IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No.: 04/31731

In the matter between:

ANDREW JOHN MILES HOLLELY Plaintiff

and

AUTO & GENERAL INSURANCE COMPANY LMITED Defendant

MEYER, AJ:

[1] This litigation stems from a collision that occurred on 22 October 2004, wherein the plaintiff's Opel Astra motor vehicle was damaged beyond economical repair and the subsequent avoidance by the defendant of the plaintiff's claim under a policy of comprehensive motor vehicle insurance to be compensated for such damages.

[2] The parties agreed on the issues in dispute that require adjudication before me. Application was made that such issues be decided before and separately from the issue of *quantum*. I ordered such separation.

[3] The parties also agreed on a written set of common cause facts, which were made part of the record of the proceedings. The defendant commenced and proceeded to call one witness, Mr Riaan Pretorius ("Pretorius"), who is employed by the defendant as its business manager for the Johannesburg region. The plaintiff testified and called no other witnesses. The facts of this matter are largely common cause.

[4] The main issue is whether the defendant was entitled to avoid or to repudiate the plaintiff's claim for compensation under the policy by virtue of the fact that the plaintiff failed to disclose that he had been involved in a motor vehicle collision on 22 August 2003.

[5] The fact that such information was not disclosed in itself does not justify the repudiation of the plaintiff's claim. The defendant bears the onus of proving that the test for materiality as enacted in the amended section 53(1) of the Short-Term Insurance Act 53 of 1998 ("the Short-Term Insurance Act"), was satisfied. This section and the corresponding amended section 59(1) of the Long-Term Insurance Act 52 of 1998 ("the Long-Term Insurance Act"), must be seen within their historic context, which commenced when section 63(3) was added to the repealed Insurance Act 27 of 1943 ("the Insurance Act"). The Long-Term Insurance Act commenced on 1 January 1999, when it repealed the Insurance Act. The Short-Term Insurance Act also commenced on 1 January 1999. Their corresponding sections 59(1) and 53(1) were identical except than for their

respective references to long-term and short-term policies and insurers. Sections 19 and 35 of the Insurance Amendment Act 17 of 2003, which Act commenced on 1 August 2003, amended section 59 of the Long-Term Insurance Act and section 53 of the Short-Term Insurance Act. These amended sections are presently in force and they remain identical except also for their respective references to long-term and short-term policies and insurers.

[6] Section 63(3) of the repealed Insurance Act reads:

"(3) Notwithstanding anything to the contrary contained in any domestic policy or any document relating to such policy, any such policy issued before or after the commencement of this Act, shall not be invalidated and the obligation of an insurer thereunder shall not be excluded or limited and the obligations of the owner thereof shall not be increased, 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 or any reinstatement or renewal thereof."

[7] The Supreme Court of Appeal has, in a number of cases, explained the purpose and object of section 63(3):

In *SA Eagle Insurance Co Ltd v Norman Welthagen Investments (Pty) Ltd 1994 (2) SA 122 (A)*, Nestadt JA, at p124, said:

"The amendment must be seen against the background of the common-law rule that a warranty, being an essential or material term, must be strictly complied with; that if it is breached, the insurer is entitled to repudiate the claim whether or not the undertaking is material to the risk and even if non-compliance has no bearing on the actual loss that takes place (Gordon and Getz *The South African Law of Insurance* 4th ed at 218)."

In *Qilingele v South African Mutual Life Assurance Society 1993 (1) SA 69 (A)*, Kriegler AJA, at p74B, said:

"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."

In *Clifford v Commercial Union Insurance Co of SA Ltd 1998 (4) SA 150 (SCA)*, Schutz JA, at p 157D – E, said:

"To my mind its purpose was simply to detoxify the warranty by removing its potential for abuse, without outlawing its legitimate use. In other words, materiality would regain its true meaning and that meaning would be protected from being stifled by contract."

[8] In *Qilingele* a distinction was made between the test for materiality in cases where the ground for repudiation is a breach of the common law duty to disclose material facts, and the test in cases where the ground for repudiation is

a misrepresentation. Section 63(3) was held to apply only to cases of misrepresentation, and the test as laid down in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 (A)* and explained in *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en 'n Ander 1989 (1) SA 208 (A)* was held to apply to cases of non-disclosure [see also *Theron v AA Life Assurance Association Ltd 1995 (4) SA 361 (A)* at p 376 C – I]. The requirement of a representation was considered central to the operation of section 63(3) [see the *Norman Welthagen Investments* case, at pp 125H – 126G, where Nestadt JA also explained the meaning of this requirement].

[9] The test for materiality where section 63(3) applied was formulated as follows:

"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." [per Kriegler AJA, at p 75C – H, in the *Qilingile* case. Also see the *Theron* case at p 376 C – I].

[10] The common law principles applicable to non-disclosures remained unaffected by section 63(3) and were thus formulated by Joubert JA in the *Oudtshoorn Municipality* case at p432E – F:

"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 or 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."

And at p435F – I the learned Judge of Appeal said:

"It is implicit in the Roman-Dutch authorities and also in accordance with the general principles of our law that the Court applies the *reasonable man test* by deciding 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. If the answer is in the affirmative, the undisclosed information or facts are material. The Court personifies the hypothetical *diligens paterfamilias* ie the reasonable man or the average prudent person. (*Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) at 410H – 411D). The Court does not in applying this test judge the issue of materiality from the point of view of a reasonable insurer.

Nor is it judged from the point of view of a reasonable insured. The Court judges it objectively from the point of view of the average prudent person or reasonable man. This reasonable man test is fair and just to both insurer and insured inasmuch as it does not give preference to one of them over the other. Both of them are treated on a par."

[11] The common law principles applicable to non-disclosures were explained by Van Heerden JA in *President Versekeringsmaatskappy*, at 216D – G, as follows:

"(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. " [See also *Certain Underwriters of Lloyds of London v Harrison 2004 (2) SA 446 (SCA)*, at p 449B – C and at pp 451J – 452C].

[12] In the *Clifford* case, Schutz JA criticized the distinction between non-disclosures and misstatements and the application of a subjective test for materiality when applying section 63(3), as opposed to the application of the objective common-law test for materiality in cases of non-disclosures, and, at pp 158J – 159B, he suggested that

"… if Qilingele is to stand, the Legislature should consider putting right not merely a discordancy, but even a serious inequity, which was initiated by imprecise legislation. The extreme results to which a subjective assessment of materiality may lead may be demonstrated by means of an example. Postulate an underwriter who, on finding that a car which was warranted as green is actually blue, claims, honestly and sincerely, hard though that may be to believe, that he would not have insured it had he known the truth, because blue cars are unlucky. Unless some way can be found, which I cannot immediately perceive, to avoid the remedial s 63(3) leading to such a result, it seems to me that his repudiation would have to stand."

[13] Before its amendment, section 53(1) of the Short Term Insurance Act read as follows:

"(1) (a) Notwithstanding anything to the contrary contained in a short-term policy contained, 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, whether or not the representation has been warranted to be true, unless that representation 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 variation thereof."

[14] In *Joubert v ABSA Life Ltd 2001 (2) SA 322 (W)*, Kuny AJ, at p 326 F, correctly in my view, held that "[a]part from minor differences, there are no material amendments or variations in the new section and the authorities relating to the old s 63(3) would therefore apply equally to the new provision." The conclusion he reached, at p 327G-H, was "…that Qilingele remains the applicable and binding authority on the question of the proper interpretation and application of s 63(3) of the Insurance Act 27 of 1943 and, a fortiori, of s 59(1) of the Long-Term Insurance Act which came into force on 1 January 1999."

[15] Since 1 August 2003, the amended section 53(1) of the Short-term Insurance Act reads 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.

[I have underlined the amendments introduced into this section].

[16] The amended sections 53(1) and 59(1) eliminate the continuance of the different materiality tests in cases of non-disclosures and untrue representations. These sections now apply to both situations through their express references also to non-disclosure of information. The common law test, as laid down in the *Oudtshoorn Municipality* case and explained in the *President Versekeringsmaatskappy* case, is expressly enacted for determining the materiality of untrue representations and of non-disclosures of information.

[17] The defendant *in casu* issued a policy of comprehensive motor vehicle insurance to the plaintiff on 1 September 2004. In terms of the policy the defendant undertook to indemnify the plaintiff in the event that his Opel motor vehicle was lost or stolen or damaged. The monthly premium payable by the plaintiff was R494.23. The plaintiff's fiancée, Ms Shelly Anne Smith ("Smith"), represented the plaintiff in concluding the agreement of insurance with the defendant in two telephone conversations between her and the defendant's representative, Mr Neil Subban ("Subban"), on 5 August 2004 and on 10 August 2004, prior to the issuing of the policy.

[18] During the telephone conversation on 5 August 2004, Smith informed Subban that the plaintiff was twenty seven years old and that he had had uninterrupted comprehensive motor vehicle insurance since he was eighteen years old. In answer to a question whether he had claimed for any accidents or stolen vehicles during that period, Smith answered *"[n]o, not at all."* During the telephone conversation on 10 August 2004, Subban asked Smith whether the plaintiff has had any vehicle claims in the last two years and whether he had had any accidents or losses not claimed for such period, and her reply to each question was in the negative. The policy expressly provides that the answers provided by the plaintiff, or on his behalf, to questions posed by the defendant allowed the defendant to work out the payment and to decide if it could accept the risk of the policy or not, and that if the declarations made were not entirely true or correct, the defendant may invalidate the cover. The declarations recorded in the policy included the following: *"Claims submitted/losses suffered in the past 2 years for the regular driver and spouse: None declared."*

[19] On 22 October 2004, the plaintiff's Opel motor vehicle was damaged beyond economical repair when it was involved in a collision. The plaintiff's claim to be indemnified under the policy was declined by the defendant and it further avoided the policy. The defendant also refunded to the plaintiff the premiums paid.

[20] The duty of disclosure relates to material facts of which the parties had actual or constructive knowledge prior to the conclusion of the contract of insurance [see the *Oudtshoorn Municipality* case at p 432 E – F; and the *Certain Underwriters of Lloyds of London* case at p 449, par 4]. It is common cause between the parties that the plaintiff's fiancée, who acted on his behalf, misstated the true facts and failed to disclose to the defendant that the plaintiff had been involved in a previous motor vehicle collision on 22 August 2003. The plaintiff conceded under cross-examination that the answers in the negative given by his fiancée in reply to the defendant's questions whether he had claimed for any accidents or stolen vehicles during the time that he had had insurance and whether he had had any vehicle claims in the last two years were incorrect. The plaintiff also testified about the previous collision in which he was involved on 22 August 2003. While he had stopped at a yield sign to allow for traffic to pass so that he could enter Hans Strijdom Drive in Randburg, another motor vehicle had collided into the rear of his motor vehicle. A claim in respect of that collision had been submitted to Santam Insurance. It is also probable, in my view, that the plaintiff's fiancée was also well aware of the plaintiff's prior collision and insurance claim, particularly in the absence of any contrary explanation by her. Under cross-examination, the plaintiff volunteered the following answer: *"I presume she forgot about it."* The stance adopted by the plaintiff's counsel when cross-examining the defendant's witness and that of the plaintiff himself when he was cross-examined, was rather that the information relating to his previous

collision and insurance claim was not material since that collision was not caused as a result of any fault on the part of the plaintiff.

[21] I am of the view that a reasonable prudent person would consider that the information relating to the plaintiff's previous collision and insurance claim should have been disclosed or truly represented to an insurer so that the insurer could form its own view as to the effect of such information on the assessment of the premium. He or she would have considered that such information is material to the decision whether or not to grant a premium discount in the form of a no claim bonus and the extent of such discount on the standard premiums to be charged in the event of a contract of insurance being concluded. He or she would not have considered such information only to have been a relevant factor and of importance to an insurer if the previous collision was caused as result of fault on his or her part. The pre-contractual questions posed and the recorded declaration also did not refer to fault in any way, but merely pertain to the period of uninterrupted insurance cover, the involvement in accidents, losses suffered, and previous claims submitted.

[22] Leaving aside the express provisions of the policy concerning the potential consequences of untrue and incorrect answers and whether such provisions *in casu* relieve the defendant of having to prove inducement [see the *Clifford* case at p 156G – 157G], the evidence, in my view, establishes that the non-disclosure of the plaintiff's previous collision and insurance claim, or the misstatement

thereof, had the effect of inducing the defendant to take on the risk at a much lower premium. Pretorius, who was called by the defendant as an expert witness, was not the underwriter who attended to the assessment in issue, but his evidence essentially related to the general conditions affecting the assessment of the kind of risk in issue and the determination by the defendant of the applicable premium. He testified that the insurance premiums offered by the defendant are prescribed in accordance with the defendant's standard tariffs or tables. If a client qualifies for what is called a *"no claim bonus"*, a prescribed discount on the defendant's premiums is offered. Comprehensive motor vehicle insurance was offered to the plaintiff at a monthly premium of R494.23, which premium included a premium discount in accordance with the allocation of a seven year no claim bonus based on the representation that the plaintiff had uninterrupted insurance cover for seven years without any claim. Had the plaintiff revealed his previous claim, the defendant would nevertheless have offered the comprehensive motor vehicle insurance to the plaintiff at its standard applicable premium, but the plaintiff would only have qualified for a premium discount in accordance with the allocation of a one year no claim bonus. Such would have resulted in a monthly premium of R726.38. According to Pretorius, the defendant only takes previous claims into account in the award of no claim bonuses and not the culpability of those involved in the collisions or incidents giving rise to previous claims. In this regard he testified that *"…it is not a no blame bonus, but a no claim bonus."* It has accordingly, in my view, not been established that the material non-disclosure or misrepresentation relating to the

plaintiff's previous collision and insurance claim had no effect. The defendant was thereby induced to take on the risk at a substantially reduced premium.

[23] The defendant's repudiation of liability is accordingly upheld and the agreed issue should accordingly be decided in its favour.

[24] In the result I make the following order:

The plaintiff's action is dismissed with costs.

P.A. MEYER AJ
ACTING JUDGE OF THE HIGH COURT

Date of Trial:	4 May 2007
Judgment delivered:	1 October 2007
Plaintiff's Attorneys of Record:	Levin Van Zyl Inc Randburg Tel: 011 886 0915
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