

SOUTH AFRICA / JUDGMENT

Nannen and Others v Momentum and Others (6769/05) [2017] ZAGPPHC 146 (18 April 2017)

[2017] ZAGPPHC 146

COURT

North Gauteng High Court, Pretoria

BEFORE

Hughes

CASE / FILE NUMBER

6769/05

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case Number: 2275/05

6769/05

18/4/2017

Reportable:

Yes

Of

interest to other judges: No

Revised.

In

the matter between:

ASHIM

KUMAR

NANNEN 1st

PLAINTIFF

YUNEEL

NANNEN 2nd

PLAINTIFF

CHINTAMONEY

NANNEN 3rd

PLAINTIFF

ASHIM

KUMAR NANNEN N.O

4th

PLAINTIFF

and
MOMENTUM 1st
DEFENDANT
MOMENTUM
GROUP
LIMITED 2nd
DEFENDANT
FIRSTRAND
LIMITED 3rd
DEFENDANT

Coram: HUGHES J

JUDGMENT

HUGHES J

INTRODUCTION

- [1] This trial commenced on 19 February 2014 before Webster J and was concluded on 07 August 2014. The delivery of the judgment was delayed as a result of Judge Webster being ill health which eventually led to his retirement. The matter was handed over to me to hear argument in December 2016 hence this judgment.
- [2] Initially there were two actions instituted under case number 2275/05 and case number 6769/05. The first case, case 2275/05, was initiated by Ashim Nannen, son of the deceased, Doughraj Nannen, in his capacity as executor of the deceased estate. The second case 6769/05 was instituted by the beneficiaries, that being Ashim Nannen, Yuneel Nannen, both being sons of the deceased and Chintamoney Nannen, the wife of the deceased. The deceased's wife has since passed on and is represented in these proceedings by the executor of her estate, being Ashim Nannen. In both actions the relief sought is payment by the defendants of the death benefit payable as a result of the death of the deceased under policy number 98539133 (the policy). For convenience these two actions were consolidated in terms of rule 33(4) of the Uniform Rules of Court.
- [3] The defendants resist this action on the basis that the deceased misrepresented and failed to disclose material facts when he applied for the policy that was issued by the second defendant, Momentum Group Limited (Momentum). In terms of section 59 of the Long-Term Insurance Act 52 of 1998 (the Act), the defendants plead that they are entitled to avoid the policy owing to the deceased's misrepresentation and non-disclosure.
- [4] It is common cause that in these circumstances the defendants bear the onus to prove that indeed there was a material misrepresentation

and non-disclosure on the part of the deceased. Be that as it may, the parties agreed that the plaintiffs would begin. The parties

accepted that this case was essentially against Momentum who had issued the policy.

THE EVIDENCE

[5] I do not propose to regurgitate the testimony of the witnesses but will set out those facts that are pertinent to the determination of the issue at hand. The plaintiffs called two witnesses namely Ashim Nannen and Dr Van Vuuren and the defendants called three witnesses namely Dr Alan Peter, Mr Kerford and Ms Lee-Anne Hale.

The Documentary Evidence

[6] The deceased completed an application for insurance with Momentum dated 11 October 2001. At section 12- Health Questioner portion, the deceased recorded that he sustained an ankle injury in September

2000. He stated that he was treated by Dr Tuson for this injury.

[7] To the question as to whether the deceased was expected to seek medical advice within the next eight weeks. The deceased responded,

yes, and advanced that it was for the removal of steel plates in his left ankle in November 2007.

The question termed as the misrepresentation in this dispute is:

'If not already stated, have you during the past five years had any X-rays, ECG's, other examinations, Genetic testing, Tumour markers, other, operations or been hospitalised, received medical advice(excluding colds and flu)'

His response was in the negative. This application also sought confirmation that on signature the information supplied was correct

and complete. It further sought that one understood that 'Momentum will cancel the insurance contract that was issued under this application if I have withheld any important information on this application form, or answered any question(s) incorrectly'.

[8] On 20 November 2001 a confidential medical report for Momentum was completed by Dr Geyer, a medical practitioner for Momentum. On this document the deceased disclosed that in the past five years he had a check- up for Tuberculosis (TB) at work in 1998 and that in 2000 he had an x-ray taken of his fractured left ankle. He also disclosed that he had gained weight over the past year, being 2000. In the same report he confirmed that he had scars on both sides of his left ankle, had varicose veins on both legs and a small umbilical hernia.

[9] It is noted on an undated pre-admission form for Kenridge Hospital that the deceased recorded that he had high blood pressure and was taking medication daily for the past two months.

- [10] The blood collected from the deceased on 24 March 2000 was analysed by Van Drimmelen Laboratories. The referring doctor recorded was Dr Irwin Luke (Dr Luke). In the report of Van Drimmelen the haemoglobin, beta, alpha and sedimentation are recorded as raised. It is also recorded that the deceased had very high anisocytosis and raised white blood cell count.
- [11] There are also undated handwritten notes of Dr Luke and a typed note dated 15 August 2002 which bears Dr Luke's name but is unsigned. The latter is addressed to Peter Kerford the investigator of the defendant.

Dr Alan Peter (Dr Peter)

- [12] Dr Peter's curriculum and qualifications were not in dispute disputed and accepted by the plaintiffs. His expertise were that of a Pulmonologist in the field of lungs and a Specialist Physician. He was instructed to compile a medical legal report from the purported notes of Dr Luke whom the deceased was alleged to have consulted. These consultations took place within the five year period prior to the inception of the policy. During one of the consultations Dr Luke referred the deceased to Van Drimmelen Laboratories for blood tests to be conducted.
- [13] In essence, Dr Peter was called upon to advance a diagnosis of the blood tests conducted on the deceased together with the notes of Dr Luke. This come about as a result of Dr Luke's demise in 2002 prior the action by the plaintiffs. At this juncture I must point out that the practise notes of Dr Luke and their authenticity are being challenged by the plaintiffs.
- [14] Dr Peter in his medical report concluded that the blood tests results pertained to the deceased and these indicated that the haemoglobin count exceeded the normal range. He explained that the blood tests results of March 2000, the haemoglobin count was recorded as 18.4, whilst the normal rate would be between 14 and 18. He testified that the raised haemoglobin level could be an indicator of polycythaemia. However, he did venture to state that there could be several causes creating spurious result of raised haemoglobin and these could be dehydration, large uses of drugs which deplete the body of water, but the culprit which results in polycythaemia with raised haemoglobin is lung disease. With damaged lungs the body will create more red blood cells to assist with the oxygenation of the body and in doing so will result in a polycythemic state with raised haemoglobin.
- [15] From the notes of Dr Luke, Dr Peter testified, that mention is made, of the deceased having presented himself with a problem with his left ankle, for which Dr Luke referred him to Dr Tuson at Kenridge Hospital. As regards the notes of Dr Luke in respect of the diagnosis of polycythaemia made by Dr Luke, he testified that:

'It would support the diagnosis of polycythaemia, but the cause of which is still not accurate and not evident from what we have and that to further investigate this patient a repeat haemoglobin level would have been deemed necessary and that would have been asked to have been done in couple of months , six months or so onwards, to establish whether the patient still had a

haemoglobin level and from the notes that Dr Brink, the comments that Dr Brink made [the notes and comments made by Dr Brink] Mr Nannen did have a blood test done on 13 February 2002 and that haemoglobin level was reported as 18.1'.

[16] Dr Peter pointed out that even though the haemoglobin level had dropped from 18.4 on 24 March 2000 to 18.1 on 13 February 2002, the indicators were still that of having polycythaemia. He testified that the impact on the future modality of the deceased, if he had polycythaemia was as follows:

'If he was polycythaemic and he had raised haemoglobin level there are negative consequences to that. If we start with just a polycythaemia due to lung disease, which he did not have, or polythaemia due to any other cause, people who have polycythaemia are

prone to high blood pressure, headaches, sometimes blurred vision, they are prone to developing gout, they have four or five times

increase risk of bleeding in the gastro intestinal tracts, ulcers and bleeding into the brain. They have increased clotting, because the blood cells are very thick and you can get clotting in any vessel in the body and so there are negative consequences to leaving a patient with a very high haemoglobin untreated. The treatment of choice in most instances is for the patient to become a blood donor or have a venesection, which would then drop the haemoglobin count.'

[17] Dr Peter testified that Dr Luke would have made the diagnosis of polycythaemia from his consultation with the deceased and the blood tests results. These results reflected that they were conducted on 24 March 2000 at 14h50 and they were uplifted at 15h51. The patient being a sixty year old male.

[18] During cross-examination Dr Peter made numerous concessions:

18.1. That he was advised that the clinical notes were that of Dr Luke;

18.2. That he could not for certain say the clinical notes pertained to the deceased and not the deceased's wife;

18.3. That one could not make a diagnosis on the results alone which were on hand before Dr Luke, but he confirmed that the results supported the diagnosis. The cause thereof was still not accurate and evident and required further investigation by means of repeated blood tests. At best these results, he stated, was 'a flag is [being] raised'. The raised haemoglobin levels alone did not confirm that there was polycythaemia, other indicators such as raised red cell count and raised haematocrit were required as well. Dr Peter testified that the raised results should be classified as 'a state' and not 'a diagnosis' and as such he admitted that the raised haemoglobin could have resulted from, but not limited to, dehydration, hangover, sleep apnoea and stress; and

18.4. Lastly, he conceded that he was not a specialist in Haematology but persisted that with a raised haemoglobin level, a suspicion for polycythaemia was raised.

[19] When asked, if in the circumstances that prevailed the diagnosis of polycythaemia had been 'proven', Dr Peter responded as follows:

'The state of polycythaemia requires a [indistinct], further tests would then be necessary to rule in the cause for polycythaemia or actually discount it, because it may have been a laboratory error that ...In Mr Nannen's case Dr Luke was writing and describing a state of po/ycythaemia on that result which he had and that s why he said I felt, I felt he was a polycythaemia, and I am quoting Dr Luke. So Dr Luke has not made a definitive diagnosis in his notes and I am just, I am asked to re/ate was this [indistinct] that he felt he was polycythemic correct from the results that he [indistinct] but I have to agree that [indistinct]'

Peter Anthony Kerford (Mr Kerford)

[20] Mr Kerford was employed in the forensic division, as a forensic examiner, at Momentum, the first defendant. He explained the process he followed in order to obtain the medical records of an insured. He testified that once he received the notification of the claim, he consulted with the medical practitioners and institutions that attended upon the insured. By doing so he stabled a medical history of the consultations and claims submitted on behalf of the insured.

[21] On the 29 July 2002 Mr Kerford wrote a letter and faxed it to Dr Luke requesting '...a report relating to all the consultations, including symptoms, treatments, surgery, prescribed[prescription]required, nature of illness, any relevant medical history mentioned by your patient. Please also include any details of laboratory tests and physical examinations conducted, as well as the results thereof.' pertaining to the deceased.

[22] Mr Kerford stated he received a call when the report was ready and he went personally to the doctor's rooms to uplift the completed medical report which was accompanied by an invoice. This meeting with Dr Luke was sometime after the 15 August 2002, as the report is dated 15 August 2002. The remittance advice, dated 04 October 2002, was issued to him after effecting payment.

[23] Ms Kerford's testimony is that after he received the documents from Dr Luke, he transmitted them to the claims department, who were then charged with the adjudication of the claim. He was not involved in that process.

[24] In cross-examination it was put to Mr Kerford, that he could not have received the medical report, as he had testified that he did in August 2002, as at that time Dr Luke was severely ill with cancer, and had just had a tumour removed. It was further put to him, that the Dr Luke had not been to his practise since July 2002, until he met his demise on 11 September 2002.

[25] Adv Keet, representing the plaintiffs put to Mr Kerford that an arrangement had been set up with Mr Nannen to meet at Dr Masters

rooms on 09 August 2002 to 'obtain the letter in question, because at that point in time you had not received anything from Dr Luke'. Mr Kerford replied that he could not remember such arrangement and as such could not dispute or admit same. However, he was adamant that he received the 'signed letter by Dr Luke dated 15 August 2002 from Dr Luke's offices'.

[26] The signed copy of the letter of Dr Luke only surfaced on the second day of the trial being 20 February 2014. He persisted that he had uplifted the signed copy from Dr Luke at his rooms.

Ms Lee-Anne Hale (Ms Hale)

[27] Ms Hale was a senior underwriter employed by Momentum who received the deceased's application and issued the policy. At the time of the trial she was employed as head of underwriting projects. She was employed in the underwriting department of Momentum since 1986.

[28] Ms Hale confirmed that in the medical portion of the application from the deceased, the deceased disclosed that he had been hospitalised for a broken ankle in September 2000 and was treated by Dr Tuson of Kenridge Hospital.

[29] She further confirmed that, with regards to the request in paragraph 15 of the application, which states: 'if he had in the past five years had X-rays, ECG, other examinations, genetic testing, tumour markers, operations or been hospitalised or received any medical advice, excluding colds and flu', the deceased responded in the negative. She concluded by saying that she placed reliance on the information provided by the deceased, as a prospective insured.

[30] Ms Hale testified that from the information supplied by the deceased on his application form there was nothing of any real concern. She further testified that to the question regarding whether he had seen any doctors, specialist, alternative medical practitioners or traditional healers in the past five years, he again responded in the negative.

[31] Ms Hale stated that she was not involved in the assessment and repudiation of the deceased's claim. On receiving Dr Luke's report, she was asked to comment thereupon, she stated that had she had the report then, she would not have granted the policy without further tests being conducted. There would have either been a loading levied on the policy of between 70% up to 200% if it was granted. By a loading she explained that this would have resulted in the policy premium being much higher than that which was quoted.

[32] During cross-examination Ms Hale conceded that the state of high polycythaemia, high anisocytosis, sedimentation, raised Alpha and Beta, no space was provided to insert same on the application form duly completed by the deceased. There was also no place to note a liver condition or changed liver condition. She further conceded, that the main issue linked to the repudiation of the policy was that of polycythaemia. Lastly, it emerged from cross-examination that from the documents at hand, the various states of high polycythaemia, high anisocytosis, sedimentation, raised Alpha and Beta were not conveyed to the deceased.

Mr Ashim Kumar Nannen (Mr Nannen)

[33] Mr Nannen testified that after his father's death, on 3 May 2002, he lodged a claim with the defendants. He was directed to Mr Kerford, who was investigating the claim, on behalf of the defendant. Mr Kerford had indicated to him, that he was having some trouble locating a Dr Luke, who had attended to the deceased. Mr Nannen was surprised as he was not aware that the deceased had been seeing a Dr Luke.

[34] On or about the 07th or 08th August 2002 Mr Nannen went to Dr Luke's rooms and was informed that the doctor was unavailable as he was severely ill. He had a brain tumour and cancer and due to his illness he had not been to his practise for one and half or two months. He testified that he was also informed by Mary, whose surname was undisclosed, Dr Luke's receptionist, that the patients' files were with Dr Masters. On receiving this information he advised Mr Kerford and they made arrangements to meet at Dr Masters rooms on 09 August 2002. He stated that on his arrival at the doctors rooms, Mr Kerford had already met with Dr Masters and had the relevant files of the deceased in his possession.

[35] Mr Nannen testified that, on 09 August 2002, after advising Dr Masters that he was the executor, he was allowed access to the

deceased's file. This was a red file but did not have the names of the deceased on the documents. He stressed that since the letter of Dr Luke is dated 15 August 2002 it could not be from Dr Luke himself as he was severely ill and had not been to his rooms since July 2002.

[36] Mr Nannen confirmed that the deceased had broken his ankle whilst at work with him and the family took him directly to Kenridge Hospital. He did not attend at Dr Luke's rooms for that injury is reflected in the disputed documents from Dr Luke. He was adamant that the deceased was not a patient of Dr Luke.

[37] In cross-examination, Mr Nannen conceded that the documents that appeared on pages 35-38 of bundle 'CC' were the documents in the red file. They were in the file which was shown to him in Dr Masters' rooms and later handed to him. He also concede that the practise notes of Dr Luke which were discovered were in fact the documents which appeared at pages 35-38 of bundle 'CC'.

[38] What also emanated from cross-examination was that the aforesaid documents that were discovered, had been done so by Mr Nannen's

previous attorney. As such, Mr Nannen could not recall if the attorneys had advised him where they had obtained the documents from.

It was however pointed out to Mr Nannen that in fact the discovery was done by his erstwhile attorneys instead. Then he profusely tried to point out that the documents must have been explained to him before he signed the discovery, but as it was a long time he could not recall where the attorney had said they attained the documents from. It was noted that the discovery of the documents in question took place on 15 August 2010.

- [39] With regards the blood tests that were conducted on the deceased, Mr Nannen was steadfast in his version that even though the blood tests had the referring doctor as Dr Luke and bore the name of the deceased, his father had never been a patient of this doctor.
- [40] The thrust of Mr Nannen's evidence is that both his parents' names do not appear on the documents from Dr Luke; that only his mother might have been referred to Dr Luke but the deceased was not a patient of the doctor; he could not account for the invoice issued by Dr Luke and paid for by the defendants in respects of tests conducted on the deceased.

Dr Hesther Jansen Van Vuuren (Dr Van Vuuren)

- [41] Dr Van Vuuren's expertise as a Haematologist were not disputed. The crux of her evidence was that from the blood tests conducted on the deceased, there was an indication of polycythaemia because of the raised levels of the haemoglobin of 18.4. However, the red blood cells and haematocrit were normal. The doctor confirmed that she and Dr Peter were in agreement that without further tests the current blood test were not sufficient to prove polycythaemia.
- [42] Dr Van Vuuren testified that it was not absolutely clear from the documents that the notes referred to the deceased. She made mention that the blood test results which were on hand could have been caused by a number of reasons namely dehydration, hangover, stress, infection, inflammation to mention but a few.
- [43] In her evidence in chief she stated that the process to establish if a patient was polycythaemia is as follows:

'...die eerste ding sat wees is ek sat kyk watter parometers is almal verhoog, is dit byvoorbeeld net die rooisel telling, is dit

byvoorbeeld net die hemoglobien of net die hematokriet, want as n mens wil sê iemand is polisitemia gaan jy graag wit hi\$ al drie moet hoog wees. So se nou al drie is hoog dan wit jy dit bevestig. 'n Enkele waarde is nie n diagnose nie en n enkele toets

van daardie drie is ook nie diagnosties nie, so jy wit seker maak dat dit wet die geval is. As jy dan kan bevestig die patiënt is polisitemies dan moet jy kyk is it primer, met ander woorde dit n beenmurg kondisie ...'

- [44] Dr Van Vuuren further testified that the recording on the blood tests of 15.1 for anisocytosis would be termed as a non-specific value where normal is 14.8. When asked if the findings of Dr Luke of sedimentation being high, she responded that it was high. Dr Van Vuuren ensured the Court that what was presented was not a sickness or a diagnosis, but rather 'dit is n merker van 'n toestand wat jy moet gaan soek.'

- [45] Dr Van Vuuren conceded in cross-examination that the notes of Dr Luke 'described the blood test quite well'. Further, that the blood tests, in question, on all probability pertained to the deceased. Her reasoning was that the nursing staff who would have conducted the blood tests would have ensured that the blood was taken from the correct person, referred by the referring doctor. She stated that she would not have used the phase polycythemic as was done by Dr Luke, instead she would have used the phase raised haemoglobin.
- [46] Dr Van Vuuren also stated that the hand written notes recorded by Dr Luke together with the blood tests from Van Dimmelen, are probably set out in the unsigned typed notewhich did not have the deceased's name on. A comparison exercise embarked upon by Adv. Mundell, for the defendant, between the hand written notes of Dr Luke, the blood results from Van Dimmelen, the medical report prepared by Dr Geyer and the typed unsigned notes, revealed that 'on the probabilities if one looks at the notes that appear at 35, the handwritten notes, they correlate almost identically with those that appear at page 34'. She confirmed that they indeed correlated.
- [47] In conclusion, Dr Van Vuuren stated that if it was not clear that a patient had polycythemia further tests were required, for if one did have polycythemia as a primary problem in a patient with lung or heart disease, one would at some stage require chemotherapy, as eventually, 10% of these cases , could develop into acute leukaemia.

THE ANALYSIS

- [48] What are the probabilities that the deceased fills in the questionnaire, undergoes medicals for the Momentum and advances the

same information which appears in both Dr Luke's hand written notes and his typed note? In *Bates and Lloyd Aviation (pty) Ltd and Another v Aviation Insurance Co* 1985 (3) SA 916 (A) at pages 9391-940A it was held that:

'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).'

The Non-Disclosure

- [49] It common cause and trite that the general rule is that he who asserts must prove. Thus in this case the onus to prove the

non-disclosure lies with the defendants and all that the plaintiffs need prove is the death of the deceased. See *Van Wyk v Lewis* 1924 AD 432; *Cecilia Goliath v Member of the Executive Council for Health, Eastern Cape* (08512014) [2014] ZASCA 182 (25 November 2014) at para [8].

- [50] In *Momentums'* letter declining the plaintiffs claim and cancelling the policy of the deceased from inception, the defendant states the reason as follows:

"The medical history obtained for the deceased indicated that Mr D Nannen consulted Dr I Luke, a specialist surgeon, on two occasions. Mr Nannen was diagnosed with: Bilateral varicose veins and swollen feet.

Polycythaemia with high anisocytosis and a raised white blood cell count. Raised sedimentation.

Raised protein and Beta and Alpha globulin.

Liver change with raised ALP.

Unconjugated bilirubin and raised total protein.

The above conditions were diagnosed prior to the application and inception of the policy concerned, and were not disclosed to Momentum.'

[51] In addition, the defendants made mention that the deceased was at risk of a number of conditions being cardiac, cancer, and

respiratory, inflammatory, and high risk of thrombosis. Not to mention his non-disclosure of being treated for hypertension. Accordingly, the defendant declined the plaintiffs' claim for the death benefit and the policy was cancelled from inception.

[52] The plaintiffs contend that the defendants cannot repudiate and cancel unless they can show that the misrepresentation and

non-disclosure materially affected the assessment of the risk under the policy at the time of it being issued. To this end the plaintiffs argued that it placed reliance on section 59(1) of Long-Term Insurance Act 52 of 1998 (the Act).

[53] As argued by the plaintiffs in their heads of argument '...notwithstanding the falsity of the answers, [the] defendant is not entitled to repudiate the claim unless it shows that the representations by the plaintiff (in the form of the false answers furnished to the questions) 'materially affected the assessment of the risk under the policy concerned at the time of its issue'. Thus the plaintiffs reliance on s 59(1) of the Act as it places the onus on the defendants to show that the representations and non-disclosure are such that they materially affect the assessment of the risk under the said policy.

[54] On the other hand Momentums' case is that a reasonable, prudent person would consider it necessary for the deceased to have disclosed his attendances on Dr Luke, thus enabling the defendants to form their own view of such information. To the extent of even allowing for further tests to be conducted in order to assess the risk which was to be assumed.

[55] The defendants contended that the underwriter, Ms Hale, was made aware of the deceased's consultation with Dr Luke. In fact the deceased did not disclose this information in his policy application. Ms Hale testified, which testimony was not contested, that had she had the information of the consultations with Dr Luke, she would have insisted that the deceased undergo additional tests and examinations prior to the policy being issued. This was because the contents of the consultation of Dr Luke with the deceased would have 'materially

affected the risk to be assumed by the defendant'.

[56] It was further argued by the defendants that both Dr Van Vuuren and Dr Peter concurred that the high haemoglobin results of the Van Drimmelen blood tests report were to be considered as a 'red flag' and that further medical examinations were required. The additional examinations would have revealed or rule out whether the deceased suffered from polycythaemia, whether it was derived from a secondary cause or was polycythaemia vera. The defendants concluded by stating that the purpose of disclosure by the deceased, which he failed to do, was for this exact reason, in order for the Momentum to be in a position to better assess its risk by conducting further examinations and tests.

The law

[57] Section 59 of the Long-Term Insurance Act, 52 of 1998, reads as follows:

'59 Misrepresentation and failure to disclose material information

(Heading substituted by s. 19 of Act 17 of 2003 (wef 1August 2003).]

(1)

(a) Notwithstanding anything to the contrary contained in a long-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2) -

(i) the policy shall not be invalidated;

(ii) the obligation of the long-term insurer thereunder shall not be excluded or limited; and

(iii) the obligations of the policyholder shall not be increased, on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any variation thereof. [My underlining]

(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular

information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed

to the insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.

[Sub-s.

(1) substituted by s. 19 of Act 17 of 2003 (wef 1August 2003).)

(2) If the age of a life insured under a long-term policy has been incorrectly stated to the long-term insurer, the policy benefits shall, notwithstanding subsection (1), be those which would have been provided under that policy in return for the premium payable had the age been correctly stated: Provided that if the nature of that long-term policy, or kind of long-term policy, is such as to render such arrangement inequitable, the Registrar may direct the long-term insurer to apply such different method of adjustment to the policy benefits of that long-term policy, or type of long-term policy, as the Registrar considers equitable in relation to the misstatement of age.'

[58] What has emerged through the cases is that there exist a duty *ex lege* to disclose in insurance contracts. See *Tucker Land Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 652G -H:

'It should therefore be accepted that in our law an anticipatory breach is constituted by the violation of an obligation *ex lege*, flowing from the G requirement of bona fides which underlies our law of contract. It would also be desirable, in order to obtain clarity of thought, to jettison the terminology of offer and acceptance in this regard, and to denote a creditor's decision to act upon an anticipatory breach not as an 'acceptance' but as an election. (Cf *Kerr Law of Contract* 2nd ed at 289 - 90.) Once the existence by operation of law of an obligation not to commit H an anticipatory breach is accepted, the question remains as to how that obligation can be violated. The answer generally given is: by repudiation.'

[59] It is trite that a duty to disclose material facts, which are known to the insured exist when seeking insurance cover from an insurer so as to assist the insurer to assess and estimate the risk needed to be covered. Further, the provision of the material facts has a bearing on the risk to be engaged by the insurer and the premiums that risk attracts. Thus it is apparent to me, that the failure to disclose material facts or the providing of misrepresentations by an insured, has a negative effect on the insurance contract concluded by the parties.

[60] In dealing with a material non-disclosure and a misrepresentation, as the least, one ought to first prove its materiality and then show that the said non-disclosure and misrepresentation induced the insurer to issue the policy to the insured. See *Clifford v Commercial Union Insurance Company of SA* [1998] ZASCA 37; 1998 (4) SA 150 (SCA) at page 1560-H. The test is one which is objective and based on the thinking of the prudent and reasonable person.

[61] This was dealt with in *Mutual & Federal Insurance Company Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 434C-F where Joubert JA in the majority judgment had the following to say with regarding the test to establish whether non-disclosure or misrepresentation was material:

'It is not surprising therefore that the prudent and reasonable insured test made its appearance sporadically in the field of maritime

insurance. This test is more favourable to an insured since the standard of judgment is the objective judgment of a prudent and

reasonable insured and not the subjective judgment of the insured in a particular case. In its report of 1957 the Law Reform Committee in England recommended that "for the purpose of any contract of insurance no fact should be deemed material unless it would be considered material by a reasonable insured". The Law Commission in its report of 1980, according to Birds, Modern Insurance Law,

(1982) at p 102-103, urged "that while the test of materiality remain broadly the same, questions expressly asked being presumed to be material, the proposer should be bound to disclose only those material facts which he knows or ought to know which a reasonable man in his position would disclose, having regard to the nature and extent of the insurance cover which is sought and the circumstances in which it is sought'.

And further at 435F-1:

'It is implicit in the Roman-Dutch authorities and also in accordance with general principles of our law that the Court applies the reasonable man test by deciding upon a consideration of the relevant facts of the particular case whether or not the undisclosed

information or facts are reasonably relative to the risk or the assessment of the premiums. If the answer is in the affirmative, the undisclosed information or facts are material. The Court personifies the hypothetical diligens paterfamilias i.e. the reasonable man or the average prudent person (Weber v Santam Versekeringsmaatskappy Bpk 1983 (1) SA 381 (A) at 410H-411D). The Court does not In applying this test judge the issue of materiality from the point of view of a reasonable insurer. Nor is it judged from the point of view of a reasonable insured. The Court judges it objectively from the point of view of the average prudent person or reasonable man. This reasonable man test is fair and just to both insurer and insured inasmuch as it does not give preference to one of them over the other. Both of them are treated on a par.'

[62] The test itself is premised on the reasonable prudent person acknowledging that the information not disclosed or that which was misrepresented should have been provided to the insurer, for the latter to have made an informed decision. See President Versekeringsmaatskappy Bpk v Trost Bank van Africa Bpk en 'nAnder 1989 (1) SA 208 (A) at 216 F-G. Having illustrated the aforesaid the insurer needs to show that the misrepresentation or non-disclosure materially caused the insurer to issue the policy. These are both delictual in nature and require objective tests.

[63] The other view is that when establishing a material non-disclosure the test is objective but when establishing misrepresentation the test in this instance is subjective. To this end see Qilingele v South African Mutual Life Assurance Society 1993 (1) SA 69 (A). Now after Qilingele came Clifford and Schutz JA, who delivered the majority judgment, did not decide on the issue whether the Qilingele test could be wrong. However, in Regent Insurance v King's Property (5/2014) [2014] 'ZA.SCA (176) 21 November 2014 at para [23] Lewis JA wrote as follows on the tests:

'...the test in respect of both misrepresentations and non-disclosures is an objective one, thus bringing the legislation in line with the common law. Two principles enunciated in Clifford remain applicable. First, the onus rests on the insurer to prove materiality (at 155E-G), this in accordance with the decision in *Qi/inge/e*; and second, the insurer must prove that the non-disclosure or representation induced it to conclude the contract. Thus the insurer must show that the representation or non-disclosure caused it to issue the policy and assume the risk. As Schutz JA pointed out (at 156E-I), however, once materiality has been proved it would be difficult for the insured to overcome the hurdle of showing no causation, a matter to which I shall return.'

The Plaintiffs Case

[64] The case of the plaintiffs is that in this instance we have a straight forward case of misrepresentation where the deceased

expressly vouched for the truth of his representations and did so in the form of a warranty in founding the insurance contract. As such, to found materiality, one ought to look at the distorted facts advanced by the misrepresentation as opposed to what should have been represented and the disparity that exist between these should be of such significance as to have encouraged the insurer to embark on concluding the insurance contract instead of declining it outright or undertaking the contract on other terms.

[65] The plaintiffs argued that the test applicable in these circumstances was that which is contained in *Qilingele*, being that which merely dealt with a misrepresentation and as such the test to be applied was a subjective one. The defendants argued that the test was objective and that the test emanates from *Oudtshoorn Municipality*.

[66] The plaintiffs further argued that the defendants had to prove that the deceased was in fact suffering from the condition alluded to by Dr Luke, that being polycythaemia, and that he was aware of this diagnosis and failed to disclose the information material to such diagnosis. The plaintiffs submitted that the defendants failed to do so, as Dr Peter had testified that Dr Luke had not made a diagnosis but rather alluded to a state that the deceased had been in.

The Defendants Case

[67] The case of the defendants is that this case comprises both a misrepresentation, the deceased having failed to state on his policy application that he saw Dr Luke, thus warranting incorrect and incomplete facts. In addition, this case also includes the

non-disclosure of the deceased having consulted Dr Luke and having undergone blood tests with Van Drimmelen Laboratories.

[68] In the aforesaid circumstances the test applicable according to the defendants is an objective one and is aptly set out in the case of *Mahadeo v Dial Direct Insurance Ltd* 2008 (4) SA 80 0N) at para [19] where Boruchowitz J advocates the test of, a reasonable person would have considered those consultations to be relevant to the defendants risk and its assessment of that risk.

[69] The argument of the defendants is succinctly set out in the supplementary heads of argument which follows below:

'In simple terms, both Dr Peter and Dr Van Vuuren confirm that the Van Drimmelen blood test results (reported on by Dr Luke) establish the need for further investigations. That is the essence of the second defendant's case. Had it been given the information (namely that the deceased had consulted with Dr Luke on at least three occasions within the required period) it would have required of the deceased to undergo further tests. Those tests may well have disclosed that the deceased suffered polycythaemia. Had that been so, and on the unchallenged evidence of Ms Hale, the insured/second defendant would not have issued the policy of insurance. Even the increased haemoglobin levels recorded by Dr Luke would have resulted in a "loading" of the policy in the sense of an increased premium.'

The Hand Written Notes and the Typed Note of Dr Luke

[70] The first port of call is to determine whether the typed note addressed to Mr Kerford is in fact that of Dr Luke. There are hand written notes which are purported to pertain to the deceased, but these do not bear the names of the deceased. The contents of these hand written notes are in essence reflected on the unsigned typed note addressed to Mr Kerford. Mr Ashim Nannen, though, disputes that the deceased was attended to by Dr Luke, he only concedes that his mother might have consulted Dr Luke.

[71] Of interest is the fact that it was the plaintiffs who discovered the hand written notes of Dr Luke. In the hand written notes, mention is made of 'wife' but the name of the deceased as I said does not appear. Even so, one cannot wish away the objective facts that emerge from this hand written note. From Mr Nannen's own testimony he conceded that when he sought information of the deceased from Dr Masters, who had taken over the files of Dr Luke, the hand written notes in question were the notes that were extracted from the red file, concerning to the deceased.

[72] Bearing in mind that Dr Masters had never treated the deceased and had no reason to fabricate these hand written notes.

[73] The evidence of all the experts indicate that the probabilities glean towards the hand written notes and the typed note constituting notes pertaining to the deceased. As was conducted with Dr Van Vuuren, when the cross references between Dr Luke's typed note, the hand written notes and the medical information provided by the deceased to Dr Geyer for his medical report, what appears in the hand written notes is in the typed note and the medical report. Pertinent references such as the left ankle injury, the varicose veins and the umbilical hernia, which the deceased, himself, disclosed to Dr Geyer at his medical examination on 20 November 2001, appear in both the typed note and the hand written notes.

- [74] The deceased also disclosed in his application that he had broken an ankle in September 2000 which was attended to by 'Dr Tuson Kenridge' and in the typed notes an annotation is made that on 14 September 2000 he appeared before Dr Luke with a fractured ankle for which he was referred to Dr Tuson. The left ankle fracture, the umbilical hernia, his obesity/ too fat, the bilateral varicose veins and swollen right foot, these annotation appear in both the hand written notes and the typed note.
- [75] In my view, on an examination of all the evidence the most probable conclusion is that the hand written notes as well as the typed note are medical notes relating to the deceased. On the plaintiff's own version the hand written notes were obtained from Dr Masters when he requested information from Dr Luke regarding the deceased. I have already stated above that Dr Masters had no course to fabricate these hand written notes. These notes have the same annotations with regards to the information that the deceased provided, in person, to Dr Geyer. The only conclusion to be reached is that the notes, both hand written and typed pertain to the deceased. The next question is, where would Dr Luke have obtain such detailed information, but for, the deceased himself. The information in all three documents and the fact that the hand written notes obtained from Dr Masters are purported to be Dr Luke's, brings me to the only conclusion, that the typed note and the hand written notes can only be that of Dr Luke.
- [76] The deceased was a patient of Dr Luke in 2000. Thus, the doctor recorded what appears in the hand written notes and it probable for the reasons I have set out above that he prepared the typed version for Mr Kerford. There is the testimony of Mr Nannen that by the time the typed note was executed Dr Luke was far too ill to have provided it. In my view, as he was mistaken about the deceased not having consulted Dr Luke he is mistaken that the typed notes were provided by Dr Luke.
- [77] Having concluded that the notes pertain to the deceased and are those of Dr Luke the next issue is whether the defendants discharged the onus in proving their defence of non-disclosure and misrepresentation.

Discharge of the onus by the Defendants

- [78] The evidence advanced by the defendants is in my view clear that the deceased misrepresented when he did not disclose that he had consulted with Dr Luke on at least three occasions in 2000. Further, that the non-disclosure of the consultations with Dr Luke and the information established from such consultations deprived the defendants from seeking further medical examinations and tests to properly assess the risk to be embarked upon by the defendants. This emanates from the undisputed evidence of Ms Hale that the information from the consultations and tests conducted by Dr Luke, would materially have affected the risk to be undertaken. She also stated that, with that information from further examinations and tests could have been conducted which would procure different results which could have necessitated either a 'loading' on the premiums or the policy would not have been provided at all.

- [79] As stated above both doctors conceded that the blood test results depicted a 'red flag' that necessitated further investigation. In my view, even though the state of polycythaemia had not been confirmed as a diagnosis, the defendants were deprived from establishing the risk it needed to cover without the advantage of the further tests and examinations.
- [80] It matters not that the deceased could not have had the knowledge of the terminology in the blood test reports or the state referred to in the medical notes, as proffered by the plaintiffs, the fact remains is that the deceased as a reasonable person would have known that the fact that he consulted with Dr Luke and conducted blood tests was relevant information for the defendants to conduct an assessment as regards the risk it was sort to cover.
- [81] In my view, the information which was submitted by the deceased on his policy application clearly induced the defendants to insure the risk as reflected in the policy application and the medical report.
- [82] This was so much as conceded by the plaintiffs in their heads however, the plaintiffs go on to say, that even so, the misrepresentation was not material such as to warrant the defendants avoiding the insurance contract.
- [83] The plaintiffs reliance on the subjective test stated in *Qilingele* cannot hold muster. As put forward in the cases of *Oudthoom Municipality*, *President Versekeringsmaatskappy* and *Regent Insurance supra*, misrepresentations (be they positive or negative) and non-disclosures in insurance contracts are to be treated on the basis of the reasonable person test in determining materiality.
- [84] I find that on the evidence, the defendants have discharged the onus in proving that the deceased, as a reasonable person, would have considered the fact that it he failed to disclose and the misrepresentation made in the policy application was reasonably relevant to the risk and assessment by the defendants.

Consequently I make the following order:

The plaintiffs claim is dismissed with costs.

W. Hughes

Judge of the High Court Gauteng, Pretoria

Counsel for the Plaintiffs: Adv. D KEET

Counsel for the Defendants: Adv. A R G MUNDELL SC

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