

SOUTH AFRICA / JUDGMENT

**BoE Bank Ltd v Ries (247/2000) [2001]
ZASCA 132; [2002] 2 All SA 247 (A); 2002
(2) SA 39 (SCA) (27 November 2001)
[2001] ZASCA 132**

COURT

Supreme Court of Appeal

BEFORE

Schutz, Harms, Cameron, Mthiyane, Conradie

CASE / FILE NUMBER

247/2000

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REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO. 247/2000

In the matter between BoE Bank Ltd Appellant and Sonja Mathilda Ries Respondent Before:
HARMS, SCHUTZ, CAMERON, MTHIYANE JJA and CONRADIE AJA Heard: 22 November
2001 Delivered: 27 November 2001

Aquilian liability – wrongfulness – insurance broker doing a favour by supplying a form for change of beneficiary under life policy – insured doing nothing further before his death – no legal duty on broker to obtain and file completed form – disappointed beneficiary cases a dangerous analogy – reasoning by analogy itself dangerous. _____

J U D G M E N T

_____SCHUTZ JA[1] The first defendant (now the appellant) was Boland Bank PKS Ltd. It is now named BoE Bank Ltd (“the bank”). One Groenewald, for a time the second defendant, was employed at its Somerset West branch as a broker. His functions were to see to the bank’s insurance interests. One Ries wished to change the beneficiary in a policy on his life. He has since died and I shall refer to him as “the deceased”. The intended beneficiary was the future Mrs Ries. She was the plaintiff and is the respondent on appeal. At the time that the events giving rise to this appeal occurred in December 1994, she worked for the deceased. They had become engaged in November 1994, leading to their marriage in May 1995. The deceased died in 1996.[2] The deceased kept his current account at the bank’s Somerset West branch. He had dealings with Groenewald about two life policies and only two. The one was with Liberty Life. This was taken out shortly before or after 22 December 1994, at the bank’s instance to provide security for his overdraft. Before the deceased selected this policy Groenewald obtained quotations from several

insurers. The other policy was an existing one, issued by Old Mutual. The fact that the beneficiary under this policy was not altered so that Mrs Ries was named as beneficiary gave rise to this case.

- [3] Groenewald first came to hear of the Old Mutual policy in the following way: A colleague at the bank's Strand branch asked him to deliver a will which she had prepared for the deceased for him to sign. Groenewald had no prior knowledge of the will, nor did he become acquainted with its terms. After he had received it in an envelope, he made an appointment with the deceased and walked the few blocks to his office. This was on 22 December 1994. The deceased signed the will and Groenewald and someone from the deceased's workshop witnessed it. According to Groenewald, the future Mrs Ries was present and although he was not sure whether she read it, he insisted that she was well aware that her future husband was signing his will. Mrs Ries, on the other hand, denied she was present at the signing.[4] According to her she learned of the existence of a will only after her husband's death. The deceased, she said, was very secretive about his financial affairs, and she also did not know of the intended change in her favour of the beneficiary named in the Old Mutual policy. The court a quo made no express finding on this dispute between Groenewald and Mrs Ries, but on two other disputes the learned judge preferred Groenewald's version as being probable, whilst not holding Mrs Ries to be deliberately untruthful.[5] Before Groenewald left with the completed will the deceased mentioned that he wished to change the beneficiary named in a policy, the Old Mutual policy as became apparent. As Groenewald had not gone armed to deal with such an eventuality he did not have the appropriate form with him. So he arranged with the deceased that he would return with the form that afternoon, in order that it might be completed, signed and lodged. He went back to the bank where he took a form and filled in such particulars as he commanded. [6] When he returned to the deceased's office at the appointed time the deceased was not there, but Mrs Ries was. He was as sure as could be that she filled in the particulars pertaining to the beneficiary. She denied this. Be that as it may those particulars were filled in by someone. But the form still lacked a signature. According to Groenewald he then arranged with her that she was to give the deceased a message that he was to come into the bank to sign. He departed with the unsigned form, placed it in a file in his office and did not speak to the deceased about the matter again. Mrs Ries's version of the afternoon was different. She did not dispute that the deceased might have been out, as his work often took him abroad. Nor did she dispute that she was at the office. But she disputed that Groenewald had left a message with her. If he had done so, however, she would certainly have passed it on, as both she and her future husband were meticulous about such matters.[7] H J Erasmus AJ, the trial judge in the Cape Provincial Division, found it probable that Groenewald's version as to whether he left a message and whether Mrs Ries filled in the form was correct. The first finding was not challenged on appeal on behalf of Mrs Ries, although its correctness was not conceded. The inference is accordingly that the deceased received the message.[8] The new will made a bequest to Mrs Ries of the trading stock, vehicles, furniture and fixtures and fittings of the deceased's business, Action Dairy Equipment, subject to her

paying R300 000 into the estate. The residue, which would have included this sum if the bequest were accepted, was to go to the deceased's three children by a previous marriage. The Old Mutual life policy was also for R300 000 and the intended purpose of naming her as beneficiary was to provide her with the funds to take up the bequest.

Groenewald did not know what the terms of the will were. Nor did he know that the change of beneficiary under the policy had anything to do with the will. Prior to the alteration of the will the same bequest had been left to the deceased's cousin, one Mr Strahlendorf, and he was named as the beneficiary in the life policy.^[9] Upon the deceased's death without having taken any further steps to notify Old Mutual of a change of beneficiary, Strahlendorf was paid the proceeds of the policy and Mrs Ries declined to take up the bequest. Her claim for damages in the amount of the Old Mutual policy succeeded, after which Erasmus AJ refused leave to appeal, which was later granted by two judges of this court. Legal issues^[10] Most of the judgment a quo, reported as *Ries v Boland Bank PKS Ltd and Another* 2000(4) SA 955(C), is taken up with a review of the "disappointed beneficiary" decisions and literature, both in South Africa and abroad. A useful collation is to be found there. I do not intend to repeat it, interesting as much of the thinking on display is, as I have little doubt that when an appropriate case, such that a duty of care is owed to the plaintiff, arises, this court will accept that a disappointed beneficiary has a delictual action for his loss. Indeed the appellant in this case, the bank, accepts as much, that is, as a matter of principle. There are also decisions of our courts supporting such a view. They are *Arthur E Abrahams & Gross v Cohen and Others* 1991(2) SA 301(C) and *Pretorius and Others v McCallum* (unreported - CPD 24 April 1995). The latter decision, by Conradie J, should, in my opinion, have been reported for the benefit of readers ahead of others that were. ^[11] Putting aside the analogy of the disappointed beneficiary, what is really in issue in this case is whether Mrs Ries has proved wrongfulness, negligence and causation. Wrongfulness^[12] Years ago Mrs Ries would have been faced by two insuperable obstacles, that her claim was for pure economic loss without injury to person or corporeal property, and that it was based on an omission, namely Groenewald's failure to obtain and lodge a signed change of beneficiary form. Today neither of these obstacles is insuperable, but they are often still difficult to surmount. *Administrateur Natal v Trust Bank van Afrika Bpk* 1979(3) SA 824(A) recognized that in appropriate cases pure economic loss can be recovered, although whereas physical injury to the person or corporeal property is prima facie unlawful, causing economic loss is not: *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985(4) SA 553(ZSC) at 563 A – C, *Lawsa First Reissue* Vol 8.1 para 59. Similarly, loss caused by an omission can be actionable where there is a legal duty to act positively. But where the conduct complained of takes the form of an omission, such conduct is prima facie lawful: *Lawsa* para 56. See also *Cape Town Municipality v Bakkerud* 2000(3) SA 1049(SCA). ^[13] In most delict cases that come before the courts the element of wrongfulness is uncontroversial and may not deserve a mention, the only real issues being negligence and causation. But in the case before us it is the first issue, particularly because the claim is for pure economic loss and is based on an omission. Foreseeability alone cannot provide the answer. Nor, if one might consider that a moral duty rested on Groenewald to do more than he did, is that in itself enough. Something more is needed. The court must be persuaded that the legal convictions

of the community demand that the conduct ought to be regarded as unlawful: Minister van Polisie v Ewels 1975(3) SA 590 (A) at 597 A – C, Minister of Law and Order v Kadir 1995(1) SA 303(A) at 317 C – 318 A and Cape Town Municipality v Bakkerud 2000(3) SA 1049 (SCA) at 1054 G – 1057 G. Put another way, the court has to be persuaded that the defendant owes a legal duty and not only a moral duty to the plaintiff. This involves forming a value judgment.[14] Applying these principles to the facts before us: in relation to the Old Mutual policy there does not appear to me to have been a professional relationship between the deceased and Groenewald, in terms of which the deceased relied upon Groenewald's special skills. The Liberty Life policy was taken out at the instance of the bank, not the deceased. It is true that Groenewald obtained competing quotations for the deceased and it may be that if Groenewald had acted negligently in respect of this policy, his conduct as against the deceased would have been wrongful as against the plaintiff even though it was the bank that had asked for the policy. But that possibility in relation to the Liberty Life policy did not constitute Groenewald the deceased's regular broker. And when he took the unsigned will to the deceased, this was not because of any relationship between them. He delivered the will as a service or courtesy to a colleague in the bank. He did not know of the Old Mutual policy and he did not visit intending to discuss insurance business. His involvement with that policy, such as it was, arose in passing. The deceased did not discuss the policy with him. He realized that having Groenewald in his office he could use him as a messenger to convey to Old Mutual his decision to change the beneficiary. There was no question of a fee for this small service, which was presumably performed to promote the goodwill of the bank and Groenewald. Neither Groenewald nor the bank had any interest in this policy. Doing a favour in such circumstances did not, in my opinion, give rise to a contract with the deceased. All of this is very different from the formal engagement of an attorney to draw a will.[15] There is another important difference between the service which Groenewald provided and that provided by the postulated attorney. When an attorney is engaged to draw a will the client does so in order to have the benefit of his skill. There was no skill involved in what Groenewald did. The deceased could have done it for himself, but found it more convenient to use a person who had access to the necessary form and was in regular contact with the insurer. Again, if the deceased had entrusted Groenewald with a completed form for delivery to the insurer, and Groenewald had negligently failed to deliver it, there could have been talk of wrongfulness.

But those are not the facts.[16] The judge a quo was of a different view. He listed five numbered factors (at 969 D – 970 H) in support of his conclusion that wrongfulness had been established. The crucial paragraph is that numbered 2 (at 969 G – H). That numbered 1 (foreseeability) is supportive of it. The others deal with possible reasons for restricting liability in some cases and have little bearing on the current enquiry.

[17] The word “analogy” as used in logic is defined in the SOED as meaning “a. Resemblance of relations or attributes as a ground of reasoning. b. Presumptive reasoning based on the assumption that if things have some similar attributes, their other attributes will be similar.” These definitions have only to be expressed for it to become apparent that conclusions reached by analogy alone are precarious. That was the trap which awaited Erasmus A J when he drew an analogy between the case before him and the disappointed beneficiary cases.

Having correctly stated that the issue of law before him was whether in the circumstances there was a legal duty on Groenewald to ensure that Mrs Ries obtained the benefit under a life policy which her future husband intended she should receive, the learned judge proceeded:

“In other words, the Court is squarely confronted by the much debated issue whether a so-called ‘disappointed beneficiary’ has any legal right to recover damages in respect of the loss of the benefit that would have accrued to him or her but for the negligence of another.”

[18] It would do an injustice to the judgment a quo to suggest that the principles governing wrongfulness, negligence and causation were not properly set out or that the facts of the particular case were ignored. But the “issue” concerning the disappointed beneficiary retained prominence when the learned judge, having stated that most of the cases in which “the legal issue” has arisen concerned negligence on an attorney’s part when preparing a will, continued: “In the present case, the facts are somewhat different but the central issue remains the same.” (Emphasis added). The dangers inherent in deducing a result from a rough label attached to a group, referred to by Van den Heever J in *van der Westhuizen v Engelbrecht and Spouse and Engelbrecht v Engelbrecht* 1942 OPD 191 at 200, lurk behind such statements.[19] In the paragraph numbered 2, to which I have referred in para [16] as being crucial, the learned judge said that there was a

“continuing relationship” in terms of which the bank rendered banking and other services to the deceased. Banking services yes. But insurance services? Except possibly in the case of the Liberty Life policy, I doubt it. The deceased, the learned judge said further, “was entitled to rely on the [bank] to render those services in such a manner that effect was given to his intentions. In my view the boni mores, the legal convictions of the community, require that persons or bodies in the position of the defendants exercise their skill and knowledge responsibly so as not to affect adversely persons whose rights and interests are certain and foreseeable” (at 969 H – J). What services, one may ask. All that Groenewald undertook to do was to bring a form for signature and dispatch it to Old Mutual after signature. He brought the form. The deceased did not keep his appointment. Groenewald’s response was sensible. He left a message with a reliable messenger that the deceased should come to the bank and sign the form. The deceased knew that it had to be signed and lodged. He had initiated the process to bring that about. He was the one who halted it. Perhaps he had his reasons, for all Groenewald knew. I do not think that the community would expect a court to impose upon him a legal duty to do more, would regard his conduct as wrongful, given all these circumstances. [20] I have mentioned the attorney engaged to draw a will, not to pursue the argument based on analogy, but to point out that the analogy relied on, if it be analogy at all, is both distant and dangerous. The learned judge’s adherence to the analogy is illustrated by his references to “services”, “in the position of the defendants”, “skill” and “knowledge”, which concepts derive rather from the case of the will-drawing attorney than the facts before the court. That is the danger of reasoning by analogy. [21] The learned judge, at an earlier stage in his judgment, correctly mentioned that Groenewald could have foreseen that a negligent failure to notify the insurer could cause serious harm to the intended beneficiary (point 1 at 969 D – G). This would be so even if he did not know of the connection between the change of beneficiary and the will. Such foreseeability is often an important, even a decisive factor in deciding whether wrongfulness has

*been established, but it is not in itself enough, and its presence in this case does not, in my opinion, have the effect of thrusting on Groenewald an obligation that he did not assume. Had he failed in performing such duties as he did undertake the case may have been otherwise.[22] The learned judge also relied on the fact that a decision in favour of the plaintiff would not lead to the imposition of liability “in an indeterminate amount for an indeterminate time to an indeterminate class” (point 3 at 970 A – C). Those may be reasons for not extending liability in a particular case, but they do not militate for its imposition in an otherwise inappropriate case.[23] Then, after having quoted Lord Goff in *White and Carter v McGregor* [1962] AC 413 (HL) at 413 H, to the effect that there would be an extraordinary lacuna in the law if the only person who might have a valid claim (in this case the deceased or his estate) has suffered no loss, and the only person who has suffered a loss (Mrs Ries) has no claim, the learned judge said (point 4 at 970 D – E):*

“In my view, a negligent act or commission which precludes the receipt of a benefit in a case such as the present clearly would call for a remedy.”

However much a remedy may be called for in a true disappointed beneficiary case (beware of the label), I hear no call in this case, for the reasons already given.[24] Finally (point 5 at 970 E – G), the learned judge took into account that in imposing liability one would not be imposing any additional duties on Groenewald. He would be held liable for failing to do what he had undertaken to do (undertaken, that is, to the deceased). The correctness of that view depends on what it was that Groenewald undertook to do. I have already sought to demonstrate that he did all that he said he would do. What the plaintiff’s complaint really comes to is that Groenewald should have reminded, or perhaps kept reminding, the deceased, to sign and deliver the form. To my mind he had performed his act of neighbourliness. That did not make him the deceased’s keeper. It would be an extraordinary result in a case such as the one before us if the legal duty in a delictual claim having its foundation in a contract with the deceased (if there was one) should be wider than the duties imposed by the contract itself.[25] In argument Mr Fagan, who is to be thanked for presenting full submissions on behalf of Mrs Ries as *amicus curiae*, sought to persuade us that we should not accept, in the face of Mrs Ries’s contrary evidence, the court a quo’s finding that the probabilities indicated that Mrs Ries and not the deceased filled in the details pertaining to the beneficiary.

There is no reason that I can see for disturbing this finding of fact, and even if it were to be disturbed, the result would be to weaken Mrs Ries’s case even further. The reason for this is that the case would then be that the deceased completed the form and then did not sign it, indicating, *prima facie*, that he had had second thoughts. Conclusion[26] For these reasons I disagree with the judge a quo’s conclusion (at 971 A) that wrongfulness was established. That conclusion makes it unnecessary to consider whether he was correct in holding that negligence and causation had also been established. It seems to me that he was not correct, but I express no considered opinion on those matters.[27] In the result the appeal succeeds with costs. The judgment of the court a quo is set aside and replaced with the following. “The plaintiff’s claim is dismissed with costs.”

____W P SCHUTZ

JUDGE OF APPEAL

CONCUR

HARMS JACAMERON JAMTHIYANE JA

CONRADIE AJA

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