

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: 5056/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

RODOS IOANNIDES N.O.

First Applicant

CHRISTOS IOANNIDES N.O.

Second Applicant

WAYNE GARETH BEELDERS N.O.

Third Applicant

(in their respective official capacities as duly appointed

Trustees of the Caramello's Trust (IT 730/04))

and

WESTERN NATIONAL INSURANCE COMPANY LIMITED First Respondent

STEPP BLOEMFONTEIN Second Respondent

JUDGMENT BY: C REINDERS, ADJP

HEARD ON: 10 FEBRUARY 2022

DELIVERED ON: 23 MAY 2022

[1] The three Applicants are the three duly appointed trustees of the Caramello's Trust ("the Trust"). The First Respondent is an insurance company against whom relief is sought in the form of declaratory relief. The Second Respondent had been cited for purposes of notice and no relief is sought against it.

[2] The Trust operates and does business at its Caramello's outlet at the Preller Plein Shopping Centre in Bloemfontein. It obtained a quotation on the 1st February

2019 in respect of insurance from the First Respondent. On the 16th of May 2021 a fire damaged the property on the premises resulting in the Trust lodging a claim with the First Respondent. Ms Ankia Pelsner, the legal and compliance manager and acting on behalf of First Respondent, declined to indemnify the Trust in terms of the insurance policy and decided that the aforementioned policy is void due to the Trust's failure to disclose an incident in 2018 when the Trust was double compensated for water damage that occurred in April 2018.

[3] The Trust therefore by way of notice of motion applies for an order declaring the First Respondent to be liable to indemnify the trust for the loss suffered as a result of the fire based on the agreement of insurance/indemnity concluded between the parties.

[4] From the papers, it would appear to be common cause that during April 2018 the Trust suffered water damages. At the time the Trust, represented by the First Applicant, enjoyed insurance cover from Renasa Insurance Company ("Renasa") and submitted a claim for the damage. At the same time the Bean & Bagle Restaurant trading as Caramellos and represented by the First Applicant submitted a claim to the insurer of the contractor for the same damage for which compensation had been claimed from Renasa. Both insurers paid for the same damage. Renasa on the 30th of October 2018 addressed a letter to the Trust considering the Trust's claim to be fraudulent and claiming repayment. The Trust repaid an undisclosed amount to Renasa and the aforementioned letter disclosed Renasa's cancellation of future business with the Trust.

[5] The history as alluded to herein above was not disclosed to the First Respondent and Mr Jan Hendrik Botha ("Mr Botha"), the head of the First Respondent's underwriting department, avers that had First Respondent been aware of the double claim, it would not have insured the Trust. He considered the double claim to be a text book example of what First Respondent and the insurance industry would treat as a "moral risk" to which it is not prepared to extend insurance cover. Such moral risk is described as "the possible propensity of an insured using dishonest means to extract insurance monies".

[6] On behalf of the Trust it was submitted that the Trust in the application form was only asked to disclose or supply “its full claims history and/or losses to the respondent for the preceding three years.” I was referred to the judgment of ***Bruwer v Nova Risk Partners Ltd 2011(1) SA 234 (GSJ)*** and in particular paras [27] and [28], the gist thereof being that the Trust was only compelled to answer to the questions which the First Respondent posed - the argument being that the insurer drafted the policy and “it has the duty to make clear and spell out plainly the limitations it wishes to impose and the risks it wishes to exclude.”

Reliance was further placed on the provisions of s53 of the Short-Term Insurance Act 53 of 1998. My attention was invited to ***Regent Insurance Co Ltd v King's Property Development (Pty) Ltd t/a King's Prop 2015 (3) SA 85*** where the Supreme Court of Appeal stated at para [23]:

“It is clear now, however, that since the introduction of s 53(1) of the Short-term Insurance Act (and pursuant to its amendment in 2003) 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 *Qilingele*; 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 Schultz 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, ...”

[7] The First Respondent referred me to the general terms and conditions of the policy in force which contains the following conditions in clause 1:

“General Conditions

1. Misrepresentation, Misdescription And Non-Disclosure

Misrepresentation, misdescription or non-disclosure in material particular shall render voidable the particular item, section or sub-section of the policy,

as the case may be, affected by such misrepresentation, misdescription or non-disclosure”

[8] Reliance was likewise placed by First Respondent on ***Regent Insurance v Kings Property Insurance supra*** in general, but in particular to para [54] where Wallis JA (as he then was) held as follows:

“The reason why an insured must make a proper disclosure is to enable the insurer to make a proper assessment of the risk it is being asked to cover. It cannot do that if it is not told what the risk is. This is not a case of a slightly inaccurate or insufficient description of the actual risk being covered, which may raise issues of materiality. It is a case where there was no disclosure at all of the particular risk. It is hard to see how a complete non-disclosure of the risk could not be material.”

[9] The Applicants move for final relief. The well-known rule in ***Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 263 (A)*** at 634e-635c is to be applied which in essence boils down thereto that the relief is to be adjudicated on the respondent’s version safe where it is so far-fetched or untenable and to be rejected. This is also the position where the onus of proof is on the respondent.

See: ***Orestisolve (Pty) Ltd t/a ESSA Investments v NDFT Investment Holdings (Pty) Ltd and Another 2015 (4) SA 449 (WCC) 468*** para [67]:

“I must emphasize, though, that the *Badenhorst* rule is conventionally formulated as requiring the company to satisfy the court of two things: its bona fides and the reasonableness of its grounds for disputing the claim. If the respondents were to fail in their reliance on the *Badenhorst* rule, it would be for failure to satisfy the second of these requirements. As to the first, I cannot find on the papers that the respondents are not genuine in disputing the claim. Bona fides is a question of fact. **At the stage of a final order, it must be assessed in accordance with the *Plascon-Evans* rule.**

Even though the onus on a particular issue in motion proceedings might rest on the respondent, this does not reverse the operation of the *Plascon-Evans* rule (see *Ngqumba en 'n Ander v Staatspresident en Andere*; *Damons NO en Andere v Staatspresident en Andere*; *H Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259E – 263D; *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541I – 542B). (own emphasis)

[10] Applying the aforementioned principles I have to accept that the insurance industry treats conduct which causes two insurance companies to make payment in respect of the very same damage to be a moral risk which insurers are not prepared to insure. There is no basis upon which I can reject such evidence to be palpably false. I have to accept that such information is material and therefore the Applicants had to disclose same to the First Respondent. There is support for the First Respondent's point of view in that Renasa terminated its business agreement with the Applicants on realizing the double claim. First Respondent was not made aware by the Applicants of the aforementioned double claim. According to Mr Botha before the First Respondent determines a premium at which it is prepared to ensure a risk, it determines the insured's risk portfolio which includes the moral risk of the insured. Claiming compensation from two different insurance companies for the same damage constituted a moral risk which the respondent would not have insured had it been aware thereof. Objectively speaking, I cannot on the accepted evidence before me, conclude that such a viewpoint is untenable. On the contrary, I would be inclined to endorse it.

[11] It follows that I cannot in applying the aforementioned principles grant the Applicants final relief in motion proceedings. The application, therefore, is to be dismissed and I see no reason why the costs should not follow suit. I may add that First Respondent abandoned its first point *in limine* as to the First Applicant's authority to bring the application, and rightly so. Having come to the conclusion I have, it is not necessary to adjudicate the second point raised *in limine* whether the order sought is not legally tenable based on the argument that the option is that of the insurer to indemnify, compensate or replace and/or repair of damaged goods.

Without deciding this point, I may add that it probably would not have found favour with me in principle.

[12] In the result the following order is made:

The application is dismissed with costs.

C. REINDERS, ADJP

On behalf of the Applicants:

Adv C Snyman

Instructed by:

Phatsoane Henney Attorneys

BLOEMFONTEIN

On behalf of the first respondent:

Adv DJ Coetsee

Instructed by:

BDP Attorneys

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