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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

CASE NO: A88/2018

9/5/2019

In the matter between;

CONCISE CONSULTING SERVICES (PTY) LIMITED **APPELLANT**

and

KING PRICE INSURANCE COMPANY LIMITED **RESPONDENT**

JUDGMENT

JOYINI AJ

- [1] · This is an appeal in terms of Magistrate's Court Rule 51(3) read together with Uniform Court Rule 50 from the Magistrate's Court to the High Court of South Africa. The Appellant noted an appeal against the entire judgment. The Court started with the Appellant's application for condonation and for the re-instatement of the appeal. The Respondent did not object to the granting of the application and as such, it was granted.

BACKGROUND FACTS

[2] The Issues that arose for determination will be best understood against the background that follows. By way of summary, on 1 January 2014, the Appellant's Toyota Yaris (2008) motor vehicle (registration number [...]) sustained damage during a collision with a wall. It was comprehensively Insured by the Respondent. The driver at the time of the collision was Mr Sibusiso Ngobese who is both an employee of the Appellant and registered as being the regular driver of the said vehicle. After the Appellant had lodged the claim, he provided the Respondent (**after being** requested by the latter) with Mr Ngobese's contact details. On 17 January 2014, the Respondent repudiated the Appellant's claim alleging that, during the validation of the claim, it had come to the Respondent's attention that Mr Ngobese supplied the Respondent with false information about *Inter alia* his whereabouts before and after the accident. The trial proceedings in the Court *a quo* were adjudicated upon by the Honourable Magistrate Tlale, on 7 November 2016, 6 February 2017, 28 March 2017, and 25 April 2017.

[3] On 7 November 2017, the Court *a quo* handed down the judgment in which it was ordered that the Plaintiff's claim be dismissed with costs including costs of a Counsel. The said order was preceded by the following findings of the court *a quo*:

- 3.1 Ngobese was acting on behalf of the Plaintiff;
- 3.2 The information or representations made by Mr Ngobese formed part of the claim that was lodged by the Plaintiff;
- 3.3 The information or representations made by Mr Ngobese were material;
- 3.4 The Plaintiff **failed** to show on a balance of probabilities that the Defendant's version was untrue;
- 3.5 The Defendant's version was true and the Plaintiff's version was false; and
- 3.6 The Defendant was indeed entitled to avoid the agreement of insurance.

ISSUES FOR DETERMINATION

[4] Whether the Honourable Magistrate:

4.1 Erred in finding that the driver of the vehicle, Mr Ngobese, was acting on behalf of the Appellant;

4.2 Erred In finding that the Information or representations made by the driver of the vehicle, Mr Ngobese, formed part of the claim that was lodged by the Appellant;

4.3 Failed to find that the Appellant was comprehensively insured by the Respondent, regardless of whether or not the driver of the vehicle, Mr Ngobese, had been candid about his route and the events of the evening of the day when the accident took place, the Respondent should have been obliged to honour the written insurance agreement;

4.4 **Failed** to restrictively interpret, the allegedly breached conditions upon which the Respondent's relied in support of the rejection of the Appellant's claim on the grounds of dishonesty;

4.5 Erred In finding that the Information or representation made by Mr **Ngobese were** material.

LAW

[5] I **agree** with the Appellant that the finding by the Court *a quo* that "... *the information or representations made by Mr Ngobese were material*", forms the basis of the Appellant's grounds for appeal. That is why I **have** decided to start with it.

South African law on materiality

[6] In *Strydom v Engen Petroleum Limited*,¹ the insured had knowingly made a fraudulent statement aimed at showing that he had not been negligent in

¹ (18412012) [2012] ZASCA 187 (30 November 2012)

relation to the motor collision which had resulted in damage to his car. The fraudulent statement was, however, of no consequence, in that it did not affect the insurer's position to its prejudice and was therefore not material. It was not necessary for the insured to have made , fraudulent statement in the first place because he was covered against his own negligence.

[7] In *Visser v 1 Life Direct Insurance Limited*,² the court correctly founded that the insurer failed to prove that the deceased had a material pre-existing medical condition that should have been disclosed. The aforementioned Insurance Acts say that a policy cannot be invalidated and an insurer cannot exclude or limit its obligations under a policy or increase the policyholders obligations under the policy due to a misrepresentation or non-disclosure unless It is material.

[8] In *Qilingele v South African Mutual Life*,³ the court considered whether the falsehood of the misrepresentation was such that it probably would have affected the assessment of the risk undertaken by the particular Insurer. This was done by comparing an assessment of the risk or, the **basis** of facts distorted by the misrepresentation with what the **assessment** would have been on the facts had they been truly 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.

[9] In *Weber v. Santam Versekerings msatsksppy Bpk*.⁴ it was held that the court does not in applying this test judge the issue of materiality from the point of view of a reasonable insurer. Nor is it judged from the point of view of a reasonable insured. The court judges it objectively from the point of view of the average, prudent person or reasonable man. This reasonable man test is fair and just to both insurer and insured inasmuch as it does not give preference to one of them over the other. Both of them are treated on a par.

² (1005/13) [2014] ZASCA 193; 2015 (3) SA 89 (SCA) (28 November 2014)

³ 1993 (1) SA **89 (A)**

⁴ 1993 (1) SA 1 (**A**) at p 410H to 4110)

English law on materiality

[10] In *Versloot Dredging BV and Another (Appellants) v HDI Gerling Industrie Versicherung AG and Others (Respondents)*⁵, the issue on this appeal was whether the Insurers of a ship were entitled to repudiate liability on the ground that the Insured had lied in the claim. The vessel *DC MERWESTONE* was incapacitated by a flood in her engine room. Her main engine was damaged beyond repair. The flood was caused by (i) the crew's negligence in failing to close the sea inlet valve in the emergency fire pumps, (ii) damage to the pump,, (iii) the negligence of previous contractors who had failed to seal bulkheads and (iv) defects in the engine room pumping system. The appellant owners presented an insurance claim to the respondent Insurers for € 3,241,310.60. They told the insurer's solicitors that the crew had informed them that the bilge alarm had sounded at noon that day, but could not be investigated because the vessel was rolling in heavy weather. This was a lie told by the owners to strengthen the claim, accelerate payment under the policy, and take the focus off any defects in the vessel for which the owners might have been responsible.

[11] The Supreme Court allowed *Versloot Dredging's* appeal by a majority of 4 to 1, holding that the 'fraudulent device' rule does not apply to collateral lies, which are immaterial to the insured's right to recover. The fraudulent claims rule does not apply to collateral lies. The dishonest lie is typically immaterial and irrelevant to the honest claim: the insured gains nothing by telling it, and the insurer loses nothing *if* it meets a liability that it has always had. If a collateral lie is to preclude the claim, it must be material. The real test of materiality is that a collateral lie told in the course of making a claim must at least go to the recoverability of the claim on the true facts as found by the court.

ARGUMENTS

⁵ [2018] UKSC 48: on appeal from [2014] W/CA Civ 1349

[12] It is common cause that the Respondent repudiated the claim on the **basis** that Appellant had breached the clauses or terms and conditions provided for in the Policy which are as follows:

These clauses were communicated to the Appellant through a repudiation letter which reads,

"We wish to refer you to your policy document that states

'The stuff you need to do... yip you

Be honest

Always provide us with true and complete information. This also applies when anyone else acts on your behalf (emphasis added).

Keep your promises

You need to give us:

- True and complete Information to us and the authorities. We act on the, information you provide, therefore any Information which is misleading, incorrect or false, will prejudice the validity of your claim.'*

*During the validation of the claim it came to our attention that Mr S **Ngobese** Id: [...] supplied us with dishonest information."*

[13] I **agree** with the Appellant that the clauses quoted above use wide wording more **especially** the word "any". Taken literally, the said clauses would mean that even irrelevant information which is incorrect or false could be a ground for repudiation. The Respondent submitted that this appeal involves the interpretation of an insurance agreement concluded between the Appellant and the Respondent. In response to this submission, this is

perhaps the right time to start by restating the main principles governing the Interpretation of a policy of Insurance, and to do so with reference to the decision in *Fedgen Insurance Ltd v Leyds*⁶, where It was said:

"The ordinary rules relating to the Interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464-5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (*Auto Protection Insurance Co Ltd v Hanmer-Strudwick* 1964 (1) SA 349 (A) at 354C-D); for it is the insurer's duty to make clear what particular risks it wishes to exclude (*French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd* 1931 AO 60 at 65; *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* (*supra* at 3540-E)). A policy normally **evidences** the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy (*Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (A) at 108C).' (**See** also *Van Zyl NO v Kiln Non-Marine Syndicate No 510 of Lloyds of London*⁷)".

Absolute Warranties

[14] The Respondent relied upon the aforementioned clauses and considers them as absolute warranties. The Respondent made this submission in its Supplementary Heads of Argument. My view is that the clauses quoted

⁶ (476193) [1995] ZASCA 20; 1995 (3) SA 33 (AD); [1995] 2 All SA 357 (A) (27 March 1995)

⁷ **2003 (2) SA 440 (SCA) at para 6**

above, widely worded as they are, do not meet the requirements of being absolute warranties. Absolute warranties must provide a specific or express indication of what is required of the insured, who must comply exactly; if he does not, breach of the warranty will occur. "Substantial performance" is not enough; there must be exact performance. The strict common-law approach, which requires exact performance of an undertaking that has not necessarily been established as a "material" aspect of the contract (and risk assessment), and entitles the insurer to cancel a contract on the basis of a breach of warranty despite the fact that the representation complained of concerns an immaterial inaccuracy, or a matter with n bearing at all on the risk insured against, has led to absurd results in some cases.

- [15] As a result of such absurd results, and the potential for more, statutory reform introduced certain curtailments regarding remedies for breach of warranties. Section 63 of the Insurance Act⁸ was amended in 1869. The effect of the amendment was that the insurer was not permitted to set **aside** a contract on the grounds of breach of an affirmative warranty unless the insurer could prove that the correctness of the statement or warranty was material to the assessment of the risk at the time the policy was issued or renewed. The purpose of the amendments was to protect the insured against repudiations by Insurers based on inconsequential inaccuracies or trivial misstatements in insurance proposal forms, even if they were warranted to be true. In 1989, the insurance Act of 1943 was repealed, Its section 63(3) was re-enacted, without any amendment as to substance, in section 59(1)(a) of the Long-term Insurance Act⁹ and section 53(1)(a) of the Short term Insurance Act¹⁰, which provided
- a) that the policy shall not be invalidated;
 - b) that the obligation of the long-term insurer shall not be excluded or limited; and
 - c) that the obligations of the policyholder shall not be increased,

⁸ Act 27 of 1943("the Insurance Act")

⁹ **Act** No. 52 of 1998

¹⁰ No. 53 of 1998

on account of any representation or failure to disclose information made to the insurer which is not true, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof. The Act tries to prevent insurers from exploiting warranties made by the insured in order to avoid paying out on claims. The Act is intended to ensure that an insurer will have no remedy on account of an immaterial incorrect representation, whether that representation was warranted or not.

[16] The Supreme Court of Appeal has, in a number of **cases**, explained the purpose and object of section 63(3):

16.1 In *SA Eagle Insurance Co Ltd v Norman Welthagen Investments (Pty) Ltd* **1994** (2) SA 122 (A), Nestadt JA, at p124, said:

"The amendment must be seen against the background of the common-law rule that a warranty, being an essential or material term, must be strictly complied with; that if it is breached, the insurer is entitled to repudiate the claim whether or not the undertaking is material to the risk and even if non-compliance has no bearing on the actual loss that takes place (Gordon and Getz The South African Law of Insurance 4th ed at 218)."

16.2 In *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A), Kriegler AJA, at p748, said:

"The object of the enactment is manifest, namely to protect claimants under insurance contracts against repudiations based on inconsequential inaccuracies or trivial misstatements in insurance proposals. An insurer's

right to repudiate liability on the basis of the untruth of a representation made to it, whether elevated to a warranty or not, was curtailed."

18.3 In *Clifford v Commercial Union Insurance Co of SA Ltd* **1998** (4) SA 150 (SCA), Schutz JA. at p 1570 - E, said:

"To my mind its purpose was simply to detoxify the warranty by removing its potential for abuse, without outlawing its legitimate use. In other words, materiality would regain its true meaning and that meaning would be protected from being stifled by contract."

Burden of proof

[17] As stated above, the Respondent bears the burden of proof to establish on a preponderance of probabilities that the Appellant made the false statement or fraudulent representation with the wilful intention to defraud and this was common cause. The clauses quoted above relied upon by the Respondent to limit its obligation to indemnify requires to be interpreted strictly with proper regard to the main purpose, general nature and object of the contract (**see** *Videtsky v Uberty Life Insurance Association of South Africa Ltd*¹¹ and *Schoeman v Constantia Insurance Co Ltd*¹² . The Respondent **bears** the *onus* to establish that the Appellant willingly made false statements with the intention to defraud and that the falsehood could reasonably have influenced the defendant **as a** prudent insurer to accept, reject or compromise the claim or to pay to plaintiff a benefit higher than he is entitled to (see *Strydom v Certain Underlining Members* at par [6] above).

Conclusion

[18] It is common cause that the insurance contract was validly entered into and was valid at the time of the accident and that the Appellant lodged the claim in accordance with the provisions of the contract. It is also common

¹¹ 1990 (1) **SA 386** CN)

¹² 2002 (3) **SA 417** CN)

cause that the damage to the vehicle was assessed at R75 000 being the difference between its pre-accident and post-accident value and as such, the Appellant instituted action for the payment of the aforementioned damage. The Appellant did not claim a higher amount than the **assessed** one. On these premises, the Respondent has failed to discharge the burden to establish dishonesty or fraud on the part of the Appellant. To sustain the defence it is necessary for the Respondent to prove that the conduct of the Appellant was not honest or was fraudulent with intention to deceive and defraud the Respondent by getting a benefit it knew it was not entitled to. There is no evidence that the Appellant entertained such an intention to defraud. This defence in these circumstances is not sustainable.

- [19] When providing dishonest information to the Respondent, Mr Ngobese was clearly not acting on behalf of the Appellant. He was providing information at the request of the Respondent. The Appellant itself did not know what the true facts were.
- [20] In *Avis Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd*¹³ it was held that like in other contracts, an insurance policy "*must be interpreted in the context of the contract and object of the policy*" and particular provision should not be construed to defeat the main purpose of the policy.
- [21] In *Klipton Clothing Industries (Pty) Ltd v Marine & Trade Insurance Co of South Africa Ltd*¹⁴ 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.
- [22] False statements or misrepresentations made by Mr Ngobese are insignificant and can in no way materially affect the assessment of the

¹³ 1981 (3) **SA 274 (A)** at 289

¹⁴ 1961 (1) SA 103 CA) at 106

indemnity. The said clauses or terms and conditions of the Policy allegedly breached by the Appellant cannot be interpreted to mean that any false statement made by Mr Ngobese after a valid claim has been lodged will have the effect of tainting the claim with dishonesty or fraud.

- [23] I agree with the Appellant that, *"No evidence was adduced to illustrate the materiality of the untruthfulness"* and this also did not happen in this Court of Appeal. There is also no record of this illustration in the Court *a quo*. An untrue or incorrect statement which does not amount to wrongful or material misrepresentation cannot be relied upon to exclude or limit liability simply on the fact of its untruthfulness. Lies in respect of facts which are immaterial to the insured's right to recover do not invalidate the claim that they relate to.

ORDER

- [24] I propose that the judgment of the Court *a quo* be set aside and be substituted with the following orders:

24.1 The appeal is upheld with costs.

24.2 The order of the Court *a quo* is set aside and replaced with the following order:

- (a) The Defendant is liable to indemnify the Plaintiff in terms of the contract of insurance between the Plaintiff and the Defendant in respect of the damage suffered by the Plaintiff in **respect** of the motor vehicle insured but damaged in the incident which occurred on 1 January **2014**.
- (b) The Defendant is ordered to pay the Plaintiffs costs of the action.

T E JOYINI

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

J W LOUW

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Appellant: Adv T. A. L. L. Potgieter SC
Instructed by: Savage Jooste & Adams Inc.
Counsel for the Respondent: Adv B. Boot
Instructed by: Weavind & Weavind

Date of Hearing: 16 April 2019
Date of Judgment: 9 May 2019