

SOUTH AFRICA / JUDGMENT

Kagan v Kagan and Others (6887/09) [2010] ZAWCHC 10 (8 February 2010) [2010] ZAWCHC 10

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward

CASE / FILE NUMBER

6887/09

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IN

THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

Case

No. 6887/09

In

the matter between:

HELMAN
KAGAN Applicant
and
RUTH
KAGAN First
Respondent
LIBERTYLIFE
GROUP LIMITED
Second Respondent
METROPOLITAN
LIFE LIMITED
Third Respondent
MOMENTUM
GROUP LIMITED
Fourth Respondent

JUDGMENT

DELIVERED ON 8 FEBRUARY 2010 BINNS-WARD J: [1] The applicant claimed various heads of relief in the notice of motion. It is unnecessary to describe them because at the hearing the applicant's counsel advised that the only relief actually sought was an order directing that the Liberty Life endowment policy, which was ceded by him to the first respondent on 29 September 1975, 'be released from its cession to First Respondent and that it revert to Applicant'. [2] The background to the application is as follows. The applicant and the first respondent were formerly man and wife. Their marriage was dissolved in terms of an order granted by this court on 25 June

1975. In terms of that order the consent paper executed by the parties on 28 April 1975 was made an order of court. As correctly identified by Mr Weinkove SC, for the applicant, the relief sought in the current application turns on the proper construction of clause 6 of the consent paper, read in context. [3] The consent paper provided that the applicant had to pay maintenance to the first respondent until the first occurring of her death or re-marriage; and also maintenance in respect of the three minor children of the marriage, of whom the first respondent was granted custody, until they attained the age of 18 or earlier became self-supporting. This maintenance obligation was initially fixed by the consent paper in the amount of R30 per month for the first respondent and R90 per month in respect of each of the children. The consent paper provided that the maintenance payable was to escalate annually on the anniversary of the divorce order by five percent. [4] Clause 6 of the consent paper reads as follows: 'CESSION OF INSURANCE POLICIES: In order to ensure the continued maintenance payments after his death, Defendant [i.e. the applicant] undertakes that against the obtaining of the Final Order of Divorce he will cede to the Plaintiff [i.e. the first respondent] Insurance Policies to the value of R66.000-00 and shall bear liability for the costs of such cession.' [5] Clause 15 of the consent paper recorded an undertaking by the applicant to pay the premiums on the policies ceded by him in terms of clause 6 and afforded the first respondent the right to claim reimbursement thereof from him should she be obliged to pay the premiums herself in the event of the applicant's default. Clause 14 of the consent paper provided that save as set out therein neither party would have any further claims of whatsoever nature against the other. [6] In discharge of his obligation in terms of clause 6, the applicant ceded three long-term insurance policies to the first respondent, having between them a total death value of R66500. The cessions were effected in terms of three deeds of cession, each of which was executed by the applicant on 29 September 1975. [7] The deed of cession in respect of the policy currently in issue provided insofar as relevant that the applicant thereby transferred, assigned and set over to the first respondent 'all right, title and interest in [the insurance policy] and all benefits and advantages to be derived therefrom'. The applicant further stated in the deed of cession that 'this Cession is I. T. O. order of Court of 25/6/75'. [8] The policy in question had been taken out by the applicant in July 1970 with life cover in the sum of R12000. The applicant had however taken out supplementary life cover under the policy in the sum of R45000 in April 1975, and it seems likely in the context of the facts that this was done with

the provisions of clause 6 of the consent paper, which was signed shortly afterwards, in mind. The policy therefore made up R57000 of the R66500 death cover provided by the three policies ceded by the applicant to the first respondent in September 1975. [9] By reason of the terms of the policy, which included an investment component, its death and surrender values as at 18 February 2009 stood at R241 111.16. [10] The contention of the applicant is that clause 6 of the consent paper properly construed means that the value of insurance cover that he is required to provide thereunder was to be at all times limited to R66000; and that accordingly, if the value of any of the policies ceded by him to the first respondent should have increased so as to at any time, in combination, afford death cover in an amount exceeding R66000, he would be entitled to an adjustment. Of course the only manner in which this could be achieved would be the recession by the first respondent of one or more of the policies, or of part of the death cover beneficiary's rights under the policies. When the applicant asks in this application for a 'cancellation of the cession', he in truth seeks an order directing the first respondent to recede it to him. He does so because he says that after a recession of the policy the first respondent will still be left with policies with a death cover value well in excess of the R66000 referred to in clause 6. [11] On the authority of *Hughes N.O. v The Master and Another* 1960

- (4) SA 936 (C) it is apparent that the parties probably accepted that a consequence of the agreement by the applicant to maintain the first respondent until her death or remarriage would be that in the event of his death occurring during the currency of the undertaken maintenance obligations the first respondent would enjoy a claim for the residual performance of the obligation of personal maintenance for herself against his estate. The dependant children would in any event enjoy such a claim. In the context just sketched the evident intention in clause 6 was to afford some guarantee or assurance to the first respondent that in the event of the stipulated contingency arising the performance of the deceased's maintenance obligations would not be dependant, or at least not entirely dependant, on what might prove at such time to be the inadequate value of the applicant's deceased estate. [12] There was some debate in the heads of argument as to whether the cession contemplated by clause 6 was of an out an out nature or in securitatem debiti. At the hearing counsel were, however, in agreement, rightly so in my view, that nothing really turned on that. If the cessions were out and out there would be no basis in law for the applicant to assert any right in the policies. If they were in securitatem debiti, the applicant's only interest in the policies would be of a reversionary nature and they would automatically revert in his deceased estate against the discharge by it of any outstanding maintenance obligations under the consent paper. That the parties intended a cession in securitatem debiti is, however, most improbable because the intention was that the proceeds of the policies, at least to the value of R66000 on the applicant's version, would enure to the first respondent upon the insured event. Accordingly, there would in reality be nothing by way of extant insurance policies to revert to the applicant's deceased estate once the insurers had paid out the proceeds of the policies, as they would be obliged to do on his death. It is for these reasons that the alleged proper meaning of clause 6, and not the character of the

cession to be effected thereunder, was eventually recognised as the only basis on which the applicant's claim could be arguably sustainable. [13] In my judgment the meaning contended for by the applicant is inconsistent with the language of the provision and also bears with it such impractical connotations as to make it unlikely to have been what the parties intended. On the plain language of the provision it imposed a once off act of obligation on the applicant. He was obliged after the final order of divorce to cede insurance policies to the value of R66000 to the first respondent. The nature of the insurance policies to be ceded was not specified, but counsel were agreed, correctly, that it is clear from the context that the 'value of R66000' denoted the value of the death cover benefit to be provided thereby and it is equally clear that the applicant's life would have to be the life insured in terms of the policies. The language of the contract suggests that once he had ceded insurance policies of the nature just described, the applicant's only continuing obligation would be to pay the premiums. It would follow that any risks or benefits attaching to the policies after their cession in terms of clause 6 would attach to or vest in the first respondent exclusively. That this was the intention is indeed confirmed in the wording of the deed of cession executed by the applicant, and quoted earlier. [14] There is nothing in clause 6, or any other provision of the consent paper, to indicate that a periodic audit of the value of the ceded policies was intended with a concomitant obligation on the applicant to cede further policies if the exigencies of fate had for one or other reason reduced the death cover originally provided to below R66000, or one on the respondent to cede back rights in the policies if the death cover provided thereby rose to exceed R66000. Any such intention would have resulted in a cumbersome ongoing process, which, if it had been desired, one would have expected the parties to expressly describe and define. There would moreover have been no business sense, if an ongoing process of reconciliation and accounting were to have been imported into clause 6, to maintain the insured value at R66000 in nominal terms on an ongoing basis. As the years went by the required cover would be expected to diminish as the children became self-sufficient and the first respondent's own expectation of longevity reduced with the passing of the years. [15] If it could be said that there is an element of ambiguity in clause 6 (and I do not consider that there is), it would be appropriate in the circumstances to examine how the parties had conducted themselves in relation to it. Nothing in the conduct of the parties in the intervening 34 years before the institution of this applications suggests that either of them understood the contract in the manner now contended by the applicant. Instead, as I have pointed out the terms of the deed of cession executed by the applicant point the other way. [16] In my judgment the applicant has failed to show any basis in law for his claim. The only beneficial effect that the applicant enjoys in the policies is that any claim that may possibly subsequently arise by the first respondent for maintenance against his deceased estate will be reduced by the proceeds received by her from the policies that he ceded to her. [17] I have refrained from setting out in this judgment the personal circumstances of the applicant that gave rise to this application. It was not necessary to do so because, without derogation from their emotional significance, they are legally quite irrelevant. I nevertheless express the hope from a purely humane perspective that the result of this application will not deter the parties from seeking

to achieve a settlement of the underlying issue if the first respondent's circumstances in any way allow it. J [18] The application is dismissed with costs. A.G. BINNS-WARD Judge of the High Court

JUDGMENT

DELIVERED ON 8 FEBRUARY 2010

BINNS-WARD J:

- [1] The applicant claimed various heads of relief in the notice of motion. It is unnecessary to describe them because at the hearing the applicant's counsel advised that the only relief actually sought was an order directing that the Liberty Life endowment policy, which was ceded by him to the first respondent on 29 September 1975, 'be released from its cession to First Respondent and that it revert to Applicant'.
- [2] The background to the application is as follows. The applicant and the first respondent were formerly man and wife. Their marriage was dissolved in terms of an order granted by this court on 25 June
1975. In terms of that order the consent paper executed by the parties on 28 April 1975 was made an order of court. As correctly identified by Mr Weinkove SC, for the applicant, the relief sought in the current application turns on the proper construction of clause 6 of the consent paper, read in context.
- [3] The consent paper provided that the applicant had to pay maintenance to the first respondent until the first occurring of her death or re-marriage; and also maintenance in respect of the three minor children of the marriage, of whom the first respondent was granted custody, until they attained the age of 18 or earlier became self-supporting. This maintenance obligation was initially fixed by the consent paper in the amount of R30 per month for the first respondent and R90 per month in respect of each of the children. The consent paper provided that the maintenance payable was to escalate annually on the anniversary of the divorce order by five percent.
- [4] Clause 6 of the consent paper reads as follows:

'CESSION OF INSURANCE POLICIES:

In order to ensure the continued maintenance payments after his death, Defendant [i.e. the applicant] undertakes that against the obtaining of the Final Order of Divorce he will cede to the Plaintiff [i.e. the first respondent] Insurance Policies to the value of R66.000-00 and shall bear liability for the costs of such cession.'

- [5] Clause 15 of the consent paper recorded an undertaking by the applicant to pay the premiums on the policies ceded by him in terms of clause 6 and afforded the first respondent the right to claim reimbursement thereof from him should she be obliged to pay the premiums herself in the event of the applicant's default. Clause 14 of the consent paper provided that save as set out therein neither party would have any further claims of whatsoever nature against the other.
- [6] In discharge of his obligation in terms of clause 6, the applicant ceded three long-term insurance policies to the first respondent, having between them a total death value of R66500. The cessions were effected in terms of three deeds of cession, each of which was executed by the applicant on 29 September 1975.
- [7] The deed of cession in respect of the policy currently in issue provided insofar as relevant that the applicant thereby transferred, assigned and set over to the first respondent 'all right, title and interest in [the insurance policy] and all benefits and advantages to be derived therefrom'. The applicant further stated in the deed of cession that 'this Cession is I. T. O. order of Court of 25/6/75'.
- [8] The policy in question had been taken out by the applicant in July 1970 with life cover in the sum of R12000. The applicant had however taken out supplementary life cover under the policy in the sum of R45000 in April 1975, and it seems likely in the context of the facts that this was done with the provisions of clause 6 of the consent paper, which was signed shortly afterwards, in mind. The policy therefore made up R57000 of the R66500 death cover provided by the three policies ceded by the applicant to the first respondent in September 1975.
- [9] By reason of the terms of the policy, which included an investment component, its death and surrender values as at 18 February 2009 stood at R241 111.16.
- [10] The contention of the applicant is that clause 6 of the consent paper properly construed means that the value of insurance cover that he is required to provide thereunder was to be at all times limited to R66000; and that accordingly, if the value of any of the policies ceded by him to the first respondent should have increased so as to at any time, in combination, afford death cover in an amount exceeding R66000, he would be entitled to an adjustment. Of course the only manner in which this could be achieved would be the recession by the first respondent of one or more of the policies, or of part of the death cover beneficiary's rights under the policies. When the applicant asks in this application for a 'cancellation of the cession', he in truth seeks an order directing the first respondent to recede it to him. He does so because he says that after a recession of the policy the first respondent will still be left with policies with a death cover value well in excess of the R66000 referred to in clause 6.
- [11] On the authority of *Hughes N.O. v The Master and Another* 1960

- (4) SA 936 (C) it is apparent that the parties probably accepted that a consequence of the agreement by the applicant to maintain the first respondent until her death or remarriage would be that in the event of his death occurring during the currency of the undertaken maintenance obligations the first respondent would enjoy a claim for the residual performance of the obligation of personal maintenance for herself against his estate. The dependant children would in any event enjoy such a claim. In the context just sketched the evident intention in clause 6 was to afford some guarantee or assurance to the first respondent that in the event of the stipulated contingency arising the performance of the deceased's maintenance obligations would not be dependant, or at least not entirely dependant, on what might prove at such time to be the inadequate value of the applicant's deceased estate.
- [12] There was some debate in the heads of argument as to whether the cession contemplated by clause 6 was of an out an out nature or in securitatem debiti. At the hearing counsel were, however, in agreement, rightly so in my view, that nothing really turned on that. If the cessions were out and out there would be no basis in law for the applicant to assert any right in the policies. If they were in securitatem debiti, the applicant's only interest in the policies would be of a reversionary nature and they would automatically revert in his deceased estate against the discharge by it of any outstanding maintenance obligations under the consent paper. That the parties intended a cession in securitatem debiti is, however, most improbable because the intention was that the proceeds of the policies, at least to the value of R66000 on the applicant's version, would enure to the first respondent upon the insured event. Accordingly, there would in reality be nothing by way of extant insurance policies to revert to the applicant's deceased estate once the insurers had paid out the proceeds of the policies, as they would be obliged to do on his death. It is for these reasons that the alleged proper meaning of clause 6, and not the character of the cession to be effected thereunder, was eventually recognised as the only basis on which the applicant's claim could be arguably sustainable.
- [13] In my judgment the meaning contended for by the applicant is inconsistent with the language of the provision and also bears with it such impractical connotations as to make it unlikely to have been what the parties intended. On the plain language of the provision it imposed a once off act of obligation on the applicant. He was obliged after the final order of divorce to cede insurance policies to the value of R66000 to the first respondent. The nature of the insurance policies to be ceded was not specified, but counsel were agreed, correctly, that it is clear from the context that the 'value of R66000' denoted the value of the death cover benefit to be provided thereby and it is equally clear that the applicant's life would have to be the life insured in terms of the policies. The language of the contract suggests that once he had ceded insurance policies of the nature just described, the applicant's only continuing obligation would be to pay the premiums. It would follow that any risks or benefits attaching to the policies after their cession in terms of clause 6 would attach to or vest in the first respondent exclusively. That this was the intention is indeed confirmed in the wording of the deed of cession executed by the applicant, and quoted earlier.

- [14] There is nothing in clause 6, or any other provision of the consent paper, to indicate that a periodic audit of the value of the ceded policies was intended with a concomitant obligation on the applicant to cede further policies if the exigencies of fate had for one or other reason reduced the death cover originally provided to below R66000, or one on the respondent to cede back rights in the policies if the death cover provided thereby rose to exceed R66000. Any such intention would have resulted in a cumbersome ongoing process, which, if it had been desired, one would have expected the parties to expressly describe and define. There would moreover have been no business sense, if an ongoing process of reconciliation and accounting were to have been imported into clause 6, to maintain the insured value at R66000 in nominal terms on an ongoing basis. As the years went by the required cover would be expected to diminish as the children became self-sufficient and the first respondent's own expectation of longevity reduced with the passing of the years.
- [15] If it could be said that there is an element of ambiguity in clause 6 (and I do not consider that there is), it would be appropriate in the circumstances to examine how the parties had conducted themselves in relation to it. Nothing in the conduct of the parties in the intervening 34 years before the institution of this applications suggests that either of them understood the contract in the manner now contended by the applicant. Instead, as I have pointed out the terms of the deed of cession executed by the applicant point the other way.
- [16] In my judgment the applicant has failed to show any basis in law for his claim. The only beneficial effect that the applicant enjoys in the policies is that any claim that may possibly subsequently arise by the first respondent for maintenance against his deceased estate will be reduced by the proceeds received by her from the policies that he ceded to her.
- [17] I have refrained from setting out in this judgment the personal circumstances of the applicant that gave rise to this application. It was not necessary to do so because, without derogation from their emotional significance, they are legally quite irrelevant. I nevertheless express the hope from a purely humane perspective that the result of this application will not deter the parties from seeking to achieve a settlement of the underlying issue if the first respondent's circumstances in any way allow it.

J

- [18] The application is dismissed with costs.

A.G. BINNS-WARD

Judge of the High Court

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