REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES:
~~YES~~ / NO
[3] REVISED
DATE 19/8/15 SIGNATURE

CASE NO: 72663/2012

DATES HEARD: 7, 11 & 12/8/2015

In the matter between:

RMB STRUCTURED INSURANCE LTD Plaintiff

and

DANRESA BOERDERY (PTY) LTD Defendant

JUDGMENT

J W LOUW, J

[1] During 2011, the defendant was the owner of a game farm in the Timbavati nature reserve which borders on a tributary of the Timbavati river and on which a five star lodge had been erected. The lodge was operated by Status Hotels (Pty) Ltd in terms of an agreement it had with the defendant. The property was insured with Santam Insurance Co Ltd in terms of a short term insurance policy which the defendant, represented by its director and only shareholder, Mr. Hennie de Beer, had obtained through Daan Schoeman Insurance Brokers in Polokwane, represented by Mr. Jannie Steyberg.

[2] During May 2011, Mr. Frik Nel of Brilliant Brokers (Pty) Ltd (Brilliant) approached Mr. de Beer and inquired whether he could make a proposal to the defendant regarding short term insurance. Mr. de Beer had previously been introduced to Mr. Nel by Mr. Nel's brother, Mr. Jannie Nel, who had been interested in purchasing the defendant's farm. Mr. de Beer provided Mr. Frik Nel with a copy of the Santam policy and told him that the quotation should be for exactly the same cover as provided for in the Santam policy. The policy provided cover for damage to the property, including to the lodge.

[3] The first quotation, which was from Risk Guard Alliance (Pty) Ltd (Risk Guard), was provided by Mr Nel during May 2011. Risk Guard were the underwriting managers for Saxum Insurance Ltd and acted as its agent.

The quotation was for a better rate with more benefits than the Santam policy. Further quotations were provided as a result of further negotiations between Mr. de Beer and Mr. Nel. The commencement date of the policy which was issued pursuant to the final quotation, which was accepted by Mr de Beer on behalf of the defendant, was 1 July 2011. Mr. de Beer was not asked to complete any application form prior to the issue of the policy. The policy was subsequently taken over from Saxum by the plaintiff. Risk Guard also acted as underwriting managers and agents for the plaintiff.

[4] On 17 January 2012, a flooding of the Timbavati river occurred as a result of heavy rains in the area. The flood caused extensive damage to the lodge. The defendant thereafter submitted a claim to Risk Guard for compensation for the damage. The assessors appointed by Risk Guard estimated the loss in an amount of R13 818 793.86. Risk Guard accepted liability for the loss on behalf of the defendant and made an interim payment of R2 980 030.00 to the defendant on 28 February 2012.

[5] On 29 May 2012, Risk Guard wrote to the defendant and advised it that Risk Guard had elected to avoid the policy because the defendant had failed to disclose certain material facts, to which I will refer in more detail below, at the time of the conclusion of the insurance contract. It claimed repayment of the amount of R2 729 623.90, being the amount of

the interim payment of R2 980 030.00 less the premiums of R250 406.19 which had been paid by Status Hotels on behalf of the defendant.

[6] The amount claimed was not repaid by the defendant, and the plaintiff thereafter, during December 2012, issued summons against the defendant under case no. 72633/2012 for repayment thereof. During April 2014, the defendant instituted action against the plaintiff under case no. 29142/2014 for payment of the amount of R10 838 763.86, being the difference between the amount of the claim it submitted and the interim payment which was made. The two cases have been consolidated in terms of a court order.

[7] The non-disclosures on which the plaintiff relied as being material as contemplated by s 53 of the Short Term Insurance Act, 53 of 1998 (the Act), and entitling it to avoid the policy, were pleaded as follows in its particulars of claim:

"*7. At the time of the conclusion of the policy, the defendant knew, but failed to disclose to the plaintiff, that:*

7.1 its previous insurer, Santam, had cancelled its previous insurance policy in respect of the property that was the subject matter of the policy due to the non-payment of premiums;

7.2 It was indebted to Nedbank in the sum of R 30 million;

7.3 It executed a mortgage bond over its immovable property in favour of Nedbank on 21 January 2008;

7.4 It was unable to discharge its indebtedness to Nedbank with the result that Nedbank instituted action against it for the recovery of the R30 million;

7.5 It concluded a settlement agreement with Nedbank on 12 June 2009 in terms of which it declared executable the immovable property at the instance of Nedbank and which settlement agreement was made an order of court on 7 July 2009;

7.6 It breached its obligations under the settlement agreement resulting in the immovable property being attached on 2 October 2010.

7.7 It was in financial difficulty, alternatively was unable to meet its debts as and when they fell due."

[8] These allegations were denied by the defendant, but when the trial commenced I was informed that the defendant admitted that the facts alleged in paragraphs 7.1 to 7.6 were not disclosed by the defendant at the time of the conclusion of the insurance contract. In respect of the allegation in paragraph 7.7, the admission was a qualified one. I was informed by Adv. Geach SC, who appeared for the defendant, that the defendant's answer to the allegation was that it was not insolvent at the time. The parties were in agreement that the only issue to be decided at this stage of the proceedings was whether the non-disclosures were

material. It was common cause that the plaintiff bore the onus to prove that they were. The *quantum* of the defendant's claim was by agreement postponed *sine die* for later determination.

[9] The test for determining whether a non-disclosure is material, is an objective one. In *Commercial Union Insurance Co of SA Ltd v Wallace NO; Santam Insurance Ltd v Affric Addressing (Pty) Ltd*[1], Nugent JA said the following[2]:

"In Oudtshoorn Municipality[3] *(supra at 435F - I), it was held by this Court that the test of materiality is an objective one, to be determined by asking, upon a consideration of the relevant facts of the particular case, 'whether or not the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums'. What is meant by that was expanded upon by Van Heerden JA in President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en 'n Ander 1989 (1) SA 208 (A), when he said the following at 216E - G:*

'(D)ie vraag (is) dus nie of na die oordeel van 'n redelike man die betrokke inligting wel die risiko beïnvloed nie, maar of dit redelikerwyse 'n effek mag hê op 'n voornemende versekeraar se besluit om al of nie die risiko te aanvaar of 'n hoër premie as die normale te verg. Anders gestel, is die toets of die redelike man sou geoordeel het dat die inligting oorgedra moes word sodat die voornemende versekeraar self tot 'n besluit kan kom. En so 'n oordeel sou hy bereik het indien die inligting na sy mening die voornemende versekeraar redelikerwyse kon beïnvloed het.'

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[1] 2004 (1) SA 326 (SCA)
[2] At para [65]
[3] 1985 (1) SA 419 (A)

[10] The objective nature of the test for materiality also appears from s 53(1)(b) of the Act, which deals with misrepresentation and failure to disclose material information. Section 53(1) provides as follows:

(1) (a) Notwithstanding anything to the contrary contained in a short-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2)-

(i) the policy shall not be invalidated;

(ii) the obligation of the short-term insurer thereunder shall not be excluded or limited; and

(iii) the obligations of the policyholder shall not be increased,

on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless 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 the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.

[11] The definition of materiality in s 53(1)(b) is effectively the same as the test formulated in *President Versekeringsmaatskappy (supra).* In *Mahadeo v Dial Direct Insurance Ltd*[4] emphasised[5] that the question

[4] 2008 (4) SA 80 (WLD)
[5] At p. 86 para [17]

whether the particular information ought to have been disclosed is judged not from the point of view of the insurer, or the insured, but from the point of view of the notional reasonable and prudent person. The test, according to Boruchowitz J, was not whether the reasonable person would have disclosed the fact in question, but whether the reasonable person would have considered that fact reasonably relevant to the risk and its assessment.[5]

[12] Section 59(1) of the Long Term Insurance Act, 52 of 1998, is in exactly the same terms as s 53(1)(b) of the Sort Term Insurance Act. Nienaber and Reinecke, *Life Insurance in South Africa,* have formulated the test for materiality as follows:

"*The test is would such a person* (i.e. the notional reasonable and prudent person)*, imbued with the common knowledge and common sense of a common consumer, believe that the non-disclosed information was essential to enable the underwriter to decide whether to accept the risk and if so, on what terms? It is a test designed to be more generous to the insured than the postulate of a reasonable underwriter since it would exclude matters (such as actuarial considerations and pricing policies) the underwriter would probably regard as important but of which the ordinary insured would be unaware.*"

[13] There are two categories of facts relating to non-disclosure on which the plaintiff relies. The first is the cancellation of the defendant's previous

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[5] Para [18] of the judgment.

Santam policy. The second is the facts surrounding the defendant's indebtedness to Nedbank.

The Santam facts

[14] The evidence of Mr. de Beer was that he instructed Mr. Steynberg of Daan Schoeman Makelaars to cancel the Santam policy after he had arranged the new insurance through Mr. Nel of Brilliant. In terms of his arrangement with Status Hotels, the operators of the lodge, they had to pay the monthly insurance premiums for the Santam policy to Daan Schoeman Makelaars before accounting to the defendant. Mr. de Beer testified that Status Hotels had not reported to him that they had failed to pay the premiums for May and June 2011, and he was therefore unaware of the non-payment when he instructed Mr. Reyneke to cancel the Santam policy. He only heard later that there had been a problem with Status Hotel's debit orders which had been dishonoured.

[15] Mr. de Beer was referred during his evidence in chief to a letter which Santam had addressed to Royal Legend Lodges, the previous operator of the lodge, on 26 May 2011. The letter refers to the fact that the latest debit order had been dishonoured by the bank, that Santam would present two debit orders at the following request for payment, but that the policy would be cancelled if a debit order was unpaid for two

consecutive months. The address to which the letter was addressed was P.O. Box 222, Wapadrand. Mr. de Beer confirmed that that was his postal address, but said that he could not recall receiving the letter.

[16] During cross-examination, Mr. de Beer was referred to a further letter which Santam had addressed to Royal Legend Lodges at the same postal address and in which they advised that the policy had been cancelled due to non-payment of the premium. The letter was dated 20 June 2011. Mr. de Beer denied receiving the letter and said that he only saw it later.

[17] Mr. de Beer was then referred to an e-mail which he had received from Mr. Steynberg on 24 June 2011 and which he had forwarded to Brilliant the same day, requesting confirmation that their insurance was in place. The e-mail of Mr Steynberg which Mr. de beer forwarded to Brilliant read: *"Ons telefoniese gesprek van 24-07*(sic)*-2011 verwys. Aangeheg die skrywe dat die versekering nou gekanselleer is."* Mr. de Beer accepted that the cancellation letter had been attached to the e-mail, but said that he received the cancellation letter *"op 'n stadium"*, and at that stage he had already cancelled the Santam policy and the new insurance policy had been in place.

[18] Mr. de Beer was then referred to a copy of a string of e-mails which had been brought to court by representatives of Santam who had been subpoenaed *duces tecum* by the plaintiff and which, according to what is reflected in the e-mails, were forwarded to Santam by Mr. Steynberg shortly before the trial on 22 July 2015. The e-mails were handed in as exhibit "B". What appears to be the same e-mail sent by Mr. Steynberg to Mr. de Beer on 24 June 2011, and which Mr. de Beer forwarded to Brilliant, contained, for a reason which was unexplained, additional information. The e-mail reads as follows:

"Ons telefoniese gesprek van 21-06-2011 verwys. Angeheg die skrywe dat die versekering nou gekanselleer is agv premies wat nie deur gegaan het nie.

Die premies was veronderstel om op die 16de van die maand deur te gaan maar daar was nie fondse op die rekening nie.

Laat weet asseblief dringend vir my wat ons nou moet doen en of daar dalk 'n ander rekening is waar die premies van kan afgaan."

[19] Mr. de Beer admitted that when he received the e-mail, he saw that the Santam policy had been cancelled due to non-payment of premiums. He said that at that stage he had already instructed Steynberg to cancel the policy. He agreed, however, that if the policy had been cancelled by Steynberg as per his instructions, the last sentence of the e-mail did not

make sense. He added that Mr. Henk Bredenoord, the CEO of Status Hotels, told him that the new insurance was in place and that they should forget about Santam and that he, Bredenoord, would handle the matter.

[20] It is clear from the aforegoing that Mr. de Beer knew by latest 24 June 2011 that the Santam policy had been cancelled due to non-payment of premiums. The Santam policy was therefore not cancelled as a result of an instruction given by Mr. de Beer to Mr. Steynberg. Mr. Nel, who was called as a witness for the defendant, confirmed that he was unaware of the non-payment of the Santam premiums when he arranged the insurance for the defendant with Risk Guard.

[21] In my view, the reasonable, prudent person would consider that the cancellation of the Santam policy due to the non-payment of premiums should have been disclosed by the defendant to enable Risk Guard to decide whether to accept the risk and if so, on what terms. The effective date of the policy issued by Risk Guard was 1 July 2011, but the policy schedule was signed by Risk Guard on 24 June 2011, which is the date on which Mr. de Beer became aware that the Santam policy had been cancelled due to non-payment of premiums. In my view, it does not make any difference if Mr. de Beer knew that the policy had been issued when he received the e-mail of 24 June 2011. The policy had not yet become effective. Once Mr. de Beer became aware that the previous

policy had been cancelled due to the non-payment of premiums, that fact should have been disclosed to Risk Guard. The evidence of Ms. Caroline Swanevelder, the head of underwriting at Risk Guard, was that she would not necessarily have declined to take on the risk, but that she would have asked questions about the non-payment of the premiums and would have required that the debit orders first go through.[7]

The Nedbank facts

[22] Mr. de Beer's evidence relating to Nedbank was that he was approached during 2007 or 2008 by two brothers with a business proposal. They persuaded him to enter into a joint venture with them, to register a covering mortgage bond for R30 million over the farm and to make the money so obtained available to their business W Capital (Pty) Ltd. to be utilized for providing bridging finance to clients. At that stage the farm was unencumbered. The R30 million was then borrowed by the defendant from Nedbank against security of a mortgage bond which was registered over the farm. Mr. de Beer stood surety for the debt. After two months, the R30 million which had been paid over to W Capital had disappeared. Mr. de Beer established that the two brothers had fraudulently bought immovable properties with the money for themselves.

[7] See *Clifford v Commercial Union Insurance Co of SA Ltd* 1998 (4) SA 150 (SCA) at 155F - G

He was advised to lay criminal charges against them, but in lieu thereof he persuaded them to transfer those properties to himself. The properties, which were situated to the West of Pretoria, were destined for township development, but a large number of squatters had in the meantime settled on the properties. Mr. de Beer resorted to litigation which culminated in the Constitutional Court which ordered the City Council to purchase the properties from Mr. de Beer.

[23] During this time, Mr. de Beer found it difficult to keep head above water. The lodge had not been completely restored and business was poor. In terms of the settlement agreement with Nedbank, the full outstanding balance of the loan (capital and interest) was payable on 31 July 2010. Nedbank attached the farm on 2 October 2010 due to non-payment of the outstanding balance of the loan. At that stage, the property was, according to Mr. de Beer's evidence, valued at R69 million. Before the property could be sold, Mr. de Beer caused the defendant to be placed under business rescue during July 2012. Towards the end of 2012, he received an offer from the owner of a neighbouring farm to purchase the defendant's farm. The offer, which he accepted, was R35 million for the immovable property and R10 million for the movable assets. The defendant was then able to settle the Nedbank debt and the business rescue of the defendant was thereafter terminated. A surplus of R10 million remained. Although the defendant was not at any stage declared

insolvent, it clearly was in serious financial difficulty at the time when the insurance contract was entered into.

[24] Adv. Chohan SC, who appeared for the plaintiff, submitted that the non-disclosure of the defendant's financial position and of the cancellation of its previous insurance policy touched on the integrity of the defendant and of Mr. de Beer, its only director and shareholder. This is commonly referred to as a moral risk or hazard, a term which generally describes circumstances personal to the insured that raise questions as to his integrity.[8] Mr. Chohan referred in this regard *inter alia* to *Van Zyl and Maritz NNO and Others v South African Special Risks Insurance Association and Others*[9] where the following was said by Kroon J[10]:

"In my judgment the present is a case where evidence as to the materiality of the information is unnecessary in that it is clearly material. I repeat that whether a man is bankrupt or not affects his whole personality. The description 'bankrupt' is applicable not only to a man who has been declared insolvent but also to a man who is in fact unable to meet his liabilities. There are, of course, additional factors applicable to an unrehabilitated insolvent, such as his inability to contract freely, but where the insured is in the desperate financial condition as that in which the Watson family was, dangers such as that the insured might institute an inflated claim under the policy or might not take proper and reasonable steps to protect the property insured from any loss insured against, or might even himself deliberately cause damage to the property are, as in the case of the declared insolvent, just as real."

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[8] See *Commercial Union Insurance Co of SA Ltd v Wallace NO* 2004 (1) SA 326 (SCA) para [64]
[9] 1995 (2) SA 331 (SE)
[10] At 361E/F – G/H

[25] In my view, a reasonable and prudent person would consider that the defendant's financial position should have been disclosed by the defendant to enable Risk Guard to decide whether to accept the risk and, if so, on what terms. Even if the possibility of fraud being committed by deliberate damage being caused to the property is disregarded, the defendant's ability to properly maintain the property, which is not necessarily a moral risk relating to the defendant's integrity, is something which a reasonable person would consider to be important for an insurer to know when deciding whether or not to accept the risk.

Conclusion

[26] For the above reasons, I conclude that the Santam facts and the Nedbank facts were material facts which should have been disclosed by the defendant, and that the plaintiff was accordingly entitled to avoid the policy.

[27] In the result, I grant the following orders:

(a) In case no. 72663/2012, the defendant is ordered –

(i) to pay to the plaintiff the sum of R2 729 623.90 together with interest at the rate of 15,5% *per*

annum from date of service of the summons to date of payment.

(ii) to pay the plaintiff's costs of suit.

(b) In case no. 29142/2014, the plaintiff's claim is dismissed with costs.

Counsel for RMB Structured Insurance Ltd: Adv. M A Chohan SC

Instructed by: Norton Rose Fulbright South Africa Inc

Counsel for Danresa Boerdery (Pty) Ltd: Adv B P Geach SC

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