

SOUTH AFRICA / JUDGMENT

Altrisk v Barker (2014/23841) [2018] ZAGPJHC 458 (15 June 2018) [2018] ZAGPJHC 458

COURT

South Gauteng High Court, Johannesburg

BEFORE

Sutherland, Matojane, Siwendu

CASE / FILE NUMBER

2014/23841

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REPUBLIC
OF SOUTH AFRICA
THE
HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
Case
No: 2014/23841
REPORTABLE
OF
INTEREST TO OTHER JUDGES
REVISED.
15/6/2018
In

the matter between: ALTRISK
 Appellant
 and
 BARKER
 Respondent

JUDGMENT

Headnote

Life insurance policy – dispute about its lapse for want of paying premiums timeously.

Held: the policy ought not to have lapsed and a restoration of the status quo ante was ordered.

A complicated series of events played out in which the applicant, a policyholder who had hitherto paid the premiums by debit order,

failed to ensure that premiums from his Nedbank account were met – the appellant insurer did not immediately upon default alert the policyholder but did so only on the second default whereupon a direct payment was made – this occurred again in slightly different circumstances and on each occasion resulting in confusion – a new debit order on the policyholders FNB account was given and accepted but the insurer did not present the debit order relying on what it claimed was the lapsing of the policy prior to the time for presentation, notwithstanding its nomination of a later deadline for a lapse.

The court analysed the facts closely and concluded that, on the facts, the insurer was in breach of its obligation to accept payment

Certain legal and mixed factual-legal issues arose:

Was there a breach by the appellant of a contractual obligation to accept certain tenders of payment?

Was the failure by the appellant to accept the payments a material breach of the contract of insurance?

Had the appellant failed to comply with section 52 (1) of the 52 of 1998 Act as regards the giving of proper notice, the giving of which being a prerequisite to a lapse of the policy.

Was an order of specific performance appropriate in the circumstances?

Particular factual issues were:

Ought a debit order instruction with Nedbank to pay the premium due for November 2012 have been presented by the appellant, which had it been would have been honoured; also, was proper notice of default given in respect of a non-payment for November 2018?

Ought a cash payment Barker made from his FNB account on 4 December been credited to his account; ie the ‘payment’ incorrectly

described by Barker which was not appropriated to his policy and, on 14 December 2012, refunded to his Nedbank account rather than to his FNB account from whence it had been paid, thereby masking the refund and default?

Ought a debit order instruction with FNB that Barker gave to the appellant on 3 December 2012 to draw premiums owed as at 7 January 2013, to have been presented; also, what was the proper interpretation of that debit order instruction?

If such payments had been credited, would the result would been that Barker could not have been in default until, at the earliest, 31 January 2013, and thus was not in default on 18 January, the date nominated by the appellant for the lapsing?

Moreover, because Barker paid further sums on 21 January 2013, had these further sums been credited to his account could he really have been in default, even on 31 January 2013?

In addition, the court considered an academic article written by the Ombud, Nienaber JA, about whether section 52 of Act 52 of 1998

requires a notice by an insurer of default; the Ombud contended in the article it was not mandatory, the court held that it was, indeed, mandatory.

Sutherland J:

Introduction

[1] This case is about whether or not the life insurance policy underwritten by the appellant on the life of the respondent (Barker)

validly lapsed on 18 January 2013, retrospectively effective from 1 November 2012.

[2] The relevant terms of the agreement are common cause. The premiums were due on the first day of every month with effect from 1 July

2009. The text pertinent to the controversy provides that:

“A period of grace of one month is allowed for the payment of each premium.....If a premium is not paid within the period of grace the policy will lapse.....If the policy lapses, [the appellant] will consider reinstatement subject to [the appellant’s] requirements at the time.”

These terms echo the provisions of section 52 of the Pension Fund Act 52 of

1998. (LTI Act).

[3] The provisions of Section 52 read:

“Failure to pay premiums

(1) If a premium under a long-term policy, other than a fund policy or a reinsurance policy, has not been paid on its due date, the long-term insurer shall notify the policyholder of the non-payment, and the policy shall, notwithstanding anything therein to the contrary, in the case of a long-term policy under which there are to be two or more premium payments at intervals of—

(a) one month or less, remain in force for a period of 15 days after that due date; or

(b) longer than one month, remain in force for a period of one month after that due date,

or for such longer period as may be determined by agreement between the parties, and if the overdue premium is not paid by the end of any such period, the policy shall be dealt with in accordance with subsection (2).

(2) In the case of a policy contemplated in subsection (1) the remaining value of which, after the satisfaction of any claim of the long-term insurer which is secured solely by the policy benefits to be provided under the policy, is greater than half of the aggregate amount of the premium payments due thereunder during the period of 12 months commencing on the due date of the unpaid premium, the long-term insurer shall—

(a)

inform the policyholder, in the medium prescribed by the Registrar, of the amount of that remaining value and notify him or her that the policy will remain in force, in accordance with the rules of the long-term insurer, until—

(i) the policy no longer has any such remaining value, whereupon it will lapse;

(ii) the payment of premiums is resumed;

(iii) the provisions of the policy are amended, in accordance with the rules of the long-term insurer, so that it becomes a policy which is fully paid-up; or

(iv) if the policyholder so requests, the policy is surrendered, in accordance with the rules of the long-term insurer, and so much of

the remaining value as then remains is, subject to section 54, paid to the policyholder; and

(b) deal with the policy accordingly.

(3) A long-term insurer shall have rules which to the satisfaction of its statutory actuary prescribe a sound basis on which, and the methods by which, a long-term policy is to be valued and otherwise dealt with for the purposes of subsection 2.

[4] The period of grace is to be calculated from the date the payment is due.[1] The reciprocal obligation to provide cover extends during the grace period. Accordingly, the bargain struck is plain: cover is available against payment effected promptly.[2] The provision about 'reinstatement' is a misnomer because the qualification in effect it renders it a fresh policy, a construction borne out by an offer by the appellant to 'reinstate' the alleged lapsed policy upon further underwriting of the risk.[3]

- [5] In order to decide the controversy, it is necessary to traverse the history of engagement between the parties in particular detail, a task performed hereafter. Prior to so doing, clarity is necessary on the cause of action relied upon by Barker, confusion about which bewitched much of the argument advanced on appeal.

What is the case put up by Barker?

- [6] In determining the “case” presented for adjudication by a litigant, it is necessary only to examine the averments. Whether the evidence adduced supports that case is a separate question. This matter was presented on motion and the affidavits therefore constitute both the pleading of the case and the evidence relied upon to sustain it.
- [7] In my view, a distillation of Barker’s case reveals that he avers that the appellant breached the agreement of insurance by way of a repudiation. Barker elects to reject the repudiation and seeks specific performance of the appellant’s contractual

obligations. The breach upon which he relies is the failure or refusal of the appellant to accept allegedly lawful tenders of payment of premiums on his policy which the appellant was, allegedly, contractually obliged to accept and appropriate to his policy. The consequence of such failure to credit the policy with payments was that the provisions of the policy which regulate the conditions upon which the policy would lapse were triggered. The triggering of those lapse provisions, were, so it is in effect averred, were caused by culpable failures on the part of the appellant to accept tenders of payment and allocate such payments to his policy. The contention is that were the appellant to have accepted payment, no lapse of the policy could have resulted. In addition, Barker alleges that the appellant failed to give notice of lapse as prescribed by section 52 of the LTI Act. Hence, the relief sought is a reinstatement of the policy on the original terms, against a tender to perform the reciprocal obligation to pay the premiums.[4]

- [8] Accordingly, Barker must establish the following to prove his case:

8.1. A breach by the appellant of a contractual obligation to accept certain tenders of payment.

8.2. The failure by the appellant to accept the payments constituted a material breach of the contract of insurance.

8.3. The appellant failed to comply with section 52 (1) of the LTI Act as regards the giving of proper notice, the giving of which being a prerequisite to a lapse of the policy.

8.4. The propriety of an order of specific performance in the circumstances.

- [9] Barker also endeavoured to advance a case that the appellant had by its conduct violated various constitutional rights underpinning fair dealings as between contracting parties. This thesis was apparently raised in the court a quo and was again argued before this court. The appellant’s conduct was described as unconscionable. Notably, the terms of the contract are not per se criticised, nor indeed could such a contention be plausibly advanced. However, it is not possible to read the founding papers as expressly laying a foundation for a case rooted in the violation of a constitutional right. In the absence of putting up such a case for the

appellant to attempt to counter when answering, it is impermissible to seek to advance it.[5] Insofar as any particular breach of any contractual obligation could be said to be ‘unconscionable’ nothing of significance or novelty is added to the debate. The norm of unreasonableness is not yet a self-standing ground for a contractual remedy in our law.[6] In those cases where the courts have held, for example, that there was a ‘snatching at a bargain’, a species of unconscionable conduct as between contracting parties, the *causa* remains conduct incompatible with a true consensus as between the parties or a matter of proper compliance with the true terms of the contract. In this matter the zone of controversy is about performance of contractual obligations by both parties.

- [10] The appellant’s case is that Barker, culpably, failed to perform his obligations in terms of the contract and that as at 18 January 2013, he was in arrear with his premiums for the months of November, December 2012 and January 2013. Moreover, it is asserted that because prompt payment of the premium was a material term of the contract and a lapse for failure to pay promptly was an expressly articulated risk, the policy indeed, as contemplated by the terms of the contract, lapsed on the date nominated by the appellant, ie 18 January 2013. Moreover, it is alleged that due notice (if indeed required by section 52 of the LTI Act) was given to Barker of non-payments of premiums to which he failed to react. The appellant was not, it is alleged, on the contract nor in law, in the given circumstances, obliged to accept the purported tenders of payments relied upon by Barker.

The identification of the critical factual elements in Barker’s case

- [11] In order to demonstrate that the lapsing provisions were not triggered, Barker sought to show that he was not in arrear, or more specifically, he ought not to have been regarded by the appellant, as being, as at 18 January 2013, in arrear and was, at worst on that date, in arrear but within the one-month grace period stipulated in the contract.
- [12] To foreshadow the essential enquiry into the facts, it is useful to mark the critical factual features of Barker’s case; in essence, that:

12.1. A debit order instruction with Nedbank to pay the premium due for November 2012 ought to have been presented by the appellant, which would have been honoured. In addition, it is alleged that no proper notice of default

was given in respect of a non-payment for November 2018.

12.2. A cash payment Barker made from his FMB account on 4 December ought to have been credited to his account. This ‘payment’ was incorrectly described by Barker and it was not appropriated to his policy and, on 14 December 2012, refunded to his Nedbank account rather than to his FNB account from whence it had been paid

12.3. A debit order instruction with FNB that Barker gave to the appellant on 3 December 2012 to draw premiums owed as at 7 January 2013, ought to have been presented. (An ancillary aspect is the proper interpretation of that debit order instruction)

12.4. If such payments had been credited, the result would be that Barker could not have been in default until, at the earliest, 31 January 2013, and thus was not in default on 18 January, the date nominated by the appellant for the lapsing.

12.5. Moreover, because Barker paid further sums on 21 January 2013, had these further sums been credited to his account he could not have been in default, even on 31 January 2013.

A narrative and analysis of the relevant facts

- [13] There are no hard facts in dispute. A synthesis of the allegations of fact reveal an unfortunate course of events.
- [14] Barker was in business, describing the business as Michael Barker & Partners, a Close Corporation, during the period relevant to the controversy. At one time, Guy Rae was a partner; he ceased to be so at the end of 2011.[7] The nature of the business is not disclosed.
- [15] Barker's policy reference number was 5938027. The premiums had been paid from inception by debit orders, presented by the appellant from 2009, for the sums due, which escalated annually. The debit order was against a Nedbank Business Cheque Account in the name of Michael Stuart Barker. The account of the appellant into which such payments were credited was also with Nedbank. Barker says that this was only one of the bank accounts which he operated, and this account was used exclusively to effect debit order payments.
- [16] On 29 April 2012, Barker had a heart attack. He was paid R1.2m under the dread disease provisions of the policy on 1 July 2012. The policy remained in force in respect of the life cover of R4.4m.
- [17] In the month following the payout, when the appellant presented the debit order, it was rejected. Apparently, so states the appellant, because of "no authority".[8] The appellant remained silent about that default during the grace period.
- [18] The September premium was also rejected as "no authority", as reported to the relevant staff member of the appellant on 7 September 2012.[9] However, apparently, the sum of the premium due had been, on 8 September, appropriated to a policy number 5957902, ie, that of Guy Rae. This was axiomatically the incorrect policy.[10] No details are given about how that error occurred. The error was remedied by a transfer of the wrongly appropriated sum to the correct policy, ie 5938027.[11] The further circumstances of this payment are not given.[12] The sum received was appropriated to the August 2012 indebtedness. It is not apparent that this fact was communicated to

Barker, which would have alerted him to the default in respect of September and of August. Much later, when the parties were engaged in addressing their dispute, in a letter of 30 May 2013, the appellant, in replying to Barker's complaint about the lapsing of the policy, and in which a chronological account was given from the appellants point of view of the management of the policy premiums, an allusion is made to a default notice being sent on 7 September 2018 of two months premiums being in arrears.[13] A copy of the notice was attached thereto, in which, inter

alia, it is stated “premium collection against this account has been suspended”[14] The significance of that statement is addressed hereafter.

[19] The appellant states that when the October 2012 premium fell due, the presentation of the debit order was again rejected. Why the debit order would be presented when the payment method had (supposedly) been suspended in September is not explained.[15] In any event, the result was that two premiums were now overdue; ie for September and for October.

[20] On 24 October 2012, the appellant notified Barker of the non-payments in respect of September and October. Barker at once paid, directly, the sums of the two premiums. He was thus, at that moment, up to date. Barker says he was shocked at the news of the non-payments. That Barker failed to monitor the Nedbank Business cheque account is admitted by him.[16]

[21] Barker says that this news caused him to ‘investigate’ the Nedbank account. Among the revelations, was the discovery that his erstwhile partner Rae, had a policy which was being paid for out the account. He caused that to stop with effect from 1 September

2012. The Appellant’s Jeanette Appolis confirmed this fact on 1 November 2012. She noted in her letter that Rae had informed her that the account had been used since 2009 when, and because, he had been a partner in Michael Barker & Partners. For what it is worth, Barker claims that Rae was not authorised to draw on the account. No explanation is offered why the debit order was improperly authorised and how Barker remained ignorant of this irregularity until October

2012. What is of more significance is that the policy numbers of the two policies bear a superficial resemblance, a circumstance that helps explain a confusion which took place later.

[22] Barker says that after 1 November 2012, when he had received the confirmation that Rae had been eliminated as a complicating factor in the use of the Nedbank account, he “confidently assumed” that the premiums due to the appellant would be paid by Nedbank upon further presentation of the debit order. The Nedbank account statements from May 2012 onwards are attached to the papers. A perusal reveals that from May 2012 the account was in overdraft and various debit orders were being bounced. The deposits into the Nedbank account were erratic, and only from July 2012 was a sum regularly credited to that account from an FNB account. These sums differed from time to time. The balance of the overdraft diminished over time. The last time a debit order bounced was 6 September 2012, and thereafter all debit orders presented were met. The November premium fell due on 1 November. Ostensibly, had it been presented, it is probable that it could have been met.[17]

[23] Barker says that owing to the ‘debacle’ with the Nedbank account he decided to give the appellant a fresh debit order against his FNB account. On 3 December 2012, he issued that debit order instruction. The proper interpretation of this instruction was hotly contested. What is plain however was that the date upon which it fell to be presented was the 7th of the month, commencing 7 January 2013. It follows logically therefore that as at 3 December, the November and December premiums

each due on the 1st of the month, ought to have already been paid.

[24] How then, on 3 December, did Barker envisage these premiums for November and December being paid?

[25] Having regard to Barker’s statement in the founding affidavit that he “confidently assumed” on 1 November that future payments would be effected upon presentation of the November debit order to Nedbank, it must be inferred that the FNB debit order could not have been intended by him to have any retrospective effect. In any event, objectively, by 7 January he would have already been in default of two months premiums were he to sincerely think the debit order could have retrospective effect. In the application and on appeal, Barker argued that the FNB debit order authorised the taking of any arrears. The argument is untenable. The reasons are threefold; first the text does not support the idea, second, the notion of a debit order operating retrospectively, or put differently, can imply an authority to collect all arrears is specious on its own terms, still more so in the absence of express language to say exactly that; third, he stated on 11 June 2013 in a letter to the Ombud for the long term insurance industry that: “It is correct that my debit order instruction did not authorise Altrisk to collect arrear premiums for at the time, I was unaware that any premiums were in arrears.” The attempt to suggest that this admission can be undone by a ‘true construction’ of the text is untenable.[18] The Court a quo correctly rejected this contention.[19]

[26] Therefore, the only tenable construction to place on the events as at 3 December, when the FNB debit order authorisation was given to the appellant is that the FNB authorisation would operate in respect of the January 2013 premium and thereafter. The appellant offers an argument that the instruction was for January only; this contention is specious, but owing to the turn of events, this notion is irrelevant for the purposes of deciding this case.

[27] What then of the November and December premiums? Bearing in mind the action taken on 3 December to give the FNB authorisation to the appellant, on the next day, he says he paid the December 2012 premium. Why did he not assume that the December premium had been paid upon presentation of a debit order to Nedbank? Barker explains that the change to the FNB debit order automatically had the effect of cancelling the Nedbank debit order[20]. Hence, alive to that implication of the new instruction he paid directly the December premium. This statement does not offer an

explanation why the December premium, due on the first day of December, would not have already been drawn on the Nedbank account.

By paying directly the December premium on 4 December it can only be inferred that he had no expectation that the Nedbank debit order was operative on 1 December. If that is so, why and how could he imagine it would be operative for the November premium? I shall return to the circumstances of this direct payment and the saga that enfolds from it. What is to be noted is that on the probabilities, on 4 December 2012, Barker, bona fide, believed he had paid the December premium.

[28] More immediately, however, what of the November premium? Why not pay that directly too? In the absence of a direct payment, the only way it could be paid is if the appellant had, during November, presented the Nedbank debit order and it had been met. Barker asserts that the appellant ought to have presented it. When he paid the December premium by way of an electronic transfer (EFT) on 4 December, he alleges he was ignorant that the November premium was unpaid. More importantly, Barker alleges that the appellant had not by 4 December, told him that the November premium was unpaid. This allegation is correct.

[29] Barker alleges that the appellant wrongly did not present the debit order for November. This is against the background that September and October premiums were not paid and a manual payment on 24 October had been necessary to address the arrears. In that context, what reason could exist why the November debit order would be met and more especially, why would Barker think so? The Bank account history does indeed show a probability that it could have been met as funds were available to meet demands from early September onwards. But what of the notice of 5 September that the Nedbank debit order was inoperative? That notice had been sent to Barker's intermediary, Consolidated Financial Planning, with a reference to, among others Pat Fletcher. There is no acknowledgement by Barker that he de facto personally knew of that communication until he read the appellant's letter of 30 May 2013. Barker's affidavits do not dispute the sending of that notice and are silent about what his intermediaries communicated to him.

[30] The appellant plainly never presented the 1 November premium debit order to Nedbank. That would be consistent with the suspending of the debit order authorisation which was mentioned on 5 September. It would, also, logically, not have presented the October debit order either. In a circumlocutionary fashion, the appellant in its answering affidavit "... [denies] that the premium for November was not paid by virtue of the fact that the respondent did not present the debit order...", despite that being plainly what did happen. [21] The appellant's allegations then refer to earlier allegations in the answering affidavit. [22] These earlier allegations merely state that the August and September debit order were unmet, and that August, September and October were paid other than by way debit order; including presumably, the 'transfer' of the wrongly appropriated premium in September 2012 from Rae to Barker.

- [31] The appellant's averments do not address head-on Barker's allegation that no attempt to present the debit order was made. Indeed, elsewhere in the answering affidavit, the appellant tries to justify why it did not present a debit order to Nedbank in November. This action is said to be in terms of a practice in the insurance industry that in the event of two debit orders being dishonoured the method of accepting payment by debit order ceases and is changed to cash. This explanation harks back to the 5 September notice.
- [32] This practice is said to be sanctified by the National Payment Systems Act 78 of 1998 and the Payment Association of South Africa rules.[23] However, no reference to that practice occurs in the contract, no notification of the practice was ever given to Barker and it is not alleged that Barker ought to have known of it. Barker claims with full justification to have been ignorant of the practice. Moreover, no case is demonstrated why such a practice could bind Barker absent an express contractual term. What Barker does not explain is why he was, supposedly, ignorant of the 5 September notice.
- [33] Accordingly, it is plain that no attempt was made by the appellant to collect the November 2012 premium. When did Barker learn of the fact of this non-payment?
- [34] Barker says that after paying the December premium on 4 December his mind was at ease. He was at the time on holiday away from his office. This peace of mind was disturbed when, on 20 December, his insurance intermediary Kathleen Bierbaum, was notified by the appellant that the policy was in arrears and would, if not brought up to date, lapse on 18 January 2013. The email that was sent by the appellant to Bierbaum on 20 December 2012[24] states:
- ‘...the following policy is currently in arrears and effectively in a state of lapse...
- Policy number 5938027
- Barker MS....
- Last premium paid: No premium paid
- Current premium: R 3861
- Current arrears: R11583
- (including premiums due up to 2013/01/31)
- The lapse will be processed on 2013/01/18’
- [35] Barker's reaction to this news was indignation. He states that he had expected Nedbank to pay the November premium and he had personally paid the December premium directly by EFT on 4 December; ie all ought to have been well.
- [36] What exactly Barker did on 20 December about the news is not disclosed. (The narrative in his founding affidavit leaps to 7

January when, in communication with Bierbaum, an exploration is launched into proof of the December payment, and into an argument

about the failure of the appellant to collect all the arrears via the debit order against FNB on 7 January).

[37] However, to address the events on 20 - 21 December, a series of emails tracks a flurry of activity by Bierbaum on 21 December on his behalf.

37.1. Bierbaum emails Emma Niemand, of the appellant, that ‘this policy must not lapse, please. I thought you had received an updated debit order details’ In this regard she was alluding to the email she sent to Barker on 4 December stating; “Altrisk has loaded the debit order and it will run from Jan 2013 as per request. I am assuming you will pay the December premium via electronic transfer,” which followed on Niemand’s email to Bierbaum on 4 December confirming the debit order changes with effect from 7 January.[25]

37.2. Niemand replies “The new order is in place for 7 January 2013, for the month of January 2013. But we hav’nt received November or December’s premiums?”[26] This communication is especially important, both as to the representation about the new debit order and the second alert to the unpaid November premium.

37.3. Later, Niemand emails again: “See attached history, last payment made 24 October 2012. Please provide proof of payment for us to allocate the premiums.”

37.4. Moments later Bierbaum replies: “Why can’t Altrisk not check their bank account for the payment amount. Surely there are not that many deposits on that particular day for that specific amount. My client is on holiday and does not have his computer with his proof of payments but has advised that the payment was made by looking at his bank account.” The account he obviously checked was the FNB account.

[38] Significantly, what is not addressed in Barker’s affidavits is that on 20 December he had been given information (by the communication from the appellant to Bierbaum) about the amount of the arrears that indicated that there was more than a single premium outstanding. Taking for granted, as it turned out, his bona fide but misplaced confidence that the December premium had been paid, what did he do about November? The email from the appellant squarely

informed him of the sum outstanding which unequivocally implied that two payments were outstanding. Thus, he ought to have realised that the debit order he claims he expected to be presented to Nedbank for the November premium had either not been presented or had not been met by the bank.

[39] Ostensibly, it can be inferred that between 21 December and 7 January, in keeping with the South African tradition of the closing

the whole country down for the year-end holidays, nothing more was done until the new year.

- [40] At the stage of this holiday interregnum, to sum up, appellant had unequivocally told Barker via his intermediary:
- 40.1. The policy was two months in arrears.
 - 40.2. The policy would lapse on 18 January if not brought up to date.
 - 40.3. Claims of payments having been made were unverified on its records.
 - 40.4. Proofs of payments were required.
- [41] On 7 January Bierbaum emailed Barker.” [27] She confirmed the Debit order had been loaded, but that “....Momentum[28] and Altrisk cannot pick up your payments for December. Please would you email me proof of payments urgently [29]
- [42] Nothing of note, apparently, occurred until eleven days later on 18 January 2013. Ostensibly, Barker was still on holiday. Bierbaum reported to him that no proof of payments could be found. Barker told his bookkeeper, Maggs to deal with the matter concerning proof of payment and report to Bierbaum.
- [43] The end result was the discovery that the payment made by EFT by Barker on 4 December, thought by him to be in respect of his policy, had been wrongly described by him with Rae’s policy number and the sum had not been appropriated to his policy. Rae’s policy had already lapsed, and logically the sum could not be appropriated to that policy and must have been initially accounted for in a suspense account. Moreover, the sum paid was the sum due for Rae’s policy, a slightly lesser sum than that due on Barker’s policy.
- [44] The way chosen, on 18 January 2013, to repair this muddle was to pay, by EFT, the sum of R255.17, being the difference between the sums owed on the respective policies. Bierbaum emailed Barker that once the difference was paid she would get “Altrisk to sort it all out”. Exactly what she actually did in this regard is not mentioned in the papers.[30] The same error in describing the policy was again committed by Barker, giving Rae’s policy number, not his own, for the additional payment. The degree of carelessness which has attended these several actions by, or on behalf of, Barker loom large.
- [45] In any event, it turned out that on 14 December, the appellant had already refunded the sum erroneously paid in respect of Rae’s policy. It had been credited to the Nedbank account not the FNB from whence it had been paid. Self - evidently, a perusal of the FNB account would continue to reflect a payment, fortifying a bona fide belief that the debt had indeed been paid, and the refund would only have been noticed once the Nedbank account was examined. Notably, the appellant did not deal with the error in appropriation of a receipt, as it had done in September 2012, ie, by a transfer the funds across to the correct account, a critical decision by the appellant, to which I shall return.

[46] Only at this time, ie 18 January, did Barker, or Maggs on his behalf, effectively investigate the reasons for the unpaid November and December premiums. Barker claims he now learnt for the first time that the November premium stood unpaid. As alluded to earlier, Barker alleges that had it been presented it would have been honoured, a probability borne out by an examination of the Nedbank account statements.

[47] Moreover, Barker now also discovered that the FNB debit order had not been presented on 7 January 2013.

[48] The explanation by the appellant to justify that failure to present the FNB debit order on 7 January is that because the policy was already two premiums in arrears, ie November and December:

“no purpose would be served in having debited the premium resulting in further confusion – having already recorded the express arrears including up to 31 January 2013 (as recorded in the [appellant’s] email of 29 December 2012) which was required to be paid by 18 January 2013 to avoid a lapse of the policy.”

[49] This explanation warrants further exploration, more particularly, why having accepted the instruction it was not acted upon and furthermore, why if the 18 January date had been selected as a deadline for a lapse, the debit order for 7 January was not

presented. These issues are addressed hereafter.

[50] 18 January was a Friday. On the next business day 21 January, Barker paid R11327.83, enough to cover three months premiums. Only later, to his shock, says Barker, did he learn that the policy had lapsed. When Bierbaum informed Barker it had already lapsed on 18 January, he claimed he had no foreknowledge of that risk.[31]

The controversies

The November Premium

[51] The rationale in the Judgment a quo, which held that the policy did not lapse, was premised on the conclusion that ‘proper’ notice was not given of the

non-payment of the November premium. The Court a quo held that the terms of the contract and the provisions of section 52 of the LTI Act required a distinct separate notice in respect of each individual premium that was not timeously paid.[32] The appellant’s reliance on that non-payment in the absence of such a distinct notice, was held to be unreasonable and thus of no legal effect. In the context of this reasoning, it followed that the giving of notice on 20 December was inadequate. [33]

[52] In my view, there is considerable force in the notion that the policy holder is by reason of section 52(1) of the LTI Act vested with a right to be timeously alerted to a default. Implied in that right is an entitlement to be informed at a time when there remains enough time to remedy the default which might have been caused by no more than an inadvertence or

other event beyond the debtor's control.[34] Notwithstanding that consideration, neither the LTI Act nor the contract stipulates a time within which to convey the notice nor a method. The 'when' must be understood to be during the period of default and no later than a reasonable opportunity to remedy the default. In my view, to be prudent it would be at the latest, at a time that left at least one business day in hand, to effect a payment. It must follow that a notice in respect of each default is indeed necessary. This is not the result of the text being cast in the singular, but rather because of an inherent coherence being required in its application.

- [53] As a fact it seems that the appellant pursued a practice in terms whereof the policyholder was not notified as soon as the default occurred but only after a default had occurred twice. Strictly speaking, the policy would have lapsed already by the date the second default occurred, but for the non-compliance with the duty to give notice, were notice a precondition for a lapse.
- [54] The attack on the judgment a quo is founded on the proposition that notice, as alluded to in section 52(1), is not a precondition for a policy to lapse, still less is a notice for each separate premium that is in default of payment on due date required. It is argued on behalf of the appellant that such a construction as advanced on behalf of the respondent means that a policy could not lapse if the first default remained unremedied. I fail to follow this thesis. If a payment is due on the first of the month and if unpaid, it follows that the policy will lapse on the last day of the month, ie the day before the next premium is due. Not only is there time within which to notify the policyholder during the intervening period, it is, in my view, obligatory to do so, not wait until there have been two defaults. Apart from the value of avoiding any confusion about exactly what default is the subject matter of the notice, the very function of the notice is to alert the policyholder so that, within the grace period, the default can be remedied.
- [55] The second leg of the contention is that no sanction is imposed if a notice is not sent and therefore notice cannot be a precondition for a lapse. This proposition is founded on the work of Nienaber JA in his capacity as Ombud.[35] In an article to which I was referred, written I infer about 2006 or thereabouts, Nienaber examines various aspects of the payment of premiums. In respect of section 52 he states this:

"10. Section 52(1)

10.1. The difficulty with s 52(1) is that it introduces a duty (notification) but prescribes no sanction for its non-compliance. The sub-section, which is in general terms, is silent as to when and how the required notification is to be given by the insurer and in particular whether the policy will not lapse if notification is not given. Two possibilities suggest themselves.

10.2. The first possibility is that an assumption is to be made that the section is to be given the interpretation that would be most favourable to the insured, namely that the policy, contrary to its terms, will not lapse if prior notification had not been given. Assume that the insured is in arrears, that no notice was given, and that the insured event occurs. Can the insured claim?

Premiums are admittedly in arrears but the contracts has not (on the assumption made) lapsed because prior notice had not been given. Even so, the non-payment cannot simply be ignored. The reason is that the non-lapsing only has an effect on the continuance of the policy; it does not excuse the non-payment of premiums due. The insurer would accordingly still be able to raise the non-payment as a defence (by way of the exception *non adimpleti contractus*) to a claim for the policy benefits.

10.3. However, the fact that the policy had not lapsed does have the further logical consequence that non-payment can be cured by a subsequent tender of payment of the arrears. And it that is so would mean:

- That an insured who is in arrears can insist on reinstatement of the policy against payment of the arrears; and
- that if the insured event should occur before he has done so he can *ex post facto* and, against tender of the arrears, claim the benefits of the policy.

10.4. This last consequence, that a policy with a lapsing provision on non-payment is nevertheless not to lapse on non-payment with the result that the default may be rectified after the event, may be so incongruous as to discredit the assumption made in par 10.2.

10.5. The second possibility may accordingly be more acceptable, namely that this assumption is not to be made and that the policy will lapse even if no notice was given. And if that is so, it simply means that s 52(1), apart from affording the insured some breathing space to make up the arrears, is a mere prelude to s 52(2). In the final analysis that may indeed be the better conclusion.”

[56] With due respect to the distinguished author, I am unable to share his view. Notwithstanding the validity of his comment on the text prescribing a duty without prescribing a sanction for non-compliance, I am of the view that his second offered interpretation is not preferable. Simply put, it implies words in the statute that have no genuine effect on the policy objectives inherent in the section. Flaccidity in legislative text is not to lightly inferred. Moreover, if one is to read a statute with a purposive intent and thus seek an understanding consistent with policy and business sense, it must be taken for granted that words in the text perform work and do not create anomalies. Perhaps the better way to read the section is to ask what work does the text perform, and in that context, ask, what are the consequences envisaged that the legislation seeks to achieve.[36]

[57] However, it may not be necessary to resolve this issue definitively, because the appellant did give notice, albeit belatedly, if the view I espouse is correct. As the appellant sought no advantage from its belated notice-giving and indeed stipulated deadlines of a generous margin, it cannot be cogently argued that any ultimate prejudice to Barker resulted in respect of the default to give a separate notice during November of the November premium being unpaid.

[58] Accordingly, in respect of the unpaid November premium, Barker has no grounds to be aggrieved in respect of the obligation to give notice in terms of section 52. As regards Barker's obligation to pay the November premium he was at fault, albeit through rank clumsiness. His case in this respect must fail. Insofar as the judgment a quo approached the matter differently, I am unable to agree.

The December premium

[59] It is incontrovertible that Barker intended to pay this premium and took steps before the lapsing on 18 January to do so. The

carelessness with which Barker misdescribed the policy number, twice, is notable.

[60] However, the conduct of the appellant is reproachable too. The chain of events reveals that a payment (marked for Rae) on 4 December occurred when, at that time, the Rae policy no longer existed so there could be no confusion about a sum due for such a policy. This event was followed by the appellant recognising that the payment was misdirected and on 14 December repaying the sum to Barker. The sum emanated from Barker's FNB account. The appellant repaid it to his Nedbank account. The effect was to mask the fact that his policy had not been credited. The fact that the appellant chose to repay the sum to a different account from whence it had come is proof that they knew the identity of the payer, knew he was a debtor and repaid the sum to another of his accounts and then did not alert him to the fact that his efforts to pay had failed. Moreover, on 20 December when the appellant denied that the December payment had been made, no further disclosure was made of the abortive attempt to pay. The denial by the appellant that the December premium had been paid was *prima facie* belied by examining Barker's FNB account. This conduct of the appellant caused a *bona fide* wrong impression to be created in the mind of Barker, which was cleared up only on 18 January. Importantly, when a similar mix-up had happened in September, the appellant transferred the sum to the correct policy account. No explanation is offered why that practice was not followed on this occasion.

[61] In the particular circumstances when an insurer knows that its debtor

- policy- holder has made an attempt to pay the premium due, and knows that the payment has been misdescribed, it is not permissible to turn a blind eye to the facts and allow the debtor to remain ignorant of what the insurer knows to be the true state of affairs. The appellant should have either alerted Barker to the refund when it was made or appropriated it to the correct policy and notified him of the error. Had that occurred, the appellant would have been able to credit the policy. By failing to take appropriate steps resulting in the acceptance of the *bona fide* tendered payment and failing to credit Barker's policy, the appellant was in breach of its contractual obligations.

[62] It was argued that where a debtor misdescribes a payment there is no obligation on the creditor to investigate where it ought to allocate it. Reliance was placed on passages from Wessels on Contract, 2nd Edition, Para 2294. However, in my view the passages relied upon

address a different set of circumstances; ie where the creditor does not know which debt, owed to the creditor, the debtor wishes to be paid. That dilemma occurs where one debtor has several debts with a single creditor. In the present case, to the certain knowledge of the creditor, the debtor had a single debt and could not by a misdescription of a non-existent debt have been understood to have meant any debt other than the true debt was intended to be paid.

- [63] When the additional sum of the underpayment was made on 18 January, the full premium would have then been paid. In accordance with the practice of appropriating payments to the earliest debt, the December payment would then have been recorded, in exactly the way the payment in September was eventually recorded, ie as a credit against the November indebtedness.

The January Premium

- [64] In my view, the appellant had no justification for not presenting the FNB debit order on 7 January. Had it done so, payment would have been effected. The December indebtedness remained, because the December payment, as described above, ought to have been appropriated to November, and logically, the January payment ought to have been credited to December. Had this occurred, as at 7 January, the “January” premium would have remained outstanding, with the grace period still running.
- [65] The reasons why the appellant was wrong not to present the January debit order are several.
- 65.1. It had accepted the new debit order instruction on 3 December. That was enough to constitute an express representation that it was an acceptable form of payment.
- 65.2. Niemand had in her email to Bierbaum confirmed that the January debit order was operative.[37] This constituted a further express representation that payment in this way was acceptable, and further, that the appellant would, indeed, act upon it.
- 65.3. Further, the appellant represented that the policy, if not paid, would lapse on 18 January, not before. This representation bound the appellant. It could not properly act in any way that prevented a tender of payment being made before that date and should have accepted it.
- 65.4. In the context of these representations, Barker was fully entitled to rely on the appellant presenting the debit order, for at least the January sum due.
- [66] To sum up, as at 18 January, had the appellant complied with its contractual obligations, in good faith and accepted the tenders of payment in December and in January, only the sum due for January would have been outstanding, and the grace period of one month calculated from 1 January would still have had to run out.
- [67] When the payments on 18 January and 21 January were made, Barker would not only have been up to date but would have paid in advance.

Conclusions

- [68] The appellant wrongly regarded the policy as lapsed on 18 January 2013.
- [69] The appellant is not to be faulted for not presenting the November debit order for November.
- [70] The appellant wrongly did not appropriate the December payment to the debtor's debt, which payment it knew full well emanated from its debtor who was endeavouring to pay his indebtedness.
- [71] The appellant wrongly did not present the debit order for 7 January 2013.
- [72] The circumstances incontrovertibly justify an order of specific performance.
- [73] The order of the court a quo directing a reinstatement of Barker's policy with retrospective effect should be endorsed.

A Variation of the order a quo

- [74] It was argued that for the period of the suspension of the judgment a quo for the purposes of the appeal, the parties' reciprocal obligations to pay premiums and provide cover should be excised from the full retrospective effect of the order. Section 19 of the Supreme Court Act 10 of 2013 is invoked as the source of the power to so vary an order on appeal.
- [75] In my view no justification is shown. The vagaries of protracted litigation are an irritation with which litigants are unhappily

obliged to put up. The effect of the relief sought implied a tender to pay all premiums retrospectively upon a reinstatement, and that is what the Court a quo ordered. What is appropriate is to set a time for performance given the amount involved, something in excess of R270,00 not counting the escalations over five and a half years. A period of 90 days from the date the appellant makes demand should be a fair period within which to marshal the sum owed.

The Costs

- [76] In view of the contribution of Barker, through his fumbling, to the saga which has unfolded, it would be appropriate that there be no costs of the appeal ordered. Each party should bear its own costs.

The Order

- (1) The appeal is dismissed.
- (2) The order a quo is confirmed, save that the time for payment of the instalments referred to in paragraph 87.2 of the order shall be 90 days calculated from the date of demand presented by the appellant to the respondent.

Sutherland J

I agree

Matojane J

Siwendu J

Heard: 2 May 2018

Judgment

delivered:

For the Appellant:

Adv H P Van Nieuwenhuizen,

Instructed by Marques Soares Fontes Attorneys

For the Respondent:

Adv D Van Niekerk,

Instructed by Kevin Cross & Affiliates

- [1] In the judgment a quo it was held that the period of grace runs from the date of the notice of non-payment. I cannot agree. The text of the section plainly extends the contract for a period, not determine a period linked to the notice.
- [2] See Steyn's Estate v South African mutual Life Assurance Society 1948 (1) SA 359 (C) on punctuality of the payment of the premium.
- [3] It is trite that a new contract has to come into being: Currie Motors (Pretoria) Ltd v Motor Union Insurance Co Ltd 1961 (3) SA 872 at 878 C-D.
- [4] See in particular, the Notice of Motion. Also, paras 111-113 of Founding Affidavit, the contents of which are dealt with hereafter, bear out this focus. The Replying Affidavit stretched to include fulsome rhetoric, but self-evidently could not broaden, nor change the case initially presented.
- [5] See: eg, Singh v Commissioner SARS 2003(4) SA 520 (SCA) Juglal NO & Another v Shoprite Checkers,(Pty) Ltd t/a OK franchise Division 2004 (5) SA 248 (SCA); Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012
- (1) SA 257 (CC)
- [6] Barkhuizen v Napier

- [2007] ZACC 5; 2007 (5) SA 323 (CC). Bredenkamp & others v Standard Bank 2010(4) SA 468 (SCA), and most recently, Boedica 231 Cc & Others v Trustees, Oregon Unit Trust & Others 2018(5) SA 549 (WCC) at [12] – [14]. Also, see FDJ Brand “The role of good faith, equity and fairness in the SA law of Contract: a further instalment” 2016 Stell LR 238. See too Christie, Law of Contract in South Africa (2015, 7Th Edition, Lexis Nexis, at pp16-23 where the case law is extensively discussed.
- [7] Letter from Barker to appellant dated 22 March 2013, record 78.
- [8] Letter from appellant, 30 May 2012: Record 96.
- [9] Letter dated 30 May 2013, Record 97, and email dated 5 September, Record 98.
- [10] The policy 5957902 was that in respect of Guy Rae who had payments of premiums made to his policy from this account until September 2012, apparently wrongly and without Barker’s knowledge. [see: letter from Barker to appellant dated 22 March 2013, Record 78]
- [11] Letter from appellant to Barker dated 30 May 2013; “...8 September 2012 premium of R3681 incorrectly paid into policy 5957902. R3681 transferred to policy 5938027 and allocated to August 2012 – transaction completed on 25 September 2012.’ The appellant’s heads of argument allege that Barker paid the premium to his policy directly in cash. HEADS: p10/ para 11.10. This is incorrect. The Judgment a quo at [13] also committed this error of fact.
- [12] See: in addition to Appellant’s letter of 30 May 2013, see Narrative given by the Ombud, record 128/5.
- [13] Appellant letter to Barker 30 May 2013, record 97.
- [14] Email appellant to Barker’s broker, dated 7 September 2012, record 98.
- [15] The October 2012 Bank statement (Record pp109-110) does not reflect any debit order being presented and rejected, but that record might be neutral on the question. The probabilities go both ways; ie the belated notice of 24 October could have been triggered by the October default, which would imply the suspension of the debit order authority on 7 September was not, in truth, acted upon, or alternatively, the appellant only after not presenting two debit orders sent a notice of default.
- [16] Barker’s letter dated 22 March 2013 to appellant, record 78-79.
- [17] See Bank statements, Record 106 – 126.
- [18] FA28/99-101.
- [19] Judgment a quo at [49].
- [20] Founding Affidavit, record p 14/37.
- [21] AA 152/138.1

- [22] AA 135/13.2 and 13.3
- [23] See: FA 29/109.1 and AA 138/55.
- [24] Record 64-65
- [25] See emails: record 63.
- [26] Emma Niemand email to Bierbaum 21 December 2012, record 167.
- [27] In communicating this information, she was obviously relying on Emma Niemand's email of 21 December, Record 167; she omitted a reference to the November premium being outstanding.
- [28] Momentum Insurance, apparently, had a similar problem with getting paid but never allowed the policy to lapse.
- [29] Record: 68
- [30] Bierbaum's email to Barker dated 18 January 2013, Record 72.
- [31] Barkers letter to appellant, 22 March 2013, record 78.
- [32] The Judgment, paras 51,68,77, esp 78, 82,84
- [33] Exactly what was communicated on 20 December is cited above in paragraph 33 of this judgment. A reminder was sent expressly stating that November and December premiums were unpaid on 7 January, the text of which is cited in paragraph 37.2 above.
- [34] The example in *Penderis and Gutman v Liquidators, Short Term Insurance Business, AA Mutual Insurance Association Ltd* [1992] ZASCA 178; 1992 (4) SA 836 (A) illustrates exactly this possibility. In that case the policyholders bank wrongfully froze the account which inhibited the premium being paid.
- [35] P M Nienaber, "On the Payment of Premiums and the lapsing of Long Term Insurance Policies"
- [36] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA (SCA) at [17] – [21]
- [37] See paragraph 37.2 of this judgment

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