

SOUTH AFRICA / JUDGMENT

Jordaan v Liberty Life Ltd (3890/2007) [2011] ZAFSHC 217 (29 July 2011)

[2011] ZAFSHC 217**COURT**

Free State High Court, Bloemfontein

BEFORE

M B Molemela

CASE / FILE NUMBER

3890/2007

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 3890/2007

In the matter between:

COERT RETIEF JORDAAN.....Plaintiff

and

LIBERTY LIFE LTD.....Defendant

JUDGMENT:

MOLEMELA, J

HEARD ON: 5, 6 and 8 May 2009; 25, 26 & 28 May 2010

and 1, 2 & 3 December 2010

HEADS OF ARGUMENT FILED ON: 15 April 2011

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INTRODUCTION

- [1] The plaintiff instituted action against the defendant for the payment of an amount of R2 251 017,00 being the proceeds of an insurance policy issued by the defendant under policy number 5[...] (“the policy”). The life insured in terms of the policy was that of the erstwhile business partner of the plaintiff, namely Mr J H M[...] (“the deceased”) who died on the 31st December
2005. The commencement date of the policy was 1 March 2000. The plaintiff was stipulated as both the “owner” and “100% beneficiary” of the said policy. During January 2006 the defendant was notified of the passing away of the deceased. The defendant paid the death benefits of the policy to the estate of the deceased.
- [2] The defendant filed a special plea in terms of which it resisted the plaintiff’s claim on the basis that the plaintiff has no locus standi to institute proceedings against the defendant on account of a cession in terms of which the plaintiff ceded his rights, interest and title to the policy in favour of the deceased (first cession) and also on account of a cession in terms of which he (the plaintiff) ceded all his rights title and interest to the policy in favour of one Opperman (second cession). I must hasten to point out that the special plea makes it clear that the plaintiff’s lack of locus standi in respect of the second cession is pleaded in the alternative, the effect whereof would be that if I find that the plaintiff signed the first cession, then the plaintiff would have divested himself of all rights to the policy and there would thereafter have been no further rights capable of being ceded in terms of the second cession.

BACKGROUND

FACTS

- [3] It is common cause that at all material times and since 1995 the plaintiff and the deceased were business partners in a property

investment business called JPJ Beleggings CC as well as co-directors and co-shareholders in an office equipment distributorship called Bloemfontein Minolta (Pty) Ltd (“Minolta”). The latter’s business supplier was a company called Minolco. The plaintiff and the deceased had signed a suretyship in favour of Minolco in September 1997 for all sums of money owed by Minolta to Minolco. It is common cause that the plaintiff was released from the said suretyship only in 2006, i.e. after the deceased’s death. It is undisputed that in addition to Minolco, the plaintiff and the deceased had bound themselves as sureties in favour of other creditors and that Minolta was, inter alia, indebted to the South African Receiver of Revenue in a substantial amount of money.

- [4] It is also common cause that at the 1999 year-end function of Minolta, the deceased announced that Ryno Opperman (“Opperman”),

Ronaldo Scholtz (“Scholtz”) and Frans Potgieter (“Potgieter”) had been appointed as directors of Minolta

and that each of them was to be issued with 5% of the shares of Minolta. Not long thereafter, a certain Mr Louwrens Smith (Louwrens

Smith), an insurance broker, addressed the directors of Minolta and gave them advice on “buy and sell” insurance policies. In November 1999, the plaintiff applied to the defendant for an insurance policy on the life of the deceased. This policy, which

commenced on 1 March 2000, was brokered by one Chari Terblanche. At the beginning of 2000, Smith arranged for “buy and sell”

insurance policies to be issued by Old Mutual for Opperman, Scholtz and Potgieter. These policies were on the life of the deceased

(Mathyssen) and were intended to provide funds for Opperman, Scholtz and Potgieter to purchase Mathyssen’s shares in Minolta in the event of his death. It is common cause that after the plaintiff left Minolta, the relationship between him and the deceased became strained to such an extent that they were barely on speaking terms as at the time of the deceased’s death. In his last days of his life, M[...] (the deceased) was an alcoholic and his death was as a result of an impairment of his liver.

[5] Furthermore, it is also common cause that during February 2001 the plaintiff resigned as a director and employee of Minolta but entered into an agreement with Minolta, in terms of which he was allowed to market and sell only Minolta products. During May 2001 Minolta severed all ties with the plaintiff pursuant to allegations of his contravention of the sub-distributorship agreement. The plaintiff’s 30% shareholding in Minolta was, in terms of an agreement signed in August 2002, sold to Opperman. On the same day, the plaintiff’s 30% member’s interest in JPJ Beleggings CC was sold to the deceased. After the signature of this agreement, the plaintiff handed the original policy to the deceased.

[6] As stated before the defendant paid the proceeds of the policy to the deceased’s estate and with the assistance of the deceased’s attorney, viz Mr Chris Gerber, the proceeds were later accepted as consideration for Opperman’s acquisition of the deceased’s shareholding in Minolta.

ISSUE TO BE DECIDED

[7] The main issue to be decided is whether the plaintiff ceded his rights in terms of the policy to the life assured (deceased) during August 2002 and, if not, (ii) whether the plaintiff ceded his rights in terms of the policy to Opperman at a rugby- suite on or about 25 October 2003. The plaintiff’s case is that he never signed the first cession and that the signature appended to that cession, purporting to be his signature, constitutes a forgery. With regards to the second cession, the plaintiff’s case is that the said cession was subject to a verbal suspensive condition that was never fulfilled, as he discovered a few days thereafter that he (plaintiff)

had, contrary to the oral agreement with Opperman, not been released from suretyship.

[8] SUMMARY OF EVIDENCE

Opperman's evidence

8.1 According to Opperman, the sale of shares agreement between him and the deceased was concluded late in the evening of 30 July 2002 and signed on the 31st July 2002. This agreement, which bears the dates 30 and 31 July 2002, was admitted as an exhibit. His evidence was that he could not recall exactly which documents were signed on that night and he could thus not confirm or deny whether or not the disputed cession document (signed by the plaintiff as the cedent and M[...] as cessionary) was signed on that day. Opperman's evidence was that at this same meeting the deceased showed him the original cession document as well as the original policy. He further testified that "just after the 17th October 2003" a meeting was held, attended by him, the deceased, Potgieter and Scholtz regarding the fact that the cession

from the deceased to Opperman could not be registered as the policy was still in the plaintiffs name.

[8.2] Opperman also testified that both he and Louwrens Smith (broker) confronted the deceased about his failure to register the cession concluded between the deceased and Opperman. Once again, the deceased showed him (Opperman) the original policy together with the original cession document, thereby allaying his (Opperman's) concerns about the ownership of the policy.

[8.3] Considering the deceased's tardiness, he (Opperman) decided to circumvent the deceased and, notwithstanding the deceased's

assurances, approached the plaintiff with the request that he (plaintiff) cede the policy in his (Opperman's) favour. The

plaintiff acceded to this request and signed this cession document at a rugby suite. He subsequently submitted the cession document to his broker. He later learnt that the plaintiff had showed up at the brokers offices under false pretences and then torn the cession document.

[9] Paula Smith's evidence.

9.1 Paula Smith, a manager in the administration division of the Defendant testified that the original cession document (first cession) was brought to her by the deceased on the 11th March 2005. It was dated the 23rd April 2001 and had already been signed by the cedent and cessionary. The deceased was also in possession of the original policy document. She filled in the policy number and the deceased's details in the cession document. Due to the fact that the deceased's particulars had not yet been verified in terms of the Financial Intelligence Centre Act (FICA), she could not finalize the registration process in the defendant's computer system and decided to fax the cession document to the deceased's broker, viz Mr Terblanche, so that he could do the necessary verification regarding the deceased's proof of residence. As the original cession document was printed on a flimsy type of paper that could not be faxed without getting crumpled, she photocopied it in order to facilitate faxing. She then gave the original cession and

the original policy back to the deceased. At a later stage on the same day, someone from Terblanche's office faxed the cession document back to her, together with the FICA verification form confirming that the deceased's details had been verified. She then completed the cession registration process by faxing a copy of the cession document to the defendant's imaging department. According to her, the deceased was more than keen to get the cession registered as soon as possible and even phoned her later the same day to enquire as to the progress.

9.2 Under cross-examination she could not explain the absence of a cancelled revenue stamp in the top right hand corner of the cession

document as per the stipulation on the pro-forma cession document. She confirmed that by 14 March 2005 when notification was forwarded

to the plaintiff by the defendant about the registration of the cession the plaintiff immediately responded by denying that he had signed the cession document. She confirmed that the deceased only wanted the registration of the cession in his favour and never mentioned a possible cession of the same policy to Opperman.

9.3 Paula Smith conceded that it was unusual for a cessionary to come off the streets with an incomplete document he allegedly signed with a third party unknown to her (Smith), requesting that the document, signed almost four years before being presented to her, be completed and be used for purposes of registration of the cession. Significantly, she testified that whereas in the normal course of business a cession is registered very shortly after it is signed and not several years thereafter, she had, however, agreed to register this cession under the aforementioned circumstances.

[10] Ronaldo Scholtz's evidence.

Scholtz largely corroborated the evidence of Opperman regarding the meetings that were held and the discussions that were had at that meeting. During his testimony, he (Scholtz) was referred to the sale of shares agreement concluded in August 2002 in terms of which the plaintiff sold his member's interest in JPJ Beleggings CC to the deceased. In the same agreement, the deceased undertook to provide the plaintiff with a written undertaking to the effect that he had been released from all suretyships signed by himself in respect of the obligations of Minolta. Scholtz conceded that such a written undertaking was never provided to plaintiff by Minolta. Scholtz further testified that the "buy and sell" agreement underlying the "buy and sell" policy taken out by him, Opperman and Potgieter was drafted by Gerber in 2005.

[11] Louwrens Smith's evidence

He testified that in the meeting held in July 2003, he strongly advised Opperman, Scholtz, Potgieter to increase their life cover. The deceased having failed and/or refused to go for the necessary medical check-ups, he drew Opperman's attention to the high risk he was running in not having sufficient cover and/or an agreement incorporating such, in place. Louwrens Smith further testified that pursuant thereto, the deceased advised him and the other shareholders that the plaintiff had ceded the policy to him (the deceased) and suggested that such policy be used to

pacify Opperman. It was for this reason that he completed the cession document dated the 17th October 2003, in terms of which the deceased was the cedent and Opperman the cessionary.

[12] Louwrens Smith further testified that he emphasized to Opperman that he was at risk without the cover and pointed out to him that while they were struggling to have the first cession registered, there was a need to apply for life cover on the deceased life in the amount of R2 000 000,00. He (Louwrens Smith) accordingly applied for such cover on the 5th November 2003, but the application was declined by the relevant insurance company.

[13] Chris Gerber's evidence

Nothing really turns on the evidence of Mr Chris Gerber, the deceased's attorney who also attended to the administration of his estate. He testified that he was not aware of any "buy and sell" agreement in place between the plaintiff and the deceased dealing with the proceeds of the life policies. He conceded that the simple taking out of a life policy by one partner on the life of another partner needs to be supported by a separate buy-and-sell agreement concluded between the parties.

SUMMARY OF EVIDENCE OF EXPERTS

[14] Mr Snyman

14.1 Mr Snyman testified that he was requested by the defendant company to analyse the cession document, which he, in his report, referred to as "the disputed document". He testified that his report was based on a comparison between a copy of the disputed signature with one single original specimen and one single copy specimen, which was executed several years earlier. He did, however, at the joint meeting of experts have sight of more specimen signatures, which he also analysed. According to his evidence, a distinction needs to be made between variations and differences. Variations are frequently found in the handwriting by the same author, while differences would point to a different author. In his report he stated that he had not identified "significant differences" between the disputed signature and the specimen signatures.

14.2 When asked to explain his choice of words (phraseology) he testified that his report was meant for laypersons and should not be understood to mean that he had recognised that there were any differences in the disputed signature. He conceded that if a single dissimilarity or difference is found in a disputed signature, which cannot be logically explained, that would justify a finding of a different author or false signature. His contention was that the disputed signature fell within the variation of the plaintiff's signatures. He was adamant that there were variations between the disputed signature and the specimen signatures he had examined, but no differences. His conclusion was that the signature on the cession document was the plaintiffs.

14.3 He was confronted with three areas of disagreement between him and Mr Bester, the expert who testified on behalf of the plaintiff:

(i) the open hook;

- (ii) the down/upstroke of the letter “J” in the signature; and
- (iii) the “misalignment” of the crossbar and line immediately to the right of the letter “A” in the signature.

14.4 As regards the letter “J” in the signature of Jordaan being part of the disputed signature, Snyman testified that the variations quite clearly evidence a triangle and teardrop formation, a V-formation and distortion of the whole letter with a downward stroke. Under cross-examination he explained the differences in configuration pointed out to him as a “wide range of variation”. As regards the misaligned crossbar of the “A” Snyman testified, inter alia, that should the court find that that portion of the crossbar of the “A” exiting the “A” on its right hand side was not caused as a result of stepping, but in fact two different lines, then such would be a difference justifying a finding of forgery.

[15] Mr Bester

15.1 Mr Bester was, according to his evidence, given several specimen signatures stretching from 1996 to 2007. In court, he explained the methodology he employed in seeking to execute the plaintiff’s mandate. He disagrees materially with Snyman insofar as Snyman seeks to rely on the whole concept of “wide degrees of variation”, it being his evidence that such an approach is not recognised in accepted literature. He testified that in analysing handwriting an expert was obliged to stay true to the definitions and three basic requirements, namely:

- (i) a single design;
- (ii) a single method; and
- (iii) a single movement.

15.2 According to Bester, the open hook referred to by Snyman constituted a fundamental difference and was clearly visible to the naked eye. Bester emphasized that, having regard to the definition and the acceptable approach to construction, it must be found that the opening upward stroke of the “J” in the disputed signature, viewed within the context of the construction of the same letter in all the specimen signatures, was nothing less than a fundamental difference entitling the court to find that the signature was fraudulent. Bester was quite prepared to concede that if the court itself found a similar construction in any one of the accepted specimen signatures it was entitled to find that such was then nothing more than a variation justifying a finding that the disputed signature was in fact authentic.

15.3 As regards the misaligned crossbar of the letter “A” Bester testified that the misalignment was not caused by stepping,

but in fact the lifting of the pen which is a departure from the basic construction in the specimen signatures.

[16] The Plaintiff’s case

In his replication, the plaintiff pleaded that “the primary purpose of the relevant policy was to secure plaintiff’s

exposure, in his capacity as shareholder, as a surety for and on behalf of Bloemfontein Minolta (Pty) Ltd”. This he repeated in his evidence. He also vehemently denied ever signing the first cession document. It was not disputed that the plaintiff has always insisted on being released from the suretyship.

EVALUATION OF EVIDENCE

[17] Counsel for the defendant, viz Mr Gautshi SC conceded from the outset that the defendant bears the onus of proof in this matter. Given the conspectus of the evidence and the submissions made on behalf of the defendant, it is obvious that the questions that need to be answered are the following: (1) whether the policy in question was a “buy and sell” policy specifically intended only for the purchase of Mr M[...]’s shares in the event of his death or whether the deceased and the plaintiff had also envisaged that the same policy could also be utilised to protect the plaintiff in his exposure as a surety for and on behalf of Minolta; (2) whether the plaintiff signed the first cession, by so doing “ceding his rights in the policy to the deceased; (3) whether the second cession was subject to a suspensive condition or not. As there are factual disputes regarding all three aspects, these disputes will be determined in accordance with the principle laid down in

STELLENBOSH FARMERS WINERIES GROUP LTD AND ANOTHER V MARTELL ET CIE AND OTHERS 2003(1) SA 11.

Whether the policy issued by the defendant is a “buy and sell” policy intended only or the acquisition of the shares upon the death of a shareholder

[18] The policy document records the reason for the policy as follows: “buy and sell / partners at Minolta”. Although Paula Smith (the defendant’s manager) testified that the reason stated in the policy application form signified that the policy in question was a “normal buy and sell agreement, to make provision for the buy out of one of the parties’ shares in the case of death”, it would seem that various individuals were not on the same wavelength regarding the events this policy was intended to cover, notwithstanding the presentation made to the plaintiff, the deceased, Opperman, Scholtz and Potgieter towards the end of 1999. The plaintiff’s version is that the policy was intended as a “buy and sell” policy but was also intended to secure liability arising out of the suretyship. This was vehemently denied by the defendant’s witnesses, who were adamant that it was only intended to be a “buy and sell” policy intended only to make provision for the purchasing of one of the shareholder’s shares in the event of death. Significantly, none of the “buy and sell” policies taken out by all these parties was preceded by a written “buy and sell” agreement. According to both Gerber and Scholtz, such a written agreement was only entered into in 2005.

[19] When one looks at the policy itself, it is silent with regards to the specific event(s) that the policy was intended to cover. The general terms of this policy seem to be standard terms that are normally stipulated in any capital insurance policy. Given the nature and especially the purpose of “buy and sell” policies, irrespective of whether there is an oral or written “buy and sell” agreement underlying them, one would expect such policies to have special provisions and unique terms applicable to their cession so as to preserve the purpose they were intended for and to ensure that the substratum of the policy does not fall away. However, in casu, clause 8 of the general terms of the policy simply provides as follows:

“8. Regte van Partye: Die Eienaar mag enige tyd ‘n Begunstigde benoem om die sterfte voordeel te ontvang (onderworpe aan die regte van enige sessionaris) of ‘n Begunstigde skrap. Die Eienaar mag die kontrak sedeer. Geen sessie, of benoeming of skrapping van ‘n Begunstigde is bindend op Liberty Life tensy deur Liberty Life op rekord aangeteken nie. Liberty Life is nie verantwoordelik vir die geldigheid van enige sessie of die benoeming van ‘n begunstigde nie. Waar ‘n absolute sessie aangeteken is, word die Sessionaris die Eienaar van die kontrak.

Enige betaalbare Voordele is aan die Eienaar of aan sy boedel betaalbaar. Indien daar egter ‘n Begunstigde benoem is en geen sessie aangeteken is nie, is die Sterftevoordeel aan die Begunstigde betaalbaar. Waar ‘n sessie aangeteken is, is enige betaalbare

voordele aan die sessionaris betaalbaar of, in die geval van ‘n absolute sessie, word die Sterftevoordeel betaal aan enige

begunstigde wat die Sessionaris in sy hoedanigheid as Eienaar benoem.

Onderworpe aan enige sessie, mag die Eienaar alle regte ingevolge hierdie kontrak sonder die toestemming van enige begunstigde uitoefen. Waar die kontrak meer as een Eienaar het, moet alle Eienaars die regte gesamentlik uitoefen.”

[20] It is evident from this clause that there are absolutely no restrictions regarding the nomination of a beneficiary as well as the cession of the policy. The policy was thus open to be ceded to anyone, which would include even persons that had no business

relationship with the deceased. As I see it, this means that if the plaintiff so wished, he could have ceded the policy to anyone even before the alleged date of signature of the first cession, such that by the time the business relationship came to an end, the deceased would have been unable to demand that the plaintiff cede it back to him. I state this only to make a point, being quite mindful of the fact that that is not how events unfolded in casu.

[21] This lack of restrictions, in my view, negates any notion of the policy having been an out and out “buy and sell” policy intended only for the purchasing of a shareholder’s shares in the event of death. It would seem that the defendants attitude when issuing the policy was that what was key was the business relationship between the owner of the policy and the life assured as at the time of the conclusion of the contract only, hence no conditions were attached to the cession of such a policy or the nomination of its beneficiaries. This, in my view supports the plaintiff’s assertion that the policy was not an out and out “buy and sell”

policy.

[22] In seeking to show that the policy was an out and out “buy and sell” policy, the defendant sought to place significant

reliance on various witnesses’ evidence. I now turn to deal with these witnesses’ evidence on this aspect. What was clear from Mr Louwrens Smith’s evidence is that a “buy-and-sell” policy is a policy intended to enable existing shareholders to purchase the interest of a deceased so as to ensure business continuity. I must say, just as an aside, that when one considers the purpose of a “buy and sell” policy as explained by Mr Louwrens Smith, one would expect that all five shareholders of Minolta (the deceased, the plaintiff, Opperman, Scholtz and Potgieter) would have taken out policies on each other’s lives pro rata to the value of their shareholding, but this was clearly not the case, as no such evidence was adduced.

[23] When consideration is paid to the evidence of Louwrens Smith, Opperman and Scholtz pertaining to what their understanding of the policies and the purpose thereof was, it must also be considered that even though the policies to the various directors were issued pursuant to the presentation made by Mr Louwrens Smith towards the end of 1999, the following differences are critical:

- (1) the plaintiff and the deceased decided to utilise Mr Chari Terblanche as their broker, while the three other directors (Opperman, Scholtz and Potgieter) decided to use Louwrens Smith as their broker;
- (2) the policy in dispute was issued by the defendant, while the other three directors’ policies were issued by Old Mutual;
- (3) according to Scholtz, there were policies issued to the three of them on the life of the deceased and there was “a cross-referencing”. With regards to the policy in dispute, there is no conclusive evidence that the deceased and the plaintiff had reciprocal policies or that they had cross-nominated each other as beneficiaries.

[24] Ms Paula Smith, a manager who has been in the employ of the defendant for about eight years, seemed clueless as to the pre-requisites for the issuance of a “buy and sell” policy by her own company. All*she really did was to make reference to the description

of the policy as it appears in the application form. This is the same lady who registered a cession on the strength of a partially

completed cession document signed in her absence and presented to her by the cessionary in the absence of the cedent. As stated before, she handed the original cession back to the deceased. Furthermore, despite learning that the plaintiff had denied ever signing the cession document, she admittedly did absolutely nothing about the matter.

[25] In his evidence-in-chief, Louwrens Smith explained that a “buy and sell” policy was never used to cover for liability arising out of a suretyship as there was a policy which was used exclusively for that purpose. From his evidence, it would seem that the difference in these

two policies would be the taxability of the premiums and death benefits and their estate duty implications. He was emphatic that the policy that is the subject of this dispute was a “buy and sell” policy intended only to secure the deceased’s shareholding and not other liabilities or suretyships. His confidence on the exact nature and purpose of the

policy in question seemed to wane with the progression of cross-examination. When it was put to him that the plaintiff had never entered into a “buy and sell” agreement with the deceased, he initially seemed to be suggesting that a “buy and

sell” policy could exist independently of a “buy and sell” agreement, stating that there were many such policies

with no underlying written “buy and sell” agreements.

[26] Under further cross-examination, he testified that as he had had no hand in the issuing of the policy, he could not elaborate on the nature thereof, but went on to suggest that the deceased would also have taken out a policy on the life of the plaintiff. He later on surmised that there was in fact such a “buy and sell” agreement that was facilitated by Mr Chris Gerber, the deceased’s attorney and the executor of his estate. As already pointed out, Mr Gerber and Mr Scholtz’s evidence was that the relevant “buy and sell” agreement was only drafted by Mr Gerber in March 2005 and not prior to the issuing of the policies. Mr Gerber testified that he never saw a “buy and sell” agreement concluded between the deceased and the plaintiff.

[27] In my view, another significant aspect that negates the defendant’s contention that the policy in question was an out and out “buy and sell” policy is highlighted by the following evidence of Mr Chris Gerber under cross-examination:

“Q: . . . An agreement is concluded between the parties in terms of which Opperman, Potgieter and Scholtz acquire the remaining 55% effective 1 March 2005. So legally and contractually by 1 March 2005 whilst Jordaan is still the owner of this policy in the eyes and minds and books of Liberty, M[...] has sold and alienated and dissociated from the company in every legal respect as shareholder and director. Then I try to understand but then how do you deal with the policy in the manner in which you did in terms of the L & D account when one has regard to the provisions of section 33(a)(i)(A) ...? So what we have got here is Mr Opperman who never took out that policy, never acquired the policy and in fact at the time that he became one of the principal directors and shareholders of the company, Mr M[...] had disassociated himself from the company as shareholder and director, the policy still belongs to Jordaan and now we are dealing with it as if Mr Opperman acquired it and took it out on the life of John M[...] and at the time of

his death they were still partners or shareholders.

A: He acquired it.

Q: How did he do that?

A: By means of a cession from M[...] to him. ...? (my underlining for emphasis).”

The above-stated exchange begs the question: if the policy was indeed a “buy and sell” policy and nothing more and nothing less, then why did Opperman still need to have a policy on the life of the deceased who was, from 1 March 2005 no longer his partner nor co-director nor co-shareholder? After all, as it was correctly contended in the defendant’s heads of argument, the objective

of “buy and sell” policies is to place surviving shareholders in funds in order to buy the shares of a shareholder who happens to die” [or becomes disabled]. Here, the shares had already been sold on 1 March 2005, nine months before the deceased’s death.

[28] As for Mr Opperman, he was, in his evidence-in-chief, adamant that the policy in question was a “buy and sell” policy. However, under cross examination, he contradicted himself on the purpose of the policy as follows: (Vol 2 p178 line 3-15):

“Q: Was it important for you to have that cession or policy ceded to you?”

A: It was important your ladyship to have a policy ceded to me.

Q: Yes and why was it important?

A: Your ladyship to cover my risks.

Q: Because you were about to expose yourself in terms of the new dealership and new suretyship agreements you had to sign, not so?

A: That is correct your ladyship and I was already exposed to the overdraft and other general creditors of the company.

Q: And for that reason you contacted Mr Jordaan and asked him about the cession of this life policy?

A: That is correct your ladyship."

Ironically, by admitting that one of the reasons for wanting a policy on the deceased’s life was to cover his existing exposure in the business, Opperman wanted the policy ceded to him for the exact same reason why the plaintiff wanted to retain the policy, i.e. to secure obligations other than the purchasing of shares. It would thus make sense why the plaintiff would refuse to cede the policy unless his suretyship was cancelled. After all, one of the consequences of his unlimited suretyship was that the creditors could, at any stage, choose to sue him and not Matthyssen if Minolta was unable to discharge its indebtedness to Minolco.

Whether the plaintiff signed the first cession (dated 23 April 2001)

[29] It must be pointed from the outset that not a single witness testified to seeing the plaintiff and the deceased signing the

disputed cession document. If one considers the sequence of events, it just makes no sense why the plaintiff would be willing to cede his policy to the deceased on 23 April 2001, a year before his 30% shareholding in Minolta was sold to Opperman and his 30% shareholding in JPJ Beleggings was sold to the deceased, which sale took place in July and August 2002, respectively.

Furthermore, according to Scholtz's evidence (vol 2 p138-139), the plaintiff resigned as a director in February 2001 but was given a sub-distributorship

contract and stayed on as a shareholder until May 2001. I would therefore disagree with Mr Gautshi's argument that the cession

was purportedly signed on the 23rd April 2001 due to the fact that the "dissolution of the business" had resulted in the substratum of the agreement to take out the insurance policy falling away.

[30] It was argued on behalf of the defendant that the very fact that the plaintiff and the deceased obtained the cession document from Terblanche just two months after the dissolution of their business relationship, justifies the inescapable inference that they must have agreed that the policy would be ceded by the plaintiff. This argument is flawed on two counts: first of all it does not take into account that the plaintiff's shares were officially sold to Opperman almost a year after the alleged date of the signing of the cession. Secondly, having gone to Terblanche specifically to discuss the cession of the policy, they (according to a note made by Terblanche and alluded to in the defendant's heads of argument) both left his office without signing the document, which lends credence to the plaintiff's assertion that he had made it clear that he would not cede the policy unless he was released from suretyship. That this suretyship has always been the plaintiff's concern is borne out by evidence from various witnesses, which corroborates the plaintiff's own evidence in this regard. It is also undisputed that the plaintiff had at some point directed a letter to Minolco making enquiries about his release from that suretyship. Scholtz conceded that he considered it "untoward" that the plaintiff had still not been released from the suretyship in favour of Minolco some four years after dissociating himself from Minolta. It should be borne in mind that the suretyship in question was unlimited, as it was for all sums of money owed by Minolta to Minolco. In his evidence under cross-examination, Opperman stated as follows:

"Q: In conclusion Mr Opperman, just that there is no confusion about this, the plaintiff will argue at the close of this case that he at all material times was concerned about his exposure as a surety and co-principal debtor and I want you to comment on every statement on that?"

A" M'lady yes, the only time I was aware of that was during the meeting in the suite where he did discuss it with me.

Q: He made it clear to you in the suite that he needed to have himself removed as surety?

A: Yes he did, m'lady."

[31]It is common cause that before presenting the first cession for registration on the 11th March 2005, the deceased had on at least two other occasions tried to register a cession document in terms of which he was the cedent and Opperman was the cessionary. I find it highly improbable that Opperman would not once but twice, be shown the original policy and the signed cession and yet not insist on it being taken to the defendant for registration. I also find it improbable that having seen the original policy and signed cession and thus having the assurance that the policy belonged to the deceased Opperman would deem it “the easiest thing in the world” to go to the plaintiff to essentially ask him to cede a policy that no longer belonged to him, instead of simply asking Louwrens Smith to attend to the registration of that cession. If the original cession was indeed at Minolta’s business premises all the time as stated by Opperman and Louwrens Smith, then there is no

reason why Louwrens Smith, having strenuously impressed the need for insurance cover upon Opperman, could not, on one of his visits,

insist on personally taking the original cession for registration. This would be especially so after realising that the plaintiff was still being regarded as the owner of the policy due to the fact that it had not yet been registered, consequently precluding the registration of the other cession in terms of which the deceased was the cedent and Opperman the cessionary. The aforementioned factors suggest that there was no such signed cession document in place.

[32]Another factor that strongly suggests that the plaintiff could not have ceded the policy is the undisputed evidence that he applied for a copy thereof from the defendant on the 27th October 2004, which was subsequently issued to him. Why would he apply for a copy of a policy knowing fully well that he had ceded it to the plaintiff and that he no longer owned it?

[33]It is noteworthy that, according to the evidence of the deceased’s attorney, the deceased was very knowledgeable in insurance matters. This is how Mr Gerber couched the deceased’s expertise: “One should understand the late Mr M[...]. He was, for a few years awarded the best insurance broker or agent in South Africa by Old Mutual and nobody questioned the late Mr M[...] about anything pertaining to insurance.” Being such an expert in insurance matters, his various attempts to register the latter cession despite being specifically informed by the defendant and his own broker that the Plaintiff was still the owner of the policy as no other cession was registered is rather odd and, in my view, just goes to show how irrational he had become. Under such circumstances, it is not unthinkable (and I state this with respect) that he could, knowing that he was no longer able to obtain new insurance cover due to his ill-health and in desperation to obtain cover that could pacify the already impatient Opperman, resort to forging the plaintiff’s signature on the cession document. He clearly had a lot to gain from doing so. On the other hand, the fact that the plaintiff was willing to cede the policy to Opperman merely upon being released from suretyship tends to show that he was not driven by greed to benefit unfairly from the policy. Significantly, even after tearing the second cession up, he was still willing to cede the policy as soon as he was released from suretyship. This much was confirmed by Opperman.(vol 2 p114 line 15-16). As it was at that stage common knowledge that the deceased’s health had already deteriorated drastically, the plaintiff could simply have decided to cling to the policy in the hope

that the deceased's death was imminent. Instead, he still expressed his willingness to cede the policy once he had been released from suretyship.

- [34] Furthermore, considering the concessions from Paula Smith (the defendant's administration manager) regarding the oddness of proceeding to register a cession valued at more than R2 million rand, signed four years prior to its presentation to the defendant and presented to the defendant in the absence of the plaintiff, it is clear that this cession was registered by the defendant under very questionable circumstances. The strangeness of this matter does not end there. Paula Smith testified that she handed the original cession back to the deceased and was content to file only a photocopy. This is quite odd, considering that Smith testified that the original cession documents were normally kept by the defendant. As things stand, the whereabouts of the original cession documents are unknown. Even after the personnel of the plaintiffs broker phoned her a few days later to notify her that the plaintiff denied ever signing the cession, she did absolutely nothing. Given that the defendant did absolutely nothing further on the matter, I find it odd that Mr Gautshi SC argues that the plaintiffs failure to do anything further after the telephonic denial by his broker's secretary is wholly inconsistent with the conduct of a person who genuinely believes that his/her signature has been forged on a deed of cession, and the plaintiffs conduct in that regard shows that he was well aware that he had, in fact, signed the first cession. I would agree with this argument if the plaintiff had never registered his denial with the defendant at all.
- [35] I now turn to evaluate the evidence of the experts. Before I do so, I need to restate that the plaintiffs case is that the signature appearing on the cession document, purporting to be his signature, in terms of which he was ceding his rights to the policy to the deceased, constituted a forgery. The original cession document could, for one reason or another, not be found. The experts' analysis was thus based on a photocopy of the cession document which was handed in as exhibit "A". The impression I obtained from my own comparison of the signature on this document and the specimen signatures was that the signatures had obvious dissimilarities. I listened with keen interests to both experts with a view of obtaining a logical explanation for the existence of these dissimilarities.
- [36] In his evidence Mr Snyman pointed out that photocopying, faxing and enlargement of documents results in distortions that may make handwriting look different. This distortion is scientifically referred to as stepping. As I understood his evidence, the more a document is photocopied or faxed, the more it will show signs of stepping. In this matter it is common cause that the cession document was at some stage faxed. It is not clear how many times this document was photocopied or faxed, but from Paula Smith's evidence it is clear that the cession document presented to her was the original standard pro-forma document printed on a flimsy type of paper that could not be faxed due to its soft texture. She therefore photocopied it before faxing it to the deceased's broker, Terblanche, who later faxed it back to her. She then faxed it to the defendant's imaging department to facilitate the registration of the cession. On the basis of Snyman's evidence regarding stepping caused by faxing and

photocopying, it is clear that this document was subjected to stepping on no less than four occasions. I must say that when one examines the printed letters of the alphabet on the cession document, stepping or distortion is clearly visible to the naked eye, as there is a clear crooked formation of some of the numbers (at the space provided for telephone number). The different shapes that the same

letters of the printed alphabet have taken also confirms this. For example, the letter “n” in small letters appears four times under the signature line but its distortion has taken four distinct shapes. The shapes of the letters “d” and “t” (of “handtekening”) are clearly different from the shapes of the “d” and “t” (of “sedent”). Having considered these visible distortions, I am inclined to believe that the poor quality of the handwriting, due to stepping, undermines any reliable analysis of the handwriting, resulting in the evidence of the experts not being of any assistance to the court.

[37] Even if I may be wrong in finding that the excessive stepping was fatal to a proper examination of the signature on the disputed

document, I am in any event of the view that where the two experts’ evidence differ, Mr Bester’s evidence is more probable than that of Mr Snyman. Mr Fischer SCargued that when the two experts’ evidence is analysed, it ought to be taken into account that Mr Snyman is not an “independent” expert in the true sense of the word. This argument was based on the fact that Snyman had conceded to having undertaken many examination-briefs for the defendant in numerous matters over a number of years. More significantly, so it was argued, it was on the basis of Mr Snyman’s own opinion (to the effect that there was no forgery) that the defendant paid out the proceeds of the policy to the deceased’s estate. This contention is not without merit. While I do not expect Mr Snyman to make concessions were none are justified, it did at some point of cross- examination appear to me that he was trying very hard not to concede any point. I agree with Mr Fischer’s argument, on behalf of the plaintiff, that it is not inconceivable that, given the enormity of the plaintiffs claim, especially considering that the defendant has not applied for any other party (either Opperman or the deceased estate), to be joined in the proceedings. Snyman could find himself not inclined to make any substantial concessions with regards to the existence of differences for fear of “sinking the defendant’s case”.

[38] I am not persuaded by Mr Snyman’s evidence that the first down-stroke of the disputed signature does not end in a hook. It clearly looks like a hook. Considering the different distortions of the different letters of the printed letters of the alphabet just below the signature line, I remain un-persuaded that the end of the down stroke looks like a hook only because “the end of the down stroke touches the “t” and probably “d” as well”, as per the evidence of Mr Snyman. Due to the state of the distortion of both letters, especially as evidenced by the enlargement of the signature, it is not possible to discern or figure out the exact point at which the down stroke touches the “t” and the “d” respectively. Simple logic tells me that if this down- stroke were to touch these two letters that are next to each other, it would touch the “t” at its upper-end and the “d” more towards its lower end and would therefore not result in the curved hook that we see here. Given Mr Snyman’s own evidence

that if a single dissimilarity or difference found in a disputed signature cannot be logically explained, that would justify a finding of a different author or false signature, I can therefore on the basis of this finding, find that the disputed signature was forged.

[39] I am in any case more persuaded by Mr Bester's evidence that, indeed, the portion of the crossbar of the letter "A"

exiting the "A" on its right hand side was not caused as a result of stepping, but rather as a result of misalignment. This view is formed from the fact that a simple examination of the document shows that that crossbar is on a different imaginary line than the line immediately to the right of the letter "A" in the signature. Thus, Mr Bester's attribution of this misalignment to a pen- lift is very persuasive.

[40] Furthermore, I agree that Mr Snyman's usage of the words "significant differences" in his report seems to suggest that differences were there but they were not significant. Indeed, his explanation of attributing the usage of those words to the fact that he prepared the report for laypersons does not make sense if regard is had to the fact that he had been specifically requested by the defendant to provide it with a report. Having, according to his own evidence, prepared many reports accepted by various institutions, leading to his testimony in hundreds of court cases, one would not expect someone with such extensive experience to use such words knowing fully well how critical the difference between a variation and a difference is.

[41] Although the defendant's counsel correctly criticised Bester's report for not being in line with the Standard Guide for examination of Handwritten Items, I find that his evidence was, on the whole, more acceptable and persuasive than that of Mr Snyman. Unlike Mr Snyman, Mr Bester had more data (specimen signatures) to enable him to make a proper comparison from the outset. Unlike Mr Snyman, Mr Bester readily made concessions on several aspects. On the basis of Mr Bester's evidence and findings, I find that the disputed signature is not the plaintiff's signature and constitutes a forgery. This finding is, in addition to what has already been stated in the aforementioned paragraphs, bolstered by the evidence of Paula Smith, who testified that the plaintiff had, a few days after being advised by the defendant in writing about the registration of the cession, denied having signed any cession document. On the basis of all the afore-mentioned factors, I find it more probable that the disputed signature is not the plaintiffs signature.

Whether the second cession was subject to a suspensive condition or not

[42] Mr Gautshi SC contends that the discussion between Opperman and the plaintiff before the signature of the cession was limited to an undertaking by Opperman that, since the plaintiff had helped him by signing the second cession, he would in turn help the plaintiff by requesting Minolco's manager, Mike Holohan to cancel the plaintiffs suretyship. In my view, from the evidence of both Opperman and the plaintiff regarding the conversation that served as a precursor to the signature of the second cession, it is clear that the plaintiff was prepared to sign on condition that he was released from suretyship. This is what constituted the suspensive condition. That he did make it a condition is bolstered by Opperman as

follows: "I still phoned the plaintiff and asked him: well, why did you tear up the cession and he said: well, I told you about the suretyship, you first help me with the suretyship and then we can talk about the cession of the policy, he would have no problem signing it." It being common cause that the deceased died without the plaintiffs suretyship having been released, the suspensive condition was never fulfilled. What is also very crucial about the second cession is that even if I were to accept that there was no suspensive condition attached to it, the provisions of clause 8 of the policy clearly provide that

"geen sessie, of benoeming of skrapping van 'n Begunstigde is bindend op Liberty Life tensy deur Liberty Life op rekord aangeteken nie. Liberty Life is nie verantwoordelik vir die geldigheid van enige sessie of die benoeming van 'n begunstigde nie."

As this cession was never registered by the defendant in terms of the express general conditions of the policy, it was therefore not binding. So strict is the defendant about non-recording of a cession that it refused to recognise a cession allegedly signed by the deceased in favour of Opperman just for the mere fact that it was not recorded. As stated before, despite the existence of that signed cession, the defendant ended up paying the proceeds of the policy into the estate of the deceased and not to Opperman.

[43] I disagree with Mr Gautshi SC's submission that the tearing of the second cession by the plaintiff is not consistent with the existence of a suspensive condition. It must be borne in mind that the deceased's difficult personality was attested to by all his business associates who testified. His tendency to break his promises even to the business associates that still had a good relationship with him lends credence to the plaintiffs testimony that the deceased had on several occasions strung him along and made several undertakings to release him from suretyship, which undertakings he never fulfilled. The plaintiffs testimony that he tore the second cession out of anger upon discovering that Opperman too, like the deceased, had lied to him, is thus very plausible.

[44] The plaintiff came across as an honest and credible witness and his version bore no material contradictions. In my view, the

probabilities in this case are overwhelmingly in favour of the plaintiff. Having considered all the facts and circumstances of this matter, I find that the defendant failed to prove that the plaintiff signed the first cession document. I further find that in terms of the provisions applicable to this very policy, which provide that a cession is only binding on the defendant if it has been recorded or been registered with the defendant, the defendant's reliance on the second cession is misplaced, as the second cession was never registered. In any event, in so far as this second cession was subject to a suspensive condition that was never fulfilled, it is invalid. I therefore find that as at the time of the deceased's death the plaintiff was still the owner and sole beneficiary of the policy. As such, the proceeds of the policy ought to have been paid to him and not to the estate of the deceased.

[45] I, accordingly, make the following order:

1. The special plea is dismissed.
2. The plaintiffs claim is allowed and the defendant is ordered to pay the plaintiff an amount of R2 251 017,00 together with interest

thereon calculated as from 31 December 2005.

3. The defendant is ordered to pay the costs of this action.

M. B. MOLEMELA, J

On behalf of the plaintiff: Adv. P U Fischer SC

Instructed by:

Lovius Block

BLOEMFONTEIN

On behalf of the defendant: Adv. J R Gautshi SC

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