

SOUTH AFRICA / JUDGMENT

Clifford v Commercial Union Insurance Company of South Africa Ltd. (302/96) [1998] ZASCA 37; 1998 (4) SA 150 (SCA); (22 May 1998) [1998] ZASCA 37

COURT

Supreme Court of Appeal

BEFORE

Van Heerden DCJ, Nienaber JA, Howie JA, Marais
JA, Schutz JA

CASE / FILE NUMBER

302/96

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SCHUTZ JA

On 5 May 1994 the respondent ("Commercial Union") repudiated an indemnity policy taken out by the appellant (Mrs J D Clifford - "Clifford") on the ground of incorrect statements made in the proposal form. The issue is whether the admitted flaws in the form justified repudiation.

Clifford claimed that a car covered by the policy had been stolen on 30 January 1994. The car was expensive, a Mercedes Benz 500 SL A/C with an estimated value of R530 000. Her claim for indemnification was dismissed by Levy AJ, who described the history of the car as a chequered one. Indeed that is so, and in that history is to be found the origin of the later dispute.

4 Together with it he received the bill of entry and the transfer form, the latter still in blank. He also "borrowed" trade plates from a company in Krottenberger's group of companies, Weisemberg Investments (Pty) Ltd, a motor dealer. He was authorized to use them by Weisemberg's director, notwithstanding that that company had no interest in the car. Trade plates are intended to be used by motor dealers in the course of their legitimate activities, not as a means of allowing others to evade the registration and licensing requirements of the law. Not that the car was driven around much during Wilshire's tenure. He was an accountant and had acquired it, as also its predecessor for which it had been exchanged, as an investment. These cars were in short supply and he hoped that they would appreciate in value. In order that the new condition should be maintained, the car was occasionally driven round the block and little more. The mileage (of this right hand drive vehicle calibrated in Imperial measure) was very low when he took delivery from Krottenberger, and it remained so. 5 In September or October 1992 Wilshire sold the car to one Ramsay for R650 000 and delivered it together with the bill of entry, the still uncompleted transfer form and the "borrowed" trade plates. Due to Ramsay's lack of garage space it remained in Wilshire's garage. As Ramsay also had bought it as an investment, it

was driven infrequently to keep the mileage low. Late in 1993 the market for valuables had weakened due to pre-election nervousness and Ramsay, having decided to liquidate the car at a loss, commissioned Wilshire to sell it for R500 000. Anything he would obtain in addition he could keep as commission. At this point Clifford enters the history. Wilshire knew her socially. The availability of the car was mentioned. He did not disclose that Ramsay was the owner and acted as if he himself was. Clifford bought the car for R530 000, by means of trading in a Mercedes Benz 450 SL at an agreed value of R130 000, the rest to be paid in cash. On 24 November 1993 the trade-in vehicle was handed to Wilshire who at the same time delivered the 500 SL. Together with it came the bill of entry, the transfer form and the trade plates. Clifford was not made aware of the full history of the car, but from what was handed over it was apparent that the car had not been registered, that the number plates consisted of a trade plate on the back window shelf and another in the boot and that the bill of entry (if one examined it) showed that the car had been imported in July 1991. Clifford saw nothing untoward in all this. Her father had been in the motor trade and from him she had learned that the model was dictated by the date of first registration. The stage was now set for the proposal form that has given rise to this case. The cash balance was paid. On 13 January 1994 the car was registered as a new car in Clifford's name. In the meantime she had driven it, using the one trade plate on the window shelf. Already on 30 November 1993 the Commercial Union's proposal form had been signed by Clifford's common law husband, Kotze. Acting with her authority he was the one who gave the requested information and effected the insurance. The proposal form included the usual type of warranty, in this case to the effect that all statements and particulars were true, correct and complete, and contained all information known to the proposer affecting the risk to be insured, and that the proposal form would be the basis of the contract and would be incorporated in it. Four statements in the proposal deserve mention. The first was that the "year of manufacture" was 1993. In the light of the history, this was incorrect. The car was manufactured by July 1991 at latest. The second was that the "registered letters and numbers" were AGP 434 T. These are the particulars that appeared on the trade plates already referred to. They do not constitute a registration number. The third was the positive answer given to the question "Is [the car] registered in your name?" This was also an incorrect answer. The fourth was the positive answer to the question "are you the owner of the car?"

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The court a quo resolved the question as to the last answer's correctness in Clifford's favour, holding that she was the owner. This finding was no longer contested on appeal, in my opinion correctly. The evidence shows a delivery accompanied by the requisite respective intentions to transfer and receive ownership. That leaves the first three statements, all of which are incorrect.

"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."

The onus of proving the requisites of the qualification ("unless ")

rests on Commercial Union: *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A) at 74 C. Only risks undertaken on the strength of "significant", as opposed to "inconsequential" or "trivial" misstatements may upon their realization be repudiated (at 75 A, 74 B). A comparison has to be made between how the risk would have been assessed had the insurer known the true facts as opposed to an assessment distorted by the falsehood. A disparity is significant if the insurer, had he known the truth, would probably have declined the risk, or would probably have undertaken it on different terms (at 75 G-H), or, I think one should add, would probably have made further enquiries before reaching a decision (see 76 A-B).

10 v AA Life Assurance Association Ltd [1995] ZASCA 61; 1995 (4) SA 361 (A) at 376 E-F, is that s 63 (3) was interpreted as imposing a subjective test. Concepts of reasonableness were held not to enter the picture (*Qilingele* at 74 F). One looks at the particular insurer (usually in his manifestation as the particular underwriter) and seeks to determine as a fact how he would probably have reacted had he known the truth. General considerations affecting assessment of the risk are not relevant in themselves, only possibly relevant in determining how the particular underwriter would have behaved (at 75 D-E). This subjective test stands in stark contrast to the objective test of the reasonable man laid down in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 435 G-I as applying to the weighing of the materiality of a non-disclosure. This contrast was recognized in *Qilingele*, but the distinction between the tests was justified on the basis of the *Oudtshoorn Municipality* case being concerned with common law non-disclosure, whereas

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Qilingele was concerned with positive misstatement. The point was that the decision in *Qilingele* was said to flow from a statute worded in a certain way, whereas the *Oudtshoorn* decision, in a situation unaffected by the statute, was based on the common law.

However the distinction has arisen, it is an extraordinary one in a system of law which gets by without drawing artificial distinctions between falsity by silence and falsity by express statement (*suppressio veri* and *expressio falsi*, to employ the traditional terminology). The distinction once introduced must open a fertile field for the subtle pleader, adroit to conjure the positive into the

negative and vice versa, as is indicated by Havenga in *Maternity in Insurance law; The Confusion Persists* (1996) 59 THR-HR 339 (in which article a reference to much of the literature may be found).

If I, as a member of this court, were asked to interpret s 63 (3) for the first time, I would not interpret it as Kriegler AJA did in *Qilingele*. To my mind his

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confused. Thus it is possible that an insured guilty of material non-disclosure or misrepresentation may be able to show that it had no effect on the underwriter: *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*

[1995] 1 AC 501 (HL) at 551 C. (Nonetheless, as Lord Mustill points out in the passage immediately following, once materiality has been established, the insured is likely to face an uphill struggle in trying to demonstrate that his non disclosure or misrepresentation bearing this stamp had no effect.). The materiality or otherwise of a circumstance should be a constant: something apart from the subjective characteristics, actions and knowledge of the individual underwriter which may be relevant to inducement in a particular case: at 533 H- 534 A.

14 in which he warranted the truth and materiality of his representations and assented to their inclusion as essential terms of the policy. The effect of this was that all the insurer had to prove was the incorrectness of the insured's statement. That done, there was a breach of warranty, giving the insurer a contractual right to repudiate liability. Once the insured had warranted that the answers to questions in the proposal form would be the basis of the insurance contract there was no question of materiality left, because the parties had contracted that there should be materiality in the questions and answers; *Jordan v New Zealand Insurance Co Ltd* 1968 (2) 238 (E) at 241 E-F. The use of a warranty therefore obviated the need for the insurer to show that the misstatement was material and that the misstatement induced it to take on the risk in the terms which it did. The effect in law was to allow trivialities to be promoted to materialities - to allow an insurer to exploit even a trivial misstatement by the insured which in fact had no bearing on the assessment of the risk or in inducing the issuing of the policy on the terms on which it was issued and escape liability as if it had been a material misstatement which did in fact induce the issuing of the policy on those terms. The potential for abuse was obvious and unscrupulous insurers took advantage of the opportunity. It was against this background that s 63 (3) was enacted in 1969. 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. On the other hand, the warranty would not be deprived of all value. Where a misstatement was indeed material the deeming effect of the contract ("the proposal form shall form the basis of the contract") would relieve the insurer of having to prove inducement. However, what the *Qilingele* decision does is to conflate the concepts of materiality and inducement. It treats the materiality mentioned in the subsection as relating to the significance that

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facts as represented and the true facts, had they been known to him (at 75 A and 75 G-H) and the effect that his view of that difference had on his decision to insure. This means that the inducement of the underwriter is treated as a matter of fact, i.e. subjectively. I have no quarrel with that as a concept, but whether the subsection is indeed concerned with inducement is another matter. Inducement so plainly entails a subjective enquiry that there seems to be no need to state, even less to emphasise that fact. However all this may be, the concept of materiality in its traditional, objective sense, has vanished. Indeed Qilingele expressly states that the "value judgment" postulated in the Oudtshoorn decision has nothing to do with the case (at 74 F). Why the legislature might have decided to cast the well-tried common law concept of materiality out of the window is not addressed. There is a presumption against such conduct. Moreover, the result achieved is the unlikely one already

18 there such reasons? Qilingele finds them in the text of s 63 (3). On one thing I would agree with Kriegler AJA, and that is that the subsection is no model of clarity. I would agree also on another, that the Afrikaans text leans more towards his interpretation than does the English. (For what that matters the English text was signed). For the rest I disagree with his interpretation. He places particular emphasis on the reference to "the assessment of the risk under the said policy" as showing, if not very obviously, that the materiality relates to the assessment of the particular risk in the specific policy under consideration (at 75 B-C). The emphasised words are, in my view, used for a far more obvious purpose entirely consistent with the traditional common law test of materiality; they recognize that what is material to the assessment of risk attaching to one kind of policy (e.g. life insurance) is not necessarily material to the assessment of risk attaching to another kind of policy (e.g. fire insurance). There is little, if any, justification

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for reading the emphasised words as if they were intended, not to achieve that

purpose, but to achieve a purpose in conflict with the common law, namely, the setting up as sole arbiter of materiality the particular insurer in the particular policy under consideration. The key seems to me to lie in the expression "such representation if of such a nature as to be likely to have materially affected ..". In this context I think that the use of "materially" amounts to an admittedly inept, shorthand, maintenance of the common law concept of materiality. And even if there be such ambiguity that there is nothing to choose between Kriegler AJA's linguistic interpretation and mine, I would think that the presumption against altering the common law, plus the other factors which I have mentioned and the one immediately to be mentioned, should carry the day. The manifest purpose of the provision is to improve the lot of the insured, not to worsen it or to give with the one hand and take away with the other. An interpretation of the provision which involves an apparent amelioration of the

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insured's position but brings with it a benefit for the insurer which the common

law steadfastly refused to give him is, in my view, inherently suspect. For these reasons I consider that the decision of Didcott J in *Pillay v South African National Life assurance Co Ltd* 1991 (1) SA 363 (D) at 367 A-E, conferring the common law meaning on the materiality referred to in the subsection, is correct. I propose to leave the question of law there without deciding it. It has not been fully argued before us, and neither counsel regards its determination as possibly decisive in this case. But I would suggest 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

21 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. To return to the facts, the Commercial Union employee who approved the grant of cover was Mr Morton, who has since died. He was a careful and experienced underwriter. In his place Commercial Union called Mr Oates, an underwriter employed by Hollandia Reinsurance Company and a Mr Fermor, one of its own underwriters. Broadly speaking they gave evidence as to what they thought Morton had thought and done and as to how he would have reacted had he known the whole truth as opposed to what it is supposed he did or did not know. Their views are of assistance in some respects but are by no means decisive of the case. The same may be said of Mrs Lourens, a one-time underwriter called on behalf of Clifford. The three of them cannot replace

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Morton. I shall deal first with the probable consequences of the incorrect statement of the year of manufacture as 1993, instead of 1991 or earlier. Mr Lazarus, for Clifford, accepted that Morton took the statement in the proposal form at face value (i e inducement had been proved). The argument was that the misstatement was not material. I shall mention its potential materiality in a general way later. More specifically, there is a special "new for old" clause in the insurance contract, extension clause 3, which I think is decisive. It reads:

"If the motor car is within one year of its first registration and before it has been driven for more than 30 000 kilometres (a)

stolen and not recovered or (b) damaged to the extent that the cost of repairs exceeds 70% of its list price plus taxes when new

the basis of indemnity will be the current cost of a new motor car of the same or similar model subject to a limit of 120% of the maximum indemnity (less the First Amount Payable)."

Clifford's claim was based on this clause and she alleged and proved the

23 facts which would bring it into operation, namely a theft and a mileage of less

than the equivalent of 30 000 kilometres at the date of the theft, which took place less than a year after the first registration. The "maximum indemnity" was R530 000, so that she claimed R636 000, which was 120% thereof.

Late in the hearing in the court a quo an alternative claim, which had not been pleaded, was put forward. It was based on extension clause 3 not bearing on the issue of materiality at all because, so it was argued, it applied to new cars, whereas the 500 SL was not "new". When the appeal commenced Mr Lazarus abandoned the pleaded claim for R636 000 and abandoned reliance on clause 3 entirely. The alternative claim was now the only claim. It was based on the general indemnity provision, which allows for an indemnity based on the market value of the 500 SL up to a maximum of R530 000, which was the amount now claimed.

The reasons for Mr Lazarus's ultimate abandonment of clause 3 are clear 24 enough. He accepted that Mr Morton believed he was insuring a new car in the particular sense of one manufactured in the year in which cover was granted,

1993. That year was reflected in the schedule to the policy, so that the cost of the new car which Commercial Union had to pay in replacement of the 500 SL in the event of its being stolen, was that of a 1993 model, subject to the maximum of R636 000. The whole attractiveness of clause 3 is that it is not concerned with the value of the insured car, a value likely to take a sharp drop immediately after it ceases to be brand new, but with the cost of a new car of the same model. On the evidence, the value of a new 1993 model was greater than that of a new 1991 model. Thus it does not avail Clifford to argue, as at one stage her counsel did, that R530 000 was not an overstatement of the value of the 1991 car in question. That was not the value in issue, even if it be accepted that the correct figure was R530 000. Nor does it avail her to argue that Clifford would not have claimed more than the value of a 1991 model. A 25 reasonable underwriter would not have left such a matter to the insured's propriety whilst committing his employer to compensate on the basis of a 1993 model. Whichever test of materiality one adopts, objective or subjective, it is clear that had Morton known the true facts he would not have issued a policy reflecting the car as a 1993 model. Mr Lazarus's only basis for contending that extension clause 3 has no relevance was the construction which he sought to place on it. The "first registration" referred to in the clause actually meant "when it should first have been registered". This, it was common cause, was in 1991, whereas the car was in fact first registered on 13 January 1994. This construction involves a reading of the clause for which no justification is to be found. Moreover, I think that the construction is contrary to the sense and purpose of the clause. Take the case of a person who buys a new car but asks the dealer to keep it unused on his shop floor for 9 months, during which time the buyer intends to be overseas. 27 because in the years following the first, when the car itself may after, say its theft, have disappeared without trace, the ordinary indemnity, based on its current market value, would have been likely to have been increased by the misstatement as to the year of manufacture. Again I do not think that a reasonable underwriter would have exposed his employer to a later model in

the policy, leaving it to the good faith of the insured to claim on the actual model of earlier date. However, as there is a "new for old" clause, it is unnecessary to enquire further what conclusion would have been reached had it been absent. Various further grounds were argued on Commercial Union's behalf as justifying repudiation. I do not propose discussing them, because of the conclusion adverse to the success of Clifford's appeal that I have reached without reference to them. The appeal is dismissed with costs.

W P SCHUTZ JUDGE OF APPEAL

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 302/96 In the matter between J D CLIFFORD Appellant and COMMERCIAL UNION INSURANCE COMPANY Respondent CORAM: Van Heerden DCJ, Nienaber, Howie, Marais et Schutz JJA DATE HEARD: 4 MAY 1998 DELIVERED: 22 MAY 1998

JUDGMENT

MARAIS JA

2 Marais JA: I have had the benefit of reading the judgment of my brother Schutz. But for one reservation, I agree with it. It is this. Whatever else clause 3 may be able to accommodate, I hesitate to conclude that it can fairly be said to accommodate a car with a history as remarkable as this. I am therefore reluctant to concur in the view that the clause was applicable to this car. However, even if it was not, I think that the very fact that controversy could arise as to whether or not it was applicable in the peculiar circumstances of the case made it necessary for the insurer to be given reasonably accurate information regarding the year of manufacture of the car. The first registration of the car had taken place almost three years after the date of manufacture and only after it had passed through the hands of three previous owners. That is a most unusual situation which, if known to an insurer 3 invited to go on risk, would at least have prompted further enquiries. The incorrectness of the information given to the insurer was, in my view, "of such a nature as to be likely to have materially affected the assessment of the risk under the policy -----". Correct information might well have resulted in a reluctance to insure the vehicle at all, but assuming that a decision to do so was not entirely out of the question, the likelihood is that further enquiries would have been made and that after the garnering of further information, the policy would not have been issued without deleting clause 3, and without correcting the year of manufacture. To have left the clause in the policy would have exposed the insurer to a potential claim under the clause in circumstances in which the insurer would not have been prepared to confer the enhanced cover it provides. Indeed, that was precisely the claim with which it was later faced and which was pursued in litigation until ultimately abandoned in this court. Whatever test of materiality be applied, I consider 4 that it was satisfied both for this reason and for the further reason suggested in the penultimate paragraph of Schutz JA's judgment. R M MARAIS JUDGE OF APPEAL HOWIE JA: I agree

Case No: 302/96 .

In the matter between: JD CLIFFORD Appellant and COMMERCIAL UNION INSURANCE COMPANY Respondent OF SOUTH AFRICA LIMITED CORAM: VAN HEERDEN DCJ, NIENABER, HOWIE, MARAIS AND SCHUTZ JJA

HEARD : 4 MAY 1998 DELIVERED : 22 MAY 1998

JUDGMENT

/NIENABER JA

2 NIENABER JA :

The correctness of the approach of this court in *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A) as to the proper interpretation of s 63(3) of the Insurance Act 27 of 1943, was never an issue in this appeal. Whether, on the facts of this case, the correct test was objective or subjective and whether the distinction drawn in *Qilingele* case between misrepresentational omissions and commissions was sound or unsound, mattered little to the arguments advanced on either side. The issue was accordingly not debated at all and for the resolution of this appeal the disputation is not material. In those circumstances I am disinclined to either endorse or express disagreement with the instructive points made by my brother Schutz in his excursus on the topic. I agree with him that the appeal should be dismissed, broadly for the reasons stated by him. I would add the following supplementary reason.

According to counsel for the appellant extension clause 3, the "new for old" 3 clause quoted in my brother's judgment, is a standard clause in the policy. It is also a conditional one. If the conditions were fulfilled the clause would apply. The one condition, that the car should not have been driven for more than 30 000 kilometres when stolen, had been fulfilled. The other condition material to this appeal was that the car should have been stolen and not recovered "within one year of its first registration". The car was registered for the first time with the registration authorities on 13 January 1994. On 30 January 1994 it was stolen after which it was not recovered. If "first registration" in the clause is taken at face value to mean its first registration with the appropriate licencing authorities, the clause would accordingly apply. In that event the Commercial Union would be liable in terms of the policy for the payment of the R636 000. That was indeed the argument advanced in the court a quo and developed in the appellant's heads of argument before this court. On that basis, however, the appeal was doomed to failure. The reason is that the sum of R636 000 which would have been payable if extension clause 3 were applicable, was well in excess of the market value of the vehicle. It was manufactured in 1991 and the evidence was that the 1993 model was significantly more valuable than the 1991 model. In respect of a car manufactured in 1993 and which had been registered before the date of the proposal form (when part of the period of the twelve months referred to in extension clause 3 would already have elapsed), the risk assumed by the company in terms of that clause would have been of the kind the clause was designed to cover. In respect of a car manufactured in 1991 which was yet to be registered, it was not. The misrepresentations contained in the proposal form, both as to the year of manufacture and as to the registration of the car, therefore affected the basis of the Commercial Union's indemnity and its exposure to the risk that it might be liable in terms of

extension clause 3 for an increased sum (compared to market value) and for a longer period (compared to an earlier registration). And if the exposure to the risk was increased, it obviously would have affected the 5 assessment thereof for the purpose of s 63(2) of the Act. If the truth had been told

in the proposal form the Commercial Union would not have assumed the risk that

extension clause 3 could be enforced against it. It would have recast the risk by deleting or revising the clause or, at best for the appellant, by insisting that the vehicle be registered before indemnification would be considered.

It is doubtless for that reason that counsel for the appellant adjusted his stance and strove to argue that words "first registration" in extension clause 3 did not mean what it said but meant "when it should first have been registered". On that reading extension clause 3 would not have been applicable and consequently the Commercial Union would only have been liable for the reasonable market value of the car as at the time of the theft. I agree with Schutz JA that this interpretation is so forced as to be untenable. On that ground alone the appeal must fail.

I accordingly concur in the order proposed by Schutz JA. 6 VAN HEERDEN DCJ concur P M NIENABER JUDGE OF APPEAL

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