

SOUTH AFRICA / JUDGMENT

Flemming v MMI Group (73982/16) [2017] ZAGPPHC 650 (2 October 2017)

[2017] ZAGPPHC 650

COURT

North Gauteng High Court, Pretoria

BEFORE

G Rautenbach

CASE / FILE NUMBER

73982/16

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 73982/16

Not

reportable

Not

of interest to other judges

Revised.

2/10/2017

In

the matter between:

HERMANUS

CHRISTOFFEL JOHANNES

FLEMMING

Applicant

MMI

GROUP

(Reg.

No.:

1904/002186/06) Respondent

JUDGMENT

Rautenbach AJ

1. Mr Flemming, in his Notice of Motion (in Afrikaans), applied to this Court to grant amongst others the following relief:

"n Bevel dat verklaar dat polisse nommers 098560601 en 099671567 en 20052330 elk die volgende verswee terme vervat.

4.1 Momentum is verplig om aan Applikant as die versekerde openbaarmaking te doen van:

4.1.1. welke feit(e) en oorweging(s) alles in ag geneem is

by

(a) die besluit om 'n premie te verhoog; en

(b) by die bedrag van die verhoging.

4.1.2. hoe by daardie feit en/of oorweging uitgekom is;

4.1.3. welke gewig en welke syferwaarde wat in e/ke oorweging aangeheg is;

4.1.4. volgens welke metode of redenering by daardie syfer of gewig uitgekom is;

4.1.5. hoe daardie syferwaardes en/of gewigte bymekaar gebring is om op die bedrag van die premie verhoging te besluit;

4.1.6. hoe en hoekom elke feit en oorweging verskil van die eienskappe van wat dieselfde feit of oorweging by aanvang van die polis behels het;

4.1.7. wie het op welke gronde besluit welke premieverhoging in werking gestel moet word.

4.2 Momentum het nie 'n reg om 'n premie te verhoog nie tensy hy eers die genoemde kontraktuele plig om gemelde inligting te verskaf, nagekom het.

4.3 Momentum het nie 'n reg om 'n premie verhoging in te stel of toe te pas nie vir solank as wat hy nie voldoen nie aan 'n aanvraag vir daardie inligting soos in 4. 1 bedoel word.

5. Verklaar dat Respondent ten aansien van polisse 098560601; 099671567 en 200523330 geen geldige reg het om na die datum van hierdie bevel premies te verhoog nie."

2. have received as Heads of Argument comprehensive Heads by the Applicant himself which was drawn up in the Afrikaans language. I have also received Supplementary Heads drawn up in English by Senior Counsel on behalf of the Applicant. The Respondent filed Heads by Senior Counsel and also Supplementary Heads by Senior Counsel.

3. The Applicant himself in his Heads relied on certain implied or tacit terms and argue that these implied or tacit terms should be read into the insurance contract. In the Additional Heads filed by Senior Counsel on behalf of the Applicant, the legal issues are somewhat broadened in argument.
4. On behalf of the Respondent it was argued that the Applicant did not make out a case that these implied/tacit terms can be imported into the contract. The Respondent further relies on various Judgments to argue that it is not possible to incorporate these implied/tacit terms into the contract and that the Applicant must fail on this basis.
5. One of the issues before me is whether I should restrict myself to the literal meaning of the Notice of Motion or whether I am empowered to give a more liberal interpretation bearing in mind the purpose and spirit of the Constitution in my interpretation of this insurance contract. In *Du Toit o.b.o. Dikeni*
- v. Road Accident Fund 2016 (1) SA 367 (FB) reference (paragraph 43) is made to principles annunciated by *Farlam Et Al Erasmus* Superior Court Practice at B1 129 to 130 with reference to several authorities

wherein the following was stated:

"The object of pleadings is to define the issue so as to enable the other party to know what case he has to meet. The parties are, therefore, limited to their pleadings; a pleader cannot be allowed to direct the attention of the other party to one issue and then at the trial attempt to canvass another. However, since pleadings are made for the court ... it is the duty of the court to determine what are the real issues between the parties and, provided no possible prejudice can be caused to either party to decide the case on these real issues ... the general principle is that the parties will be held to the issues pleaded unless there has been a full investigation of the matter falling outside the pleadings ..."

6. Very closely with the principle that I referred to above is the fact that a party should not be taken by surprise by something which does not appear in the pleadings and where a party could not have expected to answer in a structured manner or where a party could

not be expected to deal with legal issues raised at the trial or the hearing as the case may be.

7. It is further trite that in motion proceedings the case made out by an applicant through the Notice of Motion and the Founding Affidavit constitutes both the legal issues referred to as well as the actual evidence that is tendered on behalf of the Applicant.
8. In this matter, after reading the papers and the Heads and everything that was put before me, it seems to me that the real issue to be decided in this matter is whether the Respondent is entitled to nondisclosure of the methods and figures used to come to

a decision to increase the premiums of the Applicant. The Applicant is of the view that he is entitled to the information on which such decision was taken. This is the nub of the Applicant's case and the real issue to be decided in this matter.

9. In my view the issue before Court will therefore be whether the Applicant is firstly correct in relying on certain implied/tacit terms that can be imported by the Court into this specific insurance contract. In my view the enquiry does not end here, I will also have to consider whether in terms of the General Law of Contract the Common Law, the development of the Common Law through the Constitution and other factors that may be present, will allow me to grant any relief to the Applicant.

The Insurance Contract

10. I will quote certain of the contractual terms of the policy for consideration.
11. The Insurance Contract is annexed to the founding papers of the Applicant and appears from pages 56 to 66. The first part I want to quote is the part that appears under the heading "Die Doel van u Beleggingsplan". It reads as follows:

"Die kapitaalbeskermer betstaan uit 'n hele lewenspolis en 'n lewenslange annurteit. Die annurteit sal aan u 'n inkomste voorsien vir solank as wat u lewe en die lewensdekking sal uitbetaal met die dood van die versekerde /ewe. Die premies van die hele lewenspolis word deur die annurteit befonds."

12. The purpose of the policy was thus to protect the capital, that is the two third value of the annuity should the Applicant pass away.
13. On page 59 it appears that the contractual premium was R252.88 per month and after a discount, R250.35 per month.
14. Under die heading " Voordele" appears the following:

"Beskrywing die hele lewensversekering

Waarborg termyn – 10

Premie R242.88

Dekking R169 726."

15. Under the title "Moontlike Voordele" the Respondent advised the Applicant of the possible growth on the policy. The policy is the policy in terms of which the Applicant ensured his life and which premiums are paid by the monthly pension payments to the Applicant. It shows that there is a benefit at death in the amount of R169 726.00 and it also shows that a possible growth on the policy may lead to an extra amount of R4 559.00 after 10 years.
16. On the very next page the following is stated:

"Ons waarborg nie bogenoemde waardes nie. Die werklike voordele wat u ontvang sal afhang van die voorwaardes van hierdie polis, die toekomstige beleggingsopbrengste en die wisselkoers."

17. Further on it is stated:

"Die werklike waarde van u voordele sal afhang van die inflasiekoers."

18. The next important heading is " Waarborge". It stated:

"Ons waarborg die volgende:

Solank as wat u die premies betaal, sal ons die voordele soos in hierdie polisdokument beskryf betaal ten minste tot die einddatum."

19. It is not clear what is meant by the word "einddatum". Does this refer to a 10 year guarantee which I will deal with soon or does it refer to the eventual death of the Applicant? As will appear from the rest of the Judgment is not necessary to answer this question.

20. The Insurance contract then proceeds with the following :

"Wanneer hersien ons die premies?

- Ons sat die premies op 'n gereelde basis hersien om seker te maak dat dit die koste van die voordele wat u het dek.

- Indien ons sien dat die premie nie genoeg is om vir die voordele te betaal nie, sal ons u vra om die premie te verhoog sodat dit die voordele dek.

U hoef nie die verhoogde premie te betaal nie, maar indien u dit nie betaal nie, kan u voordele aan die einde van die waarborgtermyn staak. Dit kan ook u beleggingsrekening beïnvloed wat beteken dat u vir 'n baie lang tyd nie 'n kontantwaarde sal hê nie." (It is difficult to read any meaning into this last sentence.)

21. In my view the only interpretation of this part of the Insurance Contract is that at the end of the guarantee period of 10 years the Respondent may review the premium and may increase the premium. Should the Applicant not pay the premium at all, all benefits (death benefits) may come to an end.

22. On the 23rd October 2015 the Respondent wrote a letter to the Applicant about a review that would take place on the 1st February 2016 which could affect the income of Applicant's capital protector. On page 67 it specifically deals with Policy No.: 20052330.

23. The Applicant is then told that he has available to him four options. These options are described as follows:

23.1 Opsie A is die "eenmalige premiestygings" opsie.

23.2 Opsie B is die "eenmalige dating in dekking" opsie.

23.3 Opsie C is die "voegjaarlikse premiestygings by opsie" and

23.4 Opsie D is die "voeg jaartikse dating in dekking by" opsie.

24. The policy then states the following (page 68):

"As u een van hierdie hersieningsopsies kies, sat ons u waarborgtermyn met 10 jaar veteng. U nuwe waarborgtermyn sat dan op 1 February 2026 eindig. Ons verwag op grond van ons huidige aannames dat die premie nie sat styg wanneer ons oor 10 jaar die volgende hersiening doen nie. As ekonomiese toestande egter vorentoe ingrypend verswak sat ons met u in verbinding tree oor stappe wat u kan neem om die effek te verminder. As dit die geval is sal ons elke jaar aan u skryf om u op hoogte te hou."

25. My interpretation of this specific paragraph is that a new guarantee of 10 years would apply if one of these options are exercised by the Applicant.

26. The effect of the review is clearly set out on page 69 of the papers. The most important point in this regard is that should the Applicant decide on the first option, his premium would be increased from R250.35 up to R547.46. Should he for instance exercise

option C, his premium would change from R250.35 to R275.39 but which would be increased by 10% per year. Apart from the option to have a lower amount of life insurance available, the Applicant was faced with two scenarios. If he wanted to proceed with the policy, he had to pay a premium that would be more than double that he paid for the first 10 years or he would pay a premium of R25.00 more per month but the premium would then escalate annually by 10%. The same consideration is applied for the other policies mentioned herein.

27. Certain correspondence were exchanged between the Applicant and the Respondent. I do not wish for purposes of this Judgment to quote and to deal with all of the correspondence. What is important is that the Applicant wanted to know from the Respondent about essentially one issue and that is which factors were taken into account and how the premiums were calculated. It is common cause that this information was never forthcoming.

28. In its Answering Affidavit the Respondent states the following (page 102):

"Each insurance company adopts its own unique methodology in this regard, and the market will determine whether it conducts its business efficiently. The actuarial methods used are determined by qualified actuaries with many years of technical studies and experience. Premium determination constitutes a discretionary decision by the insurer concerned. "

29. It is important to note that the "discretionary decision" was pleaded by the Respondent and relied upon.

30. In paragraph 24 on paginated page 106, the following appears:

"I have already dealt with the manner in which premium increases in whole life policies are calculated. I have also pointed out that the method used are proprietary to individual insurers and constitute their trade secrets. A decision to increase premiums and the extent thereof is a discretionary matter and is taken with regard to the insurer's expectations and assumptions in respect of uncertain future events."

31. Before dealing with the discretion of the insurer, I wish to point out that we are dealing with figures, as for instance the inflation rate over a specific period of time, actuarial predictions based on taking all relevant considerations into account and so forth. We are not dealing in a matter of the nature of a chemical formula which is unique to a certain product used in the market of cleaning, etc. In the same breath one is also not dealing with an exotic dish of which the recipe is a trade secret.
32. The legal position in South Africa is quite clear in the sense that where a contract contained a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable. In this case I think it is apposite to state that it is common cause that the insurance contract, specifically as per page 65 of the contract, give such right to one of the parties, in this case the Insurer.
33. No case is made out by the Respondent in this matter either in their Heads of Argument or in their Answering Affidavit that they have an unfettered discretion and they never rely anywhere on an unfettered discretion. The explanations proffered by the Respondent actually gives the impression that there are various factors that they take into account in exercising their discretion when these premiums are increased. It is a rule of the Common Law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio bono viri*.
34. Although the Applicant never alleged in his Notice of Motion pertinently that he attacks the actual discretion exercised by the Respondent, in my view this is the real issue between the parties.
35. I am further of the view that it is not necessary to determine whether the relief that the Applicant claims in his Notice of Motion is to be established by the imposition of implied and/or tacit terms. In my view it comes into play when the exercise of the discretion is scrutinized.
36. The issues to me seems to be whether the Respondent, when it actually exercised its discretion, which is as I have already alluded to, not an unfettered discretion, whether in fact this discretion was made *arbitrio bono viri*. (See also: *NBS Boland Bank Limited v. 1 Berg River Drive CC and Others* 1990 (4) SA 928 (SCA).)
37. What is reasonable will obviously differ from case to case. The principle that all contracts are governed by good faith should be applied and the intention of the parties is determined on the basis that they negotiated with each other in good faith.

38. When the Applicant was initially expected to make an election as to whether he would purchase the product of the Respondent or any other product, he knew exactly what he was in for, for at least the next ten years. The question arises as to whether the Applicant could have expected to be fully informed of how his premiums would be affected when the review period arises ten years on. I am of the view that when the time came when the Respondent exercised its discretion in relation to the increasing of the premium, there was at least a tacit term to the effect that he would be properly informed as to how the Respondent arrived at calculating

the new premium. If I am wrong in this regard, I have to take into account to what extent the Constitution and Constitutional values

apply to Private Law.

39. In *United Reformed Church, De Dooms v. President of South Africa* 2013 (5) SA 205 WCC at paragraphs 32 and 34 reference was made to competing interests which should be born in mind in consideration of the fairness of provisions of a lease.

40. Although individuals should be left free to conclude contracts, the role of the Courts was not merely to enforce contracts but there is a public policy consideration which recognises that all persons have the right to seek judicial redress and that the role of

the Court is not merely to enforce contracts but also to ensure that the minimum degree of fairness, which will include consideration of the relevant positions of the contracting parties as well.

41. In this case the Court is faced with two parties, one an individual person, the other an insurance company. All the information in relation to the rationality of increasing the premium lies only within the knowledge of the Respondent, the insurance company in this particular case.

42. The question may well be asked whether, as a matter of public policy, an insurance company with the absence of a contractual provision to the contrary, is entitled to increase its premiums without any explanation regarding the calculation of such increase.

43. In *Juglal N.O. v. Shoprite Checkers* 2004 (5) SA 248 SCA at paragraphs 12, 13 and 25 the Court remarked:

"What the learned Judge of Appeal appears to have said is that a contractual provision may not itself run counter to public policy but that the implementation may be so objectionable that it is sufficiently oppressive, unconscionable or immoral to constitute a breach of public policy in which case public policy can be invoked in justification of a refusal to enforce such a provision."

44. As I have already alluded to earlier, a stipulation conferring on a contractual party the right to determine its own prestation is not objectionable, provided that it is subject an objective standard and thus fettered. (Erasmus

- v. Senwes Limited 2006 (3) SA 2529 TPD)
45. In my view it is not strictly necessary as pointed out before in this Judgment that a slavish implementation or consideration of the Notice of Motion in relation to all the evidence available to me should be made.
 46. The insurance contract itself makes provision for an increase of premiums. The legal consequences of this, as conceded by the Respondent, were that this discretion was not based on an unfettered discretion.
 47. I am thus of the view that the Applicant is entitled to some of the relief that he claims although not to all of it.
 48. I am not in agreement with the Applicant that the Respondent is not entitled to increase its premium and that his premium cannot be increased unless all of the information has been made available to the Applicant. In the circumstances I will thus not grant the claims for the payment of monies.
 49. Depending on the outcome of the information disclosed, the Applicant may or may not institute proceedings in the future for the payments of monies due to him.
 50. In my view the Applicant is entitled to some answers especially in respect of the information he required in respect of prayer 4.1. He is entitled to nothing further than this.
 51. Should the Respondent make available the data and calculations as required by the Applicant, it will at least guide the Applicant as to whether the increase in his premiums were properly considered and based on rational and actuarial principles. Should this be the case, the Applicant may find himself in a situation where he either is satisfied with the Respondent's calculations and explanations , or in a position where he may be of the view that he has a proper case attacking the Respondent's calculation in coming to a decision of an increase of his premiums. In such event he may decide to take the matter further or not.
 52. Due to what is set out above in this Judgment, I am not prepared to grant an order stopping the Respondent to increase or implement the options available to the Applicant. I am inclined to grant the Applicant the essence of the relief sought which has the effect that the Applicant will be entitled to his costs in the matter.
 53. In these circumstances I am granting the following

orders:

1. The Respondent is ordered, to provide to the Applicant the following facts and information:
 - 1.1 Which facts and information did the Respondent take into account when it decided to increase the premiums and the extent of the increases for policies 089560601, 099671567 and 20052330.

1.2 What method of calculation and other information were used to arrive at the new premiums.

1.3 In which respects were the facts and circumstances different to those which existed at the commencement of the policies.

2. The Respondent is to pay the Applicant his costs on a party to party basis including the costs of Senior Counsel

J G Rautenbach

Acting Judge of the High Court

Gauteng Division

Pretoria

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/650.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/flemming-v-mmi-unknown-topic-agpphc-2017>

Prepared on 8 October 2026 · Esheria