

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2022/01582

In the matter between:

MAXMILLIAN ASHIKUNI

PLAINTIFF

and

OLD MUTUAL NAMIBIA

FIRST DEFENDANT

NEPTUNE RISK MANAGERS (PTY) LTD

SECOND DEFENDANT

Neutral citation: *Ashikuni v Old Mutual Namibia* (HC-MD-CIV-ACT-CON-2022/01582) [2023] NAHCMD 670 (20 October 2023)

Coram: MILLER AJ

Heard: 4 – 6 & 11 September 2023

Delivered: 20 October 2023

Flynote: Action – Insurance claim – Repudiation by first defendant – First defendant was entitled to repudiate the claim – Plaintiff failed to provide the first defendant with the required information to do a proper assessment of the claim – Plaintiff's claim is dismissed with costs.

Summary: In this matter, the plaintiff's vehicle was insured by the first defendant against the risk of damage or loss. The plaintiff then submitted a claim alleging that the plaintiff's vehicle was damaged in an accident.

The first defendant rejected the claim on the basis that the plaintiff was required by the agreement to provide the first defendant with information to properly assess the claim. The plaintiff failed to provide such information and this led to the repudiation of the claim by the first defendant.

The plaintiff now seeks an order from the Court directing the first defendant to honour the plaintiff's claim.

It is evidence before Court that the defendant requested from the plaintiff to provide them with cell phone records, whereby the plaintiff agreed to obtain such.

The plaintiff testified that he attended to the office of his service provider in order to obtain the recordings, but could not obtain it due to technical difficulties at the time.

The plaintiff further testifies that he advised his broker, the second defendant of the fact that the information was not available. The Court is however, not satisfied with this and rejects the plaintiff's evidence on this issue as he could not explain to Court why this was not communicated to either the first defendant or to Mr Smit, who in the first place requested the information.

Held that, clause 3.7.3 of the agreement is on the face of it rather wide inasmuch as the insured is obliged to disclose '... any other information we ask for'. The wording of this clause must be considered and construed against the backdrop of our law. As a starting point it is generally accepted that a contract of insurance is *uberrima fides*. The duty *uberrima fides* requires of the insured to disclose all facts which a reasonable man would consider to be material.

Held that, the duty on the part of the insured to disclose facts are limited to those facts which are firstly, material, and secondly within the knowledge of the insured or accepted to be within the knowledge of the reasonable prudent insured.

Held that, in the instant case the cell phone records were material inasmuch as it could provide information relating to the whereabouts of the insured, at the relevant time or whether any telephone call was made immediately after the alleged incident, and if so, to whom. The information would materially assist in the process of a proper assessment of the claim. These considerations were, on the evidence presented, explained to the plaintiff and accepted by him at the time.

Held that, the first defendant was entitled to repudiate the claim as the plaintiff had failed to provide the first defendant with the required information to assess the claim. The plaintiff's claim is therefore dismissed with costs.

ORDER

1. The plaintiff's claim is dismissed with costs, which will include the costs of one instructing and one instructed counsel.
2. The matter is finalised and removed from the roll.

JUDGMENT

MILLER AJ:

[1] The claim instituted by the plaintiff lies against the first defendant. The second defendant although cited as a party to the proceedings, for some reason or another, took no part in the proceedings and no relief is claimed against it.

[2] In terms of an agreement of insurance, the first defendant insured plaintiff's motor vehicle against the risk of damage or loss of the vehicle.

[3] It is common cause that the plaintiff submitted a claim under the policy to the first defendant, in which it was alleged that the plaintiff's motor vehicle was damaged in an accident which occurred on 7 October 2021.

[4] It is likewise common cause that the first defendant, after consideration of the claim rejected the claim. The plaintiff now seeks an order from the court directing the first defendant to honour the plaintiff's claim.

[5] The stance adopted by the first defendant in response to the claim submitted to it, is that the plaintiff, withheld information from the first defendant, which in terms of the written agreement of insurance it was obliged to provide in order for the first defendant to properly assess the claim: The first defendant essentially relies on clause 3.7.3.2 of the agreement, which obliges the insured, in the event of a claim, to provide the insurer with 'proof, statements and any other information we ask for'.

[6] It is the case of the first defendant, that upon receipt of the claim, it engaged an investigator Mr Smit, to investigate the incident giving rise to the claim. Since it entertained some doubt at first sight of the veracity of the claim.

[7] Mr Smit testified that during the course of his investigation he had a meeting with the plaintiff concerning the claim. Mr Smit considered it necessary to have access to the cell phone recording of the plaintiff in order to verify or assess the veracity of the claim. The plaintiff undertook to provide the required records to Mr Smit, but ultimately failed to do so. The plaintiff testified that he attended to the office of his service provider to obtain the required records but was told that due to some technical difficulties experienced at the relevant time, no records were available.

[8] It was in the end, the failure of the plaintiff to provide the required information which led to the repudiation of the claim by the first defendant.

[9] Clause 3.7.3 of the agreement is on the face of it rather wide inasmuch as the insured is obliged to disclose '... any other information we ask for'. The wording of this clause must, in my view, be considered and construed against the backdrop of our law. As a starting point it is generally accepted that a contract of insurance is

uberrima fides.¹ The duty *uberrima fides* requires of the insured to disclose all facts which a reasonable man would consider to be material.²

[10] The duty on the part of the insured to disclose facts are limited to those facts which are firstly, material, and secondly within the knowledge of the insured or accepted to be within the knowledge of the reasonable prudent insured.³

[11] In the instant case the cell phone records were material inasmuch as it could provide information relating to the whereabouts of the insured, at the relevant time or whether any telephone call were made immediately after the alleged incident, and if so, to whom. The information would materially assist in the process of a proper assessment of the claim. These considerations were, on the evidence presented, explained to the plaintiff and accepted by him at the time.

[12] It was, in any event, not contended by the plaintiff that he was not obliged to furnish the required information. He contends that the records could not be furnished due to difficulties experienced by the service provider. The evidence of the plaintiff on this aspect of the case is contradictory and improbable. According to the plaintiff he advised his broker, the second defendant, of the fact that the information was not available. He cannot satisfactorily explain why this important piece of information was not communicated to either the first defendant or to Mr Smit, who in the first place requested the information. I reject his evidence on that issue.

[13] Inasmuch as I found that the plaintiff had failed to provide the first defendant with material or reasonable information it had requested in order to assess the claim, it follows that the first defendant was entitled to repudiate the claim.

[14] The order I make is the following:

1. The plaintiff's claim is dismissed with costs, which will include the costs of one instructing and one instructed counsel.
2. The matter is finalised and removed from the roll.

¹ *Brownlie v Campbell* 1880 5 App Cas 925 (HL).

² *Fine v General Accident, Fire and Life Assurance Corporation Ltd* 1915 AD 213.

³ *Mutual and Federal Insurance Co. Ltd v Oudtloos Municipality* 1985 (1) SA 419(A).

PJ MILLER
Acting Judge

APPEARANCES

PLAINTIFF:

N Ndilula-Ndamanomhata
Of Kadhila Amoomo Legal Practitioners, Windhoek

1ST DEFENDANT:

M Boonzaier
Instructed by Dr Weder, Kauta & Hoveka Inc,
Windhoek

M BOONZAIER