

DENEYS REITZ
GENERAL AND INSURANCE LITIGATION
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QUESTION OF MATERIALITY:
A REVIEW OF MUTUAL & FEDERAL INSURANCE CO LTD V DA COSTA

INTRODUCTION

1. The duty of an insured to disclose material facts reasonably relative to the risk or the assessment of the premium has been said to be “*the correlative of a right of disclosure which is a legal principle of the law of insurance*”. In cases where the insured has misrepresented the year of manufacture and the model of the insured vehicle, the question of materiality is not whether the insurer has successfully alleged materiality i.e. that as a result of such misrepresentation or non-disclosure, the assessment of the risk has been compromised. The question is whether the insurer has alleged and led sufficient evidence in order to establish such materiality. This question was considered in the Supreme Court of Appeal judgment in *Mutual & Federal Insurance Co Ltd v Da Costa [2007] SCA 89 (RSA)*.
2. The Supreme Court was called upon to decide whether or not an insurer is entitled to repudiate a claim on the basis of material misrepresentation or non-disclosure. Without any evidence on materiality, the Court refused to assume that a misstatement as to the year of manufacture of a motor vehicle is *per se* to be regarded as material.

THE FACTS

3. Very briefly, Da Costa entered into an agreement of insurance with Mutual & Federal in terms of which Da Costa insured a number of motor vehicles (“the policy”). The policy was amended from time to time by the addition or removal of motor vehicles as they were acquired or disposed of by Da Costa.

4. In January 1996, Da Costa acquired a Mercedes Benz which he also insured with Mutual & Federal. At the time of entering the policy, and at all relevant times thereafter, Da Costa was under the impression that this vehicle was a 1991 Mercedes Benz 230E and it was so described in the policy. It was not until the vehicle was involved in a collision that it transpired that the motor vehicle in question was a combination of a built up vehicle being a 1988 200 Mercedes Benz model body and a 1992 230 Mercedes Benz model engine. The vehicle was damaged in a collision and Da Costa claimed from Mutual & Federal in terms of the policy.
5. Mutual & Federal rejected Da Costa's claim on the basis of material misrepresentation, alternatively non-disclosure on the part of Da Costa. Mutual & Federal relied *Labuschagne v Fedgen Insurance Ltd 1994 (2) 228 (W)* where a 1986 Mercedes Benz motor vehicle was represented to the insurer in 1989 as being a new motor vehicle and the insurer undertook to replace the insured vehicle with a brand new vehicle. The Court found in *Labuschagne* that “*the description of the year of manufacture or model year and the age of the motor vehicle are material aspects of the description of the risk which the insurer is assuming*” and held in favour of the insurer. Based on the *Labuschagne* case, Mutual & Federal in the present case contended that it was only liable under the policy in respect of a motor vehicle answering to the description contained in the policy i.e. a 1991 Mercedes Benz 230E. Mutual & Federal further contended that the facts as presented by Da Costa on which it relied were material to its decision to insure the vehicle, alternatively to the terms on which it was to be insured. At the trial, Mutual & Federal also contended that the description of the vehicle amounted to a warranty which the Respondent had breached.
6. The Court held that the insurer's contention that the misdescription of the vehicle amounted to a warranty could not succeed because it did not raise a breach of warranty as a defence in its plea and that this was raised for the first time at the trial.
7. Mutual & Federal failed to lead evidence in support of the allegation that Da Costa's failure to disclose the actual year and model of the motor vehicle were material.
8. In reaching its decision, the Court held that the *Labuschagne* cannot be regarded as authority for the proposition that without any evidence on materiality a Court can assume that a misstatement as to the year of manufacture of a motor vehicle is to be regarded as material.

9. The Court held that in some cases, of which *Labuschagne* was one, a conceded or misstated fact will be held to be material without any evidence having been led on the point but this is where “*the fact speaks for itself*”. The true test for materiality on this point is “*would a reasonable person consider that the fact was one material to be known by the insurer or a fact that might influence the underwriter’s opinion as to the risk incurred*”.
10. In *Labuschagne*, the insurer was induced to insure a car as a 1989 car, not more than 12 months old and undertook to indemnify on the basis that the car was as described. It may be that the insurer, if appraised of the true facts when a claim was made on it, would have been entitled to refuse to pay other than on the basis of the true age and the status of the car. The insurer assumed contractual obligations based on the car being a 1989 model and less than 12 months old. The Court held that the age of the car would certainly have affected the premium and the undertaking of the insurer to indemnify the insured in respect of a 1989 vehicle and in particular the undertaking to replace it with a brand new vehicle. In that sense the risk assumed was affected.
11. The same cannot be said for the present case. The vehicle in question was a built-up vehicle combining a 1988 Mercedes Benz 200 model body and a 1992 Mercedes Benz 230E model engine which was represented as being a 1991 model Mercedes Benz 230E. In the absence of evidence indicating that a reasonable insurer in the position of Mutual & Federal, if it had known the true facts, would have refused to extend the cover of the Respondent’s policy to the vehicle presently under consideration or would have only accepted it at a higher premium, it could not be held that the misrepresentation relied on was material.
12. A number of other defences also failed.

CONCLUSION

13. This judgment is important for two reasons. Firstly, an insurer who wishes to rely on a breach of warranty should allege this from the onset and not wait until the trial to raise that defence for the first time.

14. Secondly, alleging materiality of the misdescription of the year of manufacture and model of the vehicle is not sufficient on its own unless there are other circumstances from which it appears that the issue is material. An insurer must lead evidence to establish such materiality.

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