Disclosure: Material or non-material?

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The rejection of a claim by an insurer on the basis of material non-disclosure by the insured came to the fore again in November last year in Regent Insurance Company Ltd v King’s Property Development (Pty) Ltd (05/2014) [2014] ZASCA. The case mainly dealt with the consequences of material non-disclosure by the insured. However, in my view the judgment has far-reaching implications for all stakeholders, that is, insured, insurer and broker involved in negotiating and concluding an insurance contract and when mid-term changes are made to a policy and at renewal. This issue will explored by examining the salient comments made by Lewis JA in delivering his judgment.

The appeal court was called upon to decide whether the insurance claim by King’s Property was properly rejected and the policy treated as void by Regent because of King’s Property’s failure to disclose the nature of a business carried on by a tenant in a building damaged by a fire. More specifically, the appeal was asked to determine the following:

(a) What was in fact disclosed to Regent about the premises;
(b) Whether Regent established a material non-disclosure in terms of section 53(1) of the Short Term Insurance Act 53 of 1998, which induced Regent to enter into the contract; and
(c) If there was a material non-disclosure, whether King’s Property established either estoppel or waiver of reliance on non-disclosure.

The facts of the case can be summarised as follows. On 24 May 2010 premises of King’s Property burnt down. The owner, King’s Property claimed the cost of repairs and payment in respect of rental income lost, from its insurer, Regent. Regent rejected the claim, alleging a material non-disclosure by King’s Property when applying for the insurance policy in respect of the premises. Regent argued that the non-disclosure lay in failing to advise Regent that the premises were occupied by a tenant, Elite Fibre Gauteng CC, which manufactured truck and trailer bodies using resin and fibreglass, highly flammable materials, a risk that Regent said it would not have undertaken had it known of the nature of the business.

At court a quo, Hughes J found Regent liable to pay the sum claimed on the basis that it was estopped from relying on the defence of non-disclosure because, when the insurance broker for King’s Property had requested the insurance, he had asked Regent’s representative to do an
urgent survey of the premises. Although the underwriter from Regent had requested an assessor to do the survey, it was not before the fire. The High Court held that King's Property had been misled into believing that the survey had been done, and had accordingly paid the premium on the assumption that the insurance covered the premises. It is important to note that prior to the fire, King's Property had an existing policy with Regent and the broker for King's Property had been communicating with the underwriter from Regent for the purposes of adjusting the policy to cater for certain items to be included in the policy. The core of the dispute is non-disclosure relating to the policy adjustment.

In dealing with material non-disclosure, the SCA commented that at common law, an insured, when requesting insurance cover, must make a full and complete disclosure of all matters material to the insurer's assessment of the risk. The court endorsed the test adopted in *Clifford v Commercial Union Insurance Co Ltd SA Ltd 1998 (4) SA 150 (SCA)* that the assessment of whether the non-disclosure is material to the assessment of risk is objective. The court further commented that Clifford confirmed the principles enunciated in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 (A)* in finding that the test was whether the reasonable person would have considered that the risk should have been disclosed to the insurer. In addition, the court confirmed that the principles enunciated in *Qilingele v South African Mutual Life Assurance Society 1993 (1) SA 69 (A)* remain applicable. Firstly, the onus rests on the insurer to prove materiality and secondly, the insurer must prove that the non-disclosure or representation induced it to conclude the contract.

In applying the facts to the law and on the issue of materiality, the court held "that King's Property non-disclosure of the fact that there was a manufacturing business that used highly inflammable materials in the process of manufacturing to Regent was material, in that the reasonable, prudent person would consider that it should have been disclosed so that Regent could have formed its own view as to the effect of the information on the assessment of the risk".

With regard to inducement, "as shown, Regent would not have extended cover under the buildings combined section had it known that there was a manufacturing business in occupation, and it would have declined the risk altogether had it been advised that Elite Fibre was manufacturing goods using fibreglass and resin. Regent was clearly induced to enter into the contract by the non-disclosure of the tenant's business. It would have accepted the risk only in special circumstances and after further investigation. Had Lewis (underwriter) known the facts that were not disclosed he would not have issued cover at all-or at least, not on the terms that he did". In the final analysis, the court held that the non-disclosure quite obviously induced Regent to extend the cover and thus Regent was entitled to reject the claim and to regard the policy as void.

As alluded above, the case has far-reaching implications for all stakeholders in the insurance
With regard to brokers, the court confirmed that the broker was the insured’s agent and in this instance, it was evident that the broker did not have proper documentation and/or information to sufficiently disclose to the insurer. With regard to the insurer and even though the court found in favour of the insurer, it was evident the underwriter did not follow the correct procedure or collate documentation that underpin Regent’s underwriting principles before underwriting the risk.

This case highlights sometimes the flagrant disregard of the basic tenets that underpin the underwriting process in pre-contractual negotiations by the parties. Hopefully the principles as enunciated in this case will serve as a reminder of the considerations to be taken into account when contracting in this arena.

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