

SOUTH AFRICA / JUDGMENT

Liberty Group Ltd v Jordaan (A289/11) [2012] ZAFSHC 168 (13 September 2012)

[2012] ZAFSHC 168**COURT**

Free State High Court, Bloemfontein

BEFORE

Kruger, Mocumie, Daffue

CASE / FILE NUMBER

A289/11

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Appeal No. : A289/11

In the appeal between:-

LIBERTY GROUP LIMITEDAppellant

and

COERT RETIEF JORDAANRespondent

CORAM: KRUGER, MOCUMIE et DAFFUE, JJ

HEARD ON: 6 AUGUST 2012

JUDGMENT BY: KRUGER et DAFFUE, JJ

DELIVERED ON: 13 SEPTEMBER 2012

INTRODUCTION

- [1] This is an appeal, with the leave of the trial court, against orders dismissing the defendant's special plea and granting judgment in favour of plaintiff in the amount of R2 251 017,00 together with interest thereon calculated from 31 December 2005 with costs. For the sake of convenience the parties are referred to as they were cited in the court a quo. The appellant, Liberty Group Limited, is referred to as the defendant and the respondent, Coert Retief Jordaan, as the plaintiff. As in the court a quo Advocate P U Fischer SC appeared for the plaintiff while Advocate J R Gautschi SC with Advocate T I Boyce appeared for defendant.

Plaintiff's case was that he was the owner and beneficiary under a life policy. Defendant's case was that plaintiff ceded his rights under the policy to the deceased, Matthysen. Plaintiff denied such cession. Plaintiff's case was that the policy existed to secure his liability as a surety towards their supplier, whereas defendant's case was that the policy was taken out to ensure that plaintiff would be able to buy Matthysen's shares should Matthysen die. The court a quo found in plaintiff's favour.

THE ISSUES AS DEFINED IN THE PLEADINGS

- [2] Plaintiff instituted action against defendant for payment of the amount of R2 251 017,00, being the proceeds of an insurance policy (the policy) issued by defendant to plaintiff as owner on the life of plaintiff's former business partner, Mr J H Matthysen (Matthysen) who passed away on 31 December 2005.
- [3] In its special plea defendant pleaded that plaintiff had no locus standi to institute action in that he ceded his rights in terms of the policy to Matthysen in terms of a written cession which was registered by defendant on 11 March 2005 (the first cession). Alternatively, defendant pleaded that plaintiff lacked locus standi by virtue of an alleged second cession in terms whereof plaintiff ceded all his rights in the policy to one Ryno Opperman (Opperman) in October 2003.
- [4] In his replication plaintiff pleaded that the primary purpose of the policy was to secure his exposure as surety for and on behalf of Bloemfontein Minolta (Pty) Ltd (Minolta). He pleaded that an oral agreement was entered into between him and Opperman in terms whereof he undertook to cede his rights, title and interest in the policy to Opperman. The agreement was however "subject to a suspensive condition that plaintiff had been released as a surety" and that the cession "would be of no force and/or effect if such release had not already been effected" and "plaintiff would be entitled to cancel and/or annul any such cession subsequently signed by him in the event of him not having been released as surety".
- [5] Plaintiff also alleged that thereafter, and once Opperman confirmed that plaintiff had in fact been released as surety, he signed the second cession in good faith only to establish later that Opperman had misrepresented that he was released as surety whereupon he tore up the signed cession. Plaintiff was released as surety after the death of Matthysen only and he pleaded that at the date of Matthysen's death he was still the holder of all rights, title and interest in the policy as owner and beneficiary.

THE KEY ISSUES

- [6] Upon the death of Matthysen defendant paid the proceeds of the policy to the executrix of his estate. This was done on the basis of the first cession, an absolute cession of the policy in favour of Matthysen which cession was on 11 March 2005 submitted to defendant by Matthysen for registration. Ex facie the first cession plaintiff as cedent and Matthysen as cessionary signed it on 23 April 2001.

[7] The main issue to be decided by the court a quo was whether plaintiff ceded his rights in terms of the policy to Matthysen and if not, whether plaintiff ceded his rights in terms of the policy to Opperman in October 2003. During the hearing it became clear that it was plaintiff's case that he never signed the first cession and that the signature appended to that document constituted a forgery. Regarding the second cession it was plaintiff's case that he was entitled to destroy the document because of Opperman's misrepresentation.

THE FINDINGS OF THE COURT A QUO

[8] The court a quo found:

8.1 that the policy was not an out-and-out "buy and sell" policy - the case that defendant tried to make out - but that it was also to secure obligations other than the purchasing of shares.

8.2 that "there is no conclusive evidence that the deceased (Matthysen) and the plaintiff had reciprocal policies or that they had cross-nominated each other as beneficiaries";

8.3 that plaintiff had reason to retain the policy, it being to provide security for his obligations as surety as "creditors could, at any stage, choose to sue him and not Matthysen if Minolta was unable to discharge its indebtedness to Minolco";

8.4 that the evidence of plaintiff's expert, Mr Bester, was more acceptable and persuasive than defendant's expert, Mr Snyman, and that there were three significant differences between plaintiff's specimen signatures and the disputed signature on the first cession, confirmed by the court a quo to be obvious based on its own empirical observations;

8.5 that plaintiff's testimony that he destroyed the second cession out of anger upon discovery that Opperman lied to him, is very plausible;

8.6 that plaintiff was an honest and credible witness and that he did not contradict himself in any material respect and furthermore, that the probabilities were overwhelmingly in favour of plaintiff's case;

8.7 consequently the defendant failed to prove that plaintiff signed the first cession.

SALIENT FACTS PRESENTED IN DEFENDANT'S CASE IN CHRONOLOGICAL ORDER

[9] Prior to evaluating the judgment of the court a quo it is apposite to state the salient facts in chronological order.

Early 1990's:

9.1 Plaintiff's former business ran into financial difficulties. It was rescued by Matthysen and the two formed a close corporation as a vehicle to conduct their future business activities. This close corporation was later converted into a private company, Bloemfontein Minolta (Pty) Ltd (Minolta). Matthysen was at all relevant times the majority shareholder in this company.

Middle 1990's:

In 1995 Peet le Grange, who had been a 15% shareholder in Minolta, passed away. His widow as heir of the estate and transferee of his shares became part of the board of directors of Minolta for a limited period of time. This caused friction. Eventually Matthysen bought the 15% shareholding of Le Grange and thereafter he held 70% of the shares. Plaintiff held the remaining 30%.

19 September 1997:

9.3 Matthysen and plaintiff signed a deed of suretyship in terms whereof they bound themselves jointly and severally as sureties and co-principal debtors in favour of their supplier, Minolco (Pty) Ltd for all sums of monies owed by Minolta from time to time.

Latter part of 1999:

At the year end function of Minolta Matthysen announced that Opperman, Scholtz and Potgieter, at that time employees of Minolta, had been appointed as directors of the company and in addition each of them were to be issued with 5% of the shareholding in Minolta. Soon after this announcement Louwrens Smith (Smith), an insurance broker of Optimum Financial Services and a neighbour and friend of Opperman, made a presentation to Matthysen, plaintiff, Opperman, Scholtz and Potgieter, the directors and shareholders of Minolta, regarding “buy and sell” (koop en verkoop) life insurance policies, explaining that these policies were intended to provide funds to the owners of the policies in order to allow them to purchase the shares of a shareholder who might die. Everyone accepted Smith’s advice regarding the necessity of obtaining such insurance.

3 November 1999:

9.5 Matthysen and plaintiff did not make use of Smith as insurance broker, but elected to employ their own broker and friend, one Charl Terblanche of Pro Spes, who applied on their behalf to defendant for insurance policies on their lives. Matthysen was the owner of the policy issued on plaintiff’s life and vice versa. It is evident from the completed application form and plaintiff’s admission that these two shareholders took out policies on the lives of each other and that they provided for “koop en verkoop” or “buy and sell” life insurance policies in their capacities as shareholders of Minolta in order to ensure that the surviving shareholder has cash available to buy the shares of the predeceased.

Early 2000:

Smith arranged for “buy and sell” life insurance policies to be issued by Old Mutual for Opperman, Scholtz and Potgieter on the life of Matthysen and the policies were intended to provide funds for these three gentlemen to purchase on a pro rata basis Matthysen’s shares in Minolta in the event of his death.

March 2000:

On 3 March 2000, with commencement date 1 March 2000, defendant issued the policy which is known as a Lifestyle Penta Plus Policy and which was the subject matter at the trial. Matthysen was the insured life and plaintiff the owner and beneficiary.

2 September 2000:

9.8 JPJ Beleggings CC (JPJ) the property investment vehicle of Matthysen and plaintiff, concluded a lease agreement with Minolta in terms of which JPJ leased business premises to Minolta.

February 2001:

Plaintiff resigned as director and employee of Minolta when it was discovered that he had acted dishonestly and contrary to the interests of Minolta. He was, however, given a sub-distributor's agreement by Minolta in terms of which he was allowed to market and sell only Minolta products.

23 April 2001:

9.10 Matthysen and plaintiff approached Terblanche at the offices of Pro Spes and requested a deed of cession in order for plaintiff to cede his rights in the policy to Matthysen. Terblanche, on 23 April 2001, recorded the date and place of signature on the deed of cession (the first cession), but same was not signed by Matthysen and plaintiff at that stage.

21 May 2001:

9.11 At a director's meeting of Minolta it was resolved that the company would sever all ties with plaintiff as a result of his further dishonesty and breach of contract.

30 – 31 July 2002 & August 2002:

9.12 Plaintiff (acting on behalf of the Discovery Trust) sold his 30% shareholding in Minolta to Opperman (acting on behalf of the HakonTrust).

During August 2002 plaintiff sold his 30% members' interest in JPJ to Matthysen. Following the signing of the JPJ agreement, various documents, including the original policy, were handed over by plaintiff to Matthysen.

17 October 2003 and shortly thereafter:

On 17 October 2003 Matthysen and Opperman signed a deed of cession in terms whereof Matthysen ceded his rights in the policy to Opperman.

A few days later Opperman, Matthysen, Scholtz and Potgieter attended an informal board meeting at Minolta during which meeting various matters were discussed including registration of the 5% shareholdings in the names of Opperman, Scholtz and Potgieter and the fact that Opperman could not register the cession dated 17 October 2003 with defendant, since Matthysen had not yet registered the first cession with defendant, which company still regarded plaintiff as the owner of the policy. After this board meeting Matthysen took Opperman to his office and showed him the original policy document and the original first cession.

On Friday, 24 October 2003, Opperman phoned plaintiff and advised him that he required him to sign a deed of cession in respect whereof plaintiff would cede his rights in the policy to Opperman, failing which plaintiff had to repay the premiums in respect of the policy which

Minolta had been paying until then and which premiums were being debited to Opperman's loan account. An appointment was made for the next day whereupon plaintiff agreed to sign the cession document at the Free State Rugby Stadium. The document so signed was defendant's standard cession document and in terms of this cession (the second cession) plaintiff ceded his rights in the policy to Opperman. Shortly after 25 October 2003 Opperman took the second cession to the offices of Smith to have it registered with defendant but, however, plaintiff obtained the second cession from an employee of Smith's offices and tore it up.

10 March 2004:

9.17 Plaintiff faxed a letter to Minolco requesting cancellation of his suretyship in favour of Minolco since he had ceased to be a director of Minolta during January 2001.

27 October 2004:

9.18 Plaintiff made a declaration to defendant in which he declared that the policy had been lost whereupon defendant issued a duplicate copy of the policy to plaintiff.

10 March 2005:

9.19 Matthysen (representing the John Heinrich Matthysen Family Trust) eventually sold 5% of the Minolta shares to each of Opperman, Scholtz and Potgieter in line with the undertaking to sell having been communicated as long ago as the end of 1999. According to the notes and testimony of attorney Gerber Matthysen confirmed that he would arrange for cession of the policy to Opperman on that day.

11 March 2005:

9.20 Matthysen approached Paula Smith at defendant's Bloemfontein offices with the original policy document and the original signed cession on flimsy paper (the first cession). He required Smith to register the first cession with defendant. Matthysen was directed to the offices of his insurance broker to comply with certain FICA requirements before the first cession could be registered. Eventually the cession was registered by defendant.

14 March 2005:

9.21 Defendant sent letters to Matthysen and plaintiff confirming that the policy had been ceded by plaintiff to Matthysen. The confirmation letter was also sent to plaintiff's insurance broker at the time, one Willem Groenewald.

16 June 2005:

9.22 Matthysen and Opperman signed a further deed of cession in terms of which Matthysen's rights in the policy were ceded to Opperman. This cession was never registered at Liberty.

31 December 2005:

9.23 31 December 2005 Matthysen died.

January 2006:

9.24 Opperman, Scholtz, attorney Gerber and Matthysen's former wife found the original policy in a file in Matthysen's office at Minolta. Later Gerber handed the original policy to Smith which policy document was subsequently handed in to the trial court by Smith.

12 January 2006:

9.25 Plaintiff's attorneys, Messrs Lovius Block, sent a letter to defendant claiming that plaintiff's signature on the first cession was a forgery.

23 January 2006:

9.26 Defendant issued a certificate confirming that the proceeds of the policy were payable to Matthysen's estate.

10 April 2006:

9.27 Opperman, Scholtz and Potgieter, in their capacities as shareholders and directors of Minolta, signed a deed of suretyship in favour of Minolca for the debts of Minolta.

11 May 2006:

9.28 Minolco cancelled plaintiff's suretyship in favour of Minolco.

GROUNDS OF APPEAL

[10] Numerous grounds of appeal were raised, but the following is an appropriate summary:

10.1 The court a quo erred in finding that the policy was not an out-and-out "buy and sell" policy, but was also intended to cover plaintiff's

exposure as surety, whilst it should have found that on the evidence and the overwhelming probabilities the policy was indeed a "buy and sell" policy and not also to cover plaintiff's exposure as surety.

10.2 The court a quo erred in finding that the evidence of the plaintiff's handwriting expert, Mr Bester, was more probable than that of defendant's expert, Mr Snyman.

10.3 The court a quo erred in finding that plaintiff was an honest and credible witness in spite of extensive unchallenged evidence that his deceitfulness precipitated the demise of his business relationship with Matthysen and his employment with Minolta.

10.4 The court a quo should have found that it was far more probable that the plaintiff signed the first cession and thereby ceded his rights in the policy to Matthysen during August 2002.

10.5 The court a quo erred in finding that plaintiff's tearing up of the second cession was not inconsistent with the existence of a suspensive

condition and it should have found that on the evidence and the overwhelming probabilities, plaintiff signed the second cession while on his own version he contradicted the existence of a suspensive condition as pleaded on his behalf in the replication.

10.6 The court a quo should have found that the discussion at the rugby stadium when plaintiff signed the second cession, was limited to an undertaking by Opperman that he would request Minolco to cancel plaintiff's suretyship.

THE RATIONALE FOR TAKING OUT THE POLICY ON THE LIFE OF MATTHYSEN, THE CONSEQUENCES AND WHETHER OR NOT THE POLICY'S SUBSTRATUM HAS FALLEN AWAY

[11] The starting point of the discussion in this regard should be plaintiff's case as pleaded in his replication:

"1.3 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." (emphasis added)

[12] The difficulties experienced by plaintiff and Matthysen caused by the death of the former director and shareholder of Minolta, Peet le Grange, ran like a golden thread through the evidence of all the witnesses that testified during the trial, who were personally involved in the affairs of Minolta. Le Grange's death triggered plaintiff, Matthysen, Opperman, Scholtz and Potgieter to take out insurance policies as advised by the broker, Smith. Opperman, Scholtz and Potgieter opted to take out Old Mutual policies on the life of Matthysen through their broker, Smith, while plaintiff and Matthysen preferred to take out life insurance policies on each other's lives through their friend and broker, Charl Terblanche of Pro Spes. The purpose of these policies, commonly described by the witnesses as "buy and sell" policies was explained by various witnesses, but most surprisingly in clear and simple words by plaintiff in particular in his examination in chief, as follows:

"That was subsequently issued in your favour, is that correct? ... That is correct.

And a similar one for the exact same amount was issued in favour of Mr Matthysen, is that correct? ... That is correct."

(This relates to policies taken out by plaintiff and Mr Matthysen on each other's lives.)

"What was the arrangement between you and Mr Matthysen as to what you would do with these policies and how would they be utilised? ... The arrangement at the time was, it was basically a buy and sell. If one of us should die, the other one has sufficient funds to pay the widower (sic) or if ... we'll have sufficient funds to settle each other as far as the amount of the shares are concerned and to buy those shares. (underlining added)

[13] Mr Fischer's cross-examination and in particular his endeavour to show that prior to March 2005 the shareholders and directors of Minolta did not have a written buy and sell agreement pertaining to their respective shares, could not take the matter any further. Writing is not a legal requirement and if Minolta's articles of association, which are in line with the standard document applicable to all private companies, are taken into

consideration, a shareholder could not sell his shares to third parties unless such shares had first been offered to the remaining shareholders. Plaintiff's averment that Matthysen could do with his shares whatever he wished and even thereby ignoring the pre-emptive rights of his co-shareholders, is incorrect in the light of his own evidence that life insurance was taken out to obtain sufficient funds to buy the shares of a deceased shareholder. Mr Scholtz, Minolta's financial director, in his uncontested testimony, explained the pro rata basis on which the surviving shareholders would be entitled to buy the shares of a deceased shareholder. Mr Fischer continuously tried to show in cross-examination that no written buy and sell agreement existed at the stage when the three Old Mutual policies and the two Liberty Life policies were taken out, but there cannot be any doubt that the five relevant role-players knew that the only purpose for taking out the life insurance policies was to place them in funds

to ensure that they would be in a financial position to pro rata pay for the shares of a deceased shareholder.

[14] Smith's evidence stands uncontested insofar as he properly explained the difference between life insurance policies in general and "buy and sell" life policies in particular on the one hand and indemnity insurance on the other. Life insurance is generally regarded as a form of capital insurance and it is regulated by the Long Term Insurance Act 52 of 1998. Disability benefits are usually added to life insurance, but it does not make the policy anything else. See Reynecke et al, GENERAL PRINCIPLES OF INSURANCE LAW 2002 ed, par 588 and further. A life insurance policy cannot be taken out on the life of another unless the applicant has an insurable interest in the life of the life insured. As Reynecke mentions in par 95, "(i)t is conceivable that one partner may have a pecuniary interest in the life of a fellow partner, for instance, where

partners are obliged to buy each other out on the death of one of them." Exactly the same principle applies in the event of shareholders in a private company or members in a close corporation and even where there is no obligation, but merely a right to buy.

[15] The Short Term Insurance Act 53 of 1998 applies to short term insurance business. Several kinds of policies can be taken out in terms hereof, inter alia, a liability or indemnity policy. Liability or indemnity insurance is insurance against a legal liability such as, for example, someone's uncertain future liability to settle the claim of a creditor insofar as such person has stood surety for and on behalf of the principal debtor in favour of the creditor. The liability insured against must be described in the policy, for example, the institution of legal action by the creditor against the surety for payment of the amount due in terms of the deed of suretyship. The insured event is thus not the life of a person, but the institution of action by the creditor. See Reynecke, loc cit, at par 531 and further and par 582 in particular.

[16] No written buy and sell agreements are required by law and there is no evidence that insurance companies require the existence of written buy and sell agreements. There must be an insurable interest and this appears to be clearly the case when the plaintiff's

application for insurance is considered, read with the evidence of all relevant witnesses, as well as Minolta's articles of association. Smith was called to testify about his presentation and the taking out of the "buy and sell" policies. His evidence was that the policy was a "buy and sell" life policy and not a liability policy. The insured event of the policy was the death of Matthysen and not the institution of action against anyone of the sureties. Smith testified about the tax implications in the event of the policy being ceded from plaintiff to Matthysen and from Matthysen to Opperman as Matthysen and Opperman intended to do. In such a case the policy would be regarded as a second-hand policy with clear tax implications, being a liability for the payment of capital gains tax. His evidence in this regard was not contested at all and his version that it might be better for tax purposes that Opperman applied for a new policy on Matthysen's life instead of obtaining cession of

the policy remains uncontested.

- [17] It is clear from the evidence that if Matthysen passed away when plaintiff was still a shareholder of Minolta, he would be entitled to utilise the proceeds to pay for the pro rata portion of Matthysen's shares. Simultaneously Opperman, Scholtz and Potgieter would receive the proceeds on their Old Mutual policies on the life of Matthysen to enable them to, on a pro rata basis, pay for such of the shares of Matthysen in Minolta as they were entitled to. Matthysen did not pass away when plaintiff was still involved with Minolta.
- [18] The substratum of the policy fell away in 2001 when plaintiff's employment relationship with Minolta was terminated and he resigned as director. If not in 2001, at best for plaintiff the substratum of the policy fell away when he sold his 30% shareholding in Minolta to Opperman at the end of July 2002 and his membership in JPJ to Matthysen in August
2002. As a non-shareholder he would not be entitled to buy any shares of Matthysen at that stage. Insofar as it might be argued that prior to that he would still be entitled, notwithstanding the severance of ties, to buy a pro rata shareholding of Matthysen, he has now forfeited all and any rights to buy any shares in Minolta in future. The agreement pertaining to the sale of the members' interest in JPJ and the sale of shares agreement between plaintiff and Opperman were interlinked and the one could not go through without the other. Therefore it makes commercial sense that plaintiff handed over the policy to Matthysen in August 2002 and at the stage when they signed the agreement in respect of the members' interest in JPJ. It also makes commercial sense and appears to be in line with the objective facts that the deed of cession, partially completed by Terblanche on 23 April 2001, was signed by plaintiff and Matthysen in August
2002. Opperman and plaintiff are ad idem that the policy was handed over in August 2002.
- [19] Opperman's concession in cross-examination that he needed finality pertaining to the cession of the policy in order to cover his risks pertaining to the creditors of Minolta, cannot be seen as an indication that Opperman considered the policy in the same light as plaintiff, i.e. that the primary purpose of the policy was to secure plaintiff's exposure (or then Opperman's exposure) as a surety for and on behalf of Minolta. This cannot possibly be so as

Opperman was at that stage not a surety of Minolta. It is clear from his evidence, read in context, that if the majority shareholder in a private company passes away and no provision was made by the others to have sufficient funds to buy the shares of such majority shareholder, the very existence of the business entity might be jeopardised. Serious cash flow problems are foreseeable insofar as the estate of the deceased shareholder might claim immediate payment of the value of the shares which might be considerable, while creditors might not be prepared to extend

further credit well-knowing that the majority shareholder has passed away and his estate is claiming an enormous amount in respect of his shareholding.

- [20] The fact that there are no restrictions in the policy pertaining to the nomination of beneficiaries or the cession of the policy is irrelevant. If the owner of the policy would be so unwise to cede the policy to a third party when still a shareholder or partner and his co-shareholder or co-partner passes away, he would be left without funds to pay for the shares of the deceased shareholder. There cannot be any reason why any owner of such policy would act accordingly. However, once the substratum of the policy has fallen away, because of the severance of the business relationship between the former shareholders or partners, such owner would be fully entitled to cede the policy to the life insured who would then have to accept liability for paying the premiums or to any third party who would then have to accept liability for the payment of premiums.
- [21] It is perhaps strange that the five shareholders of Minolta did not take out policies on each other's lives and that the three minority shareholders took out policies only on Matthysen's life whilst Matthysen and plaintiff took out policies on each other's lives. This very fact may be attributed to several considerations, but this was never taken up with any of the witnesses in cross-examination. It might be argued that there was no reason, i.e. for Opperman to take out a life insurance policy on the life of either Potgieter, or Scholtz insofar as the amount that Opperman would have to pay in the event of the death of either, bearing in mind the huge shareholdings of plaintiff and Matthysen, would be minimal. Neither Matthysen, nor plaintiff took out insurance policies on the lives of the three minority shareholders, but this is immaterial. In 1999/2000 these three minority shareholders were not shareholders as no sale of share agreements had been concluded. This took place in March 2005 when agreements were reached in respect of the purchase price and other terms and conditions.
- [22] The evidence, as set out above, shows that the policy was a "buy and sell" life policy and that it would place plaintiff in funds to pay for the shares of Matthysen to which he would be entitled pro rata with Opperman, Scholtz and Potgieter, should he die before plaintiff, in accordance with their pre-emptive rights.
- [23] Plaintiff directly contradicted the version pleaded on his behalf pertaining to the primary purpose of the policy. Plaintiff tried to label the policy as a short-term indemnity policy in which case the insured event would be the taking of legal action by the creditor against him as surety. As indicated the policy was nothing but an out-and-out "buy and sell" life policy.

The amount of R2 251 017,00 for which Matthysen's life was insured is much more in line with the value of Matthysen's shareholding in Minolta at the stage when the policy was taken out than the exposure of plaintiff as surety to Minolco which was only about R500 000,00. The amount of R2 251 017,00 is also more in line with the amounts for which Opperman, Scholtz and Potgieter took out insurance on the life of Matthysen, i.e. R600 000,00 respectively with a 10% annual increase.

SECOND CESSION

[24] The telephonic conversation and the meeting at the Free State Rugby Stadium, which took place on 24 and 25 October 2003 respectively, should also be considered to establish whether the credibility finding is in order. In his replication plaintiff pleaded that the oral agreement between him and Opperman pertaining to the cession of the policy was subject to a suspensive condition. Such a condition, also known as a condition precedent, is described as a condition suspending the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event. See Christie RH, THE LAW OF CONTRACT IN SOUTH AFRICA, 6th ed, p 145. When the replication is properly considered and read with plaintiff's reply in terms of Rule 37(4), no suspensive

condition applied. It has always been plaintiff's case on the pleadings and in his evidence that Opperman misrepresented to him that he had been released as surety by Minolco. Opperman's evidence is directly in contrast with that of plaintiff. He testified that pursuant to plaintiff having signed the cession he was asked to give plaintiff his word that he would help him with the cancellation of his suretyship. Opperman agreed to "make work" of the request.

[25] Plaintiff testified in his evidence in chief about the telephone conversation with Opperman on 24 October 2003. Plaintiff did not deny, nor was it denied during Opperman's cross-examination that Opperman informed plaintiff that plaintiff had "signed the cession to Matthysen." This omission is irreconcilable with any inference other than that plaintiff did indeed sign the cession.

NON-CALLING OF TERBLANCHE BY PLAINTIFF

[26] Notwithstanding the fact that it was made clear during cross-examination of defendant's witnesses that Terblanche, the insurance broker and friend of plaintiff, would be called upon to testify, particularly pertaining to the purpose of the policy taken out on the life of Matthysen, plaintiff failed to call him as a witness notwithstanding the fact that he was available. The only logical deduction to be made from the failure to call Terblanche is that he would not have supported plaintiff's case as pleaded, and/or as suggested by Mr Fischer in cross-examination of defendant's witnesses and/or as faintly testified to by plaintiff.

[27] The court a quo found that:

"there is no conclusive evidence that the deceased and the plaintiff had reciprocal policies or that they had cross-nominated each other as beneficiaries."

- [28] Both Scholtz and plaintiff confirmed that Matthysen and plaintiff took out policies on each other's names. Consequently it follows necessarily that the policy was an out-and-out "buy and sell" life policy taken out by plaintiff with the consent of Matthysen on Matthysen's life in order to provide plaintiff with sufficient cash to pay for Matthysen's shareholding on a pro rata basis upon his death. Matthysen took out a similar policy on plaintiff's life for the very same reason. The rationale for the policy lapsed at the very best for plaintiff when the two transactions referred to above were concluded in July and August 2002 respectively.

NON-CALLING OF MS NEL BY PLAINTIFF

- [29] Notwithstanding the fact that plaintiff's secretary, Ms Tessa Nel, was a witness to the oral agreement and available to testify, she was not called by plaintiff in support of his case. She was plaintiff's secretary at Minolta. She was dismissed as she allegedly assisted plaintiff in his alleged devious methods in undermining Minolta's business.
- [30] Plaintiff neglected to call at least two vital witnesses that could shed light on his case and/or enable him to corroborate his version, i.e. Terblanche and Nel. An unfavourable inference should be drawn for his failure to call them. See *SAMPSON v PIM* 1918 AD 657 at 662 and *MUNSTER ESTATES (PTY) LTD v KILLARNEY HILLS (PTY) LTD* 1979 (1) SA 621 (AD) at 624 C.

PLAINTIFF'S SILENCE

- [31] It is difficult to understand why plaintiff did nothing from being informed by defendant in its letter of 14 March 2005 that a cession from plaintiff to Matthysen in respect of the policy had been effected. The telephonic conversation between Ms Smith of defendant and the secretary of plaintiff's new broker, Mr Groenewald, does not support plaintiff's case that no cession took place. Plaintiff himself was vague as to whether he received defendant's letter of 14 March 2005 and/or whether Mr Groenewald communicated with him about the cession. The following dictum is pertinently relevant:

"But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion."

See *McWILLIAMS v FIRST CONSOLIDATED HOLDINGS (PTY) LTD* 1982 (2) SA 1 (AD) at 10 E – G.

His vagueness is material especially insofar as what he feared might happen (on his version), i.e. the cession of the policy to either Matthysen or Opperman, has now materialised. Bearing in mind Matthysen's ill-health at that stage, the policy should have been considered to be a valuable asset, but plaintiff did not regard it as such when his evidence is considered. The more plausible inference to be drawn from this is that he knew that he had ceded the policy to Matthysen long ago. The same reasoning applies to his silence when Opperman told plaintiff that plaintiff had

ceded the policy to Matthysen telephonically on the 24th October 2003. Plaintiff testified that he requested Matthysen numerous times to hand back the policy to him, but that Matthysen eventually told him that the policy had been lost. At that stage plaintiff had no right to the policy which he voluntarily handed to Matthysen two years earlier and he hasn't been paying the required premiums. On his own version and bearing in mind the various statements made by Mr Fischer to defendant's witnesses, Matthysen and plaintiff did not speak to each other at all

from about 2001 up to Matthysen's death. The more plausible inference to be drawn from plaintiff's application for a duplicate copy was his newly acquired knowledge that the cession to Matthysen had not been registered as Opperman told him in October 2003.

- [32] Plaintiff waited for nine months until after the only other signatory and witness to the cession passed away before he claimed to be the owner of the policy. His behaviour relating to the policy and the cession thereof at all times prior to the death of Matthysen is inconsistent with what a reasonable man under the circumstances would have done.
- [33] The evidence shows that plaintiff made himself guilty of improper conduct when he was still in the employ of Minolta and a director thereof. This conduct was perpetuated during the two months that he was allowed a sub-distributor's contract by Minolta. It is also clear that although he signed the cession given to him by Opperman at the rugby match in October 2003, he got hold of the cession again at the office of Smith under false pretences whereafter the signed cession was destroyed. The reasonable person in plaintiff's shoes would have confronted Opperman first if it was his case that Opperman lied to him about the release of his suretyship, and/or to use legitimate means to prevent the cession from being registered under the circumstances.

AN EVALUATION OF THE EVIDENCE OF THE TWO EXPERT WITNESSES

- [34] It is clear that both witnesses would prefer to conduct their investigations based on the original first cession. The documents with the disputed signature subjected to investigation were either second, third or fourth generation documents. Mr Bester (Bester), on behalf of the plaintiff, initially found seven fundamental differences between the specimen signatures of plaintiff and the disputed signature. Eventually he conceded four of these differences to be incorrect conclusions, but maintained that three fundamental differences existed and that the disputed signature on the first cession was not that of plaintiff. The defendant's expert, Mr Snyman (Snyman), dealt in detail with the three fundamental differences relied upon by Bester and came to the conclusion that there were no significant differences, but merely variations, between the specimen signatures and the disputed signature. The court a quo favoured Bester's version and went so far to state that

"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".

[35] The defendant made use of cession documents printed on flimsy paper during 2001. The nature of the paper was such that Ms Paula Smith of defendant's Bloemfontein office could not fax the original cession which was handed over to her by Matthysen to the office of his broker. She had to make a copy first and faxed the copy to Terblanche's office. The original cession document – the flimsy – was completed partially by Terblanche in the presence of plaintiff and Matthysen. He inserted the words "Bloemfontein" (twice) and the date "21 April 2001" (twice). His two friends and clients did not sign the document at that stage, but left his offices with the document. There is no doubt that the word "Bloemfontein" and the date was in Terblanche's handwriting. Therefore one has to accept that if someone wanted to forge the plaintiff's

signature on this document, he would have to train on other documents as he would only have one chance to forge plaintiff's signature on the flimsy.

[36] It is clear from the expert evidence that plaintiff has a complex signature with a range of variations. This necessitated Snyman to find that the dissimilarities were within plaintiff's range of variations and that no fundamental or significant differences existed between the specimen signatures and the disputed signature.

[37] Opperman was asked about the signature and he confirmed that he had seen numerous cheques over the years signed by both Matthysen and plaintiff and he had no doubt that the disputed signature was that of plaintiff.

[38] The handwriting experts worked with third or fourth generation copies, not with the original of the document alleged to be forged. The evidence was that the photo copying techniques used at the time the copies were made, caused distortions which were relevant to the analysis. Plaintiff's signature is a complex signature with many variations. In these circumstances the value attached to the findings of the handwriting experts is limited. The evidence of the handwriting experts, as in many cases where their evidence features, can often only be used to bolster or detract from other evidence which is on a more solid footing. The handwriting expert evidence in this case is insufficient to establish a forged signature, especially seen in the light of the evidence as to the conduct of the parties as appears from the chronology.

CHRONOLOGY OF IMPORTANT DATES

[39] The chronology highlights the inherent probability regarding the ownership of the policy:

3 March 2000:

The life policy on Matthysen's life is taken out with plaintiff as owner and beneficiary.

Matthysen and plaintiff requested the broker Terblanche to prepare a deed of cession of the policy from plaintiff to Matthysen. Terblanche wrote in the date on the cession, but plaintiff and Matthysen did not sign at that stage. Plaintiff was at that stage still a 30% shareholder in Minolta.

July – August 2002:

Plaintiff sold his 30% interest in Minolta and his 30% interest in JPJ, which CC leased the business premises to Minolta, to Matthysen. At this stage Matthysen and plaintiff probably signed the cession.

October 2003:

Matthysen showed Opperman the original cession in terms whereof plaintiff ceded his rights in the policy to Matthysen.

Matthysen took cession to Paula Smith and she registered the cession.

Defendant notified plaintiff and plaintiff's insurance broker that the policy had been ceded to Matthysen.

Matthysen died.

Plaintiff told defendant that his signature on the cession was forged.

CONCLUSION

[40] It was never put to any of defendant's witnesses, especially the financial director, Scholtz that Matthysen was a fraudster and/or that he committed fraud or acted illegally in any manner whatsoever, even accepting that Matthysen was shown to be a careless person and an alcoholic who probably manipulated situations and/or people in order to achieve his goals. The failure to file tax returns timeously, the failure to finalise the sale transactions pertaining to the 5% shares to each of Opperman, Scholtz and Potgieter which took him over five years to finalise, the failure to have the share certificates signed and his failure to go for medical examinations for insurance purposes and finally, the failure to register the cession of the policy in his name immediately and only doing so after an undertaking in attorney Gerber's office on 10 March 2005 are all indicative of his carelessness, but not fraudulent behaviour.

[41] Plaintiff's credibility was considered without assessing the credibility (or lack thereof) of the other witnesses. We are at liberty to consider the finding afresh based on the reasons advanced. In the light of what has been stated above, the finding of the court a quo cannot be supported.

[42] The court a quo did not consider the inherent probabilities in the case, as they appeared from the known facts. The chronology of events shows that

defendant's version, as to why and when the policy was taken out and ceded, fits in with what happened.

[43] Having considered several aspects of the case and the evidence pertaining thereto, it is necessary to stand back, look at the mosaic and to consider the evidence in its totality with specific reference to credibility and the probabilities. The evidence of Opperman, Scholtz

and Smith led on behalf of defendant pertaining to the rationale for taking out the policy and the circumstances prior to that, during the time and thereafter, are much more probable than the version of plaintiff. In fact, plaintiff was clearly dishonest as to the rationale for taking out the policy.

[44] Several factors show that the special plea should have been upheld:

- (i) Plaintiff was not a satisfactory witness, the main reason being that already in chief his evidence showed that he understood the policy to be a “buy and sell” policy, not one to cover his suretyship liability.
- (ii) Opperman’s evidence was consistent with the probabilities and his evidence that he saw the cession from plaintiff to Matthysen can only be rejected if Opperman is found to be a liar, which cannot be done on the evidence.
- (iii) A life policy would not have secured plaintiff’s liability as a surety. If plaintiff wanted to insure his liability as a surety, he should have taken out indemnity insurance where the insured event is the institution of action by the creditor, not as with the present life policy the life of a person who has nothing to do with plaintiff’s liability as a surety.
- (iv) The fact that the cession was probably signed at a time when plaintiff no longer had any involvement with Minolta fits in with the probabilities.
- (v) The fact that Matthysen delayed in having the cession registered, is in conformity with his general careless conduct.
- (vi) The non-calling of the broker Terblanche, who had firsthand dealings with plaintiff and Matthysen regarding the preparation and signing of the cession, weighs against plaintiff’s case. The inference must be drawn that Terblanche would not have supported plaintiff’s version.
- (vii) The expert evidence, given that the experts worked with second or third generation copies, which distorted the already complex signature, is inconclusive.
- (viii) Defendant’s version fits in with the chronology of events and the signing of the cession was the probable event to have happened at the time it did.

[45] Having considered all the issues, the evidence as events unfolded from time to time, including the documentary evidence, comprehensively, defendant has proven its defence on a balance of probability. The special plea should have been upheld with costs and the plaintiff’s claim dismissed with costs.

COSTS

[46] Defendant employed two counsel and asks for the costs to include the costs of two counsel. This trial was conducted over several days and over a period of two years. The record is voluminous and the disputed signature was fiercely contested by the parties through the evidence of the two expert witnesses. The issues are complex. There is no reason why the costs of two counsel should not be allowed.

ORDER

[47] The appeal is upheld with costs, including the costs of two counsel and the order of the court a quo is substituted by the following order:

“The defendant’s special plea is upheld and plaintiff’s claim is dismissed with costs, including the costs of two counsel.”

KRUGER, J J.P. DAFFUE, J

I concur.

B.C. MOCUMIE, J

On behalf of appellant: Adv JR Gautschi SC with Adv TI Boyce

Instructed by:

Cloete Boyce

c/o Webbers

BLOEMFONTEIN

On behalf of respondent: Adv PU Fischer SC

Lovius Block

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