IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 55354/2014

22/2/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. ✓

22/2/16 .....
DATE

.....
SIGNATURE

In the matter between:

LIEZL WESTENRAAD PLAINTIFF

And

1ST FOR WOMEN (PTY) LTD DEFENDANT

JUDGMENT

Fabricius J,

1.

Plaintiff and Defendant entered into a written agreement of insurance on 1 December 2009, which amongst others, indemnified Plaintiff against loss of property caused by theft. Relevant is the theft of certain movable assets from her residential dwelling.

2.

On 17 October 2013 persons broke into her home whilst she was present and removed a number of items. This incident was initially disputed by Defendant, but during argument Defendant's Counsel wisely conceded that it had occurred. This issue therefore need not be debated any further.

3.

She lodged a claim in respect of the stolen items, specifying them and providing a value for each. After investigations by a loss adjuster or "assessor", a Zach Teubes, he recommended to his employer that the claim be repudiated.

4.

He had two long discussions with Plaintiff about the missing items such as when were they bought, where, and for which price, as well as by whom. These interviews were recorded and transcribed, and both parties admitted that these transcriptions were correct, and examined and cross-examined them. This obviously avoided unnecessary and lengthy repetition of the two interviews which took place on 22 October 2013 and 30 October 2013.

5.

After the assessor made his recommendation, the Defendant wrote to Plaintiff on 5 November 2013 repudiating her claim in terms of the policy. This letter reads as follows:

"Dear Ms L. Westenraad,

Your claim number 03 against policy 556752151 for the incident that took place on 17 October 2013, has been given careful consideration, but will unfortunately not be paid.

This is due to the fact that additional information, relevant to a fair and accurate decision on settlement, came to light during the processing of your claim. Had these facts been disclosed initially, you would not have been indemnified for the above incident.

Proof:

When you claim, you may be asked to prove ownership and value of the things you claim for.

Providing true and complete information is stipulated as an obligation of your contract in the general terms and conditions section of your policy book:

Your obligations:

If you do not fulfil any of the following obligations, your cover may be cancelled.

Your obligations are to:

1) Give us true and complete information

5) Let it be known if any of the policy details or declaration are incorrect or if any of these details or declarations changes;

7) Be open about anything you have not yet disclosed, but that may be relevant in order to accept the policy, or about anything that changes that may be important for the continuation of the policy being accepted.

We trust you understand that your adherence to all endorsements, terms and conditions, is vital in enabling us to deal accurately and fairly with each claim. Not having provided us with the correct claims details has resulted in the company not being allowed the opportunity to do so in this instance. The file on your claim has been closed accordingly.

Kindly note that the above reason for not paying your claim may not necessarily be exhaustive". This letter was signed by the assessor, Mr Teubes.

6.

What is immediately apparent from this letter is the following:

6.1

The allegation that fair and accurate information was not disclosed, appears to be the first defence;

6.2

The failure to disclose initially, as it was put, is a separate defence, which, if proven, could have resulted in a refusal to enter into the agreement, or its lawful cancellation thereafter. This was however not pleaded and therefore not debated during the trial.

6.3

In respect of both defences set out in par. 6.1 and 6.2 above, no details were provided.

6.4

Fraud by the Plaintiff was not raised in this letter.

7.

As said, Plaintiff thereafter instituted this action and Defendant's Plea is the first proper disclosure of what its defence was:

7.1

Although a section of the policy was quoted which deals with fraudulent claims, fraud was not pleaded initially. This was done by way of an amendment to par. 9.2.3 of the Plea, which I allowed.

7.2

The real crux of the defence was that Plaintiff did not provide the Defendant with an accurate list of items that were stolen and/or their descriptions and/or their values. Details were provided in par. 9.2.3 of the Plea. It was also pleaded that Plaintiff had not provided proof of purchase and/or ownership in respect of one or more or all of the items in respect of which she had claimed. It was then also blandly pleaded that

"The Plaintiff stated that she owned a 9120 Acer Laptop", but no conclusion was pleaded or anything else pertaining thereto.

8.

Plaintiff gave detailed evidence in respect of all of these items and was cross-examined thoroughly in relation thereto, and with reference to her recorded comments with the mentioned loss adjuster, Mr Teubes. He made a good impression in the witness stand and also fully explained the circumstances under which she had drawn the initial list of missing items. Her explanations to Mr Teubes were also detailed and, where vague, explained that as well. Normal human experience is in line with her evidence on most items. If one possesses a sound system for some years, one would normally not remember or even have known its serial number, but ought to be able to fairly accurately describe its outside appearance and function. I could not really fault her evidence, except where it appeared from the transcript that she insisted that she had owned a 9120 Laptop. It is common cause that such a Laptop, with that number, did not exist at the time, but

when she realised that this was an error, she forwarded to Mr Teubes the correct relevant invoice.

9.

Mr Teubes gave similar detailed evidence about his two interviews with reference to his notes, his comments and the recorded conversations. After thorough cross-examination he also readily conceded that with the exception of the 9120 Laptop, his negative comments to the insurer had not been justified if one looked closely at the transcriptions of his interviews with the Plaintiff. It is my view that he ought to have made a similar concession in respect of the laptop number as this was fully and satisfactorily explained by the Plaintiff.

Added to this is the following:

Both the assessor and the Defendant knew that a "9120" computer did not exist at the time and could therefore not have been misled in respect thereof. Also, no warranty clause in respect of absolute accuracy is contained in the policy. An

inference of fraud in this context can only be made if it is the most evident and acceptable conclusion of a number of possible conclusions.

See: ***Santam Bpk v Potgieter 1997 (3) SA 415 OPA at 423.***

The onus in respect of its defences is clearly on Defendant and in my view Mr Teubes ought to have accepted Plaintiff's explanation at the very least at the time when the real invoice was given to him. The discrepancy in price also does not point to an intentional misrepresentation because Plaintiff knew quite well that her version would be fully investigated and debated. She also never intended to convey that her price was accurate at the time, nor was she contractually bound to relay an absolutely accurate market price for this, or any other item. I cannot find that she acted fraudulently in this context and by her providing the proper relevant invoice, any uncertainty ought to have dissipated.

10.

An insured is entitled to recover the actual commercial value of what he or she has lost through the happening of the event insured against. As I have said, the onus is on an insurer who seeks to avoid liability to prove his defence relied upon.

See: ***Walker v Santam Ltd 2009 (6) SA 224 SCA.***

11.

Returning to the topic of an inflated claim in respect of items stolen, it has been held that this does not per se prove fraud. An insurer may pay what is actually due, and in any event intent to defraud must be proven. Fraud is not easily imputed.

See: ***Schoeman v Constantia Insurance Co Ltd 2003 (6) SA 313 SCA at par. 37.***

12.

I am therefore satisfied that Plaintiff has brought herself within the ambit of the policy, and that Defendant has failed to discharge the onus on it. I must also add

however that I cannot find that Mr Teubes, the loss adjuster, was mala fide. His factual conclusions were merely wrong. This finding is relevant to a costs order.

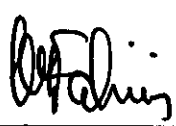
13.

The following order is therefore made:

1. **The Defendant is ordered to indemnify the Plaintiff for the loss suffered as a result of the theft that took place on 17 October 2013;**

2. **The Defendant is ordered to, within 20 days hereof, pay out the replacement value of the stolen items, alternatively, replace the stolen items;**

3. **The Defendant is ordered to pay the costs of this action including, but not limited to, the costs for the transcriptions.**



JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 55354/14

Counsel for the Plaintiff: Adv D. Keet

Instructed by: Chantel van Heerden Attorneys

Counsel for the Defendant: Adv J. Van der Merwe

Instructed by: Savage Jooste & Adams Inc

Date of Hearing: 16 – 18 February 2016

Date of Judgment: 22 February 2016 at 09:30