IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: 4160/2010

In the matter between:

SHERWIN JERRIER Plaintiff

and

OUTSURANCE INSURANCE COMPANY LIMITED Defendant

J U D G M E N T

KOEN J

INTRODUCTION:

[1] This is an action in which the Plaintiff claims payment of the sum of R608 772,20, interest thereon and costs. The claim is founded on an insurance contract, concluded during or about December 2008 to early January 2009, in terms whereof the Plaintiff avers that the Defendant was obliged to indemnify him for loss or damage sustained in respect of a 2009 Audi R8 4.2 FSI Quattro A/T motor vehicle bearing registration letters Sherla - ZN[1]. This vehicle was damaged in a collision which occurred on 8 January 2010. It is contended that the amount claimed represents the necessary costs of restoring the vehicle to its pre-accident condition.

[1]Hereinafter referred to as 'the vehicle'.

THE ISSUES:

[2] The trial proceeded on the issue of liability only, pursuant to an order granted to that effect by the consent of the parties.

[3] On the pleadings, the accident and damages are denied. The Plaintiff's unchallenged evidence however established that a collision did occur on the N2 south on the 8 January 2010 at approximately 23h00, resulting in certain damages to the vehicle.

[4] It is common cause that the Defendant was duly advised of this incident and that the Plaintiff at that time had complied with his obligations insofar as the payment of the premium was concerned.

[5] The Defendant has however denied being obliged to indemnify the Plaintiff. The basis for such denial is founded on the following two provisions in the policy:

(a) 'Your responsibilities
In order to have cover you need to:
- pay your premiums
- provide us with true and complete information when you apply for cover, submit a claim or make changes to your facility. This also applies when anyone else acts on your behalf.
- inform us immediately of any changes to your circumstances that may influence whether we give you cover, the conditions of cover or the premium we charge.
    - E.g. If you sell your car and buy another one, you need to inform us about the change before you can take delivery of this car so that you can be certain that your car is OUTsured by the time you drive off the showroom floor.

…
Claims
…
Time periods
You need to:
- report your claim or any incident that may lead to a claim to us as soon as possible, but not later than 30 days, after any incident. This includes incidents for which you do not want to claim but which may result in a claim in the future.
  E.g. If your car is involved in an accident with another car and there is no apparent damage to either car, we still want to know about this incident so that we can take steps to limit the effects of any claim which may be made by the other person.
- report any lost items, fire, theft, highjack … to the police within 24 hours of the incident'.

And

(b) 'What is not covered under comprehensive cover
Driving under the influence
If any person who drives the vehicle:
- is under the influence of alcohol or drugs
- has a concentration of alcohol in the blood exceeding the legal limit or failed a breathalyser test
- refuses to give either breath or blood sample'.

[6] The Defendant pleads with reference to the first provision quoted that:

'6.3.1 The warranties, statements and answers given during the application for insurance and at each renewal thereof constituted the basis of the contract of the insurance and were warranted by the Plaintiff to be true and complete;
6.3.2 The Plaintiff, at the conclusion of the agreement of insurance and at every subsequent renewal thereof, warranted that:
6.3.2.1 The regular driver of the insured vehicle was involved in only one previous incident whether a claim was submitted or not in the last three years being on 2 April 2008 for accidental damage;
6.3.3 The statements and answers warranted by the Plaintiff to be true and correct as set out in 6.3.2 above were not true at the conclusion of the agreement and/or at the subsequent renewal thereof, in that:
6.3.3.1 On or about 11 April 2009 the Plaintiff who is the regular driver of the insured vehicle was involved in a motor vehicle collision at or near Beach road, Amanzimtoti wherein the insured vehicle collided with another vehicle with registration number NPN 30285.
6.3.3.2 The Plaintiff failed to disclose the above incident to the Defendant.

6.3.4 The incorrectness of the information alternatively failure to disclose this information was of such a nature as to materially affect the assessment of the risk, the acceptance of the risk and the determination of the terms and conditions and the premium applicable by the Defendant under the said insurance agreement.

6.3.5 The Defendant consequently elected to avoid the insurance agreement, as it was entitled to do, and to reject the claim made upon it by the Plaintiff, alternatively the Defendant hereby elects to avoid the insurance agreement and tenders repayment of the premium paid by the Plaintiff to the Defendant in respect of the cover provided thereunder'.

(This defence will hereinafter be referred to as the 'non-disclosure defence').

[7] In the alternative, the Defendant pleads:

'6.4.1 That the Defendant would not be obliged to pay the Plaintiff any amount in respect of loss or damage to the insured vehicle where the driver of the insured vehicle was under the influence of alcohol or drugs, had a concentration of alcohol in the blood exceeding the legal limit or failed a breathalyser test.

6.4.2 …

6.4.3 The Defendant pleads further that the driver of the vehicle at the time of the incident;

6.4.3.1 Was under the influence of alcohol;

6.4.3.2 Had a concentration of alcohol in the blood exceeding the legal limit'.

(This defence will hereinafter be referred to as the 'driving under the influence' defence).

[8] The Defendant bears the onus of proving the aforesaid defences on a balance of probability. The defences are considered below in turn in the order pleaded.

DISCUSSION OF RELEVANT CASE LAW RELATING TO NON-DISCLOSURE:

[9] It is trite law that Insurance is a contract based on the utmost good faith.

[10] In *Mutual and Federal Insurance Co Limited v Oudtshoorn Municipality*[2], Joubert JA held 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[3]… The court does not, in applying this test, judge the issue of materiality from the point of view of the reasonable insurer. Nor is it judged from the point of view of the reasonable insured. The court judges it objectively from the point of the average prudent person or reasonable man'.

[11] In *Pillay v South African National Life Assurance Co. Limited*[4]Didcott J approved the statement of Bowen LJ made more than a century before that '…every fact was material and had to be disclosed "…which would affect the mind of the underwriter at the time the policy is made, either as to undertaking the contract or as to the premium on which he would take it".'

[12] In*Qilingele v South African Mutual Life Assurance Society*[5]it was stated that '… what has to be ascertained is whether the result likely to have been caused by the misrepresentation was material. Materiality is not a relative concept; something is either material or it is not. The word material denotes substance, as opposed to form'.

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[2]1985 (1) SA 419 (A) at 435 F – I.

[3]The test for materiality at common law does not appear to be different from the statutory definition as contained in s 53 (1) (b) of the Short-Term Insurance Act 53 of 1998.

[4]1991 (1) SA 363 D at 369 F.

[5]1993 (1) SA 69 (AD) at 74H.

[13] In *Fourie v SentrasureBpk*[6]it was also stated that the test to be applied to determine whether the non-disclosure was material was objective. Materiality also relates no less to the determination of the premium at which a risk will be accepted, than to the acceptance of the risk itself.

[14] In *President VersekeringsmaatskappyBpk v Trust Bank Bpk*[7]it was stated that the question is not if in the mind of the reasonable man, the information will have an influence on the risk but if it will have an effect on the decision of the insurer to accept the risk or not.

[15] In *Liberty Life Association of Africa Limited v De Waal and 'n ander*NNO[8] the court held '… die vraag is nie net of die onjuisteinligting die risikosoubeinvloed het nie, maar ook of dit 'n uitwerkingsougehad het op die Appellant se beoordeling van die risiko'.

[16] In *Bruwer v Nova Risk Partners*[9]it washeld that the interplay between the specificity of one clause[10] and the generality of a general provision in the policy relating to disclosure[11] on the facts of that case resulted in uncertainty as to what the insured

[6] 1997 (4) SA 950 (NKA) at 980 B – C
[7]1999 (1) SA 208 (AD) at 216F.
[8]1999 (4) SA 1177 (SCA) at 1182 G – H.
[9]2011 (1) SA 234 (GSJ) at para [32].
[10]A specific clause, like the one *in casu*requiring reporting incidents for which the insured does not want to claim but which may result in a claim in the future. The clause in that decision required that the insurer be advised 'as soon as you become aware of any possible prosecution or inquest'.
[11]A general clause, like the one *in casu* requiring that the insured be informed immediately of any changes to circumstances that may influence whether we give you cover, the conditions of cover or the premium charged. The clause in that case provided that 'you must inform the company of all facts that are

was required to disclose. Whether such uncertainty arises will obviously depend on the facts of each case.[12]

THE FACTS:

[17] The non-disclosure relates to two events that occurred, namely:

(a) On 2 April 2008 the Plaintiff damaged his vehicle when a wheel struck a pothole. The damage apparently amounted to some R15 000. This incident was not reported to the Defendant and no claim was made in respect thereof.

(b) On or about 11 April 2009 the Plaintiff was involved in a collision with the vehicle in Beach Road, Amanzintoti. The Plaintiff testified that he thought the damage would be approximately R20 000 which would not make it worth for him to claim in the light of the amount of the excess payable. He also considered that the collision was due to his fault and thought that he could not claim for the damage sustained. Within two weeks of the occurrence of that incident he had however discovered that the damage in fact amounted to some R200 000-00.

[18] There is a dispute on the evidence as to how the incident of 11 April 2009 occurred and what it entailed. The Plaintiff testified that he had come out of a parking lot in Beach Road and hit a tow bar on a bakkie that was parked there as he pulled off, creating the impression that this all happened at low speed. According to his evidence,

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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 the policy, any changes must be reported immediately'.

[12] Such uncertainty does not arise in this matter, as the terms of the specific provision in the policy of insurance are clear, and were not complied with.

the right hand side light on the vehicle was damaged and some other damage was caused to the vehicle on the right. The Defendant called the driver of the other vehicle, Mr Larcher. He testified that the Plaintiff had driven at high speed up and down the road at a pub where he had been earlier in the afternoon, and then later came to Beach Road where he was revving the engine of the vehicle before pulling off at huge speed, when he lost control and collided with the back of his (Mr Larcher's) bakkie. He saw his bakkie 'jump' in the air. The light, exhaust and tow bar on his bakkie were damaged. The plaintiff's vehicle stopped further down the road, initially he said about 500 metres but later conceded that the Plaintiff might have stopped 200 metres away (which might still be too generous an estimate). He witnessed the collision. His description of the damage to the plaintiff's vehicle, was that it was major. The Plaintiff's vehicle could not be driven from the scene. The front right wheel had become completely detached. When the vehicle was pulled onto a flatbed trailer which removed the vehicle from the scene the front bumper scraped on the road. The vehicle had skidded down the road after the collision before it came to a standstill. He went to the Plaintiff who was in an argumentative and pugnacious mood. He testified that the Plaintiff urinated on the front of the bumper of his vehicle, as if the whole incident was a joke. In his view the Plaintiff was 'full of alcohol'. The Plaintiff had told him that he should not go to the police and that he would settle the damages in respect of his bakkie.

[19] Mr Larcher's evidence was criticised for overstating the estimate of the distance the vehicle had travelled before it came to a standstill after the collision, and for the conflict between his evidence in court and what he had said to the Defendant's

investigator regarding the place where the Plaintiff urinated after disembarking from the vehicle. Mr Larcher had told the investigator, Mr Herbst, that the Plaintiff had urinated against the door of the vehicle, as contrasted to his evidence in court that the Plaintiff had urinated on or against the front of his bumper.

[20] I am mindful that the position of exactly where the Plaintiff allegedly urinated against the vehicle was not dealt with in the cross-examination of the Plaintiff and that he therefore did not have the opportunity of commenting thereon. In my view however this is an immaterial discrepancy. Likewise, Mr Larcher's possible overestimate of the exact distance from impact to where the vehicle came to a standstill is not all that significant.

[21] On what is material, Mr Larcher's evidence is consistent, namely that this was no minor accident. The Plaintiff was in probability under the influence of alcohol, revving the engine of the vehicle and after the accident urinated next to or against the car, wherever exactly it may be, in a built up area. That is not the conduct of a sober, responsible person.

[22] But most importantly, a collision causing Mr Larcher'sbakkie to 'jump' and the vehicle thereafter still careering or skidding some distance, even if less than 200 metres, down a tar road, resulting in the front right wheel of the vehicle coming off completely so that the vehicle could not be driven, suggests gross negligence, if not reckless driving and behaviour.

DISCUSSION:

[23] Accepting the above factual matrix, the question is whether the non-disclosure of that incident to the Defendant at the time it occurred excuses liability or whether the manner in which it was disclosed to the Defendant's investigator, at the time the claim was made in respect of the accident which occurred on 8 January 2010, excuses liability. I shall consider the latter first.

[24] Regarding the Plaintiff's obligation to make disclosure at the time of claiming, the relevant provision in the policy provides:

> 'In order to have cover you need to … provide us with true and complete information when you … submit a claim …'.

[25] The only evidence in this regard was that of the investigator, Mr Herbst. The transcript of his interview with the Plaintiff was by agreement between the parties admitted to be an accurate record of what was said. During an interview, which appears to have taken place on 13 January 2010, the following was said:

> 'MR HERBST: Have you as the incident driver in the last three years suffered any losses relating to any vehicle whether a claim was submitted or not … [indistinct].
>
> [Noise on microphone]
>
> MR JERRIER: Well the rim and the front fender and for me to basically … [indistinct].
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> MR HERBST: Ja, when was that accident?

MR JERRIER: That was round about April last year[13].

MR HERBST: April last year.

MR JERRIER: March/April.

MR HERBST: Okay, but you were covered by Outsurance.

MR JERRIER: I was covered with Outsurance but it was not worth me claiming.

MR HERBST: No that is fine. Has an insurance company ever cancelled or refused to give you cover?

MR JERRIER: No'.

[26] In a subsequent follow-up interview on 20 January 2010, the following was said:

'MR HERBST: Okay 100%. Just touching on your previous insurance, your previous claim, you told me that you had a previous incident where you damaged your rim for R15 000[14], you didn't claim because it was within excess?

MR JERRIER: No, no the rim was R15 000 but I also damaged the fender and things like that.[15]

MR HERBST: Okay, you told me you hit a pothole or something like that?

MR JERRIER: Ja, the pothole was a rim which was the R15 000 but I also damaged the front bonnet and the front headlight in a different incident which I also didn't claim for, ja'.

…

Later the interview continues

[13]That would have been 2009, thus referring to the second accident?

[14]Although the first interview referred to the incident 'about April last year' i.e.2009, it might be that damage to the rim of R15000 was referred to in the portion marked '[Indistinct]' otherwise the follow-up interview would not have referred to it as the 'previous incident where you damaged your rim for R15 000, which in fact had occurred during April 2008.

[15]The only incident on the evidence where damage of that nature occurred was in the incident of 11 April 2009.

'MR HERBST: Okay no, obviously ja, because I've also ascertained that the previous claim that you had was in excess of about R200 000 where you were in Toti in front of Almega, you were revving the car. The car jumped into gear and you smashed into a bakkie?

MR JERRIER: Yes, but I did not claim anything.

MR HERBST: No 100%, but remember I asked you any claims, any accidents whether a claim was submitted or not and you told me it was only for the rim and you said to me the reason why you didn't claim for that is because it was within excess, okay'.

[27] A fair reading of these portions of the transcript does not suggest to me as the only reasonable inference, that the Plaintiff did not provide 'true and complete information when submitting the claim'. At the first interview the Plaintiff admittedly seemed to refer to only one incident (although the answer to the initial question was not recorded and the end of the answer to the investigator's question was simply marked '[Indistinct]'. When the matter was however revisited at the second interview, the Plaintiff of his own volition referred to both incidents which he had not claimed for, without being prompted by the investigator.

[28] It seems to me that the only contractual context in which the non-disclosure of the accidents may validly be raised as excusing liability, is in relation to the provision which reads (omitting irrelevant words):

'you need to … inform us immediately of any changes to your circumstances that may influence whether we give you cover, the conditions of cover or the premium we charge … this includes incidents for which you do not want to claim but which may result in a claim in the future'.

[29] Both the previous incidents, even if the Plaintiff did not want to claim and had undertaken personal liability for any claim in respect of Mr Larcher'sbakkie against him, were incidents 'which may result in a claim in the future'. In my view it would be sufficient if they were incidents which may result in a claim, in the sense of 'could' result in a claim, it being irrelevant whether they ever actually would result in a claim, whether such failure might be due simply to no claim being pursued by any party, or whether a claim is precluded by an inclusive full and final settlement offer in settlement previously made, or for whatever reason.

[30] Both incidents would cause a reasonable man to conclude that knowledge of their occurrence would indicate a change to the Plaintiff's circumstances, at the very least from a claims history perspective, but also as a moral risk, that may (not necessarily would) influence whether the Defendant would give the Plaintiff cover, the conditions of cover or the premium they would charge.

[31] The Defendant adduced the evidence of Mr Luan Van Rooyen, an in-house actuary of the Defendant, who was the only witness to testify on the probability of these incidents influencing whether the Defendant would give cover, the conditions of cover or the premium charged. I do not intend summarising his evidence in any great detail as it is a matter of record. Stripped to its essentials, he testified as to the importance of an insured's incident history and the previous claims experience of the regular driver of a vehicle, as one of the 'Risk and Rating' factors. Leaving aside the quantum[16] of claims,

[16] He testified however that a claim of R200 000-00 on a vehicle insured for R850 000-00 would raise alarm bells and probably initiate an investigation had it been reported.

he testified that the existence of previous claims, even if not proceeded with and withdrawn, could and probably certainly would result in an adjustment in premium or other terms relating to the acceptance of the insured risk. He explained that the occurrence of incidents which may involve claims, may trigger a multi claimant process, which is a computer activated mechanism, dependant on a number of considerations including incident frequency, even incidents that are reported and then withdrawn for whatever reason, which will have an impact when an insured requests a change, or at the time of renewal, or when another claim is reported. He could not state unequivocally whether the multi-claim alert would have been raised had the previous two incidents been reported, but certainly believed it could have kicked in. He opined that it was only in approximately 10% of multi claim cases, where action would not be taken by the Defendant.

[32] Whatever Mr Van Rooyen's actual experience and whatever the Defendant's policies may be, his evidence is simply consistent with the view I believe a reasonable man would have taken of the two incidents and the impact they would have, being the question decisive of the issue, namely that they amounted to a change to the plaintiff's circumstances that may influence whether cover is given (or continued), the conditions of such cover, or the premium charged.

[33] Mr Sichel for the Plaintiff was critical of the wording of the Defendant's policy conditions, particularly the examples that are provided, as lacking in particularity and not adequately drawing the attention of the Plaintiff to the need to have reported such

incidents. The problem with giving examples, is of course always that examples of all conceivable applications can never be provided, and if the very situation which arises is not covered by one of a myriad of examples to be given, the same complaint will remain. The general principle as to what was required to be disclosed was in my view adequately stated in the policy.

[34] The Plaintiff should have reported these previous incidents within the time frames required in terms of the policy, even if he did not want to claim. He failed to do so. This failure amounted to a material non-disclosure or breach of the terms of the policy, absolving the Defendant from liability.

[35] Absolution from the instance was sought at the end of the plaintiff's case, and dismissed. I did so as I did not at that time think that the Defendant necessarily had an unanswerable case, particularly in the absence of what it stance would be in relation to the non-disclosure, and whether its track record might not show that it adopts a more benevolent attitude to that which I considered to be the attitude of the reasonable man. At the end of the trial, I am however satisfied that the Defendant has discharged the onus.

THE DRIVING UNDER THE INFLUENCE DEFENCE:

[36] In the light of my conclusions above, it is unnecessary to consider the driving under the influence of alcohol defence. I accordingly do not deal with it in any great

detail, but in the event of this judgment being appealed and it possibly assuming significance, I make the following few brief observations.

[37] The Defendant in this regard relied extensively on a written statement by the former manager of the Plaintiff"s restaurant, Mr Johan Gouws, recoded by the investigator and stating that the Plaintiff on the evening concerned had consumed between '8 and 9 double brandy and coke between 20h00 and 23h00" after he was already drunk when he arrived at the restaurant. I am not persuaded that the interest of justice justify the admission of the statement in evidence. It relates to a highly material and potentially decisive issue, on which no cross-examination would possible to establish possible bias and/or mistake. However, even if the statement was admitted, the evidential weight to be attached thereto in terms of s 35 of the Civil Proceedings Evidence Act 25 of 1965 would be so minimal as not to disturb the direct *viva voce* evidence of the Plaintiff and his friend Mr Ruthnum who arrived at the scene, both of whom disputed that the Plaintiff was under the influence.

[38] I accept the expert evidence of Professor Saayman unreservedly. His conclusions are however on the factual finding of what was consumed. In his view the consumption of two double brandies over the time involved as the Plaintiff testified would not have left the Plaintiff under the influence of alcohol. In his professional view, the half tablet of Serrepress taken in the morning would contribute insubstantially to the Plaintiff's behaviour. Furthermore he was of the view that the Plaintiff's conduct that

evening would not accord with a person who had consumed eight to ten double brandies.

COSTS:

[39] Regarding costs, the Defendant was successful. The hearing lasted materially longer than the two days for which the matter had previously been enrolled on the 16 March 2012 when it was adjourned due to the two days being insufficient, and the costs reserved. The Plaintiff should accordingly also be liable for the costs of that postponement that were reserved.

ORDER:

[40] Accordingly, the Plaintiff's claim is dismissed with costs, including the costs previously reserved in respect of the hearing that was scheduled for 16 March 2012.

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DATES OF TRIAL: 18, 19 & 20 FEBRUARY 2013.

DATE OF JUDGMENT HANDED DOWN: 20 MARCH 2013

PLAINTIFF'S COUNSEL:	ADV R D S SICHEL
PLAINTIFF'S ATTORNEYS:	BROGAN & OLIVE
c/o	AUSTEN SMITH ATTORNEYS
Tel.:	033 392 0500
DEFENDANT'S COUNSEL:	ADV. C PRETORIUS
DEFENDANT'S ATTORNEYS:	HARDEMANN & ASSOCIATES INC
c/o	VIV GREENE ATTORNEYS
Ref.:	OUT/13762.MAE
Tel.:	033 342 2766