Onlangse regspraak/Recent case law

Jerrier v Outsurance Insurance Company Ltd 2013 JDR 0562 (KZP)

The duty to disclose: An ongoing problem?

1 Introduction

The recent case of *Jerrier v Outsurance Insurance Company Ltd* 2013 JDR 0562 (KZP) highlights the fact that the duty to disclose is still problematic. This is so despite the cogent reasons put forward almost a decade ago by Van Niekerk for its farewell (Van Niekerk "Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty (Part 1) 2005 *SA Merc LJ* 150; Van Niekerk "Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty (Part 2) 2005 *SA Merc LJ* 323). Whether or not one agrees with the outcome of the case, the valid concern has been raised that short term insurers, rightly or wrongly, have interpreted the judgment to mean that "consumers are now obliged to report to their insurers every minor incident or scratch on their cars" failing which insurance claims might be rejected.

The concern voiced is that:

> Such interpretations seek to shift the onus onto customers away from the short-term insurers, who do need to examine whether these disclosure practices are fair to the consumer and not out of proportion to the risk-based approach that is necessary for the insurance industry to function efficiently.

(National Treasury "Treasury calls on the insurance sector to be fair to car owners" (2013) available at www.info.gov.za (accessed 2013-08-26)). As will be outlined below, measures have been taken in an attempt to address this concern. However the question arises as to whether these are adequate.

2 Facts and Judgment

The plaintiff, Sherwin Jerrier sued his insurer, Outsurance Insurance Company Ltd for R608,772.20, the sum necessary to restore his Audi R8 to its pre-accident condition. The action arose as a result of Outsurance repudiating Jerrier's claim for damages to his vehicle which in turn arose from a motor vehicle collision on 8 January 2010. The claim was founded on an insurance contract between the parties, which was concluded sometime between December 2008 and January 2009 and in terms of which, according to Jerrier, Outsurance was liable to indemnify him for his loss. Outsurance elected to avoid the insurance agreement, as it averred it was entitled to do, and to reject the claim made upon it by the

plaintiff, alternatively to avoid the insurance agreement coupled with tendering the return of the premium paid by the defendant in respect of the cover provided under the agreement. However, pursuant to the parties consent, an order was granted that the trial would proceed on the issue of liability only.

In this regard the insurer had ensured its protection against future liability on various fronts. First the policy contained a clause which read as follows:

> In order to have cover you need to:
>
> (i) pay your premiums
>
> (ii) 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.
>
> (iii) 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.

The insured specifically had to report his claim or any incident that might lead to a claim to the insured, as soon as possible, but not later than 30 days, after any incident. This included incidents for which he did not want to claim but which might result in a claim in the future (par 5). In the result, besides the pre-contractual duty of disclosure, there was an additional duty of disclosure by incorporation in the contract and one which possibly extended, as Van Niekerk ("More on Insurance Misrepresentation, Materiality, Inducement and No-Claim Bonuses: *Mahadeo v Dial Direct Insurance Ltd*" 2008 *SA Merc LJ* 427 438) points out in another context, "beyond facts that are material in the pre-contractual situation". In other words in the *Jerrier* case, there was a contractual duty on Jerrier to notify Outsurance of any changes to the risk that Outsurance had taken over, that occurred during the duration of the policy.

Secondly, as is apparent from the defendant's pleadings, the plaintiff warranted that statements made and answers given during the application for insurance and at each renewal of the contract were true and correct (par 6).

As well as the defence embodied in the contract that Outsurance would not be liable where the insured was driving under the influence of alcohol or drugs, (par 5) the defence raised to deny liability for the claim was based on non-disclosure. The court referred to the latter defence as the "non-disclosure defence" and accepted that the non-disclosure related to two previous incidents involving Jerrier's motor vehicle, the first to a minor incident and the second to a more serious one (par 17).

The first occurred on 2 April 2008 when Jerrier damaged his motor vehicle when a wheel struck a pothole. The damage, which he self-funded, apparently amounted to R15,000. The second incident related to a collision with another vehicle on or about 11 April 2009, in Beach Road,

Amanzimtoti. The plaintiff testified that in the light of the amount of his excess payable, he did not think it would be worthwhile to claim and furthermore believed that as the damage caused was due to his fault he could not claim. Initially he thought that the damage would amount to R20,000. However, within two weeks of the accident he discovered that the damage in fact amounted to some R200,000. There was a dispute on the facts of how the Amanzimtoti collision had occurred and what it entailed. However the court accepted that it was not a minor accident and that the conduct of the plaintiff "suggests gross negligence, if not reckless driving and behaviour" (par 22).

In determining whether or not the defendant escaped liability, (that is in respect of the damage caused by the third and latest accident) the court referred first to the plaintiff's contractual obligation in terms of the relevant provision of the policy, to make disclosure at the time of claiming. On this score on the evidence before it, the court determined that it could not be found that the only reasonable inference to be drawn was that the plaintiff did not provide "true and complete information when submitting the claim" (par 27). The court did however find that the only contractual context in which the non-disclosure of the previous accidents could be raised to exclude liability, was in terms of the clause that provided "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" (par 28). In the view of the court both were incidents which might, in the sense that they could possibly, result in a future claim irrespective of whether or not they did result in such claim (par 29). Secondly, the court determined that, in the words of the judgment, "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" (par 30). Moreover the court determined that the expert evidence of the in-house actuary of the defendant, was consistent with what the court believed the view of a reasonable man would be in respect of the two incidents and the impact they would have had on the issue (par 32).

It held that Jerrier should have reported the previous incidents within the time frames of the policy, even if he did not want to claim and that the failure amounted to a material non-disclosure or breach of the terms of the policy. As a result Outsurance was absolved from liability and the court did not deem it necessary to consider the "driving under the influence" defence.

3 Comment

At the outset it is unfortunate that Koen J remarked that "it is trite law that Insurance is a contract based on the utmost good faith" (par 9). Although the contract of insurance is often regarded as being a contract *uberrimae fidei*, it should be remembered that all contracts are based on good faith and as Joubert JA (writing for the majority) opined in the case of *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* (1985 1 SA 419 (A) 433)

> ... *uberrima fides* is an alien, vague, useless expression without any particular meaning in law … it cannot be used in our law for the purpose of explaining the juristic basis of the duty to disclose a material fact before the conclusion of a contract of insurance. Our insurance law has no need for *uberrima fides* and the time has come to jettison it.

Moreover, according to Joubert JA the duty to disclose does not flow from the requirement of *bona fides* but it is imposed *ex lege* (par 433; *cf* Van Niekerk "The Insured's Duties of Disclosure: Delictual and Contractual; Before the Conclusion and during the Currency of the Insurance Contract: Bruwer v Nova Risk Partners Ltd" 2011*SA Merc LJ* 135 who holds that the basis is delictual).

The duty to disclose is a pre-contractual duty, which as in the *Jerrier case*, becomes an additional or continuous duty when it is incorporated into the contract (Reinecke *et al General Principles of Insurance Law* (2002) par 196; Van Niekerk 2011*SA Merc LJ* 135).

Where there has been misrepresentation or failure to disclose information with regard to short term insurance, the insurer can avoid the insurance contract or deny liability and reject the insured's claim. In terms of section 53 of the Short-term Insurance Act 53 of 1998 (STIA), the information must however be material. In this context material information is that which is likely to have materially affected the assessment of the risk under the policy concerned or the premiums. Possibly where the duty of disclosure as contained in the contract calls for disclosure of specific facts, materiality as posited in the statute may be irrelevant. On the other hand where the contract determines that the insurer must disclose material facts generally, then arguably the insurer should be taken to have intended this to have the meaning assigned to materiality in terms of the statute (see the discussion by Van Niekerk 2011*SA Merc LJ* 135 144).

In terms of section 53(1) of the STIA the non-disclosure is regarded as material if a reasonable, prudent person would consider that the particular undisclosed information should have been correctly disclosed to the short-term insurer so that it could form its own view as to the effect of such information on the assessment of the relevant risk. It is clear that the provision embodies what may be termed a risk-based approach and the test of materiality is an objective test. As Boruchowitz J stated in *Mahadeo v Dial Direct Insurance Ltd* (2008 4 SA 80 (W)) the question

> whether the particular information ought to have been disclosed is judged not from the point of view of the insurer, or the insured, but from the point of view of the notional reasonable and prudent person

(par 17; see too *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A); Van Niekerk 2008 *SA Merc LJ* 427). However, as the judge further explained, the test is not whether the reasonable person would have disclosed the specific fact, but whether he or she would have considered that fact reasonably relevant to the risk and its assessment by an insurer (par 18). As further explained by the court, the reasonable person's assessment of whether the fact is material or not will often be influenced by the questions which the insurer may ask, and what the insured considers to be relevant will often depend upon the nature of the questions asked and the nature of these questions posed may indicate what a reasonable person would have regarded as material. Questions asked by an insurer may therefore affect the ambit of the proposer's duty of disclosure and moreover might in the circumstances, serve to determine what is material or not (par 19).

In the same way, the wording of the terms of the contract could serve to elucidate what the reasonable person would consider to be material in the specific circumstances. Clearly, as Van Niekerk points out although the test is an objective one, practically in its application, the reasonable person has to be placed in a particular context, here the situation of the insured. Respectively, in this regard, I would like to endorse Van Niekerk's suggestion:

> [t]hat the reasonable person test for materiality, on the face of it the ultimate in objective tests, may in the process of practical contextualisation have to be filtered through a subjective lens…

(Van Niekerk 2008 *SA Merc LJ* 427; *Mahadeo v Dial Direct Insurance Ltd* 2008 4 SA 80 (W)).This interpretation of the application of the test I believe would be fair to both parties.

The further question, also raised by Van Niekerk, is as to who the reasonable person would have had in mind as being the one who assesses or who is to assess the risk. As indicated above section 53(1)(b) of the STIA refers to *the* insurer as opposed to *an* insurer (emphasis supplied) and it is suggested that that person should be the particular insurer (see too *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika* 1989 1 SA 208 (A); but *cf Mahadeo v Dial Direct Insurance Ltd* 2008 4 SA 80 (W)). It would seem, (although not clear) that this was also the approach of the court in the *Jerrier* case when reference was made to the evidence adduced by Mr Luan Van Rooyen, an in-house actuary of the defendant. However, with regard to the evidence of the actuary, the following statement of the judge is open to criticism:

> [h]is evidence is simply consistent with the view … 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. (par 32).

Surely it would not be equitable to liken a reasonable man's knowledge of risk to that of an expert actuary and to do so would place the insured in an invidious position.

The non-disclosure of a fact, driving into a pothole, for example, might be regarded as not being material in one case but material in another depending on the circumstances. As in the *Mahadeo* case, in the *Jerrier* case the question of non-disclosure related to damage suffered as a result *inter alia* of driving into a pothole. However, in the former case, the insured had not disclosed a previous claim in this regard because he had been asked to disclose prior "accidents" and the insured believed that driving into a pothole could not be classified as an accident or collision. This the court found accorded with the conclusion that a reasonable person would reach in the circumstances: Non-disclosure of this fact was therefore not material. However in *Jerrier* the court found that both the pothole incident and the Amanzimtoti collision

> would cause a reasonable man to conclude that knowledge of their occurrence would indicate a change to the plaintiff's circumstance, 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 (emphasis added).

Although it is debateable whether a reasonable prudent person would always consider the fact of damage caused by driving into a pothole to be likely to, in other words that it probably would, materially affect the insurer's own view on the assessment of the risk, it may well have been so in the specific circumstances of the *Jerrier* case. Here the insured was under a contractual obligation to report *all* changes that *might* influence the granting of cover, the conditions of cover or the premium charged (my emphasis). It may therefore be argued, that a reasonable person would consider such fact to be likely (that is that it probably would) to materially affect the insurer's own view on the assessment of the risk. The rationale for holding that this would be the view of the reasonable person, may be that, as informed by the contract, he or she would be alerted to the fact that *all* changes that *may* (as in possibly could) affect the granting of or conditions of cover or the premium charged must be reported since these may be relevant to the risk assessment.

This being so I believe the judge in *Jerrier* case did not formulate a general rule that all minor incidents would always be considered by the reasonable man to be material to the assessment of the risk. However, be that as it may, it seems strange that the court referred to the necessity to disclose the pothole incident at all. Although not specifically stated so in the facts, it is implied that there was a renewal of the contract. The current insurance contract, that is the one in terms of which the plaintiff was claiming, was concluded during or about December 2008 to early

January 2009. It appears from the pleadings of the defendant insurer that at the conclusion of this December/January 2009 insurance contract, the plaintiff had warranted that he had been involved in only one incident during the previous three years, and that was the pothole incident on 2 April 2008 (par 6).

Although there would have been a pre-contractual duty to disclose material facts, at the time of the conclusion of the contract, albeit a renewal, facts that the insurer was aware of need not have been disclosed (Reinecke *et al (*2002) par 195). Furthermore, because a new contract comes into existence at the renewal of the contract, the fact that the plaintiff had not reported the pothole incident at the time, in terms of the "old contract", is now irrelevant. In any event, the occurrence of this incident did not reflect changed circumstances as laid down in the contract since it occurred prior to the conclusion of the contract and at the time of the conclusion of the contract the insurer was aware of it. Clearly on the facts there is a distinction between the pre-contractual duty to disclose the pothole incident and the contractual obligation regarding the Amanzimtoti collision. However, in *Jerrier* the fact that there was a measure of confusion is reflected in that the court opined:

> 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 (par 34).

However, the decision did not turn on the non-disclosure of the pothole incident alone, as there was a second incident, the Amanzimtoti collision, which was not a minor accident and which was not disclosed.

Despite this, as already indicated the pothole incident did raise concern in the short-term insurance industry when some insurers interpreted the *Jerrier* case to mean that an insured must disclose every minor incident and which led to a call by the National Treasury on the insurance sector to be fair to car owners. That it did so highlights the fact that the duty of disclosure is still problematic. While recognising that the insured has a duty to disclose material information honestly, Treasury, in the present culture of consumer protection, determined that the insurance industry, in an endeavour to avoid poor market conduct practices, needs to evaluate whether enough is being done by insurers to inform them of the importance of disclosing material risk-related information and to ensure that they understand the implications of not doing so.

Against the background of on-going discussions between the National Treasury, the Financial Services Board (FSB) and the South African Insurance Association (SAIA), aimed at the broad objective of improving the conduct of insurers towards their clients, the FSB initiated the establishment of what is known as the Treat Customers Fairly (TCF) framework. Although the framework is not yet fully implemented, Treasury has encouraged insurers to incorporate its principles into their

existing insurance contracts and business practices (National Treasury *op cit*). As a result of the interpretation of the *Jerrier* case by certain insurers, as mentioned above, Treasury specifically called upon the insurance sector "to be fair to motor car policy holders when considering insurance claims" and a meeting was subsequently held between Treasury, the FSB and the SAIA. The outcome was that SAIA declared that member companies (insurers) would not reject motor car claims on the grounds that the insured did not report minor incidents, but that customers

> are however encouraged to report any material information to their insurers in terms of the policy conditions, even if there is no intention to claim against the policy. Where vehicle damage is concerned, this would generally include damage above the excess or when a third party is involved.

The member companies then reaffirmed their commitment to embracing the TCF initiative (National Treasury FSB SAIA "Joint Media Statement: Treasury and SAIA agree on measures to enhance insurance disclosures to protect car owners" 2013-04-11 available at www.treasury.gov.za/comm_media/press/2013/2013041101.pdf (accessed 2013-08-26)).

Possibly this is a step in the right direction. However it is not sufficient. Not all insurance companies are members of SAIA and the agreement would therefore not be binding on those non-members and undesirable litigation might still follow. Moreover giving examples to serve as the guideline as to what would be material is not satisfactory. As correctly noted in *Jerrier* examples are not exhaustive (par 33) and merely positing a list of examples would not, I believe, resolve the problem.

The crux of the problem it seems to me is that an average insured person might not understand and appreciate the general principles embodied in the risk-based approach that underpins the insurer's decision to grant cover and at what premium.

Although it may be argued that in modern times the relationship between the insurer and insured is not a fiduciary one, it is certainly one that is informed by principles of fairness and good faith. One must agree with Treasury that where short-term insurers interpret the *Jerrier* case to mean that those insured are now obliged to report every minor incident or scratch on their cars to their insurer, failing which the contract may be avoided, this would not be fair to the insured and "out of proportion with the risk-based approach that is necessary for the insurance industry to function efficiently." Although Van Niekerk (2005 *SA Merc LJ* 150; 2005 *SA Merc LJ* 323) has in any case convincingly argued that the duty of disclosure should not form part our law, it currently does. As in previous cases the *Jerrier* case has shown how difficult it may be to determine what the reasonable person would have considered to be likely to have materially affected the risk to be taken by the insurer.

In modern times and specifically with regard to short-term insurance, where disclosure should take place within the context of the specific risk

and within the context of the practice and policy of a specific insurer, it ought to be incumbent on the insurer to explain the risk-basis to the insured. While it may be so that the insured and insurer are not on equal footing as far as information bearing on the risk is concerned, as possibly only the insured would be in possession of the relevant information, the insurer would be in a very good position to know how the risk is determined. The risks that the insured offers for insurance are very often assessed and the premium determined according to categories: All risks that fall into a certain profile are then rated in the same way. Especially with regard to certain types of policies, such as motor vehicle policies, the insurer would know what the categories are and what the risk and rating factors would be. The insurer therefore would be in the best position to explain the "workings" of the risk-based approach and to ask the relevant questions in order to alert the insured to the kind of information required. In the *Jerrier* case for example, the actuary's testimony as to what would result in an adjustment in premium and acceptance of the risk could be briefly summarised in one paragraph. A better informed insured person who is able to assist the insurer in its assessment of its risk, would surely serve the interest of both the insured and the insurer and minimise undesirable litigation. (This would obviously not affect the remedy of the insurer if non-disclosure were fraudulent.)

If the risk-based approach is clearly explained to the insured by the insurer in the contract, it would be easier in the first place for the insured to determine the kind of circumstances that would be likely to affect the risk and what information would be material to disclose and secondly where information was not disclosed it would be easier for the court to determine what a reasonable prudent person (as informed by the risk-based explanation) would consider as being likely to have materially affected the insurer's own view on the assessment of the risk.

Where the insured makes use of the services of a broker, it is to be expected that he or she would warn the insured to disclose all material information and to assist the latter in this regard (see too Reinecke *et al* (2002) par 474). However, in the present commercial climate the practice is becoming more and more prevalent to exclude an intermediary. This makes it even more urgent that the insurer should explain the risk-based approach to the insured. Moreover, often the contract is concluded telephonically and when procuring insurance, the proposer insured may deal with an employee of the insurer at a call centre who simply records answers in respect of questions asked in a questionnaire and who personally may not even understand the risk-based approach. In consequence the proposer insured and employee may end up speaking at cross purposes.

Since insurance legislation is in the offing to replace both the Long-term and Short-term Insurance Acts by 2015 (see the National Treasury Policy Document 2011-02-23) it might be an opportune time to revisit the duty of disclosure. If it is to be retained rather than discarded, at least the reform measures should serve to resolve the problems that have been

experienced in the past. While drafting should be left to those who are experts in this field, I suggest that a general legal rule which determines that the risk-based approach must be elucidated by the insurer to the insured should be incorporated in the relevant provision. The measures to implement this general rule could be left to the industry itself to fashion in the context of the general practice and policy of insurers.

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