**IN HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL, LOCAL DIVISION DURBAN**

**CASE NO: 190/2008**

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| **PK HARIKASUN** | **Plaintiff** |
| **and** | |
| **NEW NATIONAL ASSURANCE COMPANY LIMITED** | **Defendant** |

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# JUDGMENT

**Delivered on: 12 December 2013**

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**MOODLEY J**

**The claim**

1 This is an action instituted by the plaintiff, P K Harikasun, for indemnification under an insurance policy issued by the defendant, New National Assurance Company Limited, for loss suffered during an armed robbery at his home on 4 July 2007, of goods to the value of R321 725.

2 The plaintiff alleges that in terms of the insurance policy (the policy), the defendant agreed to compensate him for defined events occurring within the period of insurance, subject to the terms and conditions of the policy. The defined events include:

2.1 the loss of household goods and personal effects of every description on the plaintiff's residential premises situated at 2 Cadley Close, Bakerville, Durban arising by virtue of theft; and

2.2 The loss of property specifically stipulated in the schedule of insurance arising out of any accident or misfortune.

3 The plaintiff alleges further that:

3.1 an armed robbery took place at his aforesaid residence on the 4 July 2007 during the course of which, a number of items (listed on the schedule of stolen goods (Exhibit A1-2) were stolen.

3.2 as the theft constituted a defined event in terms of the policy, the defendant was liable to compensate the plaintiff for the loss;

3.3 the defendant is in breach of its obligations in that, notwithstanding compliance by the plaintiff of all his obligations under the policy, the defendant has failed and/or refused to effect payment of the sum of R321 275 to which the plaintiff is entitled in terms of the policy.

**<u>The defence</u>**

4 While admitting that it issued the policy, the defendant pleads that the agreement of insurance was induced by the plaintiff's false representation that he owned and /or bore the risk in three items of jewellery which were included in the All Risks section of the policy. However these items were stolen prior to the inception date of the policy. The defendant avers that as it extended insurance cover in respect of the three items relying on the plaintiff's misrepresentation, the policy was induced by fraud and the defendant is entitled to resile from the policy and has tendered repayment of the premiums paid.

5 The defendant has further placed in dispute the robbery and the theft of the items listed in the plaintiff's Schedule of stolen goods. But, in the event that the plaintiff proves the loss, the defendant contends that it is not obliged to indemnify him and it is entitled to avoid the agreement of insurance because :-

5.1 in contravention of Clause 9 of the General Conditions of the agreement of insurance, the plaintiff lodged two fraudulent claims. The first was for the loss of a Sony Ericsson cell phone (the cell phone)which the plaintiff falsely represented was in use and had a replacement value of at R4 500. The second was for a piece of jewellery viz an 18 carat Loasia chain (the Loasia chain) 19.4 grams in weight with a value of R6 250, which had been stolen from him on 27 April 2006.

6 The defendant pleads that, consequently, in accordance with the terms of the agreement of insurance, the benefit under the agreement of insurance has been forfeited by the plaintiff and it has properly rejected his claim.

**Issues for determination**

7 Prior to the commencement of the trial, on application by the plaintiff, the court ordered separation of the liability and quantum in terms of Rule 33(4) of the Uniform Rules, and the trial proceeded only on the merits.

8 The issues for determination are :

8.1 whether the plaintiff had proved that a robbery had taken place at his residence on 4 July 2007 and established that he had suffered the loss he claimed indemnification for from the defendant, in particular in respect of the cell phone and Loasia chain.

8.2 whether the defendant was entitled to avoid the contract of insurance because it was induced by the plaintiff’s misrepresentation to issue the policy and to extend insurance cover over three items which were not in his possession;

8.3 whether the defendant could repudiate the plaintiff's claim for compensation and cancel the insurance contract because the plaintiff had breached the contract by his fraudulent claims for the damaged cell phone with no value and the Loasia chain which was not in his possession on 4 July 2007.

**<u>ONUS</u>**

9 The onus of proof of loss and value on a balance of probabilities burdens the Plaintiff.

**Schoeman v Constantia Insurance Co Ltd 2003(6) SA 313 at 323A**

Therefore the plaintiff must prove that that a robbery took place at his house on 4 July 2007 and that he is entitled to be indemnified by the defendant for loss suffered as a result of the robbery, being a defined event in terms of the insurance policy issued by the defendant.

10 However the onus of proving fraud on the part of the insured rests with the insurer, which must also be discharged on the normal civil standard. The burden is an onerous one and our courts have observed that the point of departure has to be that fraud – the insured’s intention to deceive and defraud the insurer – is not to be imputed lightly.

**Schoeman v Constantia Insurance Co Ltd *supra* at 325 B-C**

An insurer’s plea of fraud requires strong proof; fraud on the part of the insured cannot be presumed, but must be clearly and properly proved. An important element of fraud in respect of fraudulent claims is the intention of the insured to deceive the insurer by misrepresentation or deception and to cause the insurer prejudice.

11 Therefore the defendant must prove, on a balance of probabilities, that:

11.1 the misrepresentations relied upon by the defendant in paragraphs 2bis (pre-contractual fraud) and 7(b) (in breach of Clause 9 of the General Conditions of the agreement of insurance), were made by the plaintiff;

11.2 the plaintiff’s conduct was fraudulent as it was made knowingly and with the intention of obtaining a benefit under the policy.

**Springgold Investments (Pty) Ltd v Guardian National Insurance Co Ltd 2009 3 SA 235 (D) at 243 F-G**

**<u>Legal Principles</u>**

12 In regard to the pre-contractual fraud, the insurer has the right to avoid a contract of insurance whether the proposer has misrepresented a material fact or he has failed to disclose one.

In **Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419(A) Joubert JA** held **at 432 E-H** that :

'There is a duty on both insured and insurer to disclose to each other prior to the conclusion of the contract of insurance every fact relative and material to the risk (*periculum* or *risicum*) or the assessment of the premium. This duty of disclosure relates to the material facts of which the parties had actual knowledge or constructive knowledge prior to the conclusion of the contract of insurance. Breach of this duty of disclosure amounts to *mala fides* or fraud, entitling the aggrieved party to avoid the contract of insurance.'

The aforesaid dictum was applied in **Commercial Union Insurance Co of SA Ltd v Wallace NO 2004(1) SA 326 (SCA) at 343 I-J.**

13 The materiality must be tested at the time of the issue of the policy. The onus is on the insurer to 'prove the representation, its untruth (which will involve its incorrectness) and that the incorrectness would have materially affected the assessment of the risk at the required time'.

**South African Law of Insurance: D M Davis 4th edition 234 - 235**

14 In **Mahadeo v Dial Direct Insurance Ltd 2008 (4) SA 80 (W) at 86 H –I** the court confirmed that the test remains objective:

'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.'

15 In **LAWSA (Volume 12 4th paragraph 124),** a single combined test to ascertain materiality objectively is proposed:

‘whether according to the opinion of the reasonable man in the position of the particular insured, the facts in question would be likely to influence the decision of a prudent, experienced insurer concerning questions of risks and premium’.

16 The defendant relies on the exemption clause viz Clause 9 of the General Conditions of the agreement of insurance to avoid the agreement of insurance. **Patel J** made the following comments in respect of the interpretation of exemption clauses in **Springold Investments (supra)** at page **242**:

‘[21] … If the defendant is entitled to escape liability on the grounds of fraud, then its right to do so must be found within the four corners of clause 22. Clause 22 is what is commonly known as an exemption clause and its application to the facts of this case will have to be determined. This in turn involves the proper construction of that clause and the principles of interpretation which are of application thereto.

[22] While it is clear that there is no general principle that exemption clauses should be construed differently from other provisions in a contract, the courts are wary of contractual exclusions, since they deprive parties of rights that they would otherwise have had at common law. *(See Van der Westhuizen v Arnold* (6) SA 453 (SCA) ([2002]) 4 All SA 331) at paras 37-40.) It is a well-recognised principle of interpretation of insurance policies that the courts should lean toward upholding the policy rather than producing a forfeiture.’

**Fedgen Insurance Ltd v Leyds 1995 (3) SA 33 (A) at 38B-E**

16 As pointed out by both counsel, in the absence of direct evidence the court has to determine the issues and the discharge of the relevant onus by inferential reasoning based on the conspectus of evidence. In **R v Blom 1939 AD 188 at 202-3,** the court set out the two cardinal rules of logic in the evaluation of circumstantial evidence : the inference sought to be drawn must be consistent with all the proven facts and the

proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn'. This standard is apposite when the onus of proof has to be discharged beyond reasonable doubt as a conviction can only be sustained if the only reasonable inference to be drawn from the facts points to the guilt of the accused. On the other hand, in accordance with the ordinary civil standard, the court must :

'by balancing probabilities, select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'

**Ocean Accident and Guarantee Corp. Ltd v Koch 1963 (4) SA 147 (AD) at 159 C – D**

17 In considering the conspectus of evidence, the court must evaluate the probabilities, the credibility of witnesses and the proven objective facts. However as

'……..the findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration',

**Santam Bpk v Biddulph 2004 (5) SA 586 (SCA) at 589G**

I have remained mindful that :

' …..the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true.'

**Santam Bpk v Biddulph *supra* at 592B**

**Argument**

18 Mr Broster submitted that as the evidence of Tasha and the plaintiff about the events of the evening of 4 July 2007 was not seriously disputed in crossexamination, the plaintiff has proved on a balance of probabilities that the robbery which triggered the liability of the defendant, had occurred.

On the issue of nondisclosure, he submitted that although the items that the plaintiff had previously been robbed of were covered by the policy issued by the defendant, the fact that they were not in the plaintiff's possession did not materially affect the risk assumed by the defendant. Further the plaintiff had disclosed his previous losses in his proposal for insurance cover from the defendant, and had not included the items in the claim lodged with the defendant although he had paid the premiums for the items. Consequently the non-disclosure is immaterial and does not fall within the parameters of Section 53 of the Short Term Insurance Act 53 of 1998.

19 Mr Broster contended further that fraud on the part of the plaintiff in respect of the Loasia chain could not be inferred from the facts before the court, as the defendant had failed to lead any evidence in this regard. Similarly the defendant had failed to discharge the onus on it to show that the plaintiff had fraudulently claimed indemnification for the cell phone by representing that it was in use. The defendant had itself recorded in correspondence that the plaintiff had not alleged that the cell phone was in use, and the evidence of the plaintiff and his witnesses did not sustain the defence of fraud relied on by the defendant.

Mr Broster submitted in conclusion that the defendant had, in the premises, failed to discharge the onus on it and the plaintiff ought to be awarded his claim.

20 Ms Annandale argued that the matter could be disposed of on the grounds that the insurance contract had been induced by the plaintiff's material misrepresentation that he bore the risk in and to items of jewellery which he knew had been stolen during a previous robbery and for which he had been paid out by his previous insurers. As the defendant had assumed the risk for the aforesaid items in the contract of insurance on the basis of the misrepresentation, the contract is rendered voidable at the instance of the defendant. The defendant has elected to resile from the contract and tendered the return of premiums

paid. Consequently there is no liability attaching to the defendant under the contract of insurance to indemnify the plaintiff for loss.

21 In the event that the court does not find that argument dispositive of this matter, Ms Annandale has submitted that the plaintiff did not discharge its onus to prove the robbery as the only eyewitness to the robbery did not testify although available, and the evidence of the plaintiff and Tasha lacked credibility. Therefore the plaintiff failed to establish the insured event.

22 As the final leg of her argument, Ms Annandale advanced in detail the numerous improbabilities in and contradictions between the evidence of the plaintiff and his witnesses in respect of the cell phone and Loasia chain, which render the evidence false and to be rejected. She contends that the defendant has therefore established fraud on the part of the plaintiff and that the plaintiff's claim falls to be dismissed.

23 She has also contended that the plaintiff's conduct merits costs on a punitive scale and, given the seriousness of fraud in relation to insurance policies, the defendant's employment of senior counsel was warranted.

**Summary of Facts :**

24 The following is common cause:

24.1 The plaintiff submitted a Personal Insurance Plan Proposal Form dated 20 March 2007 to GDI Schofield Insurance Brokers.

24.2 The defendant issued domestic insurance policy HARIP006/0001 to the Plaintiff, with an inception date of 1 April 2007.

24.3 Under the the 'All Risks Specified Section' it insured 41 items of jewellery. Under the 'Household Contents Section', the Limitations included:

‘2 cover in respect of Cellular Phones at the Insured’s private residence is limited to R1500 unless specified. Theft must be accompanied by forcible and violent entry and accidental damage is excluded.’

24.4 The plaintiff lodged a claim form dated 6 July 2007 and a schedule dated 10 July with the defendant in respect of loss suffered during a robbery at his residential premises on 4 July 2007. The schedule included 43 specified items of jewellery valued at R305 775, and the cell phone valued at R4500.

24.5 The plaintiff and his wife declined to take a polygraph test or examination, citing medical and legal advice.

24.6 The plaintiff supplied receipts and valuations for some of the jewellery on the schedule and two affidavits in respect of the cell phone.

24.7 MTN, the service provider on whose system the cell phone was registered confirmed that :

24.7.1 the said cell phone was inspected on 18 February 2006;

24.7.2 liquid damage was diagnosed at a repair cost of R3 780 (inclusive of VAT);

24.7.3 the replacement cost of the cell phone was R4 028.32 (inclusive of VAT); and

24.7.4 the cell phone was not repaired by them.

**SUMMARY of EVIDENCE**

25 The plaintiff called 2 witnesses, his daughter Tasha and a cousin, Caveer Ramjathan, and testified himself.

**Tasha Harikasun (‘Tasha’)**

26 Tasha, the plaintiff’s daughter, testified that on the evening of 4 July 2007, she fell asleep in the TV lounge which adjoined her parent’s

bedroom on the second storey of her home. The safe was in her parent's bedroom.  Her bedroom and the kitchen were on the ground level.

27 She was awoken by laughter and unfamiliar voices. Realising that something was wrong, she grabbed her mother's cell phone from a handbag on the bed, and went down to her bedroom. She pressed the panic button near the doorway of her room but nothing happened. She then ran to the kitchen and pressed the emergency button there. After activating the alarm, Tasha hid in a cupboard in her room from where she telephoned the plaintiff and told him that 'something was happening' and that he ought to return home. She remained in the cupboard until she heard the plaintiff calling her name. The police were with her father.

28 A Sony Ericsson cell phone belonging to her father was taken during the robbery. About a month prior to the robbery, her uncle, Caveer Ramjathan, had brought the cell phone with a note attached to their home. He gave her the cell phone and told her to tell her father to phone him.  Without checking if it was in working order, she put it into the cupboard in the TV lounge, in which old cell phones were stored, and forgot to tell the plaintiff about it.

29 Tasha's cell phone had been taken away by her parents. On the 4 July 2007 she took out the cell phone brought by Ramjathan but left the note it was wrapped in, in the cupboard. While her parents were away, she put the cell phone on charge in their bedroom, after placing her one of her many sim cards in it, but when they returned early she had forgotten to take it off the charger. She informed her parents about the cell phone on the night of the robbery.

30 Tasha had decided to charge the cell phone brought by Ramjathan because she had thought that it had been repaired as the plaintiff had informed her that Ramjathan had taken the phone for repairs. She had

not read the note that was wrapped around the cell phone but she gave the note to the plaintiff after the robbery.

31 Even allowing for Tasha's immaturity and informal manner of expression, the impression gained by the court was that she was too glib and rehearsed in some of her responses, particularly in respect of the cell phone, and therefore unconvincing. Comparatively, although her evidence in respect of the robbery was not detailed, and her reaction to the presence of the robbers, unusual given the exposure to risk of discovery by them, her testimony in respect was consistent and had a more truthful ring.

32 Caveer Ramjathan testified that in mid-2007 met the plaintiff, who is his cousin, in a car park at Sandton City, Johannesburg. Ramjathan saw a Sony Ericsson cell phone in the boot of the plaintiff's car. The plaintiff told him that the cell phone was not working. Ramjathan offered to have the cell phone repaired by his friend Nolan Naidoo.

33 Upon his return to Durban, Ramjathan gave the phone to Naidoo, telling him to check what was wrong with the phone and to repair it. Approximately two weeks later Naidoo brought the cell phone wrapped in paper to Ramjathan's house and gave him the cellphone wrapped in paper, and said to him ," ….give it to your cousin and get him to call me." Ramjathan did not ask Naidoo what was wrong with the phone or if he had repaired it. He knew that Naidoo usually wrapped the phones he repaired in paper on which he wrote his name and number.

34 Ramjathan kept the cell phone with him for two or three days before he took it to the plaintiff's house, where he gave it to Tasha, and told her tell the plaintiff to phone Naidoo.

35 Subsequently the plaintiff brought an affidavit to him which he deposed to after reading it and satisfying himself as to its contents.

36 Ramjathan was not a credible witness. His evidence was riddled with material contradictions and inconsistencies and the explanations he offered were weak and lacked credibility. He changed his version about whether he had discussed the damage to the phone with the plaintiff and his reasons for not wanting to involve Naidoo in the plaintiff's case several times. Ramjathan was also clearly unhappy about testifying, which was apparent from his demeanour and discomfort under crossexamination. He eventually attempted to attribute his uncertainty and contradictions to his personal problems and alleged that he could only remember that he had given the phone back. His testimony was undoubtedly unreliable and served only to undermine the credibility of the plaintiff's version about his claim for the cell phone.

**37** The plaintiff testified that on the evening of the 4 July 2007 he attended a meeting in Durban. While he was waiting at his flat at the North Beach for his children fetch him, he received a call from Tasha who informed him that a robbery was in progress at their home. Immediately thereafter the alarm company contacted him and advised him that the panic button in his house had been activated and that there was no response on the landline to the house. The plaintiff and his children rushed home.

38 On the way he telephoned a neighbour, Mr Abdul, and the Newlands East Police Services. When they arrived home Abdul and the police were there. The police, Abdul, Abdul's son and a friend entered the house. When he was told the assailants were not in the house, the plaintiff entered the house shouting for Tasha, who came out of a wardrobe in her bedroom. He found his wife lying on the bed in their bedroom.

39 While the police were questioning him about what was taken from the house, Tasha told him that the Sony Ericsson cell phone had been taken. He immediately informed a policeman whose name he could not

remember. The policeman advised him not to block the phone, because the phone could be traced if it were used.

40 The plaintiff had received the stolen cell phone when he took a contract with I Talk Cellular. The cell phone was damaged some months later when he went into the water at Addington beach during the sardine run with the phone in his back pocket. He handed the phone in for repairs at the MTN Store but was advised a few weeks later that liquid damage did not fall under the warranty and it was not economically viable to repair the phone. He concluded another contract with I Talk Cellular and obtained a new phone.

41 The plaintiff kept the damaged phone in his car. Some time later he met two of his cousins in Johannesburg, one of whom was Caveer Ramjathan. When Ramjathan asked him why the cell phone was in the boot, he told Ramjathan that the phone was not usable because of water damage. Ramjathan offered to have the cell phone repaired by his friend. The plaintiff had not seen Ramjathan and the phone since then.

42 Tasha told him that Ramjathan had brought the cell phone back about 5 or 10 days before the robbery. There was a note attached to the cell phone and the plaintiff was to have contacted the person whose name was on the note. On the day of the robbery she had taken the cell phone out of the cupboard in the TV room, inserted one of her simcards and placed it to charge. The plaintiff confirmed that he had taken Tasha’s cell phone away from her.

43 The plaintiff submitted a claim to his brokers, GDI Schofield, with a breakdown of the items that had been taken during the robbery (Exhibit A 2A). He listed the cell phone on the schedule at a value of R4 500. At the request of the assessor, the plaintiff completed the schedule (Exhibit A8-9) required by the underwriter.

44 On 23 July 2007, Rob Head, the assessor, asked the plaintiff and his wife to take a polygraph test. The plaintiff could not remember what his response had been.

45 On 24 October 2007 the plaintiff and his wife were called to a meeting with the insurers at which he was asked why he had not declared that the cell phone was not functional or faulty. According to the plaintiff, "I explained to them exactly what I knew at that point in time. That the cell phone was damaged, it went in for repairs, it came out unrepaired and I never used that cellphone ie from the time it went to MTN for repairs and was returned." He had not said that the phone was in use.

46 The defendant requested details of the person who had effected the repairs to the phone. The plaintiff explained to Ramjathan what had transpired about the cell phone and requested the details of the person who repaired the cell phone. Ramjathan replied that he would get back to him, but subsequently informed the plaintiff that he had done a favour in attempting to have the cell phone repaired and he did not want the repairer involved. However eventually both Ramjathan and Nolan Naidoo deposed to affidavits, on 30 October 2007 which were submitted to the brokers.

47 Harikasun was crossexamined strenuously about the cell phone and three of the items that appeared on the All Risks schedule of the policy issued by the defendant as items 13, 16 and 22 respectively: a Loasia chain, a ¼ Kruger Rand with diamond, and a hand chain. He admitted that the aforesaid 3 items were stolen during a previous 'smash and grab' robbery on 27 April 2006 and he had been compensated therefor by the insurer at the time, Mutual & Federal, but were nevertheless covered by the policy issued by the defendant.

48 He was unable to answer the questions relating to the Loasia chain and finally responded that there were two Loasia chains.

49 The plaintiff was neither an impressive nor a credible witness. His reliance on his medical woes, unsubstantiated by any expert evidence, was illconceived and did little to alleviate his inability to offer logical and pertinent responses. He alleged confidently that he was able to apply for insurance cover and lodge insurance claims because he had the relevant documentation and knowledge of the items insured. But under pressure to explain why he included items he knew he did not have in his possession and the anomalies relating to the Loasia chain, he relied on his 'impaired memory' and claimed confusion and requested that he be excused from answering questions relating to the chain, because his wife would be able to answer the questions about the jewellery as she made the purchases. And yet he was quick to retort that there was no prejudice to the defendant although it had insured items taken from him during a previous robbery, because he had not claimed for those items and paid the premiums. His ability to comprehend at that point seemed unaffected by the general malaise he claimed to be afflicted with.

50 When asked about what his response was to the request by the assessor to take a polygraph test, the plaintiff alleged that he could not remember. And yet he knew that he and his wife had refused to take the test, allegedly on the advices of his attorney and his surgeon. This was in my view a feeble attempt to impress the court with his inability to remember.

51 There were several inconsistencies in the plaintiff's testimony which impacted adversely on his credibility. He alleged that he had made a number of errors in the schedule he had lodged with the claim form (Exhibit A1-2) :

51.1 At first he confidently asserted that he had a list, and knew which items were in the safe, which items his wife had left on the table and which items he was wearing. The jewellery that was not taken was those items he had been wearing. However he then added that he was not sure whether all his wife's jewellery was taken.

51.2 The plaintiff confirmed twice that the video machine listed under the unspecified items was in his bedroom. But when he admitted that there was no television in his bedroom and he was asked why the videomachine was in his bedroom, he claimed to have made a mistake and what he had listed as a video machine was in fact a video camera.

51.3 The plaintiff described the office desk in his bedroom that was listed on the claim being in dimension 60cm wide by 1 meter in length, light weight, with no drawers and made of veneered oak. Only under further cross examination on resumption of the trial, did he testify that the desk was not taken by the robbers, but broken. As the desk was against the safe, he presumed that it had been broken because the robbers wanted to get to the safe. But it raises the question as to why the desk was broken if it was lightweight and portable, as it would have been easier to move the desk than to break it.

52 The plaintiff's credibility was seriously undermined further in version about how the cell phone sustained damage. In his evidence in chief the plaintiff testified that the phone was damaged when he went into the water at Addington beach during a sardine run, with his phone in his back pocket. He 'got out happily with the sardines' and pulled out his phone and called his uncle who was a keen fisherman to tell him about the sardines. To quote the plaintiff,

"I said 'come and join the fun here and pick up your sardines' I couldn't get through to him because the water had gone in already'.

53 However under crossexamination he realised that he could not have called his uncle from the phone after entering the water, and he insisted that he did call his uncle, but it must have been before he went

into the water. Subsequently he changed his version again: he had intended to speak to his uncle but he was no longer certain that he had.

54 But his version gained further improbability when he was reminded that the sardine run occurred during the winter months, not in February as he alleged. The plaintiff then alleged that the fish were mackerel which were being scooped from the sea in nets. Having lived in KwaZulu-Natal all my life, although I am not a fisherman, I have never heard of a mackerel run, although unlike the plaintiff, I am familiar with the saying "To throw a sprat to catch a mackerel".

Unsurprisingly the mackerel run tuned out to be 'a red herring'. According to the South African Sustainable Seafood Initiative – the species of mackerel or the King mackerel (also called Couta or Cuda) which is found near the KwaZulu-Natal coastline, are linefish. This species is targeted by commercial and subsistence fishers but also caught by recreational line and spear fishers.

The plaintiff's explanation about how liquid damage was caused to the phone while he was gathering armfuls of mackerel is consequently a ludicrous lie.

55 However I remain mindful that the advantage of the trial court in evaluating the credibility of witnesses must not be overemphasised as 'the truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors, including, especially, the probabilities'. **President of the Republic of South Africa & Others v South African Rugby Football Union &Others 2000(1) SA1 (CC) at par 9**

56 The defendant did not call any witnesses.

**<u>THE PLAINTIFF'S ONUS : THE ROBBERY</u>**

57 As pertinently pointed out by Ms Annandale, the only eyewitness to the robbery was Mrs Harikasun but the plaintiff elected not to call her, although she was available and in court. Therefore the details of the

robbery remain sketchy. There is no evidence that the robbery occurred at gunpoint or that it was executed under threat of violence, except for Tasha's evidence that she heard the word 'rape'.

58 Tasha's evidence was not satisfactory in all respects. There was no evidence as to what language the intruder or intruders were speaking in, although she testified that she heard the word 'rape'. When she described her phone call to the plaintiff she told him that '…something is happening I don't know, please come home'. There is no mention of a robbery or even rape. Similarly the plaintiff could not recall her exact words, but he understood that they were being 'held up'.

59 There were also some unexplained contradictions in the plaintiff's evidence in respect of the robbery. In the claim form (Exhibit A2A) the plaintiff reported the time of the robbery at 18h30; he testified that he had estimated the time from the call he received and the report from his home. However according to Mrs Harikasun's cell phone records (Exhibit A26), Tasha phoned him at 19h30. The plaintiff impressed on the court that he got home in a matter of minutes and he had phoned Abdul and the police on his way home. But his cell phone records reflect that he called Abdul 16 minutes after his daughter's call and the police almost 1 hour later at 20h25. He was unable to explain the time lapse and the discrepancy between his testimony that he had contacted the police immediately after Tasha called him and the delay of an hour reflected on the cell phone record.

60 Similarly, although the plaintiff stated in the claim form that two armed men had held his wife and child at gunpoint and assaulted and threatened them, he conceded that Tasha had not been held at gunpoint or assaulted; but he considered that she was under threat because of the presence of the robbers inside the house.

61 However it was not disputed that the security company was alerted by Tasha and that the police and the plaintiff were alerted by the security

company. According to the plaintiff, the police arrived almost simultaneously with him at the house. The plaintiff had also telephoned the police and Abdul, his neighbour, who was present with his son and a friend. The plaintiff remained outside while the police and his neighbours went into the house to secure it. Tasha only emerged from the cupboard when she heard her father, and the police were present. Mrs Harikasun was lying in her bedroom upstairs.

62 In my view, it is improbable that the robbery could have been faked in the presence of so many people. If a false alarm had been sounded to perpetuate belief in an alleged robbery, it would have been evident to the police and perhaps even the neighbours.

63 When Tasha testified that heard the voices emanating from her parents' bedroom which adjoined the TV lounge, it was put to her by Ms Annandale :

'So when you heard the word 'rape' you must have realised that there were people in the house who were threatening your mother, there was something badly wrong?

Tasha : Yes'

Therefore, although her actions exposed her to detection by the robbers, and were risky and potentially foolhardy, her conduct was consistent with her explanation for not remaining in the TV room:

"I don't know why I didn't but I know I just had to get help. My mom always tells us 'You know what. Don't get into the situation. Get out and get help'."

64 She therefore took the risk to get help which she did, by activating the alarm and telephoning her father. She also had the presence of mind to take her mother's cell phone out of her bag before she ran downstairs. Tasha's testimony about the robbery and her conduct is also corroborated to an extent by evidence of the plaintiff. Further, although Tasha's statement to the police was available, she was not tested on its contents, nor was her evidence about hearing the robbers disputed.

65 In the premises, despite the adverse inferences I have been urged to draw by the defendant from the failure of Mrs Harikasun to testify, I am of the view that the plaintiff has established, on the probabilities, that the robbery on 4 July 2007 at his residence did take place.

**The INDUCEMENT of the CONTRACT of INSURANCE by a MATERIAL MISREPRESENTION**

66 In order to avoid liability under the policy, the defendant has to prove that that there was pre-contractual fraud on the part of the plaintiff. Within that context, the misrepresentation must have materially affected the assessment of the risk under the policy at the time of issue before an insurer may avoid liability under the policy in terms of Section 53(1) of the Short-term Insurance Act 53 of 1998, as amended by Sections 19 and 35 of the Insurance Amendment Act 17 of 2003 which provides :

> **"*53 Misrepresentation and failure to disclose material information***
>
> *(1)(a) Notwithstanding anything to the contrary contained in a short-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2) –*
>
> *(i) The policy shall not be invalidated;*
>
> *(ii) The obligation of the short-term insurer thereunder shall not excluded or limited; and*
>
> *(iii) The obligations of the policyholder shall not be increased,*
>
> *on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or*

*disclosure has been warranted to be true and correct, unless the 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.*

(b) *The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk*".

67 It is common cause that the plaintiff was previously insured with Mutual & Federal insurance Co (Ltd). The plaintiff admitted that he was compensated by Mutual & Federal in cash for four items (Exhibit C9 – 12) which were stolen from him during a robbery on 27 April 2006 : an 18 carat Loasia chain weighing 19.4 grams valued at R6 250; an 18 carat ¼ Kruger Rand with diamond valued at R3 995; a 9 carat hand chain weighing 16.9 grams valued at R3 250; and 9 carat earrings to the value of R1 995 (the plaintiff suggested that there may have some confusion and this item viz the earring could have been a ring that he was robbed of).

68 The plaintiff thereafter requested cover from S A Eagle Insurance Co (Ltd) on 8 November 2006. In the proposal, under the Specified All Risks section (Exhibit D3), he requested cover ' *As per attached list from M & F Nos 1 – 34'* viz the 34 items of jewellery which had been

insured by Mutual & Federal, which included the Loasia chain, the ¼ Kruger Rand and the hand chain, which had been stolen and he had been compensated for.

69 When the plaintiff sought cover from the defendant on 20 March 2007, in the proposal form he requested 'All Risks' cover for Specified Items: '*Jewellery as per specified schedule on existing S A Eagle policy'* (Exhibit A65), which again included the aforesaid three items of jewellery. The defendant subsequently issued policy HARIP006/0001 to the plaintiff for 41 items of jewellery, including the aforementioned 3 items.

70 The defendant contends that by signing the proposal form (Exhibit D1-8), the plaintiff sought cover for at least two of these items – the ¼ Kruger Rand and the hand chain, with full knowledge that he did not possess the items and therefore bore no risk in them. The defendant contends further that as the plaintiff's misrepresentation had a bearing on the fact of the risk assumed by the defendant because it had extended cover on the non-existent items, it constituted a material misrepresentation which induced the conclusion of the contract of insurance on the terms set out in the policy, and consequently entitles the defendant to avoid the contract of insurance under **Section 53** of the **Short Term Insurance Act** (**supra).**

71 I find no merit or pertinence in the plaintiff's contention in response that the defendant suffered no prejudice because the he paid the premiums on the items and did not include them in the claim he lodged with the defendant. I am also unable to find merit in Mr Broster's submission that the nondisclosure did not materially affect the risk assumed by the defendant in respect of the plaintiff. The defendant extended cover for items which were non-existent and for which the plaintiff bore no risk at the time of the issue of the policy, which impacted on the risk it assumed. To that extent, the failure to inform the defendant that cover should not be extended over the aforesaid items is material.

72 However I am not persuaded that the contract of insurance was induced by fraud on the part of the plaintiff, entitling the defendant to avoid the policy. The plaintiff was assisted by the broker in the completion of the proposal and it was probably expedient to transfer the items covered under the previous insurer instead of noting each item individually. It is apparent that the same practice was followed in the SA Eagle proposal. There was also a time lapse between each proposal, and there is no evidence that the plaintiff was aware at the time that the schedule that was utilised in the proposal for the policy with the defendant was the schedule that was utilised not only when the SA Eagle Policy was issued, but was also the schedule utilised when he applied for the earlier policy with Mutual & Federal. Therefore, despite his signature to the proposal, I am not satisfied that the plaintiff deliberately and with intent, made a material misrepresentation or non-disclosure in failing to note that certain items ought not have been transferred from the previous schedule to the policy with the defendant, as he was not solely responsible for listing the items included 'All Risks' section in the policy.

73 Consequently, despite the duty of disclosure on the plaintiff and the objective test to be applied in determining the materiality of the misrepresentation, in my view this is a matter where there is a 'special circumstance' as set out in **Fransba Vervoer (Edms) Bpk v Incorporated General Insurance Ltd 1976 (4) SA 970 (W)** in the headnote **at 970 E-F :**

'The practice of allowing evidence of materiality is firmly established, though the Court may still hold that the fact concerned is immaterial. The Court will examine such evidence, as it will examine any other evidence, to see whether it is unduly coloured by bias or partiality. Once the Court has found that certain facts were material to the assessment of the risk in any case, it follows, in the absence of special circumstances, almost automatically, that a reasonable man would have disclosed those facts'.

74 I am accordingly not persuaded that the defendant is entitled to rely on the provisions of **section 53** of the **Short Term Insurance Act 53 of** 1998 and to avoid the policy on the grounds that it was induced by fraud on the part of the plaintiff.

**<u>The claim for the Cell Phone and Loasia Chain</u>**

**The cellphone**

75 Earlier in this judgment, I have already found that that the evidence of all three witnesses in respect of the cell phone unsatisfactory and inconsistent. What has to be determined now is whether the evidence supports the inference that the plaintiff knew that the phone had not been repaired and therefore did not have a value of R4 500 as contended by the defendant or alternatively, as alleged by the plaintiff, that he was under the impression that it had been repaired.

76 According to Tasha she wanted to use the cell phone without her parents' knowledge, yet despite the size of their house, she chose her parents' room to charge the phone. But when this was put to her, she responded that her mother had not noticed the phone charging because it was on a table on the other side of the room. Tasha knew that the phone had been damaged and on receipt, she had simply put it into the cupboard; yet she selected this phone for her use and put it on charge without switching it on or checking if it was working.

77 Ramjathan alleged that after taking the phone from the plaintiff, he did not discuss the phone with the plaintiff or the insurance company, and did not know about the claim. However he conceded under cross-examination that he had communicated with the plaintiff before the affidavit was made and that he learnt about disputed claim after the plaintiff requested the affidavit.

78 Ramjathan initially testified that the plaintiff did not tell him why the cell phone was not working nor did he ask the plaintiff for any details. But when faced with the statement in his affidavit: 'he told me it had a faulty

screen', Ramjathan responded "no, well I spoke to him thereafter and I told him it could have a faulty screen". He then agreed to the proposition that the plaintiff had never told him that the phone had a faulty screen, but subsequently changed his version again, alleging that he had tried to switch the phone on a day after he took the phone from the plaintiff but there was no screen. He then telephoned the plaintiff who told him that it might be a faulty screen.

79 Tasha had testified that she had no idea what was on the paper, and Ramjathan had told her to tell her father to phone him viz Ramjathan. According to Ramjathan, he gave Tasha the phone and told her to tell her father to phone his friend who had repaired the phone and whose details were on the paper. But he admitted, when presented with the plaintiff's statement, that he did not want to divulge the details of the person who undertook to do the repairs because he was not a registered cell phone dealer, even though he had shortly before testified that Naidoo always put his details on the paper he wrapped around the phones he repaired. Ramjathan then alleged that he could not remember that he had given the phone to Tasha with a piece of paper on it. He clearly realised that his refusal to divulge his friend's details made no sense if Naidoo's name and contact details were on the paper wrapped around the phone. Further, after denying that he knew that the phone was not fixed, Ramjathan admitted that Naidoo told him that the phone had not been repaired a week or two after returning it. Hence his concern about Naidoo getting into trouble was inexplicable.

80 Although Mr Broster was dismissive of any collusion between Ramjathan and the plaintiff, he has failed to consider that Ramjathan admitted that he did try to switch on the phone and thereafter spoke to the plaintiff, and that he did know that the phone was not fixed because Naidoo told him so. He has also failed to justify Ramjathan's reticence about Naidoo despite his evidence that he knew that Naidoo's details were on the note handed to Tasha. As already noted, his lapse of

memory was a deliberate attempt to avoid the implications of the note furnishing  Naidoo's details.

81 The plaintiff, in contradiction of Ramjathan's evidence, testified that he told Ramjathan that "it's (the phone) not usable because it's got water damage" when Ramjathan enquired why the phone was lying in the boot of his car. Ramjathan testified that not only did he not know at the time when he offered to repair the phone that it had liquid damage, but the plaintiff did not tell him at any time what was wrong with the phone. However as already noted, under cross-examination Ramjathan admitted that he had discussed the cellphone and its 'faulty screen' with the plaintiff.

82 The plaintiff, too, attempted to untangle himself from the straits of Naidoo's note. In his evidence in chief, the plaintiff alleged that Tasha told him that Ramjathan had given her the phone and there was a note attached to the phone and he had to contact the person whose name was on the note. But under crossexamination on the next day, without a plausible explanation, he alleged that it was possible that she had told him about the note, but he could not remember. Tasha testified that she had given the plaintiff the note which she had left in the cupboard when she took the phone out, but the plaintiff alleged that he could not remember if she had. The plaintiff's failure to remember was convenient because he would otherwise have had to admit that he had Naidoo's details and could therefore have ascertained the status of the cell phone.

83 According to the plaintiff Tasha told him about the cell phone while the police were there because he had asked them if he should bar the phone. The logical step would have been for him to enquire whether the phone had been repaired and was usable. As Tasha gave him the note he could have immediately called Naidoo, alternatively Ramjathan, if he really did not know whether the phone had been

repaired or not. In any event he was obliged to do so before lodging a claim for the value of the cell phone in its usable state.

84 Instead, even though he claimed that he was surprised that the phone had been returned, the plaintiff made no attempt to call Ramjathan to find out what had happened about the phone. But even more significantly, he did not pay Naidoo for repairs nor did he receive an invoice for repairs. The plaintiff admitted that if the phone had been fixed he would 'definitely have had to pay for the repairs'. This is apparent from the estimated cost of repairs in excess of R3 000 by the service provider. There is therefore no credible basis for the plaintiff's belief that the cell phone was in a usable state and carried a value of R 4500. Ramjathan alleged that he had volunteered to have the phone repaired because he wanted to arrange business for his friend, but even he made no enquiries if any payment was due to his friend for the repairs; he did not even enquire if the cell phone was repaired; so much for the favour he intended doing for the plaintiff and his friend.

85 The plaintiff's evasiveness was also evident when he agreed that the cell phone had been damaged beyond economical repair but was not sure if the warranty applied. He must know that the warranty did not apply as MTN informed him that the liquid damage to the phone was excluded under the warranty, or the phone would have been repaired or replaced under the warranty.

86 The plaintiff also alleged that he had carried the damaged phone with him in his vehicle for over a year – February 2006 until May 2007, when he gave the cell phone to Ramjathan. The fact that he kept the damaged phone in his car for such a long time, is remarkable as both Tasha and the plaintiff testified that old cell phones with expired contracts were kept in the cupboard in the TV room.

87 I am in agreement with Ms Annandale that the plaintiff's version falls to be rejected as inherently improbable. In my view, the only reasonable

inference to be drawn in the light of the aforegoing evaluation and the facts, is that the plaintiff was aware that the cell phone was damaged, it had not been repaired and had no value.

89 Mr Broster has contended that the defendant reliance on the plaintiff's misrepresentation that the cell phone was in use was misplaced as the defendant had confirmed in its letter dated that the plaintiff had in fact stated that the cell phone was not in use. This is not the defendant's case. As pointed out by Ms Annandale the defendant contended that the fraud consisted in the plaintiff's misrepresentation that the cell phone was in a state of repair and had a value of R4 500, which was the loss he suffered when the cell phone was stolen, when the plaintiff knew the phone was damaged and had no value. This view is sustained by the request of the defendant by letter dated 24 October 2007 to the plaintiff to furnish the details of the person who effected repairs to the cell phone.

90 I am accordingly satisfied that in lodging a claim for the cell phone, the plaintiff acted with deliberate intent to obtain a benefit that was not due under the policy. The plaintiff's claim was 'fraudulent in the sense of having been made knowingly and with the intention of obtaining a benefit under the policy'.

**Springgold Investments ( *supra)* at page 243 F**

**Papagapiou v Santam Limited (2005 JDR 1385 (SCA)**

91 In avoiding liability the defendant relies on Clause 9 of the General Conditions of the agreement of insurance which provides that :

'If any claim under this policy be in any respect fraudulent or if any fraudulent means or devises be used by the Insured or anyone acting on his behalf to obtain any benefit under this Policy or if any accident, loss, destruction, damage or liability be occasioned by the wilful act or with the connivance of the Insured all benefit under this Policy shall be forfeited.'

92 The plaintiff's fraudulent claim in respect of the cell phone consequently constitutes a breach of the conditions of the policy, entitling the defendant to avoid the claim. In the premises, the defendant has discharged its onus to show that the plaintiff's claim for the cell phone was fraudulent, and the plaintiff's claim for indemnification under the policy falls to be dismissed.

93 Although there is the dispute raised by the defendant, in respect of the Loasia chain claimed by the plaintiff and there are many unsatisfactory aspects in the plaintiff's evidence in relation thereto, in particular his late allegation that there were two such chains, his failure to answer questions in respect thereof and request that the questions be reserved for his wife, who did not testify, it is not necessary to deal with this claim any further. Having found that the claim in respect of the cellphone is fraudulent the entire claim must fail.

**Costs**

94 There is no reason why costs should not follow the event. Ms Annandale has contended that costs on a punitive scale is warranted and the matter was sufficiently serious to warrants cost incidental upon the employment of senior counsel.

Costs are eminently within the discretion of the trial court, which discretion must be exercised judicially.

95 The proliferation of insurance fraud is undoubtedly a serious offence which has adverse repercussions not only for the insurer and the insurance industry as a whole, but also for the public in the form of increased premiums and the scrutiny genuine claims are subjected to. The courts show their displeasure when an insurer unfairly and without just cause repudiates a claim, compelling the insured to resort to litigation in order to enforce indemnification by the insurer. There is no reason why the courts should also not penalise an insured who seeks indemnification when his claim is clearly fraudulent. Even on the issues

decided in his favour, viz the robbery and the nondisclosure, the probabilities favoured the plaintiff very narrowly.

96 Punitive costs are not granted lightly, but a court may award attorney and client costs where a party has been dishonest in conducting the proceedings, where there has been a fraudulent claim, false evidence presented, and where there has been a concocted case. (Yassen v Yassen 1965 (1) SA 438 (N) at 444)
**A C Cilliers : Law of Costs at 4-21**
**In Waste Products Utilsation (Pty) Ltd v Wilkes & Another 2003 (2) SA 515 (W) at 587 Lewis J** confirmed that 'One of the recognised grounds for a punitive award is the dishonesty or fraud of a litigant'.

The plaintiff herein persisted with his fraudulent claim for the cell phone even after he obtained the affidavits confirming that the cell phone had not been repaired and was valueless. He drew his daughter, Ramjathan and Naidoo into his web of lies to pursue his claim.

97 I am satisfied that this is an appropriate case for a punitive order for costs and that the use of Senior counsel by the defendant was warranted.

**<u>Order</u>**

**1 The plaintiff's claim is dismissed.**

**2 The plaintiff is directed to pay the defendant's costs on an attorney and client scale, such costs to include the costs consequent upon the employment of senior counsel.**

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MOODLEY J

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