**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 72341/2018**

In the application between:

**PETER TITOSE SEEPI** Plaintiff

And

**KING PRICE INSURANCE COMPANY LTD** Defendant

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE : 21/12/2023

*This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 14h00 on 21 December 2023.*

JUDGMENT

LENYAI J

[1] This is a claim where in the plaintiff seeks an order that the defendant should pay him R300 000.00, being the value of the plaintiffs motor vehicle after it had allegedly been written off (less the value he received after selling the wreck of the vehicle). Plaintiff was a policy holder with the defendant for a comprehensive cover for the retail value of his Mercedes Benz C220 , 2016 Model. The defendant repudiated his claim due to non-disclosure of material information at the inception of the agreement.

[2] The plaintiff testified in support of his claim and the defendant did not call any witnesses.

[3] In terms of the Joint Practice Note dated 30th August 2023 the parties agreed that the following are common cause:

3.1 the full names of the plaintiff;

3.2 the citation of the defendant;

3.3 the jurisdiction of the court;

3.4 that a written agreement of insurance was entered into between the parties on approximately 5th June 2017;

3.5 that the plaintiff instituted a claim on 23rd August 2017, pursuant to the above-mentioned agreement of insurance;

3.6 that the defendant repudiated the plaintiff's claim;

3.7 that the plaintiff was involved in an accident on 20th June 2014, where the windscreen of his motor vehicle was chipped after being hit by a stone, he instituted a claim with Outsurance on 21st June 2014, but did not proceed with the claim;

3.8 that the plaintiff was involved in an accident on 21st June 2014 with a cyclist, as a result of which the left side mirror glass popped out, he instituted a claim with Outsurance on 23rd June 2014, but did not proceed with the claim;

3.9 the plaintiff did not inform the defendant of the two incidents during the sales call on 5th June 2017;

3.10 that there is no need to call any witnesses to testify on the transcription of this sales call of 5th June 2017, as it is common cause between the parties that the content thereof correctly reflects the discussion between the parties.

3.11 that the plaintiff accepts the defendant's expert report, and the expert need not be called to testify on the contents of his report;

3.12 that the report contains one typing error, the monthly insurance premium paid by the plaintiff was R1 637.21 and not R1 532.50;

[4] During the plaintiff's opening address at the commencement of the proceedings, a submission was made by his legal representative that the plaintiff's claim is one for specific performance. A further submission was made that the plaintiff complied with the contract by paying his monthly premiums and the defendant did not comply with the terms of the contract.

[5] The defendant in its opening address submitted that this was a damages claim and not a claim for specific performance as alluded to by the plaintiff. The defendant further submitted that it repudiated the plaintiff's claim due to non-disclosure of material information which was material to the assessment of the risk and also to determine the premium that the plaintiff had to pay.

[6] The plaintiff testified that during the sales call he gave the defendant permission to conduct an ITC check on his profile and he expected the defendant to do this before entering into a contract with him. He further testified that he did not inform the sales consultant during the sales call about the two incidents and the defendant never came back to him to advise him about the results of the ITC check. It was submitted during closing arguments that the defendant was negligent in not conducting an ITC check before concluding the contract.

[7] The plaintiff further testified that the two incidents that the defendant was referring to in their repudiation letter, were minor incidents which occurred years before and it was for a different car to the one in question, being the Mercedes Benz C220, 2016 Model. The first was a windscreen chip caused by a stone and the other was a side mirror which broke when a cyclist drove into him. At the time, he was insured by OUTsurance and he ended up not proceeding with both claims as the excess was too expensive. For both claims the excess was R3 500, and to fix the chipped window himself, cost him R200.00 and for the side mirror he spent R500.00.

[8] During his testimony the plaintiff stated that he was never involved in an accident prior to taking an insurance with the defendant and further confirmed that he never claimed for any incidents. The legal representative of the plaintiff referred the court to CaseLines 31-20, line 5, where the plaintiff confirmed during the sales call that "*With, with the car it was, it, there has been, there has not been any incident."*

[9] During cross examination plaintiff conceded that he was involved in two incidents, the first on 20th June 2014 where the windscreen of his vehicle was chipped after being hit by a stone and the second on 21st June 2014 where a cyclist drove into him which resulted in the left side mirror glass of his car popping out. Plaintiff further confirmed that he did not inform the defendant of these two incidents during the sales call of the 5th June 2017 and to use his words " *I was never involved in an accident."* Plaintiff was adamant that he did not claim but rather he lodged a claim for the two incidents and a quotation was furnished to him with an excess amount of R3 500.00. He reiterated that he fixed the damages himself at the cheaper rate of R700.00. Plaintiff further testified that there is a difference between a claim and a payout, and because he did not receive any payout from the insurance, it is as good as he did not claim. Plaintiff conceded that a reasonable person would understand that this information is required for the proper assessment of risk by the insurer. He further conceded that had this information been available at the time of the conclusion of the contract the premium he would be paying would be R2 004.63. Plaintiff admitted during cross examination that he was insured for the retail value of the motor vehicle.

[10] Further, during cross examination the plaintiff was referred to the pretrial trial minutes dated 12th October 2020 at CaseLines 20-15. The legal representative of the defendant put it to the plaintiff that he must prove his claim with regard to the issues on the pretrial minute and there was no response from the plaintiff. These issues are noted as "*issues in dispute"* in the pre-trial minute and they are :

> "*2.2.2 that the plaintiff's insured motor vehicle was involved in a motor vehicle accident on 21st August 2017 and that the insured motor vehicle was written off as a result of this motor vehicle accident;*
>
> *2.2.3 that the plaintiff suffered a loss;*
>
> *2.2.4 that the replacement value of the plaintiff's insured motor vehicle amounted to R450 000.000;*
>
> *2.2.5 that the plaintiff sold the wreck of the insured motor vehicle for R150 000.00;*
>
> *2.2.6 that the loss relating to previous incidents that took place in the three-year period preceding 5th June 2017, was minor or trivial or negligible;*
>
> *2.2.7 that the plaintiff complied with all his obligations in terms of the Agreement of insurance;*
>
> *2.2.8 that the plaintiff intentionally misrepresented certain facts to the defendant at the time that the Agreement of insurance was concluded;*

*2.2.9* *that the alleged misrepresentation was made by the plaintiff with the intention of inducing the defendant into concluding the agreement of insurance at a lower premium or on more favourable terms.*

*…*

*3.5.1* *the plaintiff bears the onus of proof of his claim and the duty to begin and;*

*3.5.2* *the defendant bears the onus to prove that their repudiation was rightful."*

[11] The plaintiff further confirmed during cross examination that the incident he referred to during the sales call was with regards to household goods and the sales consultant had to call his supervisor to come and override the system so that he can correct the information he had earlier included as a motor vehicle incident.

[12] During re-examination and the plaintiff indicated that flowing from the sales call, the consultant indicated that she would have to check this. He understood this to mean that because he gave them permission to conduct an ITC check on him, they will discover the previous incidents by themselves. He further confirmed that the policy contract was issued immediately after the sales call.

[13] After the plaintiff closed his case the defendant opted not to give evidence and closed their case.

[14] At the heart of this matter is whether the defendant rightfully repudiated the contract on the grounds of non-disclosure.

[15] Section 53(1) of the short term Insurance Act 53 of 1998 as amended, is of importance in this matter as it speaks on misrepresentation and the 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)-*

*…*

*…*

*(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 or correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof.*

*(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that 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."*

[16] On the issue of non- disclosure, the Appellate Division in the matter of **Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality [1985] 1 All SA 324 (A) at page 432**, the court held 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 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."*

[17] In the same matter at **page 435**, the Court held that the reasonable person test should be applied when deciding upon a consideration of the relevant facts of a particular case, whether or not and disclosed facts or information reasonably relative to the risk or the assessment of the premiums. 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.

[18] It is trite 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.

[19] It is trite that the onus rests on the insured ( plaintiff in this matter) to prove the facts necessary to bring it within the terms of the insurance. **Van Zyl No. v Kiln Non-Marine Syndicate No. 510 of Lloyds of London (216/2001) [2002] ZASCA 120 [2002] 4 All SA 355 (SCA) (26 September 2002).** The plaintiff in my view failed to prove that any facts existed for a claim of indemnity in terms of the insurance policy. Plaintiff only testified that there was an accident *"in August 2017, the car I insured was involved in an accident."* During cross examination he was reminded that there was a dispute as to whether an accident had occurred and the damages and *quantum* he claimed." Plaintiff did not respond to the issues in dispute and as a result no evidence was presented before court of the actual accident and the damages suffered. In my view the plaintiff failed to prove facts necessary to bring his claim within the terms of the insurance contract and the defendant thus never attracted an onus. There was just no case for the defendant to meet.

[20] The defendant in avoiding the claim had to prove that the non-disclosure of the previous incidents was material to the assessment of the plaintiff's risk to show that the repudiation was good. Turning to the matter before me, the plaintiff conceded (i) that the facts were not disclosed; (ii) that the facts were within his knowledge; (iii) that the facts were 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, through admissions and during

cross examination. In my view that is the end of the matter, and the defendant correctly repudiated the claim.

[21] In the premises, the following order is made:

(a) The plaintiff's claim is dismissed with costs.

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**M.M.D. LENYAI**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

FOR THE PLAINTIFF: ADV V Mukwevho

INSTRUCTED BY: Shapiro & Ledwaba Inc, Pretoria

FOR THE DEFENDANT: ADV C Richard

INSTRUCTED BY : Weavind & Weavind, Pretoria

HEARD ON: 30 – 31 August 2023,

DATE OF JUDGMENT: 21 December 2023