REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A189/2022

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

(3) Revised

DATE: 20/06/2023

SIGNATURE

In the matter between:

THABO JOSEPHE MOLEFE Appellant

and

MIWAY INSUARNCE COMPANY LTD Respondent

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email

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JUDGMENT

MATSHITSE AJ:

INTRODUCTION

[1] This is an appeal against the judgment and order of the District Magistrate, sitting in the Magistrate Court for District of Tshwane Central, Pretoria, in which the appellant's (Mr Molefe) claim was dismissed with costs[1]. Mr Molefe had instituted a claim against the respondent (Miway), for payment of an amount of R164 880,00 being the replacement value of his stolen motor vehicle. Only the issue of liability served before the court *a quo* as the parties agreed prior to trial on a separation of the issues of liability and quantum

[2]Mr Molefe's case is that the motor vehicle was stolen on 22 January 2018; he submitted a claim to Miway in terms of his insurance policy on 23 January 2018 only to have the claim rejected on 16 February 2018 as Miway alleged that he had breached the above mentioned clause of the agreement when he supplied it with dishonest information, and they therefore refused to pay him out.

[3] The essence of this appeal is founded in the following: that in dismissing Mr Molefe's claim, the court *a quo* found that he had acted fraudulently; that Miway's defence to the action was not founded in fraud, but rather on the fact that Mr Molefe had been dishonest; that the court *a quo* had made a finding as to the materiality of Mr Molefe's alleged fraud and dishonesty and that, in all of this the court a quo had erred as this was not Miway's case as pleaded. In coming to the conclusion that Mr Molefe had not poven his case on a balance of probabilities, taking into account the above findings, the court *a quo* had made a material and fundamental mistake in law and had erred, thus this court was entitled to interfere with the court ***a quo's*** findings.

[4] Mr Molefe was the only witness and Miway did not call any witnesses. The parties had also agreed that certain exhibits could be handed in as evidence. Miway only relied on those exhibits, more particularly on certain tape recordings of interviews

[1] The appeal was not defended by the respondent

and conversations between Mr Molefe and Miway's claims assessors in order to rebut Mr Molefe's claim.

THE SALIENT FACTS

[5] During late 2017[2] Mr Molefe and Miway concluded an agreement of insurance in terms of which Miway undertook to insure Mr Molefe's motor vehicle, amongst other perils for its theft, being a 2010 Mercedes Benz with registration number H[...].[3]

[6] The terms and conditions of the agreement are embodied in a standard contract (insurance policy). The agreement *inter alia* provided that:

> *"If I or anyone acting on my behalf submits a claim or any information or documentation relating to any claim, which is in any way fraudulent, dishonest or inflated, all benefits under this policy in respect of such a claim will not be paid. MiWay will reject the whole claim and all premiums paid that have been received by MiWay will not be refunded. MiWay will cancel my entire policy retrospectively to the reported incident date, or the actual incident date, whichever date is the earliest scenario: If MiWay receives new information at any stage and it is found that I was dishonest on a previous claim, the previous claim will be rejected and my policy will be cancelled from the previous reported incident date.*
>
> *MiWay will not pay me for a claim when I, members of my household, any person with authorised access to my property, anybody who acts on my behalf or anyone covered under this policy deliberately caused the loss, damage or injury"*.

[7] Mr Molefe was at a cycling event on Sunday 21 January 2018 whereafter he proceeded to his house to drop off his other vehicle. He switched vehicles, took the

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[2] October or November

[3] It is common cause between the parties(Mr Molefe and Miway) that theft of the vehicle is an insured peril as contemplated in the insurance agreement.

vehicle in issue here,being the 2010 Mercedes Benz, and with his friends Victor and Thabo, proceeded to drop Thabo at his home. From there Molefe and Victor proceeded to a social event where they met an individual named Roy who owed him money.

[8] After collecting the outstanding money from Roy, Molefe and Victor socialised with two women (unknown to them) who, after sharing food with Mr Molefe and Victor, asked them for a lift just as Mr Molefe and Victor were about to leave.

[9] Mr Molefe and Victor obliged, and left the social event. Mr Molefe, when he submitted his claim, said that they left around 00:00, however, in a subsequent WhatsApp message, he informed Miway's assessor that he could have underestimated the time they left the social event and it could have been later because they only arrived at his cousin's house some time past 04:00.

[10] Mr Molefe arrived at his cousin's premises, already not feeling well, but did not stay there as the women in the vehicle wanted to purchase food. Thereafter they went to a nearby garage to buy food. Mr Molefe had no recollection of the events that unfolded after that.

[11] Mr Molefe was woken up the next morning by unknown individuals in an unknown location without his vehicle, cell phone, keys and wallet. His evidence was that he was 'dizzy'. He managed to approach a nearby shop and eventually managed to contact his family. Thereafter when he was still '*tired, sleepy very much dizzy'*, he went to SAPS to open a case of theft of his motor vehicle. By that time he did not know what had happened to his friend Victor. He later managed to establish that Victor was also suffering from the same symptoms as he was, and during his testimony it was established that Victor took about two weeks to recover from the said illness. They suspected that the two women had drugged them.

[12] On the 23rd of January 2018, at a time when he was still '*dizzy',* he lodged a claim with Miway for the loss (theft) of his motor vehicle. He reported to Miway that he

had an open alcoholic beverage in his vehicle when they left the social event and mention was made of the fact that he stopped at his cousin's place before he dropped the the two women off (which information was only made later).

[13] Mr Molefe went to the nearby garage and obtained video footage, which showed that at around 04:30 a woman alighted from his vehicle, went into the garage shop, came back and got into his motor vehicle and the vehicle drove off. The video footage was handed over to Miway's assessor. On the 24th of January 2018 while still feeling dizzy, he went to to consult a doctor who booked him off from work. He sent the doctor's certificate to Miway's asessors as well.

[14] Mr Molefe deregistered the said motor vehicle and it was listed as stolen. There was no evidence presented to counter this evidence and it was never disputed by Miway.

[15] On the 25th of January 2018 Mr Molefe had his first conversation with Miway's assessor for purposes of validating the claim. It bears mentioning that Mr Molefe immediately gave permission to the assessor to do all necessary checks in order to validate the claim. A request was also made that Mr Molefe sign a 'validation letter'- this is a document which gives Miway access to *inter alia 'all relevant information in possession of SAPS, tracking companies, police departments…any information in possession of anyone which assist to confirm my claim and validation process'.*

[16] On 30th January 2018 Miway's assessor spoke to Victor and Nox (individuals who had seen Mr Molefe the next day) and the assessor looked at the video footage from the garage where the vehicle was last seen. He went for a physical inspection at the premises of the social event where Mr Molefe was, and requested registration documents from Mr Molefe. Both Nox and Victor corroborated Mr Molefe's version. Miway also interviewed Mr Molefe's cousin who verified his version of the events.

[17] On the 8th of February 2018 Mr Molefe had his final interview at MiWay's offices

during which Miway's assessor informed Mr Molefe that he was under the impression that no false information was given by Mr Molefe to Miway.

[18] Miway elected not to lead any evidence and closed its case. During argument it relied on the recorded conversations between Mr Molefe and the Miway assessors upon submission of the claim and during the course of Miway's investigations.

THE COURT'S FINDINGS

[19] In determining whether Mr Molefe had proven the merits of his claim on a balance of probabilities, the court *a quo* made no credibility finding against Mr Molefe, but dismissed his claim on the following basis::

> *" [27] The Defendant purely relied on the agreement in a clinical manner which was set out in the heads of arguments paragraph 21.3 – 21.6, it can only be synopsized to indicate that the Defendant acted dishonest, by not providing honest information to the insurer and by doing so, the Plaintiff failed to proof on a balance of probabilities that the vehicle was stolen.(sic)*
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> *[28] It is in light of the above that I align myself with the submissions made by the Defendant's legal representative in that the Defendant did withhold information when the claim was submitted and as soon as the dishonesty was discovered the determined condition of the agreement was fulfilled which had the result that the Defendant's obligation to indemnify the plaintiff was discharged whether the dishonesty was material or not."*

[20] Ultimately, the issue to be decided by the court *a quo* was whether or not Mr Molefe had proven that his vehicle was stolen and whether Miway was entitled to repudidate Mr Molefe's claim.

[21] It was never truly disputed that Mr Molefe had provided information to Miway that, at a later stage was incorrect. This information related to whether or not he

dropped off the two women before or after he lost consciousness; where the alcoholic beverage was in his vehicle[4] and the time he left the social event.

[22] At the end of the day, the court stated the following:

"[15] "Although fraud is not a point of contention in the matter before court the law relating to same was taken in to consideration to provide a framework as to how repudiation of claims based on information received from insureds claims stage are treated by court.

[16] The burden of fraud on the part of the insured rests on the insurer. The insurer must prove on a balance of probabilities that the insured's conduct amounts to either common law frayd or to fraud prescribed by the terms of the fraudulent claim itself. It was ponted out in the heads of argument by the Plaintiff that where the insured prima facie established that its claim fall within the ambit of the protection promised in term of the insurance policy, the insurer bears a full onus to establish its right to repudiate the claim.

[23] At the end of the day however, and as stated *supra*, this was not Miway's pleaded case and the issue of fraud should never have been considered as it was Miway's case that the claim had been repudiated because Mr Molefe had been dishonest.

THE MATERIAL MISDIRECTION

[24] This, in itself, constitutes a material misdirection. But the question must then be asked as to whether the discrepancies in Mr Molefe's evidence are so material and prejudicial to Miway that it entitled it to repudiate the claim?

[25] On the conspectus of evidence presented, and on the balance of probabilities, Mr Molefe proved that his vehicle was indeed stolen. (a) he reported the theft first to the SAPS before it was reported to his insurer. The vehicle was also

[4] Whether it was in his car or, as later stated, in the trunk of his vehicle

deregistered and listed as stolen, more so from the request of Miway;

(b) at the time he lodged his claim with Miway, he told Miway that there was an open alcoholic beverage in the vehicle and he had consumed alcohol during the evening. Thus he was honest in this account and the issue of wether the alocohol was in his vehicle or in the trunk of his vehicle is of no consequence;

(c) he gave his unqualified assistance at all times to Miway (assessors);

(d) his version of events was substantially corroborated by the individuals Miwaycontacted;

(e) it was never placed in dispute that he had lost his personal belongings like his driver's licence.

[26] It is my view that Mr Molefe's actions, viewed wholistically, establishes that on a balance of probabilities his motor vehicle was indeed stolen on the night of the 22nd January 2018. This being so, where the insured *prima facie* establishes that its claim falls within the ambit of the protection premised in terms of the insurance policy, the insurer bears a full onus to establishd its right to repudiate the claim.[5] And the question then is whether the discrepancies in Mr Molefe's account as listed supra, entitle Miway to repudiate the claim.

[27] The clause, in the policy contract upon which Miway relied upon to limit its obligation to indemnify Mr Molefe[6], requires to be interpreted strictly with proper regard to the main purpose, general nature and object of the contract[7].

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[5] *Renasa Insurance Company Ltd v Watson* (32/2014) (2016) ZASCA 13 (11 March 2016)
[6] Per paragraph 3 supra
[7] see *Videtsky v Uberty Life Insurance Association of South Africa Ltd*[7] and *Schoeman v Constantia Insurance* Co *Ltd* 2002 (3) SA 4'17 CN)

[28] The technique of interpretation of a written contractual documents consistently adopted by our courts was summarized by Joubert JA in, *Coopers & Lybrand v Bryant*[8] as follows:

> "*According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistence with the rest of the instrument…*
> *The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself…*
>
> *The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:*
>
> *(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract …;*
>
> *(2) to the background circumstances which explain the genesis and purpose of the contract, i.e to matters probably present to the minds of the parties when they contracted..;*
>
> *to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent; conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions."*

[8] 1995 (3) SA 761 (A)

[29] Counsel for the appellant submitted that in analysing the wording of the contract to determine the reciprocal responsibilities of the parties, the contract has to be interpreted in *contra proferentum* against the insurer- this is indeed so.

[30] In *Klipton Clothing Industries (Pty) Ltd v Marine & Trade Insurance* Co *of South Africa Ltd*[9] it was held that when interpreting an insurance contract *"the court should incline towards upholding the policy against producing* a *forfeiture".* An insurer cannot escape liability to indemnify the insured by relying on some insignificant incorrect statement which is not materially connected to the risk or assessment of the claim. An untrue or incorrect statement which does not amount to material misrepresentation cannot be relied upon to exclude or limit liability simply on the fact of its untruthfulness.

[31] As stated, in cases of this nature, the onus is on the insurer to prove a material misrepresentation. The onus arises from the general principle that the party who alleges something must prove it. In *Strydom v Certain Underwriting Members*[10]*,* which likewise concerned a valid claim accompanied by fraudulent means in the form of a false statement as to the cause of the insured's loss, the court held that the statement was not material as it did not affect the insurer's position to its prejudice. The insurer was therefore held liable, but the court expressed its disapprobation of the insured's conduct by declining to award him costs and prejudgment interest. Thus it is so that materiality is a vital compenent to Miway's successful defence and that this must be proven on a balance of probabilities.[11]

[32] The question whether the particular information sought to have been disclosed is judged not from the point of the insurer, or the insured, but from the view of the notional reasonable and prudent person[12] and the test is an objective one..

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[9] 1961 (1) SA 103 CA) at 106
[10] 2000 (2) SA 482 (W)
[11] *Mutual & Federal Insurance Co. Ltd v Oudtshoorn Municipality* 1985 (1) SA 415 (AD) at 432
[12] *Mahadeo v Dial Direct Insurance Ltd*[12]

[[33] In *Regent Insurance Co Ltd v King's Property Development (Pty) Ltd t/a King's Prop*[13] the Court held:

'*The history of the case law dealing with the distinction between material positive misrepresentations and material non-disclosures is set out with great clarity by Schutz JA in Clifford v Commercial Union Insurance Co of SA Ltd 1998 (4) SA 150 (SCA). This court endorsed the view that the test for whether a non-disclosure is material to the assessment of the risk is objective. In this regard the court in Clifford confirmed the principles adopted in Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 (A) at 435G – I in finding that the test was whether the reasonable person would have considered that the risk should have been disclosed to the insurer. But, in interpreting s 63(1) of the former Insurance Act, this court held that the test for determining whether a misrepresentation was material was a subjective one: Qilingele v South African Mutual Life Assurance Society 1993 (1) SA 69 (A). In Clifford Schutz JA (delivering the majority judgment) considered, but did not decide, that that aspect of Qilingele was wrongly decided. (The minority considered that it was not necessary for the decision to pronounce on the correctness or otherwise of Qilingele and refrained from doing so.)*'

CONCLUSION

[34] The test is therefore that, to the extent that there is any dishonesty or discrepancies in a version, it must be material to Miway's obligation to indemnify Mr Molefe for the theft of his motor vehicle. In my view, absent any evidence being led by on behalf of Miway establishing how and on what basis, it was allegedly prejudiced, there was no basis upon which the court *a quo* could have found that the discrepancies in Mr Molefe's version were so momentous that they were prejudiced. In fact, it is my view, that they were not material at all. Thus, there was no basis upon which they should have dismissed Mr Molefe's claim, and there was no basis upon which the court *a quo* could have dismissed his claim either. Accordingly, it is my view that this Court is entitled to interfere with the findings of the *Court a quo.*

[13] 2015 (3) SA 85 (SCA) at para 22

[35] In the result, the appeal must succeed.

[36] Accordingly, the following order is made:

1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside in its entirety and replaced with the following:

   (i) “Judgment is granted in favour of the plaintiff in respect of the merits and the quantum of the claim is postponed *sine die*.

   (ii) The defendant is ordered to pay the plaintiff’s costs, including cost of counsel.”

C K Matshitse AJ
Acting Judge of the High Court of South Africa
Gauteng Division, Pretoria

I agree

Neukircher J
Judge of the High Court of South Africa
Gauteng Division, Pretoria

Appearances:

Counsel for the Appellant: **Adv. M Louw**

Instructed by:	**Cillers & Reynders Attorneys**
Counsel for the Respondent:	**No appearance**
Instructed by:	**No Appearance**
Date of Hearing:	**18 May 2023**
Date of Judgement:	**20 June 2023**