-away nuts as it cannot be assessed;

20.3 The Old Mutual summary document that includes the 'wash away clause' came to his attention during July 2021; and did not form part of the defendant's insurance agreement; and

20.4 He was not present at all times and could therefore not recall whether the 'wash away clause' was discussed at the training sessions.

[21] When cross-examined, Mr Delport confirmed that he was contacted by Mr Myburgh who informed him that the plaintiff's pecan nuts had washed away and that the assessment would be postponed until harvest time. He could not dispute that Mr Myburgh informed the assessors and agents of the 'wash away clause' as he was not present at all times. The Bullhill Pecan claim was paid out after the 'wash away clause' was applied in the assessment process. He was adamant that the postponement of the assessment did not entail that the 'wash away clause' would be applicable.

SUBMISSIONS BY COUNSEL: -

[22] Mr LLR Pohl SC, on behalf of the plaintiff, submitted that the plaintiff proved that the hail assessment / taxation procedure as pleaded and testified by the plaintiff's witnesses formed part of the insurance agreement.

[23] Mr Pohl SC argued that, at the very least, the insurance agreement is ambiguous as it does not contain a definition of the taxation procedure and as a result, the insurance agreement should be construed against the defendant in favour of the plaintiff in terms of the *contra proferentem* rule; with the effect that the insurance agreement should be interpreted to include a 'wash away clause' as pleaded by the plaintiff and testified to by its witnesses.

[24] Mr AJ Trotski SC, on behalf of the defendant, submitted that I should dismiss the plaintiff's claim for the following reasons, namely: -

24.1 The plaintiff failed to prove the necessary facts to bring its claim within the terms of the insurance agreement, more particularly, as the primary risk insured against is defined in the insurance agreement as *"Die sigbare en takseerbare skade aan Versekerde Oeste veroorsaak deur die direkte meganiese aksie van hael."*, which therefore excludes the risk of washaway nuts. Mr Trotski contends that the procedure as advocated by the plaintiff is thus irreconcilable with the specific cover provided by the insurance agreement;

24.2 The plaintiff failed to prove that the defendant's hail assessment procedure document does not form part of the insurance agreement.

24.3 The insurance agreement is the sole recordal of what the parties had agreed to, and as a result, no extrinsic evidence and/or document, namely the Old Mutual summary document, can add to or change the terms of the insurance agreement between the parties; and

24.4 The plaintiff failed to comply with the provisions of Uniform Rule 18(6) in that it did not attach the Old Mutual summary document to its particulars of claim; and

24.5 The plaintiff failed to present any evidence pertaining to the quantum of its claim.

APPLICABLE LEGAL PRINCIPLES: -

Onus of proof: -

[25] It is trite that a plaintiff bears the overall onus to prove its case, on a balance of probabilities.[1] The ordinary rule is that the insured must prove himself to fall

[1] *Govan v Skidmore* [1952] 1 All SA 54 (N) page 57.

within the primary risk insured against, whilst the onus is on the insurer to prove the application of an exception.[2]

Rule 18 (6): -

[26] Rule 18(6) stipulates that: -

"A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

Interpretation of contracts: -

[27] The Supreme Court of Appeal in ***KPMG Chartered Accountants (SA) v Securefin Limited and Another*** [3] reaffirmed the rules applicable to the interpretation of contracts as follows: -

"First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) Phipson on Evidence (16 ed 2005) para 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd 1985 BP 126 (A); [1985] ZASCA 132 (at www.saflii.org.za). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between

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[2] *Eagle Star Insurance Co Ltd v Willey* 1956 (1) SA 330 (A) at 334A - 335F.
[3] 2009 (4) SA 399 (SCA) at para 39.

'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See Van der Westhuizen v Arnold 2002 (6) SA 453 (SCA); [2002] 4 All SA 331) paras 22 and 23, and Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another ; 2008 (6) SA 654 (SCA) para 7.)"

[28] This denial of recourse to evidence of an oral *consensus* was explained by the Appellate Division in ***Johnston v Leal*** **("Johnston")**[4] as follows: -

"...In many instances recourse to evidence of an earlier or contemporaneous oral agreement would, in any event, be precluded by the so-called "parol evidence rule" (see Van Wyk v Rottcher's Saw Mills (Pty) Ltd, supra, at p 996) or, more correctly, that branch of the "rule" which prescribes that, subject to certain qualifications (to which some reference will be made later), when a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract (see National Board (Pretoria) Pty. Ltd. v Estate Swanepoel, 1975 (3) SA 16 (AD), at p 26 A-D and the cases there cited). The extrinsic evidence is excluded because it relates to matters which, by reason of the reduction of the contract to writing and its integration in a single memorial, have become legally immaterial or irrelevant (National Board case, supra, at p 26 C)."

ANALYSIS OF THE EVIDENCE AND LEGAL ARGUMENTS: -

[29] Clause 2 of the insurance agreement[5] states that " *Die Assessor wat deur die Versekeraar aangestel is sal die gemiddelde bruto verliespersentasie volgens the voorsgeskrewe taksasie prosedure bepaal."* The defendant's policy document, however, does not contain a prescribed taxation procedure.

[30] In ***Johnston***, the Appellate Division, nonetheless, confirmed that the parol evidence rule or "integration rule" does not preclude evidence of a subsequent oral agreement contradicting, altering, adding to or varying a written contract in cases not governed by the now repealed section 1(1) of the Formalities in

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[4] [1980] 2 All SA 366 (A) at 371-2.
[5] Pleadings bundle: page 36.

Respect of Contracts of Sale of Land Act, Act 71 of 1969. The Appellate Division held: -[6]

"Furthermore, in my view, an instructive and relevant analogy is provided by cases of what is termed a "partial integration". Where a written contract is not intended by the parties to be the exclusive memorial of the whole of their agreement but merely to record portion of the agreed transaction, leaving the remainder as an oral agreement, then the integration rule merely prevents the admission of extrinsic evidence to contradict or vary the written portion; it does not preclude proof of the additional or supplemental oral agreement (see Avis v Verseput, 1943 AD 331, at p 380; De Jager and Others v Capital Building Society, 1963 (3) SA 381 (T), at p 382 B-E; also Wigmore on Evidence, 3rd ed, par 2430; Corbin on Contracts, par 581). The question as to whether a written contract constitutes an integration of the whole agreement or merely a partial integration is one which depends on the intention of the parties. This raises the problem as to what evidential material may be looked at in order to determine the intention of the parties in this regard. In De Jager's case (supra) this was the very problem which confronted the Full Bench of the Transvaal Provincial Division and it was held that in order to ascertain this intention it was necessary for the court to look not merely at the document itself, but also at evidence of the surrounding circumstances, including the negotiations between the parties leading up to and accompanying the conclusion of the written agreement. In this connection TROLLIP J (as he then was), who delivered the judgment of the Court (LUDORF and STEYN JJ concurring), said the following (at pp 382 F-383 A):

"The question 'depends wholly upon the intent of the parties' (Wigmore, ibid) and in order to ascertain that intention it is necessary to look not only at the document but also at the 'surrounding circumstances', evidence of which is therefore admissible. Phipson, ibid, says: 'The inference that the writing was, or was not, intended to contain the full agreement may be drawn not only from the document itself, but from extrinsic circumstances.' Wigmore further says: 'This intent must be sought where always intent must be sought, namely in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiations were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered." My emphasis.

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[6] *Johnston v Leal (Supra)* n. 4 at 378-9..

[31] To my mind, an assessment procedure is an integral and material term of an insurance agreement as it accurately prescribes the manner in which an assessment is to be conducted in order to determine the damage suffered by an insured party. Without a properly described assessment procedure, insurance policies would likely result in disputes, and litigation, between the insurer and the insured.

[32] I can reach no other conclusion than that the document alone did not suffice and was therefore not the exclusive memorial of the whole of the insurance agreement. The prescribed assessment procedure was therefore regulated by a supplemented oral agreement, not precluded by the integration rule. This finding is bolstered by the fact that both parties insist that a prescribed hail assessment procedure had to form part of the insurance agreement. I was thus permitted to hear evidence of surrounding circumstances, including the relevant negotiations of the parties, in order to determine whether the parties intended a written contract to be an integration of their whole transaction or merely a partial integration.

[33] The question remains whether the assessment procedure as pleaded and testified by the plaintiff should form part of the insurance agreement or whether the defendant's hail assessment document should form part thereof.

[34] On a proper evaluation of the evidence, I am persuaded that the plaintiff proved that the procedure as pleaded by it and testified to by its witnesses should form part of the insurance agreement; and that the defendant's assessment procedure document did not form part of the insurance agreement. I reach this conclusion in view of the following: -

34.1 Mr Louw's undisputed evidence that it was a "deal breaker" if a 'wash away clause' was not included in the insurance agreement;

34.2 Mr Louw agreed to pay a higher annual insurance premium of R641 257,85 for this specific insurance cover;

34.3 The undisputed fact that an excess of 20% would be applicable to any claim;

34.4 The uncontroverted evidence of the plaintiff's witnesses that the insurance agreement would provide for a preliminary and a final assessment a week before harvesting, which is similar to the Old Mutual summary document that contains a 'wash away clause';

34.5 The plaintiff's undisputed evidence that: -

34.5.1 The 'wash away clause' was included in the training, without any objection from the defendant's employees; and

34.5.2 Assessments of washed away nuts are conducted in terms of the Old Mutual summary document;

34.6 The plaintiff's and the defendant's evidence that the defendant's hail assessment procedure document did not form part of the insurance agreement; and that it was not in place as at 28 October 2020;

34.7 The concession by the defendant's witnesses that the insurance agreement consisted of only 22 pages. By necessary implication it therefore did not include the defendant's hail assessment procedure document;

34.8 The defendant witnesses' concession that previous versions of the defendant's hail assessment procedure document could have included a 'wash away clause';

34.9 The defendant's hail assessment procedure document which states that it was "updated" on 19 November 2020. No evidence was presented by the defendant that the defendant's hail assessment procedure document existed when the insurance agreement was accepted on 21 October 2020 or on the date on which the cover commenced on 28 October 2020; and

34.10 The inclusion of a term in the insurance agreement that an assessor has the discretion to postpone the final assessment of any damaged fruit to such a time when the damage can be accurately determined.

[35] As a result of the above finding: -

35.1 The alternative plea that no enforceable insurance agreement was concluded as an agreed assessment procedure is a *sine qua non*, does not withstand scrutiny; and

35.2 I do not deem it necessary to deal with Mr Pohl SC's alternative argument pertaining to the *contra proferentem* rule.

[36] I furthermore do not agree with Mr Trotski's argument that the plaintiff had to attach the Old Mutual summary document to its particulars of claim, and that its consequent failure to do so, precludes it from relying on same. I reach this conclusion on the basis of the manner in which the plaintiff's claim is pleaded in its particulars of claim. The plaintiff did not plead that the Old Mutual summary document formed part of the insurance agreement. It did, however, specifically plead that the assessment process involved the preliminary and final assessments, which was confirmed by the evidence of the plaintiff's witnesses.

[37] The plaintiff's witnesses testified that the plaintiff paid a much higher premium for the inclusion of insurance cover for washed-away pecan nuts. In addition, Mr Du Plooy testified that the visible nuts were taken into consideration in the assessment of the plaintiff's damage. No evidence was presented by the defendant to the contrary. I accordingly find no merit in the argument that the procedure as advocated by the plaintiff is irreconcilable with the insurance agreement.

[38] Messrs Louw, Myburgh and Nel testified as to how the quantum was calculated, which evidence was not disputed by the defendant's witnesses. The plaintiff accordingly proved the quantum of the damages.

COSTS: -

[39] The convention is that costs are awarded against the unsuccessful party and no contrary submissions were made. Mr Pohl SC submitted that the complexity of the matter and the quantum justified the employment of a senior and a junior counsel. I agree.

ORDER:

Wherefore the following order is made: -

1. The defendant is to pay to the plaintiff the amount of R9 629 640,00;

2. The defendant is to pay interest *a tempore morae* on the amount of R9 629 640,00; and

3. The defendant is ordered to pay the plaintiff's taxed costs on scale C, including the costs of two counsel.

STANTON, A

JUDGE

On behalf of the plaintiff:	Adv. LLR Pohl SC Adv. PDP Greyling (on instruction of Marius van Zyl Inc. care of Haarhoffs Inc.)
On behalf of the defendant:	Adv. AJ Trotskie SC (on instruction of Hay & Scott Attorneys care of Van de Wall Inc.