

SOUTH AFRICA / JUDGMENT

Lotter v Trustees for Time Being of Phildi Trust (13754/2023)

[2024] ZAWCHC 158 (7 June 2024)

[2024] ZAWCHC 158

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

13754/2023

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IN

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

Case

No: 13754/2023

In

the matter between:

KAREN
LOTTER
N.O.
Excipient/Defendant
and
THE
TRUSTEES FOR THE TIME BEING OF
THE
PHILDI TRUST
Respondent/Plaintiff
In

re:

THE
TRUSTEES FOR THE TIME BEING OF THE PHILDI TRUST
Plaintiff
KAREN
LOTTER
N.O. Defendant

Coram:

Justice J Cloete

Heard: 30 April 2024, supplementary note delivered on 3 May 2024
Delivered
electronically: 7 June 2024

JUDGMENT

CLOETE J:

Introduction:

[1] This is an exception taken by the defendant to the plaintiff's particulars of claim on the basis that the pleading lacks averments necessary to sustain a cause of action on two distinct grounds. The first is that ex facie the pleading there is no vinculum iuris between the plaintiff trust (the trust) and the deceased estate of the late Mr Phillipus Van Staden (the deceased) of which the defendant is the executrix. The second is that the agreement upon which the trust relies for its relief is a pactum successorium and thus invalid and unenforceable.

[2] The deceased, who passed away on 10 August 2021, was divorced from Ms Magaretha Van Staden (his ex-wife) on 21 October

2010. Earlier on 12 October 2009 the deceased and his ex-wife concluded a written settlement agreement to be incorporated in their final order of divorce and this subsequently occurred. Relevant for present purposes are the following clauses in the settlement agreement:

'The Phildi Trust. As agreed between Husband and Wife the benefactors [sic] of the current life insurance of the two parties (see addendum A) will be nominated to the Phildi Trust in the event of death of either Husband and/or Wife. The beneficiaries of the trust will remain as presently nominated and will not change unless agreed to by both parties... [clause 4]

The Husband will also continue to pay all assurance [sic] contributions... (see addendum A)... [clause 6]

This Agreement shall be binding upon the parties, and upon their heirs, executors, personal representatives, administrators, successors, and assigns [clause 12]'

[3] It bears mention that the trust seeks rectification of the word "benefactors" in clause 4 to read "benefits"

but nothing turns on this for purposes of this exception. The cause of action to which the exception is directed is pleaded as follows:

'10. On an appropriate interpretation of the agreement, the rights and benefits accruing to the trust from the agreement did so without any need for the trust to inform the deceased of their [sic] acceptance of those rights...

Claim B: damages

14. In breach of the agreement, the deceased:

14.1 Failed to nominate the Trust as the beneficiary of the policies; and

14.2 Discontinued the payment of the policies, causing their lapsing.

15. As a consequence of these breaches, and upon the death of the deceased, the Trust suffered loss in the value of the policies...

19. At the date of his death, the policies would have entitled the Trust, had the deceased complied with his obligations in terms of the agreement, to payment of the following sums, representing the damages suffered by the Trust by virtue of the deceased's breaches calculated by applying the foregoing increases to the capital benefits recorded therein:...'

[4] There is no allegation in the pleading that the trust accepted the benefits conferred upon it in clause 4 of the settlement agreement. Further, the addendum to the settlement agreement incorporated in the order of divorce reflects that there is no nominated beneficiary of either of the two life policies in issue which means that, given the deceased was the insured under both, on his death the proceeds (had the policies not lapsed due to his non-payment of the premiums) would have accrued to his estate.

First ground – no vinculum iuris

[5] Self-evidently the trust is not a party to the settlement agreement since it was concluded only between the deceased and his ex-wife. The defendant submits that clause 4 of the settlement agreement can only be a contract for the benefit of a third party (*stipulatio alteri*) which benefit must be accepted by the third party (the trust) for it to be enforceable.

[6] The trust raises two arguments in response. First, and 'as a general proposition', courts are reluctant to determine the interpretation of contracts on exception. Second, and in any event, the general rule that acceptance by a third party of benefits arising from a contract is required for the establishment of a *vinculum iuris* is subject to certain exceptions, one of which is the so-called *Perezius* exception and this, it is contended, applies in the present case. Given there is no dispute as to the requirements for a *stipulatio alteri* I deal with each of the arguments raised by the trust with reference to the authorities upon which it relies.

[7] Counsel for the trust relied on a portion of para [39] in *Picbel Groep Voorsorgfonds v Somerville and Related Matters*[1] (which I will underline for ease of reference hereunder) but it is necessary to quote from other paragraphs of that judgment as well:

'[25] The exception in this appeal concerns the settlement agreement, its interpretation and its implications for the right of one joint wrongdoer to claim a contribution from other joint wrongdoers in terms of s 2(12) of the ADA...

[26] It is necessary first to say something about the proper approach to issues such as these on exception. In *Lewis v Oneanate (Pty) Ltd & another*[2] Nicholas AJA stated that an excipient bears the burden of persuading the court that “upon every interpretation which the particulars of claim” and any agreement on which they rely “can reasonably bear, no cause of action is disclosed”. And, in *Sun Packaging (Pty) Ltd v Vreulink*,[3] Nestadt JA confirmed that there is no hard and fast rule that the interpretation of agreements is to be avoided on exception. He said:

“As a rule, Courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where its meaning is uncertain . . . In casu, the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous . . . Contracts are not rendered uncertain because parties disagree as to their meaning.”

[27] What these authorities mean in this case is that if the relevant clauses of the settlement agreement (for it is its terms that make or break the funds’ cause of action for purposes of the exceptions) can reasonably bear any meaning that supports a cause of action in terms of s 2(12) of the ADA, the exceptions must fail – and the appeal must succeed. If, on the other hand, the relevant clauses of the settlement agreement can only reasonably bear the meaning attributed to them by the respondents, and they are incapable of sustaining a cause of action based on s 2(12) of the ADA, the exceptions must be upheld – and the appeal must fail...

[39] The only outstanding issue is whether the settlement agreement contemplated a full settlement, as required by s 2(12), as this is not expressly pleaded. In order to determine this, it is necessary (and permissible) to interpret the settlement agreement that is relied on in the particulars of claim, and which is “a link in the chain of [the funds’] cause of action”. [4] In *Dettmann v Goldfain & another*,[5] this court stated that courts are, in some instances, reluctant to “decide upon exception questions concerning the interpretation

of a contract”. Those circumstances are, first, where the entire contract is not before the court; and secondly, where it

appears from the contract or the pleadings that “there may be admissible evidence which, if placed before the Court, could

influence the Court’s decision as to the meaning of the contract”, provided that this possibility is “something

more than a notional or remote one”.

[40] In this case, the entire settlement agreement is before the court and there has been no suggestion, either in the pleadings or in argument, of the meaning of the settlement agreement being influenced by admissible evidence being led in the trial. Indeed, the parties are ad idem as to what the relevant clauses of the agreement mean and I am of the view that that meaning is the only reasonable meaning that those clauses can have. The parties differ only in respect of what the legal consequences may be as far as a cause of

action based

on s 2(12) of the ADA is concerned. As it was put in the appellants' heads of argument, the issue is 'given the terms of section 2(12), what ex lege is the effect of this settlement agreement?'

- [8] Applying all these principles to the present matter the following is evident. There is a single allegation (in paragraph 10 of the pleading) that on an 'appropriate' interpretation of clause 4 of the settlement agreement the rights and benefits (in the policies) accrued to the trust without any need for the trust to inform 'the deceased' of its acceptance of those rights. But the intention of clause 4 is plain: the deceased and his ex-wife, who were the only parties thereto, agreed that the 'benefactors' of the policies 'will be nominated to the Philidi Trust' in the event of death of either of them. I accept of course that the wording itself is poor, but their joint express intention is nonetheless clear. They contracted for the benefit of a third party, viz. the trust.
- [9] Accordingly on this fundamental aspect there can be no uncertainty of the kind envisaged in Picbel. As the Supreme Court of Appeal made clear 'contracts are not rendered uncertain because parties disagree as to their meaning'. Clause 4 can only reasonably bear one meaning on this score and given that ex facie the pleading the trust did not accept the benefits of the rights bestowed upon it there is no pleaded vinculum iuris. In addition the entire settlement agreement is before the court. There is no suggestion in the pleading, and nor was there in argument, that the meaning of clause 4 might be influenced by admissible evidence being led in the trial. Moreover the contention in the trust's heads of argument that because the divorce order effectively dispensed with the necessity for the trust to accept the benefit is not pleaded.
- [10] Turning now to the trust's second argument, namely that the provisions of clause 4 fall within the so-called Perezius exception. The legal position was succinctly set out by the Supreme Court of Appeal in Hofer and Others v Kevitt NO and Others[6] as follows:

'In order to overcome the hurdle presented by the fact that there had been no acceptance of the benefits by the appellants and the other more remote beneficiaries, Mr Walther endeavoured to invoke what may be called "the exception of Perezius". Perezius ad Cod 8.55 stated as a general rule that a donation is recoverable unless accepted by the donee. He added, however, the important qualification that

"in the case of the settlement of property in a family the acceptance of the first donee enures for the benefit of and is considered an acceptance by all the beneficiaries".

The Perezius exception has been received and applies to beneficiaries under trusts created inter vivos in South Africa. See Honoré and Cameron (op cit at 422 n 72, and cases there cited).

It was pointed out, however, by Centlivres CJ in Crookes' case at 288E-H that the exception only applies if the donated property is to remain in the family of the donor and also is to be inalienable and is to remain intact. It is clear from the provisions of the trust deed in the present application that the trustees were empowered to sell the assets and to invest the proceeds in such

manner as they in their sole discretion deemed fit. There was also no prohibition of alienation to persons outside the family imposed on the ultimate beneficiaries of the trust capital.

Furthermore, the donor, Herbert, Charles and Eleanora were only entitled to the income of the trust and their acceptance of that benefit cannot be regarded as an acceptance of the capital which was to go to the ultimate beneficiaries. The exception of Perezus cannot therefore apply to the present case.’ (my emphasis).

[11] I do not see how the Perezus exception can apply in the present matter, since there is no allegation in the pleading that the defendant is attempting to recover the “donation” in clause 4 from the trust. The whole pleading is to the opposite effect. But in any event what is not pleaded is:

(a) the identity of the trustees; (b) the identity of the beneficiaries; and (c) the terms of the trust deed. There is no allegation that the trust is a family trust and the settlement agreement is equally silent in this regard, and there is not a single pleaded allegation that the beneficiaries of the trust are family members of the deceased and his ex-wife. The pleading thus lacks averments necessary to sustain a cause of action based on the Perezus exception as well, and it is presumably for this reason that counsel for the trust did not persist with argument on this point.

Second ground – pactum successorium

[12] In *Borman en De Vos NNO en ’n Ander v Potgietersrusse Tabakkorporasie Bpk en ’n Ander*[7] a pactum successorium was described as follows. For convenience I adopt the English translation agreed between the parties with

references to other authorities omitted:

‘A pactum successorium (or pactum de succedendo) is, in short, an agreement in which the parties regulate the devolution (successio) of the estate (or a part thereof, or a specific item forming part thereof) of one or more of the parties after the death (mortis causa) of the party or parties concerned. An example of such an agreement is where A and B agree to appoint each other as heirs; or where A and B agree that A will bequeath his estate (or a part thereof) to B; or where A and B agree that A will bequeath his estate (or a part thereof, or a specific item belonging to him) to C. An agreement of this nature is contrary to the general rule of our law that estates devolve ex testamento (by will) or ab intestato

(intestate), and is considered invalid except in the case where it is embodied in an antenuptial contract.’ (my emphasis)

[13] In the present matter it would be the third example in the quoted passage that would apply if it is determined that clause 4 of the settlement agreement is a pactum successorium. The trust argues that the third example does not apply since clause 4, on any reading, does not regulate an inheritance. This argument is based on two contentions. First, the proceeds of the policies never formed part of the deceased’s estate and therefore no inheritance was contemplated. Second, ex facie the pleading the rights and obligations in terms of the

settlement agreement vested immediately since the deceased was obliged, again immediately, to pay the monthly premiums of the policies and ensure the nomination of the trust as beneficiary.

[14] To my mind both of these contentions are misplaced. As to the first, the proceeds of the policies would, for the reason already given, have been paid to his estate on the death of the deceased (but for the nomination in clause 4 and had the policies not lapsed). The intention to bequeath this part of his estate was thus manifest. Further, the deceased did not retain the right to revoke his

undertaking in clause 4, as occurred in *Ex parte Calder Wood NO: in re Estate Wixley*[8] upon which counsel for the defendant relied and where it was held that:

‘On the nature of a pactum successorium, Mr Jordaan drew my attention to *Ahrend and Others v Winter* 1950 (2) SA 682 (T); *Varkevisser v Estate Varkevisser and Another* 1959 (4) SA 196 (SR); *Costain and Partners v Godden NO and Another* 1960 (4) SA 456 (SR) and *Borman en De Vos NNO en ’n Ander v Potgietersrusse Tabakkorporasie Bpk en ’n Ander* (supra). I think these cases show that a pactum successorium is an agreement relating to the succession to an estate, or a portion thereof, or to a specific asset or benefit belonging thereto, which postpones the devolution of personal rights until the death of the owner and which prevents the latter from bequeathing his estate or property to another person when otherwise he would be entitled to do so. It is the deprivation or curtailment of testamentary freedom that justifies the prohibition of such an agreement. Accordingly, an agreement not to pass property mortis causa would be invalid on the same ground.

Does the contract between the deceased and the beneficiary fall into this category? If it does not, then it affords no assistance to the applicant to contend that the contract with the insurance company was but the juridical act by which it was to be performed.

The foundation of a pactum successorium is that the person who contracts with regard to his own succession purports to bind himself to that contract. He does not seek to retain the unilateral right to revoke his promise. Should he do so, then the contract is not one which conflicts with the general rule of our law that inheritances must devolve *ex testamento* or *ab intestato*...

In the present case in promising the beneficiary the proceeds of the policy if he were to be killed, the deceased contemporaneously retained the unilateral right to revoke her nomination. He explained to her the conditions in the beneficiary appointment form, which plainly permit of a revocation of the nomination either expressly by written notice, or impliedly by cession of the policy. Consequently her acceptance was within the framework of the beneficiary appointment form.

I consider, therefore, that the retention by the deceased of the right to revoke his promise made to the beneficiary effectively prevents their contractual relationship from being designated a pactum successorium.’ (my emphasis)

[15] As regards the second contention it is indeed so that, upon conclusion of the settlement agreement, the deceased became contractually bound to his ex-wife to pay the policy premiums and nominate the trust as beneficiary of the policies, but this does not detract from the invalidity in law of his undertaking to make that nomination. As was made clear in *McAlpine v McAlpine NO and Another*:^[9]

‘A donatio mortis causa is, in my view, simply a species of pactum successorium and it is not suggested that the agreements in this case meet the special requirements for validity of a donatio mortis causa, namely unilateral revocability and compliance with testamentary formalities. (See Joubert (ed) *The Law of South Africa* vol 8 paras 283-5.)

However, whether they be donations or not, in my opinion the basic determinant as to whether or not the reciprocal promises in clause 1 of agreement B constitute pactum successoria is the so-called vesting test. This test is applied by asking in a particular case whether the promise disposing of an asset in favour of another (whether by way of donation or other form of contract) causes the right thereto to vest in the promisee only upon or after the death of the promisor (which points to a pactum successorium); or whether vesting takes place prior to the death of the promisor, for instance, at the date of the transaction giving rise to the promise (in which case it cannot be a pactum successorium).’

[16] Whichever way one looks at it the asset, being the proceeds of the life policies, could only have vested in the trust upon the death of the deceased. The undertaking to nominate the trust as beneficiary could not somehow have accelerated the trust’s entitlement (had the deceased complied with his undertaking) to payment of the proceeds at some earlier date. It was not the obligation that vested but the right to the proceeds of the policies. Further, and although submitted in the trust’s heads of argument and advanced at the hearing, the contention that the deceased in any event became obliged to comply with clause 4 by virtue of a court order (i.e. the decree of divorce) the trust does not rely on this in the pleading; it only relies on a breach of the settlement agreement. It follows that the second ground of exception must also be upheld. As to costs, given the nature of the arguments it is my view that scale B should apply.

[17] The following order is made:

1. The defendant’s exception to the plaintiff’s particulars of claim is upheld;
2. The plaintiff is granted leave to serve a notice of intention to amend its particulars of claim in terms of rule 28 within 15 court days from date hereof; and
3. The plaintiff shall pay the defendant’s party and party costs on scale B.

J I CLOETE

For excipient: Adv M De Wet

Instructed by: Nabal Attorneys (Mr R Nabal)

For respondent: Adv A Van Aswegen

Instructed by: Brand Attorneys (Ms C Brand)

[1] 2013 (5) SA 496 (SCA).

[2] Lewis v Oneanate (Pty) Ltd & another

[1992] ZASCA 174; 1992 (4) SA 811 (A) at 817F-G. See too First National Bank of Southern Africa Ltd v Perry NO & others 2001 (3) SA 960 (SCA) para 6; Theunissen & andere v Transvaalse Lewendehawe Koöp Bpk 1988 (2) SA 493 (A) at 500E-F.

[3] Sun Packaging (Pty) Ltd v Vreulink [1996] ZASCA 73; 1996

(4) SA 176 (A) at 186J-187B.

[4] Van Tonder v Western Credit Ltd 1966 (1) SA 189 (C) at 193H; South African Railways and Harbours v Deal Enterprises (Pty) Ltd 1975 (3) SA 944 (W) at 953A; Moosa & others NNO v Hassam & others NNO 2010 (2) SA 410 (KZP) para 17.

[5] Dettmann v Goldfain & another 1975 (3) SA 385 (A) at 400A-B. See too Davenport Corner Tea Room (Pty) Ltd v Joubert 1962 (2) SA 709 (D) at 715G-716E.

[6]

[1997] ZASCA 79; 1998 (1) SA 382 (SCA) at 387E-J.

[7] 1976 (3) SA 488 (A) at 501A-D.

[8]

[1981] 4 All SA 389 (Z) at 397-398.

[9]

[1996] ZASCA 127; 1997 (1) SA 736 (AD) at 750B-E.

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