IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

22/5/15

CASE NUMBER: 38037/2014

In the matter between:

ALFAGRANITE (PTY) LTD **PLAINTIFF/RESPONDENT**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

22/5/2015 DATE
SIGNATURE

and

ALEXANDER FORBES INSURANCE COMPANY LTD **DEFENDANT /APPLICANT**

JUDGMENT

TLHAPI J

[1] The plaintiff had instituted action against the defendant for repudiating the plaintiff's insurance claim on account of an alleged material non-disclosure, prior to the conclusion of the insurance agreement, of full details relating to claims with plaintiff's previous insurer, Mutual & Federal.

[2] The defendant excepted to a portion of the plaintiff's plea in replication, contained in the alternative reply to paragraph 2.12 of the defendants plea. In order

to have perspective of the issue excepted against, in its plea to paragraphs 4,5 and 6 of the particulars of claim the defendant pleaded.

" 2.1 *During or about October 2013 the Plaintiff, represented by Stefan Willemse ('Willemse') applied for business short-term insurance for twenty four (24) businesses dealing in electronic goods and more in particular cellular phone and appurtenances. In the course of making such application Willemse, in writing, completed a written "DECLARATION", a copy of which is annexed hereto marked "AFI".*

2.2 *In answer to the question posed under numbered paragraph 1 on Annexure "AF1" Willemse did not give any response i.e whether any insurer/underwriter ever cancelled any policy held by the Plaintiff"*

2.3 *In response to the questions posed in numbered paragraphs 3,4,5 and 6 of Annexure AF1, Willemse did not give any response to question 3 but indicated, with reference to questions 4,5 and 6 that the date of loss for which a claim was made during the past three(3) years, the insurer involved and the type of loss are set out in an attachment, a copy of which is annexed hereto marked Annexure "AF2".*

2.4 *In Annexure AF1, Willemse declared that the application for insurance contains full details of the risk and is complete, true and correct in every respect and agreed that the application for insurance and declaration form the basis of the contract between the Plaintiff and Defendant.*

2.5 -2.10

2.11. The answer, statement or representation made by the plaintiff in Annexure "AF1" in response to the questions posed in numbered paragraphs 3,4, 5 and 6 read with the attachment thereto (Annexure "AF2") were false in that the Plaintiff omitted from the attachments various previous claims made by it against Mutual and Federal.

2.12 The correctness and falsity of the aforesaid representation was of such a nature so as to materially affect the assessment of the risk assumed by the Defendant under the contract of insurance.)

In replication to 2.12 above the plaintiff pleaded

" 13. *The contents hereof are denied......*

In the alternative to paragraph 13

14. *.......only if the Court should find ....that Plaintiff supplied information as alleged Plaintiff pleads that the undisclosed fact was not material and would Defendant in any way have contracted with Plaintiff*

In the further alternative to paragraph 13 and 14

15. *...only if the Court should find........that ...the information ...was of such a nature as to materially affect the assessment of the*

risk....the Defendant is estopped from denying that it would not have contracted with Plaintiff for one or more of the following reasons:

(a) Plaintiff provided Defendant on Defendant's special instance and request for the purpose of providing a quotation to Plaintiff with a mandate to authorise Defendant to obtain all information regarding Plaintiff's short term insurance portfolio (e.g. Insurance history and claims experience), from Mutual and Federal.

(b) Defendant thereafter provided Plaintiff with a quotation(s) thereby negligently representing that it indeed obtained and considered .....information for Mutual and Federal...and that the Defendant was not withstanding the information still willing and able to contract with Plaintiff;

(c) ....
(d) ....
(e) ....
(f)

16. ....Defendant is estopped from claiming that it would not have contracted with Plaintiff as it did."

[3] Mr Ferreira for the defendant submitted that the replication excepted to, could only be interpreted to mean that once the plaintiff/ insured had supplied a mandate to the defendant /insurer, the plaintiff was assumed to have complied with its obligation

to make a full and complete disclosure of all matters material to the assessment of the risk. A failure by the plaintiff to disclose information relating to previous heists and robberies and a 'positive' misrepresentation as to the extent of such incidents was a material factor to be considered by the defendant.

[4] The legal principle covering material non-disclosure and the purpose of the enacted legislation (section 53(1) of the Short term Insurance Act 53 of 1998) ('the Act') was aptly stated in *Regent Insurance v King's Property* (5/2014) [2014] ZASCA (176) 21 November 2014, par [20]:

> "*It is trite that, at common law, an insured, when requesting insurance cover, must make full and complete discovery of all matter material to the insurer's assessment of the risk. Failure to do so will entitle the insured to reject a claim under a policy and to treat it as void. Legislation has been enacted, however, to preclude insurers from treating misrepresentation that are trivial, as grounds for avoiding insurance contracts and rejecting claims*"

[5] Mr Ferreira submitted that the plaintiff could not place the duty of proper disclosure or, by shifting its own obligation, on the defendant on the basis of a mandate, by expecting the defendant, to enquire into the plaintiff's short term history. He submitted further that there was no room for the defence of estoppel as pleaded by the plaintiff. He argued that the facts herein were comparable to those of *King's Property supra.* The plaintiff ('Kings Property') sought to place the duty on the insurer to make enquiries relating to the risk to be insured on the basis of various revisions to the policy, where information was present in previous records of Regent

that the premises, which was the subject of the insurance claim 'were occupied by a business using flammable materials. At paragraph 51 of the judgement Wallis J stated:

> *"It required Mr Lewis to fossick around Regent's records unearthing little bits of information that had been disclosed to it in the past and assemble them into a picture that would enable him to determine the nature of the risk and assess whether Regent wished to grant cover and if so on what terms"*

[6] According to Mr Kairinos for the plaintiff, the facts in *Regent* were distinguishable in that the insurance agreement covering the building was already in existence when the plaintiff made a request to have all its properties surveyed, '<u>the purpose of the survey was not to ascertain the risk but to survey the risk</u>'. In the present matter the '<u>defendant requested and obtained a mandate ... for the purpose of assessing the risk in order to determine the premium to be quoted'.</u> (my underlining)

He further submitted that on the facts and pleadings the estoppel pleaded in *Kings Property supra* had not been established.

[7] This exception was aimed at obtaining a decision on a point of law which might dispose of the case in part 'and avoid leading unnecessary evidence at trial'. In *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001(3)SA 986(SCA) at paragraph 7 Marais J stated:

> *"It was trite law that an exception that a cause f action is not disclosed by a pleading cannot succeed unless it is shown that ex facie the*

allegations made by the plaintiff and any document upon which his or her cause of action may be based, the claim is bad in law. In the circumstances of this case.....that means that the excipient had to show ex facie the written documents relied upon by the appellant it will not be possible to identify the res vendita on the ground that there is no reason to suppose that any admissible evidence could conceivably exist which would enable that to be done"

In certain instances caution was also prudent as stated in *Vermeulen supra* at paragraph [12] :

"I stress that these are not firm findings. It may be that some of the data which I have postulated probably exists, and would be admissible in evidence if it did exist, does not in fact exist. But that will only be known once the appellant has been given an opportunity to adduce evidence. By allowing the exception the Court a quo deprived the appellant the opportunity of showing that the land excluded from the sale can be indentified ....In short, it was not an issue which lent itself to fair resolution by way of exception"

[8] The plaintiff pleaded that it was the seeking and obtaining of the mandate and the quotation that induced it to contract with the defendant. In considering the exception the question I asked myself was, if material information was indeed obtained by the defendant, what happened to such information received or what role did it play in order to assess the risk for purposes of obtaining a quotation and prior to entering into a contract. Alternatively do I confine myself to the documents annexed to the exception, Annexures "AF1" and "AF2" and find *ex facie* the said documents that there was no disclosure. Fortunately these are questions that I need

not answer in this application.

[9] Mr Kairinos argued that not all material facts need to be disclosed and that there were limitations. He referred to a text General Principles of Insurance Law p126. The text that I sourced was Reinecke *et al*, General Principles of Insurance Law, 2007 at par 195 at page 128 – 129 which gives five limitations to a duty to disclose material facts:

> " (a) Facts which are actually known to the other party to the contract need not be disclosed. Apart from the question whether such facts are included in the duty to disclose, their non-disclosure does not found an action based on misrepresentation since a party obviously cannot be misled by the non-disclosure of facts already within his knowledge;
>
> (b) A proposer for insurance need not disclose facts tending to diminish the risk, even though strictly speaking, such facts are, or may be material in that they are relevant to the risk;
>
> (c) Material facts which are covered by an express or implied warranty in the insurance contract need not be disclosed;
>
> (d) No disclosure is required of material facts of which the proposer has no Knowledge;
>
> (e) Material facts of which information has been waived by the insurer need not be disclosed;"

[10] The legal principles relating to the duty to disclose and the ameliorating effects of section 53(1) of the Act, as espoused in *King's Property supra*, remain applicable when considering the repudiation of a claim by an insurer. However, in my view and, having regard to what might constitute a limitation to the duty to disclose, it is important to first determine the consequences to the both parties, of the request for the mandate and information allegedly received from Mutual and Federal prior to the conclusion of the contract. It is for these reasons that the exception should fail.

[11] In the result the following order is given:

1. The exception is dismissed with costs which includes costs of two counsel.

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**12 MAY 2015**
JUDGMENT RESERVED ON	:	**12 MAY 2015**
ATTORNEYS FOR THE PLAINTIFF	:	**DOUW STEENKAMP ATT.**
ATTORNEYS FOR THE DEFENDANT	:	**KLAGSBRUIN EDELSTEIN BOSMAN DE VRIES ATT.**