CASE NO.: (P) I 2269/07

TUTALENI PETER REINHOLDT SHIIMI versus MUTUAL AND FEDERAL INSURANCE COMPANY OF NAMIBIA

FRANK, A.J.
2007.11.28

Practice – Absolution from the instance.

After close of plaintiff's case – onus on defendant – relief not competent – if defendant discharge onus entitled to dismissal of plaintiff's claim – If defendant closes case conceptually no problem to dismiss plaintiff's claim where onus on defendant discharged – where defendant does not close case – dismissal of claim only to be granted in exceptional circumstances where defendant can never be asked to do anything more in regard to matters and where no possibility that the potential witnesses to be called by defendant may alter the position to his detriment – court not satisfied that potential evidence on behalf of defendant may not conceivably change the mater to the detriment of defendant – evidence as to what amounts to a material non-disclosure in an insurance contract may be of relevance – application for absolution dismissed.

CASE NO. (P) I 2269/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

TUTALENI PETER REINHOLDT SHIIMI **PLAINTIFF**

and

MUTUAL AND FEDERAL INSURANCE COMPANY OF NAMIBIA **DEFENDANT**

CORAM: FRANK, A.J.

Heard on: 2007.10.29, 30, 31

Delivered on: 2007.11.28

JUDGMENT

FRANK, A.J.: [1] In this matter the trial proceeded up to he stage where the plaintiff closed his case. Counsel for defendant then applied for absolution from the instance.

[2] Very briefly stated the plaintiff insured a motor vehicle with the defendant who is a registered short-term insurer. Plaintiff alleges that the

vehicle so insured with defendant was stolen in South Africa and claims the value of the vehicle (less the excess he must pay in terms of the insurance agreement) from the defendant. The defendant is resisting the claim. For the purpose of the absolution application only two of the grounds upon which the claim is resisted are of relevance, namely whether a misdescription of the particulars of the vehicle made the subject matter of the insurance so unclear that it cannot be said that the vehicle in respect of which the claim is made is the same vehicle that was insured and whether the fact that the plaintiff did not disclose that there were pending criminal cases against him relating to the possession of suspected stolen vehicles when he applied for the insurance amounted to a material non-disclosure justifying a repudiation of the agreement by the defendant.

[3] Plaintiff in his Particulars of Claim describes the vehicle as a '2003 model Volkswagen Jetta 4-1.9 TDI" and continues to mention it's engine and chassis number. Of relevance in this context for reasons that will become apparent shortly is the numerals of the chassis number which ends with 6259. A copy of the agreement between the parties also forms part of the pleadings and has not been placed in dispute. In this agreement the mentioned vehicle is listed with the additional detail of it's Namibian registration number.

[4] From the evidence at the trial it became evident that plaintiff acquired the vehicle in South Africa and then imported it into Namibia. On the documentation from South Africa the chassis number of the vehicle that plaintiff acquired ends with the numerals 0259. Apart from this difference (and of course the fact that the vehicle did not have a Namibian registration number when plaintiff acquired it) the remaining details of the vehicle corresponds with that of the vehicle eventually registered in Namibia.

[5] In his evidence the plaintiff was extensively cross-examined with regard to the difference in chassis numbers that is apparent from the documentation. According to him the difference in the documentation was due to an error by the registering authorities. The particulars in the proposal form and the agreement emanates from the Namibian registration documents and if the chassis number reflected on it is wrong it must have been an error by the registering authorities. What he knew was that he only had one Volkswagen Jetta which was blue in colour and which he insured. This vehicle he also identified with reference to a colour photograph and which has a registration number as indicated in the agreement. He readily conceded that the only way to verify the actual chassis number was to view it on the vehicle which was no longer possible as it has been stolen. He was thus not in a position to state with certainty that the vehicle he insured in fact had as it's chassis number the one mentioned in the proposal form and the eventual agreement.

[6] Counsel for defendant submitted that in view of the fact that plaintiff could not prove that the actual chassis number was the one contained in the agreement and the one alleged in the particulars of claim he did not discharge the onus to prove that the car he insured was the one that was stolen and hence the application for absolution from the instance.

[7] Whereas it is correct that the onus in respect of the abovementioned issue rests with the plaintiff[1] I do not at this stage have to decide whether he has established a *prima facie* case in the sense that I would have to if the defendant had also closed it's case (which it did not do). At this stage I take the evidence produced on behalf of the plaintiff at face value[2] and decide whether based thereon if "there is evidence upon which a reasonable man might find for the plaintiff".[3]

[8] In my view a reasonable man "might find for the plaintiff". Apart from the uncertainty surrounding the chassis number all the other details of the vehicle provided to the defendant fits in with the description of the car. Thus the registration number, engine number, make, model, type and size of engine

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[1] *Van Zyl N.O. v Kiln Non-Marine Syndicate No. 510 of Lloyds of Lanison* 2003 (2) SA 440 (SCA)
[2] *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527 C-D
[3] *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173 quoted in Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa, 4th ed.p. 681

correlates with that provided to the insurer. Furthermore the plaintiff identified the particular car with reference to a colour photo and it was the only car fitting the description (save for perhaps the chassis number) provided to the defendant that the plaintiff possessed at that stage. It was the vehicle plaintiff intended to insure and it was the one eventually claimed for. Furthermore the insurer on it's information knew it was the only vehicle of that type, model, registration and engine number that it covered for plaintiff. There is no suggestion whatsoever that plaintiff possessed or possesses a similar vehicle which can be compared with the one under consideration.

[9] It thus follows that the application for absolution from the instance based on the misdescription of the vehicle must fail.

[10] In it's plea the defendant states that it was entitled to repudiate this claim because at the time of the conclusion of the agreement the plaintiff did not disclose to it, amongst others, the fact that "criminal charges were contemplated and/or pending against him in Namibia in respect of motor vehicle thefts".

[11] During his evidence plaintiff denied that such theft charges were contemplated or pending against him. However he admitted in cross-examination that two charges relating to the possession of suspected stolen vehicles were pending against him. Backed by this admission counsel for

defendant sought the amendment of the plea to delete the reference to motor vehicle thefts and substitute it with a reference to possession of suspected stolen vehicles. Counsel for plaintiff objected to the amendment on the basis that it was not the case plaintiff was called to meet and as he had already given evidence it would also prejudice plaintiff in his case. At the time I made a ruling allowing the amendment indicating that I would furnish the reasons to for granting the amendment at a later stage. I thus do it now.

[12] In view of plaintiff's admission the real issue that arose between the parties was whether the fact of the admitted pending cases were such as to justify a repudiation of the policy by the defendant if it had not been disclosed prior to entering into the agreement between the parties. To, in such instance hold defendant to a version which was technically incorrect instead of dealing with the real issue would in my view not be in the interests of justice. In view of plaintiff's admission the truth was out in the open and he could not claim prejudice in any sense except that his case may have weakened on the merits. In any event despite an offer from counsel for defendant to reopen his case and even consult with regard to this aspect this offer was not taken up nor was this approach adopted when, subsequent to the granting of the amendment, plaintiff's counsel was granted the opportunity to deal with the issue. The amendment brought the real issue between the parties to the fore and did so without any prejudice to plaintiff in terms of dealing with it.[4]

[4] *Cross v Ferreira* 1950 (3) SA 433 (C) at 447 B

[13] Defendant when it repudiated the agreement and hence it's liability arising from it obviously did not mention as a ground for repudiation the alleged non-disclosure presently under discussion. Counsel for plaintiff submits that defendant is bound by it's original reasons for repudiation and cannot now raise others which is in effect what the amendment does. Counsel's submission is without merit. A party repudiating an agreement and relying on a wrong reason for such repudiation or termination may rely on any valid reason that was available to it even if it was not originally relied upon.[5] This general principle of the Law of Contract applies a fortiori even more forcefully in the present context where defendant could only repudiate once the facts, which were in the exclusive knowledge of plaintiff, came to it's knowledge.

[14] It was common cause between counsel that the onus in respect of the alleged non-disclosure was on respondent. This being so the question arises whether the respondent can seek absolution at this stage of the proceedings at all. It must be borne in mind if defendant had also closed it's case such course would not have been possible for if the defendant is found be successful in this regard the plaintiff's case needs to be dismissed.

Myers v Abrahamson 1951 (3) SA 438 (C) at 450 H
Union Bank of SA Ltd v Woolf; Union Bank of SA Ltd v Shipper 1939 WLD 222 at 224-225

[5] *Matador Buildings (Pty) Ltd v Harman* 1971 (2) SA 21 (C) at 28 A
Stewart Wrightson (Pty) Ltd v Thorpe 1977 (2) SA 943 (A) at 953 G
Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd 1985 (4) SA 809 (A) at 832 C-D

> "It seems to me that logically there is no room for a judgment of absolution from the instance where the onus is on defendant".[6]

[15] The one authority that I was referred to on this point takes the stance that where the onus is on the defendant such defendant cannot seek absolution from the instance at the end of plaintiff's case.[7]

[16] Where defendant bears the onus he must place enough evidence before Court so as to at least *prima facie* establish his case. The duty to adduce evidence then shifts to the plaintiff so as to dispute the *prima facie* case established by defendant or to at least ensure that the probabilities are equal and hence ensure that the onus resting on the defendant is not discharged.[8]

[17] The purpose of absolution is to avoid a matter proceeding where there is no prospect whatsoever of success and not to put a defendant to the task of shielding him or herself against a case that cannot or does not threaten him or her at all.[9]

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[6] *Hirschfield v Espoch* 1937 TPD 19 at 21
Schoeman v Moller 1949 (3) SA 949 (O) at 957
Rosherville Vehicle Services v BFN Plaaslike Oorgangsraad 1998 (2) SA 289 (O) at 293 B-H
[7] Schoeman case, above
[8] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548 A-C
[9] Rosherville case, above at 293 E

[18] Assume for the moment the plaintiff in the present case had admitted to the non-disclosure of insurance fraud relating to motor vehicles committed 6 months prior to the conclusion of the agreement. Counsel were *ad idem* that with this example the defendant would have been entitled to repudiate the claim. Would the defendant in such circumstances be entitled to seek absolution after the plaintiff's case? What would have happened is that defendant would have, through the plaintiff, put the necessary evidence before the Court and there being no evidence adduced to the contrary by plaintiff the onus would have been discharged. I assume here that there is nothing to suggest that the defendant's witnesses would be able to add anything favourable to plaintiff's version.

[19] The one answer to the question posed can be that where the matter is so clear the defendant must close his case and seek the dismissal of the claim. In my view this would be to approach the matter in too theoretical a fashion without regard to the practicalities of litigation. A claim may be (and are usually) resisted on various bases. One cannot close one's case in respect of one defence and not the others. It is unrealistic to expect a party to rely on one of his defences only where in the process he jeopardises his other defences. In this process if one is not to allow a party to seek an end to the matter on the basis that one of his defences was established in the plaintiff's case which defence would dispose of the matter *in toto* one would allow the matter to

continue needlessly and perpetrate exactly what an absolution from the instance order is supposed to avoid.

[20] Despite my criticism above conceptually one cannot seek absolution against a party who bears no onus as the whole concept is not to put someone on his defence where the party who bears the onus cannot pass muster when it comes to the test for absolution. The answers may lie in a more constructive use of Rule 33 (4) to adjudicate certain issues separately from others but this was not the route chosen in this matter and I refrain from commenting thereon.

[21] I am thus of the view that an order for absolution from the instance can only be granted against a party who bears an onus and where, e.g. the defendant bears an onus he cannot seek absolution from the instance in respect of the issue he bears the onus against the plaintiff. If the defendant discharges the onus resting on it, the plaintiff's claim stands to be dismissed and there no room for an order for absolution from the instance in respect of such claim. Where the defendant in such matter bears the onus and cannot discharge it the plaintiff will obviously succeed to that extent.

[22] The next question is whether a defendant can seek the dismissal of plaintiff's case and not an order for absolution from the instance at the close of plaintiff's case where the defendant bears the onus. It goes without saying that

he can do so where he closes his case. The real question is whether he must close his case or whether he can ask for such dismissal without closing his case.

[23] An onus can of course be discharged without the party on whom the onus lies presenting evidence. This was realised at least as far back as 1946 when Davis, A.J.A has the following to say in this regard:

> "It (the onus) may have been completely discharged once and for all, not by any evidence what has been led, but by some admission made by his opponent on the pleadings (or even during the course of the case), so that he can never be asked to do anything more in regard thereto;…"[10]

[24] Apart from admissions on the pleadings such admissions, as pointed out by Davis, A.J.A, can be made "during the course of the case". From this I gather these admissions may stem from formal admissions by the opponent or his lawyer but it can also emanate from the evidence presented by the opposing party. Thus in the present matter the evidence of the plaintiff that there were cases pending against him with regard to the possession of suspected stolen vehicle is an admission of this averment in the plea as amended. With this admission on record it is the submission on behalf of defendant that he "can never be asked to do anything more in regard thereto". As there is no evidence to combat the case alleged by him and which would have to be forthcoming

[10] *Pillay v Krishna and Another* 1946 AD 946 at 953

from the plaintiff[11] this is akin to excepting to a plea that does not disclose a defence in my view and should be dealt with similarly so as to dispose of the matter without leading any further evidence.

[25] To deal with the matter on such basis it must be very clear that there is no possibility that the potential evidence still to be led by defendant on the remaining issues or the evidence that he would potentially lead on the issues were he not to close his case might alter the situation to be detriment of the defendant. In other words the facts upon which the issue is to be determined must be clear and undisputed and it must further be clear that the case of the defendant and the evidence potentially to be presented by the defendant would not alter the position detrimentally for the defendant and that "he can never be asked to do anything more in regard thereto". It goes without saying with such a test it will only be in very rare and exceptional cases where this approach should be followed. The upshot however of a successful application on this basis by a defendant who bears an onus is that the plaintiff's claim will be dismissed and not an order for absolution from the instance.

[26] Plaintiff admits that at the time he concluded the agreement with defendant that there were two cases pending against him of being in possession of suspected stolen vehicles and that he did not disclose this to the defendant.

[11] Pillay case, above at 953

According to defendant's plea this information was "material to the risk, or the assessment of the premium".

[27] A fact is material if it would influence the judgment of the prudent insurer in determining whether he will accept the risk or in fixing the premium for the acceptance of such risk.[12] Furthermore it is immaterial whether the non-disclosure was intentionally, mistakenly, just not present to the mind of the insured, or because of the insured's failure to appreciate it's materiality when seeking the insurance.[13]

[28] One of the factors that is material is the character of the insured in the sense of his moral integrity. This has been referred to as to moral hazard.[14] Thus it has been held that a conviction of robbery had to be disclosed as well as the fact that an insured's husband was convicted of receiving stolen goods. The latter was in respect of an "all risks" policy for jewellery.[15] Similarly the failure to declare that the vehicle insured was a stolen vehicle was also held to constitute a material non-disclosure.[16]

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[12] *Beyers Estate v Southern Life Association* 1938 CPD 8 at 19-20
Munns and Another v Santam Ltd 2000 (4) SA 359 (1) at 366 B-C
Liberty Life Association of Africa Ltd v De Waal en 'n Ander 1999 (4) SA 1177 (SCA) at 1178 I
[13] Lee and Honore: Law of Obligations, 2nd ed., par. 510
MacGillivray: On Insurance Law; 9th ed. Par. 17.13
[14] Munns case, above at 367 J
[15] Munns case, supra at 367H-368 A
[16] Commercial Union Insurance Co of SA Ltd v Lotter 1999 (2) SA 197 (SCA)

[29] According to MacGillivray it is uncertain in English law whether pending cases need to be disclosed.[17] Some cases suggesting that it should whereas others are to the contrary. Reference is also made to a duty depending on whether the allegations are well founded or unfounded.

[30] Whereas the courts have and do decide the question of materiality without reference to evidence this is not an inflexible rule and an occasion the need for evidence, even expert evidence, arises.[18]

[31] With the English position uncertain, the Namibian and South African position not decided as far as I could establish and from the lack of authority on this aspect cited to me I am of the view that this aspect isn't one that I should determine on the evidence thus far presented. This is simply not one of those cases where it would be safe to assume that the further evidence potentially to be led by defendant will not be of such a nature that it won't influence the Court's view in this regard. Whereas the fact of the non-disclosure and the nature of the non-disclosure is clear it cannot be stated with sufficient certainty that the materiality of such non-disclosure was established to such a degree that nothing of any use may still appear as the trial proceeds.

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[17] MacGillivray, above at par. 17-55

[18] *Fransba Vervoer (Edms) Bpk v Incorporated General Insurances Ltd* 1976 (4) SA 970 (W)
Qilingele v South African Mutual Life Assurance Society Ltd 1991 (2) SA 399 (W) at 418 A-I

[32] In the result the application for absolution is refused.

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FRANK, A.J.

ON BEHALF OF THE PLAINTIFF **Mr S Namandje**

Instructed by: **Sisa Namandje & Co**

ON BEHALF OF DEFENDANT	**Mr R Heathcote**
Instructed by:	**LorentzAngula Inc**