REPORTABLE
IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

Case Number: A5030/2010

Case Number in Court *a quo*: 2008/16953

DATE: 25/10/2010

In the matter between:

DONN ETTIENE BRUWER Appellant

and

NOVA RISK PARTNERS LIMITED Respondent

JUDGMENT

C. J. CLAASSEN J:

[1] This is an appeal against the judgment handed down by Mathopo J in this court on 28 October 2009. What is surprising is that the record does not disclose whether leave to appeal has been granted, either by the court *a quo* or the Supreme Court of Appeal. It will be assumed that appropriate leave to appeal was obtained until the contrary has been established.

[2] At the outset of the hearing of this appeal, condonation for the late filing of the appellant's heads of argument was granted without opposition from the respondent.

[3] This case concerns a claim for indemnification by an insured in terms of an insurance policy which was repudiated by the insurer. The insured is the appellant and the insurer is the respondent. The case started out as an application launched by the appellant against the respondent for an order to indemnify the appellant for damages suffered together with an order for costs on an attorney and client scale. This matter came before Lamont J who referred the matter to trial due to various disputes which could not be resolved on the papers. Lamont J referred the matter to trial ordering the appellant to file a declaration where after normal pleadings followed. Ultimately the matter came before Mathopo J on trial.

[4] Mathopo J held that the appellant failed to disclose certain material information entitling the respondent to void the policy as a result whereof the respondent's repudiation of liability was upheld and the appellant's action was dismissed with costs. It is against this order which the appellant now appeals. For the sake of convenience the parties will be referred to as they were known in the trial before Mathopo J i.e. the appellant was the plaintiff and the respondent was the defendant.

BACKGROUND FACTS

[5] Initially the plaintiff was comprehensively insured by SA Eagle Insurance Company against any damage to his motor vehicle. His portfolio with SA Eagle was taken over by the defendant, during 2003. While still insured by SA Eagle, the plaintiff was involved in two motor collisions, one during 1994 for which he was charged but acquitted and one during 1997 for which no prosecution ensued due to a *nolle prosequi*.[1]

[1] See Evidence of Bruwer Record p 268 line 15 to p 271 line 8; Evidence of Stodart Record p 384 line 17 to Record p 386 line 4.

[6] The insurance policy in the instant case between the plaintiff and the defendant took effect on 1 November 2003. [2] The annual anniversary date of this policy was 31 October 2004 and was subject to a monthly premium of R1551.40. In exchange for the premium the defendant insured the plaintiff against damage, liability or injury as set out therein. The indemnity covered the insurance of the plaintiff's motor vehicle being a Fiat Palio. The policy consisted of a booklet and a schedule attached thereto. It stipulated that words printed in italics were only intended for explanation purposes. [3] The further provisions of the policy relevant to the present dispute, are the following:

> "**SECTION 5 – GENERAL CONDITIONS**
>
> **3. Claims**
> If anything happens that could result in a claim
> 3.1 you must:-
> 3.1.6 not, under any circumstances, make any admission, statement or offer to any other party or do anything that would be tantamount to that in connection with any event that may give rise to a claim against you, without the Company's written consent;
> 3.1.7 immediately advise the Company as soon as you become aware of any possible prosecution or inquest.
> …
>
> **6. Disclosure**
> You must inform the Company of all facts that are material to the acceptance of the insurance or the premium that is charged. If you fail to do this, the Company may, at its option, declare this policy void. As this also applies during the currency of this policy, any changes must be reported immediately.
> (*It is therefore important for you to disclose all material facts that may be of relevance to the Company*.)"

The "First Accident" on 29/09/2006

[7] On 29 September 2006 the plaintiff was involved in a motor collision while driving his Mazda 4X4 vehicle. He reported the details of this collision in a "MOTOR CLAIM FORM" completed on the same day. This form indicated that he reported the incident to the Muldersdrift police station under case number 425/09/06. He completed the form in

[2] See Record p 21 Annexure DEB002, p 70 Annexure C and p 167 Annexure POC2.
[3] See Record p 13 Annexure DEB001 and p 159 Annexure POC1.

respect of the place where and the manner in which the collision occurred by stating that it occurred in Hendrik Potgieter Drive, Krugersdorp and: --

> "I misjudged the speed with which the car in front of me stopped as I was looking in my mirror to see if there were cars behind me and I bumped the other vehicle."

The form also indicated that he reported that he was tested for alcohol. He signed the document on 13 October 2006.[4] I will refer to this accident as "the First Accident".

[8] The plaintiff was subsequently charged with reckless/negligent driving.[5] The evidence disclosed some disputes between the two witnesses testifying for the defendant namely Ms Orgina Willemina Stodart and Mr Mike de Kock as to when notification was given to the defendant of this impending prosecution. What is, however, beyond doubt is that Stodart informed the plaintiff on 31 May 2007 in an e-mail that De Kock, the defendant's assessor/investigator, would accompany plaintiff to court for the trial set for 14 June 2007. [6] This e-mail confirms that there was a discussion between the plaintiff and "Mike". [7] It was also copied to Mr Hennie Naude of M & S Loss Adjusters who acted on behalf of the defendant on the instructions of Stodart. De Kock did not, however, accompany him to court on 14 June. In any event, the case was postponed to a date in October 2007. De Kock testified that as a matter of norm, he would not accompany a client to a court hearing as "he had nothing to do there".

[9] Stodart admitted that she was aware of the fact that the plaintiff was being charged with reckless/negligent driving and driving under the

---

[4] See Annexure RA4, Record pp 140 – 142 and Exhibit A15 – A17, Record pp 428 – 430.
[5] See Exhibit A20, Record p 432.
[6] See Annexure A18, Record p 431.
[7] See Exhibit A18, Record p 431.

influence of liquor. [8] Stodart testified that she was told by De Kock that there was a prosecution in regard to the first accident when she appointed him in October 2006. [9]This must be so because it was common cause that she appointed De Kock to investigate this first accident. The plaintiff testified that he was told by Stodart to speak to De Kock. He further testified that he told De Kock that he was going to plead guilty to the charges. De Kock denied being told this by plaintiff.

[10] On 22 August 2007, Stodart attempted to obtain the results of tests done on plaintiff for his blood alcohol count from a certain Maryanne of the Legal Office at Santam Insurance Company.[10] It is not clear from the evidence whether or not she was successful in this endeavour. Be that as it may, it is beyond question that Stodart was aware that plaintiff was also being prosecuted for drunk driving.

[11] On 15 October 2007 the plaintiff was convicted of negligent driving and on 24 October 2007 was sentenced to a fine of R8 000.00 or six months' imprisonment wholly suspended for five years on condition that he was not convicted of reckless/negligent driving committed during the period of suspension. His driver's licence was also endorsed. [11]

[12] On 23 October 2007 Stodart sent an e-mail to De Kock asking for urgent clarification in regard to the outcome of the criminal case against the plaintiff. [12] In reply to this e-mail De Kock responded in an e-mail to Stodart dated 20 November 2007, wherein he stated that he was finalising his report. This e-mail contained a note in manuscript stating:

> "24/10/2007 Skuldig
> Reckless & neg.
> R8000-00 of 6 months.

[8] See Record p 305 lines 19 – 21.
[9] See Record p 365 lines 11 – 18.
[10] See Exhibit A140, Record p 476.
[11] See Exhibit A42, Record p 443.
[12] See Exhibit A23, Record p 433.

Drunk Driving. charged not guilty." [13]

The "Second Accident" on 17/01/2008

[13] The "Second Accident" which forms the subject of the present claim occurred on 17 January 2008. In this accident plaintiff was the driver of his Fiat Palio vehicle which was insured by the defendant. Plaintiff completed a "MOTOR CLAIM FORM" in regard to this accident on 21 January 2008. [14] Also on 21 January 2008 the Fiat Palio was declared uneconomical to repair by Ger-Matic CC. [15] It is common cause that on 22 January 2008 the motor claim form was submitted by the plaintiff to Mr. Hennie Naude of the defendant's Loss Adjusters. [16]

[14] On 21 February 2008 Stodart addressed a letter to the plaintiff marked "Without Prejudice", stating that the defendant was of the view that there was sufficient information to indicate that the second accident was attributable to the plaintiff having driven while under the influence of liquor and for that reason the claim was repudiated (the "First Repudiation"). [17] The next day and on 22 February 2008, the defendant gave the plaintiff thirty days notice of its intention to terminate the policy as from 22 March 2008. [18]

[15] In a letter dated 18 March 2008, Centriq Insurance Innovation, owners of the defendant, wrote to the plaintiff attaching several documents, amongst others the warrant issued by the Krugersdorp Traffic Court confirming the plaintiff's conviction and sentence in regard to the first accident.[19] This would indicate that at least by 18 March 2008 the defendant and/or its parent company, was aware of the conviction and

[13] See Exhibit A25, Record p 434.
[14] See Exhibit A26, Record p 435.
[15] See Exhibit A29, Record p 437.
[16] See Exhibit A30, Record p 438.
[17] See Exhibit A33, Record p 439.
[18] See Exhibit A34, Record p 440.
[19] See Exhibit A41, Record p 442.

sentence on the first accident which occurred in October 2007. In response hereto the plaintiff wrote an e-mail on 27 March 2008 to the defendant requesting a copy of the assessor's report which alleged that he was under the influence of liquor. [20] In an e-mail four days later dated 31 March 2008, the plaintiff again requested Stodart for information as to why his claim was repudiated. In this regard the e-mail states the following:

> "The above and your e-mail dated 11 March 2008 refers.
>
> I have not heard anything from Mike relating to my last claim. **It is now more than two months later.** I have contacted him and he said he will revert to me regarding a meeting, but he has not. I also do not know why he wishes to meet with me as **I have provided you with all the requested information**.
>
> You will appreciate that I am paying my monthly instalments on the vehicle, whilst I do not have the use of same and that same is frustrating as it would seem that you have done nothing to date to sort my claim out.
>
> Should this matter not be sorted out within five days after date hereof, I will approach the Ombudsman for his advise (sic) **or I will seek legal advise** (sic)." [21] (Emphasis added)

The very next day on 1 April, the plaintiff received a response from De Kock wherein he states the following:

> "I have again tried to phone you today. Your landline number diverts and then goes dead and your cell number remains engaged.
>
> The same applies to previous attempts.
>
> Please contact me regarding your claim." [22]

It appears that the plaintiff was in Cape Town at that time and did not respond immediately as a result whereof De Kock again sent him an e-mail on 4 April 2008 wherein the following was stated:

---

[20] See Exhibit A91, Record p 455.
[21] See Exhibit A92, Record p 456.
[22] See Exhibit A93, Record p 457.

> "Please will you contact me regarding your claim. I need to see you regarding the claim as a matter of urgency." [23]

[16] Nothing further of note transpired between the parties as a result whereof the plaintiff proceeded to act upon his threat mentioned in his email of 31 March. He instituted the application on 5 June 2008 for the relief referred to above. After the institution of the application the plaintiff was requested by the respondent's attorneys of record to supply it with information by filling in a questionnaire consisting of some nine pages of questions. The plaintiff refused to do so as litigation between the parties had already commenced. [24]

[17] On 20 August 2008 (two and a half months after the application was launched) Stodart, as claims manager, wrote a letter to the plaintiff (the "Second Repudiation") marked "Without Prejudice", wherein the following was stated:

> "In the view of the circumstances surrounding this incident we referred this claim to our principals, Nova Risk Partners.
>
> Accordingly, and without derogating from any other rights they may have, as you have **failed to submit any documentation** or **comply with our reasonable requests for information and documentation** relevant to the claim and you furthermore **failed to disclose material information** relating to your **conviction and suspension of your driver's licence** in terms of section 63(1) of Act 93 of 1996, we are instructed to inform you that they are denying liability in terms of:
>
> Section 5 – General Conditions
>
> 1. The Company will be relieved of all liability if any person or entity claiming any benefit under this policy fails to comply with its conditions.
>
> 3.1.3 as soon as possible, give the Company written details of the event and if applicable, a detailed statement of the claim
>
> 3.1.5 give the Company any proofs or statements or information which it may require and any communication received from other parties.

[23] See Exhibit A94, Record – 458.
[24] See Evidence of Bruwer, Record pp 276 line 14 – 278 line 4.

> 6. Disclosure: You must inform the Company of all facts that are material to the acceptance of insurance or the premium that is charged. If you fail to do this, the Company may, at its option, declare this policy void. As this also applies during the currency of this policy, any changes must be reported as soon as possible. (It is therefore important for you to disclose all material facts that may be of relevance to the Company).
>
> We regret to inform you that your claim is therefore repudiated, and you will be held liable for the towing, storage and release fees on the 2005 Fiat Palio 1.2 EL.
> ....."[25]

[18] It would appear that the towing and storage charges amounted to R14 802. 90. [26]

THE ISSUES IN DISPUTE

[19] In its amended plea the defendant denied that the plaintiff complied with all its contractual obligations in terms of the policy and in particular in regard to the following:

> "6.2.1 Failing to disclose to the Defendant a material fact relating to the risk; namely that his driver's licence had been endorsed as a result of a criminal conviction; and/or
>
> 6.2.2 Failing to disclose to the Defendant a material fact relating to the risk; namely that he had been convicted of reckless and negligent driving; and/or
>
> 6.2.3 Failing to immediately advise the Defendant of any possible prosecution or inquest; and/or
>
> 6.2.4 Failing to give the Defendant any proofs or statements or information which the Defendant required to investigate the accident; and/or
>
> 6.2.5 Failing to inform the Defendant of all facts that are material to the acceptance of the insurance or the premium that is charged." [27]

[20] The parties agreed in their pre-trial conference that the defendant bore the *onus* to prove the aforesaid defences and that the plaintiff bore the

[25] See Exhibit A117, Record p 474. It would appear that this letter constitutes the second repudiation of the claim by the defendant after it was first repudiated on 21 February 2008 based on the plaintiff's alleged driving under the influence of intoxicating liquor.
[26] See Exhibit A150, Record p 478.
[27] See Defendant's Amended Plea, paragraph 6, Record p 147-5

onus to prove his claim. They further agreed the documents contained in the bundle were what they purported to be without admitting the truth or correctness thereof and that copies of documents may be used unless the originals were called for. [28]

THE JUDGMENT OF THE COURT *A QUO*

[21] The court *a quo* dismissed plaintiff's claim based on two main grounds: (i) a breach by plaintiff of material non-disclosure; and (ii) a breach of clause 3.1.6. The court found that the defendant succeeded in proving a non-disclosure as set out in paragraphs 6.2.1, 6.2.2 and 6.2.5 of the defendant's plea. The court found that the plaintiff's failure to (i) inform the defendant of the fact that his driver's licence had been endorsed; and (ii) that he was convicted of negligent driving; and (iii) inform the defendant of all material facts affecting the acceptance of the insurance risk and/or the premium that is to be charged, were proved entitling the defendant to void the policy and repudiate the plaintiff's claim in regard to the second accident. In coming to this conclusion the court *a quo* relied only on the contents of clause 6 of the policy. [29] No reference was made to the contents of clause 3.1.7 which obliges the plaintiff to advise the defendant as soon as he became aware "of any possible prosecution or inquest." The court *a quo* did not seek to interpret the impact of this latter clause on the generality of the clause 6 obligation to disclose material facts.

[22] In coming to a conclusion that there was a material non-disclosure on the part of the plaintiff, the court *a quo* held as follows:

> "[32] A conviction of negligent driving together with a heavy fine and the endorsement of a silence (sic 'licence') is an indication of the seriousness of the matter, which was a material fact which should

[28] See Record pp 190 – 191.
[29] See paragraph [22] of the judgment at Record pp 212 and 213.

have been disclosed and failure to do so amounts to a material breach justifying repudiation.

[33] I agree with the defendant that a conviction of negligent driving which if (sic, 'is') disclosed would assist the insurer to reassess whether it should remain on risk and if so on what terms (i.e. whether the premiums are to the (sic 'be') increased or not).

[36] I have no doubt that there was a duty on the plaintiff to disclose the conviction and sentence because such facts were actually known to him. His failure to disclose amounts to lack of good faith.

[38] A criminal conviction of negligent driving is much more serious than a pending case as it may be an indication of carelessness on the part of the insured especially when the court has imposed a fine and endorsed the insured's license. There is no reason why the insurer would not have reassessed the risk and adjusted the premiums charged in accordance with the plaintiff's new driving record." [30]

[23] In addition the court *a quo* found that the plaintiff's claim should be dismissed on his alleged contravention of clause 3.1.6 of the policy. In this regard the court *a quo* found as follows:

"[39] I further agree with the defendant's counsel's submissions that in terms of clause 3.1.6 of the agreement, the plaintiff was obliged to *'Not, under any circumstances, make any admission, statement or offer to any other party or do anything that would be tantamount to that in connection with any event that may rise to a claim against you, without the company's written consent'* (My emphasis) Notwithstanding this fact, the plaintiff proceeded to plead guilty on a charge of negligent driving without the written consent of the defendant. On this basis alone, I would also dismiss the action" [31]

[24] In my view, the second ground upon which the court *a quo* dismissed the plaintiff's claim, constituted a misdirection. No reliance on a contravention of clause 3.1.6 of the policy agreement was relied upon by the defendant (i) in its plea; nor (ii) in evidence tendered on behalf of the defendant by Stodart and De Kock; nor (iii) as grounds for repudiation in the two letters of repudiation. The relevance of clause 3.1.6 was raised for the first time in argument after the close of the parties' respective cases. No request on behalf of the defendant was made to amend its plea to incorporate the aforesaid alleged contravention of

[30] See Judgment, Record pp 218 – 220
[31] See Judgment, Record p 220

clause 3.1.6 as an additional ground for repudiating the plaintiff's claim. However, even if the defendant attempted to do so, such amendment should not have been entertained purely on the basis that it was never traversed during the evidence tendered before court. The court *a quo*'s dismissal of the plaintiff's claim on this ground, cannot, therefore, stand.

THE LAW

[25] In order to adjudicate the parties' respective contentions regarding their rights and duties flowing from the insurance agreement, it is trite that the agreement will first have to be properly interpreted and construed. Interpretation is aimed at determining the common intention of the parties as expressed in the terms of the contract. This has been called "the general rule" or "the golden rule" of interpretation. [32] The "golden rule" of interpreting contracts, equally applies to the interpretation of insurance contracts. Interpretation is the process by which the exact content and meaning of the terms of a contract are determined. The interpretation of a contract of insurance is not a matter peculiar to insurance. [33] An insurance policy and the other documents making up the insurance contract are therefore generally interpreted according to the ordinary rules of interpretation applicable to contracts in general. [34]

[26] The interpretation of contracts is a question of law. [35] Consequently, it is for the court to construe the contract between the parties according to the applicable legal principles and in this the views of technical experts and/or witnesses for either party are not conclusive.[36] Even where the

[32] See **Joubert v Enslin** 1910 AD 6 at 37; **Jonnes v Anglo-African Shipping Co Ltd** 1972 (2) SA 827 (A) at 834; **Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd** 1980 (1) SA 796 (A) at 804; Reinecke, Van der Merwe, Van Niekerk en Havenga "General Principles of Insurance Law" paragraph 216 – 220.
[33] See **Silverstone v North British and Mercantile Insurance Co** 1907 ORC 73.
[34] See **Fedgen Insurance Ltd v Luyds** 1995 (3) SA 33 (A) at 38A
[35] See **Marine and Trade Insurance Co Ltd v Van Heerden** 1977 (3) SA 553 (A) at 558F; **Blackshaws (Pty) Ltd v Constantia Insurance Co Ltd** 1983 (1) SA 120 (A) at 126F
[36] See **Ameen v SA Eagle Insurance Co Ltd** 1997 (1) SA 628 (D) at 631D

words and/or phrase to be interpreted are not linked to any specific jurisdiction, a comparative approach commends itself and would be persuasive especially in the absence of any clear local authority. [37]

[27] Some rules of interpretation are always applied: The rule that words should be accorded their ordinary grammatical meaning; the rule that words should be read in the context of the contract as a whole; and the rule that every word should, if possible, receive effect. These are regarded as the primary rules of interpretation. Some of the "residual" or secondary rules are applied almost as a matter of course such as the rule favouring the validity of the contract. Just as the presence of every word or phrase in the contract is relevant to its interpretation, so too may the **absence** of certain words, phrases or provisions from the contract be relevant in its interpretation and to ascertain what the parties intended those words, phrases or provisions which do appear in it, to mean.[38] In my view this rule is particularly apposite in the construction of clause 3.1.7 in the present case. Another way of stating this rule is *expressio unius est exclusio alterius*, which means that if a document contains a special reference to a **particular thing**, it is *prima facie* assumed that the parties intended to exclude everything else, even that which would have been implied in the circumstances had it not been for the special reference.[39] This assumption has been called not so much a rule of interpretation but rather a principle of common sense which may serve as a guide in determining the intention of the parties to a document which has been imperfectly expressed. [40]

[28] In regard to insurance contracts, it has been authoritatively held that clauses which limit or exclude an insurer's obligation to render

[37] See **Sikweyiya v Aegis Insurance Co Ltd** 1995 (4) SA 143 (E)
[38] See **Concord Insurance Co Ltd v Oelofsen** 1992 (4) SA 669 (A) at 674D – G; Reinecke *et al supra* at paragraph 224
[39] See Wessels *Contract* paragraph 1950; **R v Vlotman** 1912 AD 136 at 141; **Cargo Africa CC v Gilby's Distillers and Vintners** 1996 (2) SA 324 (C) at 329I.
[40] See **Poynton v Cran** 1910 AD 205 at 222; Reinecke *et al* at paragraph 232.

performance to the insured and which are expressed in vague or ambiguous language should be strictly interpreted. The reason given is that because the insurer usually drafts the policy which contains its promise to the insured as well as any limitations on that promise, it is its duty to make clear and spell out plainly the limitations it wishes to impose and the risks it wishes to exclude. [41] As will be indicated herein later, I am of the view that this particular rule of interpretation finds application in the proper construction of the insurance agreement in the present case.

[29] Finally the courts have also formulated a rule that a contract of insurance should be construed in favour of the insured rather than the insurer where an ambiguity arises on the face of the policy. [42] This rule has been justified simply by saying that an insured's claim for indemnity should not be defeated and that a policy should be upheld in favour of the insured and not be forfeited. [43] This rule is often used in conjunction with the rule that limitations on or exceptions to the insurer's obligation must be interpreted strictly and therefore in favour of the insured. [44] This rule will also be of assistance in the present case.

[30] Applying these aforesaid principles of interpretation to the facts of the present case, will, in my view, prove a salutary approach to the resolution of the disputes and issues referred to above.

EVALUATION

[41] See **Lange and Co v The SA Fire and Life Assurance Co** [1867] 5 S 358 at 365; **Auto Protection Insurance Co Ltd v Hanmer-Strudwick** 1964 (1) SA 349 (A) at 354; **Fedgen Insurance Ltd v Luyds** *supra* at 38C; **Botha's Trucking v Global Insurance Co Ltd** 1999 (3) SA 378 (T) at 382H; Reinecke *et al supra* at paragraph 233.
[42] **Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd** 1961 (1) SA 103 (A) at 107C citing **Smith v Accident Insurance Co** [1870] LR 5 Exch 302 at 308-9
[43] See **Pereira v Marine and Trade Insurance Co Ltd** 1975 (4) SA 745 (A) at 752H
[44] See Reinecke *et al* paragraph 236

[31] Because the proper interpretation of the insurance contract in the present instance being a matter of law, care should be taken not to be persuaded by the views of the witnesses. Interpretation is a matter for the courts and not for witnesses. The provisions of the contract must first be properly construed to establish if on the proven facts there was a non-disclosure. Only if such investigation leads to a result that there was a contractual non-disclosure, does it become necessary to enquire if such non-disclosure was material entitling the insurer to repudiate the claim.

[32] Clause 3.1.7 of section 5 deals specifically with **claims**. It obliges the insured to advise the insurer immediately "as soon as you become aware of any possible **prosecution** or inquest". This is a clause specifically dealing with the performance duties resting upon an insured in regard to the submission of claims. As will be indicated in the next paragraph, clause 3.1.7 on the face of it is clear and unambiguous. The problem arises when it is compared to the provisions of clause 6 dealing with **disclosure.** The interplay between the specifics of clause 3.1.7 and the generality of clause 6 dealing with disclosure, causes confusion, uncertainty and ambiguity. It is unclear to what extent the specifics of the contractual duty of **disclosure when making claims** are influenced or over ridden by a **clause dealing with the general duty to disclose**. In my view, this uncertainty introduces ambiguity and vagueness.

[33] The circumstances surrounding the duty which rested upon the plaintiff to disclose information regarding the "first accident" should, as a matter of simple logic, primarily be determined by the provisions set out in clause 3.1.7. In my view this clause is clear and unambiguous. It uses language and words which have plain and ordinary meanings.[45] What is required is information regarding "any possible prosecution" and nothing else. The absence in the clause of a demand to supply

[45] The reference to "inquest" is irrelevant for purposes of a proper interpretation of this clause.

information regarding a conviction or sentence is significant. If indeed information regarding a conviction and sentence which follows upon any prosecution was deemed relevant and/or material, it would have been a simple matter to include those words in clause 3.1.7 as was done in the case of **Heslop v General Accident, Fire and Life Assurance Corporation Ltd** 1962 (3) SA 511 (AD) where the clause requiring interpretation read as follows:

> "Have you or your paid driver or any person who to your present knowledge will drive the insured car been **convicted** of any offence in connection with the driving of a motor vehicle including a motorcycle, or is any **prosecution** pending? If so, give particulars of any such **conviction** and/or impending **prosecution**." [Emphasis added]

[34] In my view nothing prevented the defendant, as author of the agreement, to include a requirement in clause 3.1.7 that information was required regarding any possible prosecution, **and/or conviction and/or sentence and/or suspension or endorsement of a licence**, if they deemed it of material value to assess the risk and/or the premium payable. The defendant's failure to be clear and unambiguous in their request for information regarding claims, must, therefore, redound to their disadvantage. In my view, the plaintiff should not be prejudiced for having complied meticulously with the contents of this clause. He gave sufficient information of the impending prosecution in regard to the first accident as early as 31 May 2007 i.e. fourteen days prior to the first trial date set for such prosecution.

[35] The defendant's failure to expressly stipulate that information regarding a conviction, sentence and/or endorsement of a licence was required, in my view, amounted to a representation to the plaintiff that no information beyond any prosecution, was required. Considering comparative law in this regard, it is of some moment what **MacGillivray and Parkington on Insurance Law** has to say regarding instances where questions asked of the insured may relate to material

facts in his possession on subject matter beyond the ambit of the questions asked. In this regard paragraph 646 at p 260 of the Eighth Edition, states the following:

> "It is more likely, however, that the questions asked will limit the duty of disclosure, in that, if questions are asked on **particular subjects** and the answers to them are warranted, it may be inferred that the insurer has waived his right to information, **either on the same matters but outside the scope of the questions, or on matters kindred to the subject matter of the questions.** Thus, if an insurer asks, 'How many accidents have you had in the last three years?' it may well be implied that he does not want to know of accidents before that time, though these would still be material. If it were asked whether any of the proposer's parents, brothers or sisters had died of consumption or been afflicted with insanity, it might well be inferred that the insurer had waived similar information concerning more remote relatives, so that he could not avoid the policy for non-disclosure of an aunt's death of consumption or an uncle's insanity. Whether or not such waiver is present **depends on a true construction of the proposal form**, the test being, would a **reasonable man** reading the proposal form be justified in thinking that the insurer had **restricted his right to receive all material information, and consented to the omission of the particular information in issue?"**[46] (Emphasis added)

[36] I find the remarks of MacGillivray's *supra,* particularly apposite to the facts of the present case. In my view the plaintiff was entitled to assume that the defendant was not interested in receiving information of actual convictions, sentences and/or endorsements of licences. In my view the court *a quo* was not correct in attributing to the plaintiff, as an attorney, knowledge as to what kind of information affected the defendant's computation of risk and premiums. In any event it is a question of interpretation as to what a reasonable man would have expected the question posed in clause 3.1.7 demanded. In this regard the court *a quo,* with respect, correctly referred to case law stating that the test is an objective one regarding the materiality of any non-disclosure as viewed through the lens of the reasonable man and not the insured nor the

[46] The corresponding paragraph in the previous edition of the work was cited with approval by Woolf J in **Hair v Prudential Assurance Co Ltd** [1983] 2 Lloyd's Rep 667 at 673. In that case it was held that where the proposal form contained a declaration that "I warrant that all the information entered above is true and complete and that nothing materially affecting the risk has been concealed," the assured was not bound to disclose any material facts outside the scope of the specific questions asked on the ground that if it was intended that the assured should answer matters even though he was not questioned about them, the insurer should have stated clearly the need for such disclosure and left space on the proposal form for the assured to put in details.

insurer. [47] A court of law is, therefore, abundantly suitable to determine this question. In my view the court *a quo* should have accepted the evidence of the plaintiff as confirmed by Stodart and De Kock that indeed he disclosed the fact of a pending prosecution to them timeously. The fact that he did not disclose the fact of the conviction and sentence, was, in my view, not a breach of his contractual obligations. On the proven facts there was no non-disclosure and the question of materiality does not arise.

[37] Such conviction and sentence were, however, disclosed to the parent company of the defendant not later than 18 March 2008. It appeared that they had already been placed in possession of the warrant of conviction and sentence passed by the Krugersdorp Traffic Court. It is of some significance that the defendant had, by that time (21 February 2008),[48] already repudiated the claim on a false ground which was not persisted in, i.e. the alleged drunken driving by the plaintiff.

[38] In addition the evidence is clear that the conviction of negligent driving did not in any way affect the insurance risk or calculation of the premium as the insurance policy expressly indemnified the plaintiff against such negligence. [49] In any event, Exhibit A25 dated 20 November 2007 which was sent by De Kock to Stodart already contained a note in manuscript regarding the conviction and sentence. In my view that was more than adequate compliance with the duty to inform the defendant not only of the prosecution but also of the conviction and sentence.

---

[47] See in this regard paragraph [27] of the judgment *a quo* where reference is made to **Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality** 1985 (1) SA 419 (A) at 435F – I; **Weber v Santam Versekeringsmaatskappy Bpk** 1983 (1) SA 381 (A) at 410H – 411D; **President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en 'n Ander** 1989 (1) SA 208 (A) at 216F; **Commercial Union Insurance Co of SA Ltd v Lotter** 1999 (2) SA 147 (SCA) at 154B

[48] See Exhibit A33, record p 439.

[49] See Evidence of Stodart Record p 359 lines 4 - 24

[39] In my view, the importance of the endorsement of plaintiff's licence is a red herring. Neither of the two repudiations relied on the endorsement of the licence as a ground for repudiation. The second repudiation relied on an alleged "suspension" of the licence as ground for repudiation. It is common cause that plaintiff's licence was never suspended, only endorsed.[50] As such, there has, in fact to date, never been a repudiation of the claim based on the alleged endorsement! Nor did the defendant's plea remedy this deficiency in its case. There is no allegation that it sought to repudiate on that basis in the plea itself. The plea merely records the alleged failure to inform the defendant of such endorsement as a breach, but does not seek to allege that repudiation ensued as a result thereof. In addition, there was no admissible evidence that an endorsement of a driver's licence will affect the calculation of the risk and/or the premium. If failure to disclose the fact of an endorsement of the plaintiff's driver's licence constituted a contractual non-disclosure, there should have been evidence to this effect. [51]

[40] In addition, the court *a quo* failed to take into consideration the ameliorating effect of the provisions of section 53(1)(a) and (b) of the Short-Term Insurance Act No 53 of 1998 (as amended). Section 53(1)(a) serves to limit an insurer's right to repudiate a claim premised on a non-disclosure to instances where same *"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."* Section 53(1)(b) of the Act provides that *"non-disclosure shall be regarded as material if a reasonable, prudent person*

[50] It is interesting to note that although the sentence required such endorsement, plaintiff's licence was in fact not so endorsed.

[51] See **Mutual and Federal Insurance Co Ltd v Da Costa** 2008 (3) SA 439 (SCA), paragraph [12] at p 444 where Farlam JA said the following:

> "[12] In the circumstances of the present case, in the absence of evidence indicating that a reasonable insurer in the position of the appellant, if it had known the true facts, would have refused to extend the cover of the respondent's policy to the vehicle presently under consideration or would have only accepted it at a higher premium, I do not think we can hold that the misrepresentation relied on was material. It follows that the first point argued on behalf of the appellant cannot be upheld."

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." The predecessor to this provision was section 63(3) of the Insurance Act 27 of 1943. It has been deemed to be similar in its effect and meaning.[52]

[41] The aim of these measures, it has been said, is to protect claimants under insurance contracts against repudiations based on inconsequential inaccuracies or trivial misstatements in insurance proposals. [53]

[42] Applying the provisions of the aforesaid sections to the facts in this case, I am of the view that the non-disclosure of the actual conviction and sentence and endorsement of the licence would not have been regarded by a reasonable prudent person as affecting the calculation of the risk and/or premium. The plaintiff's failure to disclose the fact of the conviction, sentence and endorsement of his licence was, therefore inconsequential. In my view, the court *a quo* should have held that the plaintiff was also protected by the provisions of the aforesaid Act.

[43] Finally applying the principles that exclusionary clauses should be restrictively interpreted and that a court should be inclined towards upholding the policy against producing a forfeiture, I am of the view that the court *a quo* should have dismissed the defendant's defences and found for the plaintiff. The court should have come to this conclusion on the basis that the strict interpretation of the policy demanded notification only of the impending prosecution by the plaintiff to the defendant,

[52] See **Mutual and Federal Co Ltd v Oudtshoorn Municipality** 1985 (1) SA 419 (A) at 435F – I

[53] **Qilingele v SA Mutual Life Assurance Society** 1993 (1) SA 69 (A) at 74B. Whilst no doubt providing some measure of welcome protection to insured against the abuse by insurers of the warranty technique, the measure is no model of clarity and has been criticised by courts and academic writers as not going far enough and requiring fundamental reconsideration and revision. See further Reinecke *et al* pp 270 *et seq*.

which occurred, and that the various attempts by the defendant to repudiate the policy were based not only on incorrect grounds, but also on spurious grounds. The final repudiation dated 20 August 2008, not only came at the very least seven months late, [54] it was also based on incorrect grounds. It was based on an alleged suspension of the licence which never took place. It was based on a failure to submit information in response to reasonable requests. Yet Stodart admitted that no reasonable request for information was directed at the plaintiff prior to the launching of the application. [55] Furthermore she admitted that information in the form of the motor claim form was submitted thus making the grounds for repudiation, in my view, wrongful. The previous attempted repudiation based on an alleged driving of the insured vehicle by the plaintiff under the influence of liquor also proved to be futile. In my view, the defendant failed altogether to prove this defence of failing to supply adequate information to it by the plaintiff.

[44] Finally it would seem to me as if the ground for repudiating on the basis that inadequate information was submitted, related to a failure to refer to two previous accidents which occurred more than five years prior to 1 November 2003. Stodart admitted that an alleged failure to supply adequate information relating to these accidents could not sustain a ground for repudiation. [56]

CONCLUSION

[45] For all of the aforesaid reasons I am of the view that the appeal should succeed and I therefore make the following order:

1. The appeal is upheld with costs.

---

[54] See **Resisto Dairy v Auto Protection Insurance Co** 1963 (1) SA 632 (AD) at 643B - C
[55] See Stodart's evidence, Record p 376 lines 10 – 12; **Resisto Dairy** supra at p 645D
[56] See Stodart's evidence Record pp 385 - 386.

2. The order of the court *a quo* is set aside and substituted with the following:

"1. The Defendant is directed to indemnify the Plaintiff, in terms of the insurance agreement between the Plaintiff and the Defendant for:

1.1 The damages suffered by the Plaintiff, resulting from the collision on 17 January 2008, in respect of the Plaintiff's 2005 Fiat Palio motor vehicle with registration numbers and letters 'SFT471GP'.

2. Costs of suit which are to include the application costs reserved by Lamont J."

DATED THE _____ DAY OF OCTOBER 2010 AT JOHANNESBURG

_____
C. J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree

_____
T. M. MASIPA
JUDGE OF THE HIGH COURT

I agree

_____
P. COPPIN
JUDGE OF THE HIGH COURT

It is so ordered.

Counsel for the Appellant: Adv J. van Rooyen

Counsel for the Respondent: Adv B. P. Geach SC

Attorney for the Appellant: Greyling Orchard Attorneys
Attorney for the Respondent: Naudés Attorneys and Savage Jooste & Adams Inc

The appeal was argued on 21 October 2010.