191/92

Case Number 117/91

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IN THE SUPREME COURT OF SOUTH-AFRICA

(APPELLATE DIVISION)

In the matter between:

ANGELINE LULAMA QILINGELE Appellant

and

SOUTH AFRICAN MUTUAL LIFE Respondent

ASSURANCE SOCIETY

CORAM: VAN HEERDEN, E.M. GROSSKOPF JJA, VAN COLLER, KRIEGLER ET HARMS AJJA

DATE OF HEARING: 11 September 1992

DATE OF JUDGMENT: 28 September 1992

J U D G M E N T

KRIEGLER AJA/.....

KRIEGLER AJA:

The appellant was the nominated beneficiary under a life insurance policy issued by the respondent on the life of one Tomazile Elijah Qilingele ("the insured"). The policy provided for basic life cover of R105 476,00 and a supplementary benefit of R5 000,00. The insured died (of multiple stab-wounds) in August 1986, some five weeks after inception of the policy. The appellant's claim for payment of the supplementary benefit was met but the respondent, subsequently, refused her claim for payment of the basic life cover. The appellant thereupon instituted action in the Witwatersrand Local Division for payment of the latter benefit. She was met with a plea repudiating liability on a variety of grounds. Subsequently the issues were by agreement narrowed to the single question whether a particular misrepresentation, contained in the proposal form

on the strength of which the policy was issued, grounded repudiation of liability thereunder. The learned trial judge determined that issue in favour of the respondent and dismissed the action with costs. His judgment is reported sub nom Qilingile v South African Mutual Life Assurance Society Ltd 1991 (2) SA 399 (W), ("the reported judgment"). The appellant now pursues her claim for payment of the basic life benefit. It is common cause that the appeal turns on the same narrow point.

The evidence relating to the events preceding the issue of the policy is fully set out in the reported judgment (at 400I - 408F). The facts germane to the present discussion fall within a narrow ambit and the following summary will accordingly suffice. The insured was a 41 year old divorcee living in Orlando East, Soweto, and earning an average of R1 000,00 per month as a

self-employed clothing salesman. The insurance policy concerned was issued pursuant to and on the basis of a completed application form signed by the insured on 13 May 1986. The form bears a note at its commencement which reads:

> "As the statements in this application constitute warranties, complete and accurate information must be given."

The body of the form is divided into ten numbered sections. Each of the first nine deals with a particular topic and calls for data to be furnished in designated spaces. Section 5 poses ten questions covering a variety of topics. Opposite each question there is a block for the insertion of a positive or negative response. The second question reads as follows:

> 5.2 Is any other application for insurance on your life now pending or contemplated? (If 'yes', please state below names of insurers, amounts and whether such application is to be proceeded with if OLD MUTUAL accepts this application).

The tenth section, headed "DECLARATION", does not call for information but requires the applicant to affix his signature immediately below seven numbered paragraphs. The first two thereof read as follows:

> "1. I warrant that all the information given in this application, and in all documents which have been or will be signed by me in connection with the proposed assurance, whether in my handwriting or not, is true and complete.
> 2. I agree that the statements in this application and the documents mentioned above shall be the basis of the proposed contract, that any misstatement or omission therein may lead to any contract made being declared void by OLD MUTUAL, and that in such event all monies paid in respect thereof shall be forfeited."

The answer entered in the appropriate block opposite question 5.2 was "No". That was not true. The insured not only contemplated other applications for assurance on his life but, on the very occasion, signed completed applications for such insurance addressed to two other insurers. He

wanted to obtain life insurance of the order of R300 000,00 but insurers generally require a medical examination where life cover above a certain limit is proposed. In order to avoid having to comply with such requirement the insured, acting through a so-called sub-broker, decided to "spread the risk" over three insurers. That entailed applying for life insurance to three insurers, in each case for an amount of cover below that which would trigger a demand for a medical examination. It was, of course, inherent in the scheme that the insurers were not to know that three contemporaneous applications were being made. The three applications were submitted to the respective insurers at the same time and resulted in total cover in excess of R250 000,00 being obtained against monthly premiums adding up to approximately a third of the insured's income. The appellant acknowledges the falsehood of the answer

to question 5.2 but maintains that the respondent failed to establish that its repudiation of liability was lawful. The nub of the contention is that the respondent, in order to justify the repudiation, had to show that the misstatement was material in the eyes of the reasonable man. That it had failed to do, so the argument ran, because expert evidence adduced on its behalf had been misdirected and irrelevant. Three experienced actuaries had opined that the truth of the answer to question 5.2 was material to a life insurance underwriter assessing the risk. (A detailed resumé of their evidence and an evaluation of its cogency are to be found at 408G -415J of the reported judgment.) But what has to be established, so the argument continues, is not whether, in the eyes of an insurer, the untruth was material but whether the reasonable man would regard it as such. Hence the respondent had failed to discharge the onus,

which it admittedly bore, to justify its repudiation of liability under the policy.

The argument, both in this court and in the court below, was founded on the conclusion of Joubert JA in the majority judgment in Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 (A) 435F-I, viz that the court judges the materiality of a non-disclosure objectively "from the point of view of the average prudent person or reasonable man". For the sake of convenience that conclusion will henceforth be referred to as the "Oudtshoorn Municipality test." The learned judge a quo (at 416B - 417F) adopted the argument but, in the event, held that on that test, as explained by Van Heerden JA in President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en 'n Ander 1989 (1) SA 208 (A) 216D-G, the false answer to question 5.2 had been material.

In the court a quo and initially in this court

the respondent accepted the applicability of the Oudtshoorn Municipality test to a defence based on misrepresentation. In doing so it enjoyed the support of the recent judgment in Pillay v South African National Life Assurance Co Ltd 1991 (1) SA 363 (D & CLD). There the insured had answered questions in a life assurance proposal form relating to his medical history in the negative whereas, in truth, positive answers had been called for. In determining the materiality of the misstatements the learned judge expressly applied the Oudtshoorn Municipality test, as elucidated by Van Heerden JA, and, wearing the spectacles of the reasonable man, non-suited the plaintiff.

However, as I hope to make plain, the Oudtshoorn Municipality test applies only to cases where the ground for repudiation is a failure of the common law duty to disclose material facts. In that case, as also in the

President Versekeringsmaatskappy case, the point at issue was such a non-disclosure. Here we are not concerned with that situation but with a straight-forward case of misrepresentation where the insured expressly vouched for the truth of his representations founding the contract of insurance and moreover did so by way of warranty. The legal effect of such warranted representations in insurance transactions is well known. See e.g. Lewis Ltd v Norwich Union Fire Insurance Co. Ltd. 1916 AD 509 at 514 in fin to 515. Strict observance thereof is a pre-condition to liability under a contract of insurance founded thereon. In paragraphs 1 and 2 of the DECLARATION the insured, over his signature, warranted the correctness of the statements in the application form and agreed that they would be the basis of the insurance contract. He further agreed that any misstatement therein could found a repudiation. Contractually,

therefore, the materiality of the false answer to question 5.2 is irrelevant.

If the matter had rested there the respondent's repudiation of liability for payment of the basic life benefit would clearly have been unassailable. But the lawgiver deemed it necessary to intervene in the relationship between insurers and those whom they contract to insure. This it did in 1969 by adding an important provision to the Insurance Act, No 27 of 1943 ("the Act"). By s.19 of Act 39 of 1969, ss.(3) was inserted in s.63 of the Act to cut down any contractual right which an insurer may have to repudiate liability on the basis of misrepresentation. That sub-section, in so far as here relevant, provides as follows:

> "Nothwithstanding anything to the contrary contained in any ... document relating to [a domestic] policy, any such policy ... shall not be invalidated and the obligation of an insurer thereunder shall not be excluded ... on account of any representation made to the insurer which is not true, whether or not such representation has been warranted to be true,

> unless the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said policy at the time of issue ... thereof."

The object of the enactment is manifest, namely, to protect claimants under insurance contracts against repudiations based on inconsequential inaccuracies or trivial misstatements in insurance proposals. An insurer's right to repudiate liability on the basis of the untruth of a representation made to it, whether elevated to a warranty or not, was curtailed. This was done by, first, providing generally that liability could not be avoided on account of any misrepresentation, warranted or not, and then adding a qualification. By structuring the provision in that way the draftsman ensured that the onus to prove the requisite elements of the qualification - and hence of the right to avoid liability - would rest on the insurer.

The formulation of the qualification is no

model of clarity, but purposive interpretation and reference to the Afrikaans text of the sub-section render its meaning clear. In Afrikaans the qualification is expressed in the following terms:

> "...tensy die onjuistheid van bedoelde voorstelling sodanig is dat dit waarskynlik die berekening van die risiko onder bedoelde polis wesentlik beïnvloed het ten tyde van die uitreiking of enige herstelling of hernuwing daarvan."

The requirements of the qualification can conveniently be broken up into its components. What an insurer has to establish first in order to bring itself under the protective shield of the qualification is a probability: That is apparant from the use of the word "likely" and manifest from its Afrikaans equivalent, namely, "waarskynlik". Whether or not something is probable is a factual question, pure and simple; and it has to be answered by applying common sense and experience to all the available data. Concepts of the reasonable

insurer, the reasonable insured or the reasonable man, which connote a value judgment, do not enter the picture. From this it follows that the Oudtshoorn Municipality test has no bearing on a case under s.63(3).

What has to be established as a probability in terms of that sub-section is whether a misrepresentation is "of such nature " ("sodanig is") as to have had a particular result. It seems passing clear from the Afrikaans text that no particular significance need be attached to the circumlocutional phrase the draftsman saw fit to use when he ran into difficulties with the hypothetical past tense. The phrase would have been as sound grammatically, and its meaning clearer, if the reference to "nature" had been omitted, i.e. if it had simply read "unless the incorrectness of the representation is such as to be likely ..."

Be that as it may, what has to be ascertained is whether the result likely to have been caused by the misrepresentation is material. Materiality is not a relative concept; something is either material or it is not. Etymologically the word "material" ("wese" in Afrikaans) denotes substance, as opposed to form. In legal parlance it bears a corresponding meaning:

> "Of such significance as to be likely to influence the determination of a cause ..."

(Shorter Oxford English Dictionary vol.2, p.1289). Conformably its meaning in insurance law is significance in relation to the determination of the risk. In the sub-section now being examined the adverb "materially", used in conjunction with the verb it qualifies ("affect"), simply means that only risks undertaken on the strength of significant misrepresentations may be repudiated under the saving qualification.

That such significance relates to a risk, is clear. What is also clear, but not so obvious from the wording of the sub-section, is that the materiality relates to the assessment of the particular risk against which the insurance obligation sought to be repudiated was afforded. The sub-section says quite plainly that it is "the assessment of the risk under the said policy" ("die risiko onder bedoelde polis") which had to be materially affected. The enquiry as to the materiality of the misrepresentation is consequently not conducted in abstracto but is focused on the particular assessment. From that it follows that the evidence of the underwriter who attended to that assessment is not only relevant but may prove crucial. So, too, evidence that the insurer had a particular approach to risks of the kind in question would be relevant and could be cogent.

Obviously general considerations affecting the assessment of the kind of risk in issue will bear on the probabilities and will be taken into account. But, and this serves to be emphasized, the enquiry is aimed at determining whether the specific assessment was probably materially affected by the specific misrepresentation in contention. It goes without saying that, although the evidence of the particular underwriter, and of other such experts, will carry considerable weight, the court will not be bound by their ipse dixit. That is so, not only because of its function as trier of fact weighing the probable effect of the particular misrepresentation, but also because of the retrospectivity inherent in the exercise. In terms of the sub-section that effect is expressly to be ascertained as "at the time of issue, or any reinstatement or renewal" of the policy, i.e. when the risk was assumed. What the court has to

determine is whether the falsehood of the misrepresentation in suit is such as probably to have affected the assessment of the risk undertaken by the particular insurer when he extended the insurance cover under which the contested claim is being brought.

That exercise is essentially a simple comparison between two assessments of the risk undertaken. The first is done on the basis of the facts as distorted by the misrepresentation. Then one ascertains what the assessment would have been on the facts truly stated. A significant disparity between the two meets the requirement of materiality contained in s.63(3) of the Act. And a disparity will be found to be significant if the insurer, had he known the truth, would probably have declined outright to undertake the particular risk, or would probably only have undertaken it on different terms.

Application of the test as formulated above to the facts of the instant case puts the conclusion beyond doubt. Prima facie the respondent drafted its application form in order to elicit information which it considered important to its decision whether or not to accept the proposed insurance and, if so, on what terms. The evidence of the respondent's chief actuary, amply supported by the other two experts, established that the items of information called for in the application form are weighed in conjunction with one another in assessing the risk. In particular, so their evidence established, the amount of life insurance cover applied for is viewed against the proposer's income. A disparity between the two when measured against a standard criterion (appropriate cover equals approximately 10 years' income) was regarded by the respondent as an indication that the risk proposed was abnormal; and it would have resulted

in either a declinature or, at least, further enquiries. That adds up to materiality. Whether such criterion is objectively reasonable is beside the point, the enquiry being directed at respondent's assessment of the risk.

Once it is accepted that the disparity was probably material from respondent's point of view at the time, the conclusion is clear. And there can be little, if any, doubt on the evidence that it must be accepted. The learned judge a quo summarised, analysed and evaluated the evidence in extenso at 408G - 415J of the reported judgment. There is no reason to differ from his conclusion that the evidence of the three actuaries called on behalf of the respondent was entirely acceptable. Two of them were not cross-examined at all and the line pursued by counsel for the appellant in cross-examining the third, respondent's chief actuary, proved barren. Indeed in this court appellant's

counsel argued but perfunctorily that the respondent's evidence was not acceptable. The thrust of his argument was rather that such evidence, even if acceptable, had been misdirected as it did not postulate the reasonable man, as it ought to have done to comply with the Oudtshoorn Municipality test. He could hardly have done otherwise. Not only does the record make manifest that the evidence was acceptable, but there was nothing to gainsay it. As both parties at the trial believed that the Oudtshoorn Municipality test was applicable, the evidence ranged wider than would have been the case had the confines of the real enquiry been appreciated. In the result it was established that not only the respondent would have viewed the risk proposed by the insured with a jaundiced eye if the truth had been told in response to question 5.2 in the application form, but that life insurers generally

would have held such view. In short, the respondent discharged the onus resting upon it to prove the elements which bring its repudiation of the appellant's claim for payment under the basic life provision of the policy within the qualification to s.63(3) of the Act. The appeal therefore falls to be dismissed with costs.

One issue remains. That is whether the respondent is entitled to the costs of two counsel. The point at issue is an important one and the law was uncertain. The only authority dealing with the approach to a case falling under the provisions of s.63(3) of the Act was Pillay's case, supra, which decided that the Oudtshoorn Municipality test was applicable. In the circumstances it was prudent for the respondent to have retained the services of two advocates.

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

KRIEGLER AJA

VAN HEERDEN JA]

E.M. GROSSKOPF JA] CONCUR

VAN COLLER AJA]

HARMS AJA]