



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

CASE NO: 10163/2016

In the matter between:

VIANTHA NAIDOO

PLAINTIFF

and

DISCOVERY LIFE LIMITED

FIRST DEFENDANT

KERUSHAN SUBBIAH

SECOND DEFENDANT

This judgment was handed electronically by transmission to the parties' representatives by email. The date and time for hand down is deemed to be on 13 March 2025 at 15:30

ORDER

The following order shall issue:

1. The plaintiff's claim is dismissed with costs on scale C, including that of senior counsel.

JUDGMENT

CHETTY J

[1] The plaintiff, Viantha Naidoo, instituted an action against the defendant, Discovery Life Limited ('Discovery'), following the refusal by the defendant to pay to her the amount of R6 million, which constitutes the proceeds of a life insurance policy in respect of which she was the nominated beneficiary. The policy in question was taken by the plaintiff's late mother, Sandra Naidoo, who died of natural causes¹ on 5 January 2016, after a short illness. The action is defended only by the first defendant, Discovery. No relief was sought against the second defendant, Mr Kerushen Subbiah, who was the insurance broker, acting as an intermediary and independent financial advisor of the late Sandra Naidoo at the time of the inception of the life insurance policy material to this action.

[2] Upon the death of Sandra Naidoo, the plaintiff, as the nominated beneficiary, sought payment from Discovery in accordance with the contractual terms of the policy. However, on 19 May 2016, Discovery notified the plaintiff in writing that the claim was rejected, and the contract was declared void by reason, inter alia, of Sandra Naidoo having misrepresented her income in her application, stating that she earned R35 000 per month in her declared 'nominated occupation' as a supervisor at Shoprite Checkers, Chatsworth. Instead, her gross income earned was only R5 455.89 per month. In addition, Discovery averred that Sandra Naidoo breached the contractual requirement to disclose, in good faith, to Discovery a simultaneous application for life insurance with any other insurer. Discovery averred that Sandra Naidoo had simultaneously applied for a life policy with Old Mutual, which policy was initiated on 1 September 2015.

[3] As a result of the aforementioned misrepresentations, Discovery elected to avoid and cancel the insurance contract applied for on 14 August 2015, and retained the premiums paid as a penalty. Discovery maintained that the Plaintiff was not entitled to any benefits under the policy. The basis for Discovery's refusal to pay was, in essence, that Sandra Naidoo had falsely declared and overstated her monthly income as R35 000, which was in violation of the express warranty in the application form requiring all information to be true

¹ Discovery admits the cause of death to be recorded on the Death Certificate as such, but disputes that the deceased died of pneumonia, as contended by the plaintiff.

and correct, and for all material information to be disclosed to Discovery. The warranty further stipulated that any benefits would be voided in the event of a breach. Discovery also contended that Sandra Naidoo failed to disclose her simultaneous applications for life insurance with two other insurers, Old Mutual Life Assurance Company (SA) ('Old Mutual') and Altrisk, and argued that this failure to disclose material information, as required by the contract, could result in the repudiation of the policy.

[4] Accordingly, Discovery, on the basis of the misrepresented facts submitted by Sandra Naidoo and her declared income of R35 000 per month, issued the policy for life insurance for R6 million. Discovery now contends that had it known the true facts (both relating to her correct salary earned via her 'nominated occupation' and her simultaneous applications for life insurance with other insurers), it would have either not issued the policy on the terms it did, or possibly at all. In light of the breaches as set out, Discovery asserts that it was entitled to refuse payment of any benefits under the policy due to the breach. The plaintiff, on the other hand, submitted that Sandra Naidoo was employed by Checkers at the relevant time of contracting with Discovery, but that her total income was far in excess of her monthly salary from Checkers, with the additional income derived from 'other sources' that the plaintiff was able to verify. On this basis, it was contended by the plaintiff that Sandra Naidoo did not breach the contract, and that Discovery was therefore obliged to pay the amount due in terms of the policy.

[5] By agreement of the parties, the following issues were recorded as issues for the Court to determine:

- (a) Whether the late Sandra Naidoo earned R 35 000 per month.
- (b) Whether the late Sandra Naidoo misrepresented or failed to disclose the amount and source(s) of her income.
- (c) Whether the Old Mutual application for insurance was a simultaneous application for insurance.
- (d) Whether the above is material to the risk.
- (e) Whether Discovery was induced by the above to conclude the agreement at all, or, on the terms that it did.

[6] Discovery elected to lead evidence first, as a matter of convenience. This proved useful from the perspective that the evidence of the plaintiff was largely based on

recollections of what she had known of her late mother's earnings, and pre-dominantly hearsay evidence of her mother's financial affairs. The defendant, on the other hand, through discovery processes, obtained the actual financial statements of the late Sandra Naidoo as well as copies of her salary advice slips during the period of her employment at Checkers. In addition, the defendant called witnesses who were in a position to offer testimony, based on their actual knowledge and interpretation of the bank statements and employment records, of the late Ms Sandra Naidoo.

[7] Mr *Lamplough* SC, who appeared for Discovery, confirmed the basis, as pleaded, on which the insurer cancelled the policy with immediate effect and declined to pay any benefits in terms of the policy, on the grounds of material non-disclosure. Answers provided by applicants for insurance are crucial in enabling the insurer to assess the risk. The plaintiff would lead evidence to demonstrate that the deceased did not earn a gross monthly income of R35 000 from Shoprite Checkers² as declared in the application form for life cover. Apart from the aforementioned grounds of non-disclosure, it is also contended that the deceased failed to make disclosure of a simultaneous application for insurance from Old Mutual Insurance. The plaintiff's stance was that apart from her salary at Checkers, the remainder of Sandra Naidoo's income of R35 000 was earned from a family business known as Distinctive Workwear, as well as from commissions she earned as a sales agent employed by the cosmetics company, Avon.

[8] In essence, Discovery's position is that had the deceased properly disclosed her salary from Shoprite Checkers, it would not have offered the life cover amount that it did – that the misrepresentations induced it to enter into the agreement, on the conditions it did. Alternatively, if Sandra Naidoo had disclosed her simultaneous application for life cover with Old Mutual, Discovery would have provided her with significantly lower life cover (based on the fact that she had already succeeded in obtaining cover with Old Mutual), or it may have decided not to offer her any cover at all on the basis that she was covered to the fullest extent, based on her age and verifiable income.

[9] Mr *Winfred*, who appeared on behalf of the plaintiff, outlined the plaintiff's case that Sandra Naidoo had made full disclosure of her income to Discovery, including the sources

² The application form completed by Ms Sandra Naidoo referred to her employer as "Checkers".

of her income additional to that from ShopRite Checkers. All of this, it was submitted, totalled approximately R35 000 per month. It was contended that at no time following such disclosure did Sandra Naidoo earn less than what she disclosed, and all of this information had been forwarded to Discovery. It was contended that based on a similar disclosure³ to Old Mutual Insurance, the latter honoured an obligation in terms of a life insurance policy on the life of Sandra Naidoo and paid the plaintiff, as the nominated beneficiary, an amount of R3.3m. It was submitted that the application to Old Mutual was not a 'simultaneous' application and therefore there was no basis for the deceased to have made such disclosure to Discovery at the time when she applied for the policy which is the subject matter of the present claim.

[10] The first witness called on behalf of Discovery was Andrew Adams ('Adams'), who has been employed as a human resources manager at ShopRite Checkers having joined the company in March 1997. According to records produced by Adams, the deceased was employed as a front-end controller, earning a basic salary of R5 455.89 as at 31 December 2015, with deductions of R 1999.35, resulting in a net salary of R3 663.25. According to company records, she was employed as a permanent employee, working 40 hours per week. The witness testified in relation to the deceased's salary slips for the year preceding her death, which reflected an average earning between R5 930 and R5 692. In the month of November 2015, the deceased received a slightly higher salary owing to a Christmas bonus. The evidence of Adams, and substantiated by the deceased's salary slips, indicate that as at the time of her death, she was employed as a front-end controller, which position entailed that she occasionally supervised the cashiers, and sometimes would provide relief services for the cashiers. However, none of the company records or the deceased's salary slips bear any reference to her being employed as a supervisor.

[11] The next witness, Anna Maria Bopp ('Ms Bopp'), is employed by the cosmetics company, Avon Justine⁴, as a credit control manager. She explained that Avon engages in direct sales, where sales representatives sell products to individual clients, earning commissions. In response to the contention on behalf of the plaintiff that the deceased was

³ This contention was however contrary to evidence as established by Discovery's witnesses, which indicated that the deceased represented to Old Mutual in her application that she in fact earned R70 000 per month.

⁴ The plaintiff referred interchangeably in the pleadings and evidence to Avon or Justine, which I understood to be one and the same.

a sales representative of Avon, Ms Bopp confirmed that, according to the company records, no account was ever opened in the name of the deceased or with the identity number of the deceased. These details would have appeared on any application to Avon by a registered sales representative. Ms Bopp confirmed that a sales representative is required to pay in advance for any orders placed before these are delivered to the representative. The representative earns a commission based on the difference between the amount paid for the product from Avon Justine and the amount for which the product is ultimately sold to the customer. In essence according to this witness, there is no evidence at all of the deceased having been registered as a sales representative of the company.

[12] In her pleadings the plaintiff recorded that Sandra Naidoo was also an 'agent' for Avon and earned commissions via monthly sales. This version changed and it was later contended that Sandra Naidoo 'referred' clients to an agent of Avon called "Shamla". Under cross examination, Ms Bopp denied any knowledge of a representative of Avon known as 'Shamla', or that this person would have paid the deceased what was referred to as a 'spotters fee'. I understood this term to mean a fee paid by the sales representative to a third person for the introduction of new business. The witness was not in a position to make any comment denying or admitting the arrangement supposedly in place between Shamla and the deceased.

[13] Nerissa Wallace ('Wallace'), a specialist underwriter employed by Discovery testified that she was the person who approved the application for insurance received from the deceased through her broker, Mr Subbiah, the second respondent. The application for insurance was completed by the applicant and subsequently captured at the branch level, which provided administrative support to the broker. It was then transmitted via facsimile to the underwriting team which considered the applicant's income and age to determine the amount of cover for which she could qualify. In following the Discovery Life Underwriting Technical Guide (2013), as I understood the witnesses' evidence, it provides a 'quick reference' formula in determining the amount of insurance that one could qualify for, based on the equivalent of 12 month's salary multiplied by a factor of 10. This figure represents the maximum cover that would be offered. Wallace explained the total amount of insurance would be the cumulative sum applicable, irrespective of the number of insurers that could offer cover. In other words, if the total amount of life insurance cover was determined to be R10 million, this would encompass both Old Mutual and Discovery

Life offering an applicant two policies of R5m each, subject to the understanding that the applicant would have made disclosure of any simultaneous application, where relevant. On this basis, the insurers prevent an applicant from being over insured.

[14] In the case of Sandra Naidoo, her application form disclosed a salary from her nominated beneficiary, ShopRite Checkers, of R35 000 per month. Based on this and her age, the section of the form requiring the applicant to list any other policies '*for which your life is currently insured, including any simultaneous applications with Discovery Life or any other insurer*' was left blank. Wallace was also satisfied that Sandra Naidoo's job description did not present any risks that could affect the amount of cover offered.

[15] The application served before a member of the underwriting team, referred to only as Thandi, whose computerised notes indicated that the matter was considered on 18 August 2015 at 12h24. The notes record the occupational details of Sandra Naidoo, her income of R35 000, as well as the request for R6 million life cover, severe illness benefit and capital disability benefits. The underwriters were satisfied that the Sandra Naidoo was healthy and that the cover amount of R6 million was justified by the income declared. Wallace considered this to be a 'straightforward case' and accepted the proposal resulting in a standard acceptance letter being sent out to Sandra Naidoo. On being asked what the position would have been, if the application was based on the actual salary earned at Shoprite Checkers by the deceased, Wallace responded that she would have restricted cover to R1.2 million, alternatively that she would have rejected the application.

[16] Wallace further testified that the underwriters had no knowledge that Sandra Naidoo had at the same time of applying to Discovery, applied to Old Mutual for life cover. Had such information, together with the actual salary earned by the deceased from Checkers been known to her, Wallace stated that she would not have offered any cover as the insured would have been over insured. According to Wallace, and having regard to the time of the initiation of the Old Mutual application, which was pending throughout the same time that the Discovery application was being processed, Discovery considered the Old Mutual application as a 'simultaneous application' as contemplated in item 9 of the

application for the Classic and Essential Life Plan (referred to as the 'application form').⁵ In these circumstances, according to Wallace, Discovery would have not offered any cover, alternatively they would have proposed a conditional acceptance that the insured would not take out a policy with Old Mutual. In essence, had the deceased disclosed her application for insurance with Old Mutual and her actual income, her application would have been rejected or substantially reduced.

[17] In light of the contention that the deceased had earned commissions via a 'spotter's fee' in introducing customers to an Avon sales representative, Wallace stated that if she had known that the deceased's income did not come from her employment with Checkers but came from sales commission, as well as from the interest of investments in a business venture, none of this would have affected her conclusion as to the applicant's salary from a nominated occupation, being Checkers. The approach of Discovery is to ascertain the earning from the primary nominated occupation in order to determine the amount an applicant qualifies for life cover. As commission from sales fluctuates, Discovery would look at income over a period of at least two years in order to gauge the average income via this source. Similarly, Discovery would generally rely on the ITA34 providing an indication to the South African Revenue Service ('SARS') of an assessment of income. Moreover, bank statements alone would not suffice, nor would income via investments be considered.

[18] Under cross examination, it was suggested to Wallace that, Subbiah, the broker and intermediary responsible for the contract of Sandra Naidoo, was unaware that Discovery only considered income received from the insured's primary or nominated occupation. It was put to the witness that he understood the position that 'any income' would be taken into account when apply for life cover. It was also contended on behalf of the plaintiff that the application form for insurance does not specify that income from only one source will be considered. In this regard, counsel for the plaintiff directed the witness's

⁵ The application for insurance to Discovery Life was signed by Sandra Naidoo on 14 August 2015 and the first page contains the imprint of a facsimile transmission on 17 August 2015 at 02:21am. In contrast, the evidence of Mr Moonsamy who testified on behalf of Old Mutual Life Assurance Company (South Africa) stated that the application by Sandra Naidoo for life, health and disability benefits is recorded as being submitted on 17 August 2015, with a so-called 'freeze date and time' being 12h29 on the same date.

attention to item 1.3 of the application form of Discovery which makes provision for 'Total gross monthly income'.

[19] It was also contended that the form places no restriction on the sources of income and implies a cumulative income from any or all sources with an emphasis placed on the word 'total' in the context of all 'income', as opposed to the use of the word 'salary'. In my view this section of the form should not be interpreted in isolation of the remainder of the form, particularly item 1.3, which requires details of the applicant's 'nominated occupation' and 'employer'. The form continues with an enquiry of the breakdown of the applicant's different functions within his or her 'occupation'. Accordingly, the plaintiff contended that the deceased and her broker entertained the reasonable belief that what they were required to disclose was total 'income' and not total 'salary'. Hence the justification for R35 000 and not R5 455,89 per month as Sandra Naidoo's income.

[20] In light of the evidence of Wallace, Discovery assessed Sandra Naidoo's claim based only on the information contained in her application proposal. It remains unclear to me why Discovery did not call for her salary advice slip, which would have been an elementary request. Had they done so, the application for cover of R6 million, on the evidence before me, would have been rejected at source. This however, does not absolve an applicant seeking to rely on a fraudulent statement or misrepresentation of affairs to claim contractual benefits under a contract of insurance.

[21] Discovery then called Prelan Moonsamy ('Moonsamy'), a legal advisor at Old Mutual who testified in relation to an application by Sandra Naidoo for life, disability and health insurance cover with Old Mutual. According to the application form completed by Sandra Naidoo, she was assisted by Mr Subbiah as the broker on behalf of Old Mutual. Mr Subbiah is the same broker who assisted Sandra Naidoo with the application to Discovery. According to the document produced by Moonsamy, Sandra Naidoo's application was captured by Old Mutual on 17 August 2015. This is the same day on which Sandra Naidoo also applied to Discovery, assisted by the same broker, Mr Subbiah. One of the grounds on which Discovery contends that the contract with Sandra Naidoo is void was due to her failure to disclose that she had made a simultaneous application for cover to another life insurer. *Ex facie* the evidence on the respective application forms, there is

nothing to contradict the contention of Discovery that Sandra Naidoo had failed to make disclosure of such fact in her application. Moonsamy further testified that the application form to Old Mutual specifically enquired whether an applicant has made application for life insurance with any other insurer, whether pending or contemplated. Sandra Naidoo answered in the negative.

[22] As regards disclosure of her occupation, Sandra Naidoo responded that she was employed as a 'supervisor' at Checkers.⁶ However, in the same application form she indicated that's her salary was the amount of R70 000. This warranty by Sandra Naidoo should be contrasted to her disclosure when applying for insurance to Discovery, in which he indicated her income as R35 000. It is important to note that at no stage during the cross examination of any of Discovery's witnesses, or of the plaintiff's witnesses, was this discrepancy in the two application forms addressed. It would appear to me to be inconceivable, in the context of an applicant who is required to make full and honest disclosure, to represent to one company an income twice that she represented to the other. In either event, as the evidence shows, her salary from her nominated occupation was R5 455,89, with a nett take home in the region of R3 600 per month.

[23] On the issue of non- disclosure, the Appellate Division in the matter of *Mutual and Federal Insurance Company Ltd v Municipality of Oudtshoorn*⁷ held :

'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 material facts of which the parties had actual knowledge, all constructive knowledge prior to 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 court went on to add that the reasonable person test should be applied when deciding upon consideration of the relevant facts of a particular case, whether disclosed facts or information reasonably relative to the risk or the assessment of the premiums was not

⁶ The documentary evidence indicates that Sandra Naidoo was employed as a front-end controller earning a basic salary of R5 450.

⁷ *Mutual and Federal Insurance Company Ltd v Municipality of Oudtshoorn* (240/82) [1984] ZASCA 129; [1985] 1 All SA 324 (A) at 432.

made.⁸ The court found that if the answer to the above is found to be in the affirmative, then the defendant may avoid the consequence of the insurance agreement and repudiated claim.⁹

[24] In light of the information disclosed, which Old Mutual considered to be material in assessing the risk and determining the premiums and the benefits it issued a letter dated 24 August 2015 confirming that Sandra Naidoo was covered for R3 million death benefits; R3.3 million in severe illness benefits and R3 million for disability. It must be noted that the cover offered to Sandra Naidoo was made in the context of her indicating that she did not make an application for life insurance to any other insurer at the time when she applied to Old Mutual. On her death, Moonsamy confirmed that her nominated beneficiary, the plaintiff, was paid out in accordance with the terms of the policy.

[25] Under cross examination, it was put to the witness that a member of the underwriting team at Old Mutual, Ms Verwey, did indeed consider the income and bank statements in verifying the information presented by Sandra Naidoo to Old Mutual. Moonsamy stated that he was aware that the policy was subject to a forensic investigation, but that he had not seen the report which was prepared.

[26] In the course of the re-examination of this witness, it was revealed that Old Mutual had become aware of a 'pacemaker syndicate' in which clients misrepresented their income when applying for insurance, and once their policies were approved, they shortly thereafter claimed on the severe illness component for the insertion of a pacemaker. Claims would thereafter follow in respect other aspects of the policy, including the severe illness component. Mr Moonsamy confirmed that Mr Subbiah was a person of interest in the investigations by Old Mutual. The witness however conceded that there was no evidence which implicated Sandra Naidoo as being part of the pacemaker syndicate, although it was suspected that she was part of it.

[27] Vinson Jansen van Rensburg ('van Rensburg'), a senior underwriter of approximately 34 years' experience in the insurance industry, then testified in relation to a

⁸ Ibid at 435.

⁹ Ibid.

report which he had prepared dealing with financial underwriting in the life insurance industry and the need for an applicant to make disclosure of material facts, including sources of income and other insurance policies which the client may have applied for. In essence, his evidence was that an insurer should not be liable to compensate the insured for more than the economic loss incurred. The purpose of underwriting is also to ensure that a client is not over insured having regard to the age, income and health status as an important part of the factors taken into account in determining the risk insured against.

[28] As regards the disclosure of income, the witness testified that this is a significant factor in determining how much of cover a client could qualify for. Where sales commission forms part of the income of a client, in the opinion of the witness, such commissions can be included, but only after a consistent level of earnings is proven over a minimum period of 12 months. In regard to income from investments, van Rensburg stated that this does not normally form part of the income taken into account in determining cover. This is particularly so as investment income, on the death of the client, would fall into the estate. As such it is not a loss that can be insured against. Ultimately, the issue of disclosure is based on good faith on the part of the client, who is in possession of all of the necessary information. Having regard to the facts of the particular matter, van Rensburg was of the view that a client applying for R6 million life cover, based on an earning of R6 000, ought to trigger the underwriter to request a financial needs analysis. In conclusion, his evidence was that if the client earned R35 000 per month, no concerns would be triggered by an application of R6 million in life cover. Where however the earnings were significantly less, such as R5 455,89 as in the case of the earnings of Sandra Naidoo, van Rensburg was of the view that it was highly unlikely that a policy would have been issued. Apart from proof of income, salary advices, proof of tax returns and income disclosed to SARS are necessary to assess affordability and also to prevent fraud. The cross examination of this witness elicited nothing that placed in doubt any aspect of his evidence.

[29] The last witness for Discovery was Johannes Mouton ('Mouton') who was previously employed by Discovery as an investigator. His testimony focused on the investigation by Discovery into what has already been referred to as the 'pacemaker syndicate'. During the course of his investigations, including an analysis of the flow of money into and out of the bank account of Sandra Naidoo, the witness established that

her account was essentially being used as a 'mule account' to funnel funds to various individuals, including a Mr R Dhurgasamy, who was in a long term relationship with Sandra Naidoo. When the plaintiff testified, I gained the impression that Mr Dhurgasamy was akin to a father figure to her. He was certainly deeply affected by the sudden demise of Sandra Naidoo and rejected any insinuation that she was involved in any irregularity.

[30] Mouton's investigation uncovered that there were a number of policy's taken with Discovery, in which Mr Subbiah featured prominently as a broker. Between the period 2014 to 2016, Mr Subbiah was the broker to no less than eight clients who had pacemakers inserted. Mouton discerned a wider pattern involving a number of insured clients who had pacemakers inserted, including Mr Dhurgasamy. All of this background evidence serves only to establish one point in my view, being that very little reliance, if any, could be placed on the bank statements of Sandra Naidoo as evidence of her financial status, and in particular, whether she made full and honest disclosure to Discovery of her earnings. A closer scrutiny of her bank accounts reveals payment of large sums received from a number of persons, many of whom who were associated what the syndicate. There was no explanation from the plaintiff or Mr Dhurgasamy as to the movement of large amounts of money into and out of Sandra Naidoo's account, other than an assertion from Mr *Winfred* that, as her life partner, Mr Dhurgasamy often lent money to the deceased, and she did to him.

It was put to Mouton under cross examination that Discovery had raised the allegation of the link between Sandra Naidoo and the pacemaker syndicate in order to avoid paying out on the life policy, unlike Old Mutual which honoured its obligations. A bird's eye view of the financial transactions involving Sandra Naidoo, in my view, casts a cloud of suspicion over her affairs. It is not entirely clear exactly how she may have benefited from these transactions through her account, other than serving to disguise the true beneficiaries of the payment into her account. In any event, according to Mouton, the matter has been the subject of a criminal investigation over many years, without any finality in sight. Mouton added that he had conducted a thorough investigation into Sandra Naidoo's financial affairs and interviewed 24 persons who deposited money into her account, or were the subject of payments. He was not aware of payments into her account from Distinctive Workwear, the company allegedly owned by sister. It was put to Mouton

that Sandra Naidoo received R20 000 per month as a dividend for her investment in Distinctive Workwear.

[31] In order to address the paucity of evidence to prove the assertion of Sandra Naidoo's investment in Distinction Workwear, it was alleged that Yvette Verwey from Old Mutual took possession of a file from Mr Subbiah at the time when he was interviewed. That file allegedly contained a letter which would substantiate the plaintiff's contention of Sandra Naidoo's investment in the company. It is apparently in the possession of the South African Police Service and constitutes evidence in the ongoing fraud investigation. However, Mouton pointed out that the broker, Mr Subbiah, would have retained a copy of all information in his file, or that these could have been scanned if they related to compliance issues, and would include documents such as bank statements. These statements of the late Sandra Naidoo only came to the attention of Mouton once these proceedings had arisen. This concluded the evidence on behalf of Discovery.

[32] The plaintiff testified in support of her claim for payment as the nominated beneficiary of the proceeds of the policy taken by her mother, Sandra Naidoo. In addition, Mr R Dhurgasamy testified of his knowledge of Sandra Naidoo's financial and employment status. Mr Subbiah testified with regard to his role as the broker on behalf of Discovery at the time when Sandra Naidoo applied for benefits in terms of the policy under consideration.

[33] There was no explanation for the plaintiff not securing the attendance of the Avon sales representative, Shamla, through whom the deceased earned a considerable income, justifying the representation to Discovery and Old Mutual, of her declared earnings, which were recorded as R35 000 and R70 000 respectively. Discovery submitted that the failure to call Shamla deprives the court of the opportunity to assess the veracity of the plaintiff's contention as regards Sandra Naidoo's earnings from all alleged sources of income. Moreover, it would have allowed the Avon official, Ms Bopp, the opportunity to have evaluated Shamla's sales records, in order to determine the percentage of commissions that would have been earned by the deceased. Accordingly, the failure of the plaintiff to call material witnesses leaves the assertion of the salary or total income of the deceased as being R35 000.00, uncorroborated.

[34] Similarly, the plaintiff failed to call the sister of the deceased, Sadia, who was a partner in Distinctive Workwear, to corroborate the plaintiff's version of Sandra Naidoo's investment and partnership in the enterprise, and the extent to which she received returns on this investment. The plaintiff provided no explanation for failing to produce the partnership agreement between the deceased and Sadia, which would have corroborated the averment of the deceased's investment in the family business.¹⁰ Moreover, the bank statements do not bear out regular payment of returns on the investment as one would expect, or for that matter the payment of a 'salary' on a monthly basis, as contended by the plaintiff. A perusal of the bank statements of Sandra Naidoo indicates that in the month of August 2015, she received three deposits into her account from Distinctive Workwear (described as 'salary') in the amounts of R20 000 and two payments of R10 000 each on 11 and 13 August 2015 respectively. This would have also coincided with the period during which Sandra Naidoo applied for life insurance benefits with both Discovery and Old Mutual. There is no indication of any amounts paid to the deceased from Distinctive Workwear prior to August 2015. This again is contrary to the plaintiff's assertion that her mother earned approximately R20 000 per month from this source.

[35] Coincidentally, during August 2015 there is also a record of two deposits, listed as being from '*Shamla Avon*' for R6 000 and R7 500. The next deposit which I have been able to find on perusal of the bank statements is on 3 December 2015 in the amount of R7 900.00. The plaintiff did not alert the court to any other transactions from 'Avon' or 'Distinctive Workwear'. Under cross examination, the plaintiff attributed non-payment from Distinctive Workwear to a family squabble over finances after Sandra Naidoo's death. Even if this were so, Sadia's attendance and the necessary documents required to prove the plaintiff's case would have been secured by way of subpoena. It was contended on behalf of Discovery that the reason why no evidence was led is that in all probability, no such evidence existed. As stated earlier, a perusal of the bank statements of the deceased

¹⁰ In the plaintiff's summary of witness evidence, it is stated that Sandra Naidoo's sister, Devi Naidoo, would testify that the deceased was a partner of Distinctive Workwear from inception to her death and at the time of her death, Sandra Naidoo was paid a salary of approximately R20 000 per month. Devi Naidoo was also supposedly aware that Sandra Naidoo was an appointed agent for Avon Cosmetics and earned between R7000 and R10 000 per month.

do not support the plaintiff's contention that her late mother received the regular 'salary' from Distinctive Workwear as alleged, or from Avon cosmetics.

[36] The plaintiff's evidence was short in respect of the detail pertaining to her mother's earnings. She maintained that her mother had invested monies with Distinctive Workwear and that she earned approximately R20 000 as a result of this investment. Under cross examination however, the plaintiff was unable to dispute that the investment made by her mother, in order to generate a return of R20 000, would probably have been in the region of R2.5m, alternatively that this would have been approximately the amount that would have accrued to the estate of Sandra Naidoo, on her death. Despite the significant contribution to the estate, the plaintiff, who was the only child of Sandra Naidoo and the executor of her estate, stated that she did not know the value of her mother's investment in the company, and simply 'wanted the matter to come to an end' due to acrimony among family members. I accept that the death of the deceased would have been traumatic for the plaintiff, as it was unexpected and the plaintiff would have wanted to put these matters behind her. At this time, the plaintiff was also expectant with her baby. However, the absence of any answer in relation to a significant asset of the estate negatively impacts on the plaintiff's assertion of her mother's investment in Distinctive Workwear. This remains unsubstantiated as a fact and as a source of income.

[37] Similarly, the plaintiff also testified that her late mother referred customers to Shamla, a sales representative for Avon cosmetics. Significantly however, the plaintiff was unable to provide any details of the 'spotter fee' or commission that her mother allegedly earned through such referrals. The plaintiff confirmed that she was informed by the broker, Mr Subbiah, that the claim on the Discovery policy was rejected on the basis that there was no proof that the deceased earned the income which she represented at the time of her application. According to the plaintiff, the rejection of the claim tainted the name and reputation of her mother, as it imputes fraudulent conduct on her part. She further maintained that there could be no fraudulent conduct on the part of Sandra Naidoo, as Old Mutual honoured its policy, based on essentially the same factual basis on which application had been made to Discovery for life cover.

[38] Under cross examination of the detail regarding her mother's income, the plaintiff although maintaining the accuracy of her mother's disclosure in her application for insurance, stated that she did not know too much of her mother's finances, particularly when asked to respond to the lack of any entry in the bank statements prior to August 2015, of income from Avon cosmetics or Distinctive Workwear. The plaintiff was also unable to provide any satisfactory answer in relation to the evidence put to her that according to the CIPC database, Distinctive Wear CC, also known as Distinctive Workwear, was deregistered on 24 February 2011. Accordingly, it was contended that she could not have been earning a salary from this source as alleged, as it had long been deregistered. The plaintiff was also unable to explain as to why Mr Subbiah, who would have assisted her mother in completing the applications for insurance to both Discovery and Old Mutual, would have represented to Old Mutual that the deceased earned R70 000 per month. The evidence before me indicates that Old Mutual accepted the representation from the deceased that she earned R70 000 without demur, and subsequently paid the proceeds on the policy to the plaintiff.

[39] Mr R Dhurgasamy testified that he and Sandra Naidoo shared an intimate relationship over 18 years. He conceded that he had a pacemaker inserted but denied that this was attributable to him being part of the so-called pacemaker syndicate. Instead, he stated that it was the result of a congenital illness in his family. He stated that the deceased worked at Checkers as a supervisor and at times, as an acting manager, earning approximately R5 000 a month. According to Mr Dhurgasamy, the deceased was a versatile businesswoman who utilised her proximity to customers at Checkers to supplement her income at Avon cosmetics.

[40] He further stated that she was involved in the business referred to as Distinctive Choice (also referred to as Distinctive Workwear), which manufactured prison and police uniforms. He confirmed having heard of the Avon cosmetics representative, Shamlala, through the deceased but did not know the exact nature of her relationship. He did however, confirm that the deceased earned between R10 000 to R15 000 per month through her work with Avon cosmetics, and a further R20 000 to R30 000 per month via Distinctive Choice. On this basis it was contended that the total of R35 000 represented by Sandra Naidoo in her application form to Discovery was indeed correct. I pause to

point out, without having to interrogate the source of the amounts represented, that they are purely estimates at best. The only amount which can safely be accepted as true and verifiable is the salary from Shoprite Checkers. That equates to one-tenth of the total represented income.

[41] As regards to the transactions into an out of the deceased's bank account, he denied any suggestion that she operated a 'mule account' and confirmed that he on occasion transferred money into her account. Part of these transfers were the payment of his legal fees in respect of litigation with Discovery, over the past four years. He also testified that the deceased was involved in a business with a person called Denzil, to whom she sold protective uniforms. No evidence was received from 'Denzil' in support of this contention.

[42] Under cross examination, Mr Dhurgasamy confirm that he consulted with the plaintiff and her legal team in preparation for his evidence, and that he too was engaged in litigation against Discovery. As regards the investment by Sandra Naidoo in Distinctive Workwear, the witness stated that this was in the region of between R250 000 to R300 000 and arose from an amount of R200 000 which he had given to her in 2015, in the form of cash, as she said that she required this to invest in a business venture. The records however show that Distinctive was already deregistered at this time. He further indicated that the return on this investment was approximately R20 000 per month. However, he denied that such a return would be a realistic yield for an investment of R200,000, suggesting instead that it might more accurately reflect the repayment of a loan to Distinctive Workwear. It was further put to the witness that his evidence as regards the deceased's business ventures was vague. In response, he stated that he simply recalled what he had been told by the deceased. He was also unaware that she was not registered as a sales representative for Avon, had no idea of the model on which her sales commission was based, nor when exactly she commenced this business relationship with Shamla.

[43] He was questioned at length regarding financial transactions in respect of the deceased's bank account, including amounts deposited by him. He denied that the account was being used to funnel funds between certain individuals (including himself) in

circumstances where the income earned by the deceased would never have allowed the level of activity seen in her account. It was put to Mr Dhurgasamy that an overall conspectus of the deceased's bank statements reveals financial transactions which are designed to conceal the identity of payment of funds, and not a true reflection of the financial affairs of a supervisor at Checkers earning a nett salary of R3 816.00 per month. This was particularly so in that when Sandra Naidoo passed away she had no asset other than the house in which she lived, which belonged to her mother, despite the impression created in her financial statements that she was a person of considerable wealth. Moreover, Mr Dhurgasamy was unable to deny that many of the individuals (eight to be precise) whose names feature in the bank statements of Sandra Naidoo (including his), by some coincidence, have had pacemakers inserted.

[44] It is not necessary for this court to make any finding in regard to the suspicious level of activity on the deceased's bank accounts, except that the inescapable conclusion is that no reliance could be placed on her bank statements to gauge the amounts that she would have reliably earned, other than the monthly nett salary of approximately R3 816.00 earned from Checkers. As stated earlier, the payments received via the deceased's 'other sources of income' only arose in and around August 2015. The contention by Discovery was that this was a fabrication to create 'evidence of earnings' that would have been supposedly scrutinised by her broker, prior to the submission of the applications for life assurance from Old Mutual and Discovery. The lack of any supporting documentation for her investment with Distinctive Workwear as well as from Shamla or Avon, in my view is destructive of any claim by the plaintiff that Sandra Naidoo made full and honest disclosure of her salary via her nominated occupation. Her nett salary of R3 816, on average, would never qualify her to receive the amount of benefits issued to her by Discovery. As stated by the underwriters, had the true state of facts been known at the time of application, the application would have in all probability been rejected, alternatively it would have been granted but at a significantly lesser value than that which was offered to the deceased.

[45] The last witness to testify was the second defendant, Mr Subbiah. It was recorded, at the request of counsel for Discovery, that he was seated in the gallery in court during the entire proceedings. He confirmed that he was the broker who assisted Sandra Naidoo in applying for life insurance benefits with both Discovery and Old Mutual, on the same

day. As stated earlier, both application forms completed with the assistance of the witness contain significantly different reflections of the earnings of the deceased.

[46] The witness further conceded that both applications were submitted on the same day, but for reasons which appear unclear, he indicated that five days after having been submitted he attempted to 'withdraw' the Discovery application. The apparent reason for this was that the deceased secured the services of a new broker. This version had never been canvassed with the witnesses called on behalf of Discovery, nor is there any record of this event having been captured in the documents of the underwriters. It was also established that the witness had consulted with the legal representatives of the plaintiff, and accordingly that these facts would have been in their knowledge at the time when the defendants' witnesses testified. Mr Subbiah oddly testified that he was aware that life insurance applications could not be submitted simultaneously to different companies and accordingly believed that the requirement of disclosure could be overcome by consecutive submission of applications. However, under cross examination, and read together with the evidence from the underwriters, it was evident that both applications for life insurance were submitted simultaneously, and in circumstances where the deceased failed to make disclosure of such simultaneous application. To that end, neither Discovery nor Old Mutual had knowledge at the time when they considered their respective applications, that another life assurer was considering the grant of life cover to Sandra Naidoo.

[47] In order to counter this material non-disclosure, the witnesses attempted to reconstruct his evidence of the date and times when he submitted the respective applications for life cover. He admitted that he was paid a significant commission for the Discovery Life policy, only for it to be clawed back after another broker was appointed by the deceased. Despite his attempts to avoid conceding non-disclosure or simultaneous applications having been made, Subbiah conceded that as from 17 August 2015, both applications for insurance were being simultaneously presented and that both applications came to be considered within a day of each other, being 25 August 2015. The witness furthermore conceded that the inquiry in item 9 of the Discovery application form relating to 'Previous and Existing Assurance' required disclosure of any other application for life

cover. He accepted that from the date of the submission of the Old Mutual application, the disclosure to Discovery Life on the application form would have been untrue.¹¹

[48] Mr Subbiah also testified that he had regard to the bank statements of the deceased prior to the application for life insurance and he was satisfied with them, as it showed 'certain earnings'. It bears noting however, that the bank statements from First National Bank which formed part of the court record for the period 6 June 2015 to 5 September 2015, were only issued on 5 September 2015. As such, the witness's evidence of being satisfied of the earnings of Sandra Naidoo as of 15 August 2015 is placed in doubt because the statements would not have been available at that time. Moreover, as canvassed earlier, the first indication of funds being received from Distinctive Workwear and from Shamla of Avon only featured in the August 2015 bank statements and these deposits were made only a few days before the application. There is no evidence of such of such payments before August 2015.

[49] The witness was equally evasive and stated that at the time when he completed the application form indicating that the deceased earned R35 000 per month, he was not aware that this income was restricted to a "nominated occupation" as defined. He believed that Discovery required him to stipulate income from *all sources*. Finally, it was put to the witness that his evidence was unreliable and that he was evasive in answering questions and in his understanding of what was meant by 'nominated occupation'. It was further put to him that he involvement in this matter was even more suspicious given the pattern that emerges as was the broker to nine clients with Discovery who had pacemakers inserted

¹¹ According to Lawsa, para 215:

Duty of broker to advise insured to disclose material information 'An important duty of a broker is to disclose to the insurer material information of which he or she is aware, because if he or she fails do so the insurer may be entitled to rescind the contract. It remains the duty of the applicant for insurance to disclose material facts not known by the broker, but the broker must call the applicant's attention to this duty and its importance. The Financial Advisory and Intermediary Services Act General Code of Conduct imposes explicit disclosure obligations on the financial services provider in this regard. The broker must also advise the applicant which facts he or she has to disclose. If the application form completed or overseen by the broker contains incorrect information, this may amount to a breach of contract by the broker since it is his or her duty to ensure that the form is properly completed.' (case references omitted)

all of whom claimed benefits under their policies between the period May 2015 to January 2016.¹² This concluded the evidence of the plaintiff.

[50] I now turn to an analysis of the salient aspects of the evidence in determining whether the late Sandra Naidoo earned R35 000 per month, as stipulated on her application for life assurance. Allied to that is whether she misrepresented or failed to disclose the sources of her income and by misrepresentation, induced Discovery into the contract. It is common cause that the amount of R35 000 represented, on the version of Mr Dhurgasamy, an estimation of what Sandra Naidoo purportedly earned from various sources of income. The evidence of first defendant's witnesses and underwriters was clear – they required disclosure of the client's salary from her 'nominated occupation'. The deceased in her application completed the form and indicated that her nominated occupation was Checkers. That being so, it was not open to the plaintiff to argue that the deceased and/or her broker genuinely believed that the words 'salary' was open to wider interpretation and could encompass sources outside of the income from the nominated occupation. Even if this argument were to gain any traction, which it does not, the plaintiff is still faced with the difficulty that the 'other' sources of income are incapable of verification.

[51] Even if Mr Subbiah is correct when he says that he looked at the deceased's bank statements at the time of submitting the application and was 'satisfied', one is not certain as to what he was satisfied with. Certainly, a careful perusal of the bank statements indicates that payment from sources annotated as 'Distinctive Clothing' and 'Avon/Shamla' did not constitute a salary, nor did they constitute a reliable source of funds which

¹² As to a broker's duty, see para 212 of Lawsa:

'In terms of the common law, the contract of brokerage requires the broker to properly advise his or her client as to the suitability of the product recommended by the broker. In advising his or her client, a broker must exercise the degree of care and skill which is ordinarily exercised by reasonably competent members of the profession who have the same rank and profess the same specialisation as he or she does. This holds good for any other particular duty the broker may have to perform towards his or her client.

In assessing the standard of care and skill, a court may accept the evidence of other experienced members of the profession. It may also refer to the code of conduct or practice which lays down the business standards to be observed by partaking brokers.

By failing to properly comply with the duties imposed by the brokerage contract, the broker commits a breach of contract. This gives rise to the normal remedies for breach of contract, such as a claim for damages to restore the client to the financial position in which he or she would have been had the broker correctly carried out his or her duties.'

Discovery's underwriters could safely assume to be a regular source of monthly income. This is crucial in determining the risk profile of an applicant for insurance. The reason for this is apparent from the Underwriting Guide which Subbiah ought to have been familiar with, and which points out that *'the life assured must not be worth more dead than alive to the owner of the insurance policy.'* The guide further points out that the *'sum assured must bear a reasonable relationship to the financial status of the proposed life insured. Simple explanation: should a stranger take out a policy on your life, you should be worried as he/she would have no insurable interest and you would therefore be worth more dead than alive unlike a dependent such as a child or an elderly relative, who relies upon you for their financial well-being. If you took out a policy for R10 000 000 and only earned R5 000 a month, there would be little or no insurable interest for the amount applied for. This would be out of line with the loss of income on your death.'*

[52] Having regard to the evidence before me, as well as the documentary evidence, in particular the bank statements of the deceased, I am satisfied that the only income, which was verifiable and corroborated, was that from her employment as a supervisor at Checkers. Other sources of income as alleged, were not. The plaintiff had the opportunity to call witnesses to do so but did not. Apart from a negative inference to be drawn, Discovery submits that the entries in the bank statement were manufactured for the purpose of falsely reflecting her earnings as being significantly higher than her actual verifiable income. This allowed her to apply for life assurance in an amount that bore no correlation to her financial status. Accordingly, I am satisfied that the deceased misrepresented her true earnings to the first defendant, and in doing so, failed to make proper disclosure as she was obliged to.

[53] The second enquiry is whether the application to Old Mutual was a simultaneous application together with that to Discovery. The evidence reveals that the application for life assurance was submitted on the same day to both Old Mutual and discovery. The deceased was assisted in respect of both applications by her broker, Mr Subbiah. He was clearly aware of the requirement to disclose a simultaneous application for benefits. He attempted, unsuccessfully in my view, to navigate around this requirement, which is clearly stipulated in the application for insurance with Discovery. In addition, the evidence of the underwriters, which has not been refuted, indicates that both applications were being considered at the same time at the same time.

[54] I am satisfied that the deceased and/or her broker flouted an express stipulation in the application form to reflect whether a simultaneous application to another life assurer had been made. The reason for this emerges from the evidence of the underwriters who pointed out that had such disclosure been made, Discovery would have either rejected the application or offered life assurance at a substantially lesser amount. On this score too, I find that the deceased breached obligation to provide accurate and complete information to Discovery, who acted on the information to their prejudice, in issuing a contract of insurance in an amount which they would not have, but for the misrepresentation by the deceased.

[55] The authorities hold that a party relying on non-disclosure of a fact by the other contracting party must prove the following: (i) that the fact was not disclosed; (ii) that the fact was within the knowledge of the other party; (iii) that the fact was material, that is a reasonable man in the position of the insured would have considered the non-disclosed fact as being reasonably relevant for a proper assessment of the risk and premium; (iv) that the non-disclosed fact caused the party to either enter into the contract at all or on the agreed terms. It has been held that an insurer has the right to avoid a contract of insurance not only if the proposer has misrepresented a material fact, but also if he has failed to disclose one.¹³ On the facts of the matter, I conclude that Discovery has satisfied this burden in meeting all of the requirements set out above.

[56] The burden of proving materiality is on the party alleging the misrepresentation or non-disclosure.¹⁴ The duty of disclosure is as follows: 'The duty of disclosure continues throughout the negotiations. It terminates when the contract is concluded. Material facts which come to the proposer's knowledge before the contract is concluded, or facts which, though previously immaterial, become material owing to changed circumstances before then, must be disclosed'.¹⁵ Allied to this is the duty to act in good faith.¹⁶ Lastly, the non-disclosure or misrepresentation, to be legally relevant, must be material if a reasonable, prudent person would consider that the information which was not disclosed should have been correctly

¹³ *Regent Insurance Co Ltd v King's Property Development Pty Ltd t/a King's Prop* 2015 (3) SA 85 (SCA).

¹⁴ *Fransba Vervoer (Edms) Beperk v Incorporated General Insurance Ltd* 1976 (4) SA 970 (W). See also *Clifford v Commercial Union Insurance Co of SA Ltd* 1998 (4) SA 150 (SCA) at 156E.

¹⁵ Gordon and Getz *The South African Law of Insurance* 4 ed (1993) at 126-128.

¹⁶ *Mutual and Federal Insurance* above fn 5.

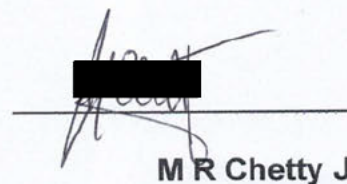
disclosed to the insurer so that the latter could, on the information available, assess the risk or exposure. This was in line with the evidence of the witnesses called by the first respondent, in defence of its repudiation of the deceased's life policy and its refusal to pay benefits to the plaintiff.

[57] In the result, I am satisfied that the plaintiff has failed to prove its case. The first defendant, Discovery, was induced into the contract by a material representation and non-disclosure by Sandra Naidoo and is consequently entitled to avoid the contract and refuse to pay the death benefit stipulated therein to the nominated beneficiary.

Order

[58] I make the following order:

The plaintiff's claim is dismissed with costs on scale C, including that of senior counsel.



M R Chetty J

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