

SOUTH AFRICA / JUDGMENT

Ntlokwana v Sanlam Life Insurance Limited (2023-053497) [2024]

ZAGPPHC 1092 (22 October 2024)

[2024] ZAGPPHC 1092

COURT

North Gauteng High Court, Pretoria

BEFORE

Coertzen

CASE / FILE NUMBER

2023-053497

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NUMBER: 2023-053497

1. REPORTABLE:

YES/NO

2. OF INTEREST TO

OTHER JUDGES: YES/NO

3. REVISED

DATE: 22 October 2024

SIGNATURE:

In the matter between: EDMUND
GREGORY MISELO NTLOKWANA
APPLICANT
and
SANLAM
LIFE INSURANCE LIMITED
RESPONDENT

JUDGMENT

COERTZEN AJ:

THE APPLICATION AND THE AFFIDAVITS:

[1] The applicant seeks the following declaratory and ancillary relief by way of motion proceedings:

- '1. That the non-surrender clause contained in the Capital Preserver: Whole Life policy under policy number 1[...]2, the Single Life Annuity policy under policy number 1[...]6 and the Single Life Annuity policy under policy number 1[...]3 concluded between the Applicant and the Respondent on 17 September 2020 be declared unreasonable, unlawful and unenforceable.
2. That the refusal by the Respondent to accept the Applicant's notice of termination dated 01 December 2020 of the Capital Preserver: Whole Life policy under policy number 1[...]2, the Single Life Annuity policy under policy number 1[...]6 and the Single Life Annuity policy under policy number 1[...]3 be declared unreasonable and be set aside.
3. That the notice of termination given by the Applicant to the Respondent on 01 December 2020 in respect of the Capital Preserver: Whole Life policy under policy number 1[...]2, the Single Life Annuity policy under policy number 1[...]6 and the Single Life Annuity policy under policy number 1[...]3, be declared to be reasonable notice of termination.
4. That the insurance contract concluded between the Applicant and the Respondent on 17 September 2020 under policy numbers 1[...]2, 1[...]6 and 1[...]3 be declared to be cancelled.
5. That all obligations and rights under the insurance contract concluded between the Applicant and the Respondent on 17 September 2020 under policy numbers 1[...]2, 1[...]6 and 1[...]3 be declared to come to an end.
6. That the Respondent be ordered to release and pay all the monies held by the Applicant under policy numbers 1[...]2, 1[...]6 and 1[...]3 to the Applicant within 45 days of service of the Court Order on the Respondent.'

[2] I deal below with the allegations in the affidavits.

THE APPLICANT'S CASE IN THE FOUNDING AFFIDAVIT:

[3] The applicant's case in the founding affidavit may be summarised as follows:

- (a) The applicant retired from his employment with the South African National Defence Force in 2020. On date of his retirement, the applicant had a retirement benefit with the Government Employees Pension Fund (GEPF) to the value of R9,445,893.01.
- (b) The applicant instructed the GEPF to transfer his full retirement benefit to the respondent. According to the applicant, the GEPF did so on 29 July 2020, and gave a tax directive which indicated that the applicant would be entitled to a tax free lump sum of R3,528,985.63.
- (c) The applicant alleges that the respondent only on 17 September 2020, paid an amount of R3,132,068.94 according to a 'tax directive' generated by 'Personal Preservation Pension Fund'.
- (d) On the advice of an adviser, one Mr Glen Domingo, who was employed by the respondent at the time, the applicant took out the three policies referred to in the notice of motion.
- (e) According to the applicant, Mr Domingo informed him that the applicant would be charged commission of 0,6 %. The applicant alleges that he was charged amounts of commission and interest which he did not agree to.
- (f) On 20 September 2020, the applicant lodged a complaint to the Sanlam arbitrator ('the arbitrator'), in terms of which the applicant complained about the 'mismanagement' of his investment. The complaint centred around the commission, and with the failure of the respondent to speedily deal with his investment, and to pay the 'shortfall' between the amounts of R3,132,068.94 and R3,528,985.63.
- (g) On 14 October 2020, the arbitrator ruled in the respondent's favour. According to the applicant, the arbitrator held that the reduction in the one-third lump sum was caused by the reduced investment value. According to the applicant, the arbitrator gave no explanation for the reduction in the investment value; and the arbitrator did not rule on the commission charged.
- (h) The applicant alleges that he was not aware of the contents of his policy documents until he was provided with a copy on 25 October 2020, and that he did not sign a record of advice.
- (i) The applicant alleges that he gave the respondent a notice of termination of the policies on 1 December 2020. According to the applicant, he informed the respondent that the advice he was given was 'not proper' and that the adviser failed to present the applicant with a financial means test.
- (j) The applicant alleges that Mr Domingo did not provide him with the option of a joint life annuity despite being informed that the applicant is married. According to the applicant, he and his wife would have benefited from a joint life annuity.

- (k) The applicant alleges that Mr Domingo failed to inform him that no amendments to his investment could be made and/or that the guaranteed annuities cannot be cancelled or 'transferred to another service provider'.
- (l) The applicant alleges that he requested the respondent to 'cancel or reverse' his investment, but the respondent refused to do so.
- (m) The applicant alleges that the consensus between the parties was that they would 'carry on' with the policies, for as long as the policies benefitted their mutual interests. The policies no longer benefitted the applicant.
- (n) The applicant contends that because he only received the record of advice from Mr Domingo on 25 October 2020, the applicant's notice of cancellation given on 1 December 2020, was still within the prescribed 30 day period in terms of the applicable Policyholder Protection Rules.

THE RESPONDENT'S ANSWER:

[4] The respondent's answer to the application may be summarised as follows:

- (a) The answering affidavit is deposed to by one Alma Nefdt, who is a consultant in the employ of the respondent. She points out that Mr Domingo died before the institution of the present proceedings.
- (b) She confirms that Mr Domingo was the financial adviser who advised the applicant.
- (c) The deponent relies, inter alia, on correspondence received by her from Mr Domingo, relating to the applicant's complaint concerning policy number 1[...]4.
- (d) The deponent further relies on the record of advice which Mr Domingo had prepared for the applicant.
- (e) The deponent alleges that by virtue of the position that she holds, she is the best person to answer to the applicant's allegations on behalf of the respondent. The deponent declares that she has access to, and where necessary, consulted the relevant books, records, and documents of the respondent.
- (f) To the extent that the respondent relies on hearsay evidence, the respondent seeks that such evidence be admitted in terms of s 3(1) of the Law of Evidence Amendment Act 45 of 1988.
- (g) After considering the relevant factors, I am of the opinion that the evidence of the respondent, as contained in the records and
correspondence prepared by the respondent's adviser, Mr Domingo, prior to his death, should be admitted in the interests of justice.[1]
- (h) The deponent points out that upon retirement, the applicant as a member of the GEPPF, withdrew a portion of his gross retirement benefit.

- (i) On 25 and 28 September 2020, the applicant utilised the remaining balance of his gross retirement benefit, to purchase two investment products from the respondent. These were:
 - (i) A Single Life Annuity which provides the applicant with a guaranteed annuity income for life, under policy number 1[...]4 ('the stand- alone annuity');
 - (ii) An Income with Capital Preservation Plan, comprising of a life policy under policy number 1[...]2 (which provides the applicant with life cover); an annuity under policy number 1[...]6 (the proceeds of which fund the life policy); and an annuity under policy number 1[...]3 (which provides the applicant with a guaranteed annuity income for life). It is the investment under the Capital Preservation Plan ('the preservation plan' or 'the policies') which is the subject of the dispute.
- (j) On 1 December 2020, the applicant lodged a complaint concerning the stand-alone annuity. The complaint served before the arbitrator. The arbitrator determined that the applicant cannot cancel the stand-alone policy.
- (k) The present application was launched in a bid to cancel the preservation plan and to obtain payment of the monies held by the applicant under the policies comprising the preservation plan.
- (l) The respondent's opposition to the application is based on the following:
 - (i) That the preservation plan is subject to legislative regulation which precludes the granting of the relief sought by the applicant.
 - (ii) That the allegations in the founding affidavit are not supported by the objective documents evidencing the parties' consensus on the terms of the agreements entered into.
- (m) At the time of his retirement, the applicant's gross retirement benefit stood at approximately R9,445,893.01.
- (n) On 30 July 2020, and after numerous telephonic discussions and meetings, the applicant met with Mr Domingo. The applicant was presented with various quotations and permutations to assist him to make an informed decision.
- (o) On 30 July 2020, the applicant applied to transfer his gross retirement benefit out of the pension fund and into the Personal Portfolio Preservation Pension Fund ('the preservation fund') where it would be 'parked'.
- (p) On 24 August 2020, the respondent provided the applicant with a written quotation in respect of the preservation plan. The applicant accepted the quotation. The preservation plan enabled the applicant to buy an income for life and a guaranteed amount that will be payable when the applicant passes away. The life cover which provides the guaranteed amount is funded through a life annuity, resulting in two annuities being issued. The quotation authorised by the applicant, and which contains his signature, expressly provides that the preservation plan may not be cancelled, commuted or reduced, with reference to

the Pension Funds Act 24 of 1956 ('the Pension Funds Act'). The applicant also completed and signed a Retirement Notification in respect of the preservation fund, which reflects his election to take one third as a cash lump sum and to use the balance to purchase a compulsory annuity from a registered insurer; and to transfer the retirement benefit to the respondent for the purchase of the investment products.

- (q) On 17 September 2020, the respondent confirmed in writing to the applicant that an amount of R6,280,061.42 was transferred from the preservation fund in payment of policy premiums. The applicant did not object to the confirmation.
- (r) On 25 September 2020, the respondent issued three related policies under policy numbers 1[...]2, 1[...]6 and 1[...]3, and sent copies of the policy documents and the record of advice to the applicant by mail.
- (s) On 25 August 2020, the respondent provided the applicant with a written quotation in respect of the stand-alone annuity. The applicant also accepted the quotation on the same day that he received it. The stand-alone annuity enabled the applicant to buy an income for life. The quotation similarly expressly provides that the product may not be cancelled, and that the annuity may not be commuted or reduced, with reference to the Pension Funds Act.

[18] General Note 18 issued by SARS under the Income Tax Act, which applied when the policies were issued in September 2020, required:

'The annuity so purchased, as is the case with an annuity purchased in the name of a retirement fund or paid directly by such a fund, must be compulsory, non-commutable, payable for and based on the lifetime of the retiring member and may not be transferred, assigned, reduced, hypothecated or attached by creditors as contemplated by the provisions of sections 37A and 37B of the Pension Funds Act, 1956.'^[4]

[19] The onus is on the applicant to plead and prove the facts upon which he wishes to impugn the policy agreements on public policy grounds.^[5] In light of the above I am unable to find that the non-surrender clauses at issue may be struck down as against public policy.

[20] The applicant seeks final relief in motion proceedings. The Court must operate on the basis of the evidence presented to it.^[6] It is submitted in the applicant's heads of argument that the non-disclosure by Mr Domingo that the policies are not cancellable or transferable before the applicant concluded the policies, is material and would have influenced the applicant's decision whether or not to conclude the policies; and further that such non-disclosure was a contravention of the Policyholder Protection Rules under the Long-Term Insurance Act 52 of 1998 ('Long-Term Insurance Act').

[21] In terms of s 62 of the Long-Term Insurance Act, the Authority,^[7] by notice in the Gazette, 'may prescribe rules not inconsistent with the Act, aimed at ensuring for the purpose of policyholder protection that policies are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and in the public interest generally'. Such rules may provide that a policyholder may cancel a policy 'under

particular circumstances and within a determined period, and what the legal consequences shall be if he or she does so'.[8]

[22] The Policyholder Protection Rules published under Government Notice R.1129 in Government Gazette 26854 of 30 September 2004 and amended by Government Notice 1214 in Government Gazette 33881 of 17 December 2010, were repealed, and replaced by the Policyholder Protection Rules (Long-term Insurance), 2017 ('PPR 2017').[9]

[23] It is common cause that the policies in question were taken out by the applicant. The relevant quotation, which was accepted and signed by the applicant, expressly records under the heading: 'Cancellation of policy'; that the preservation plan (against which the relief sought in the notice of motion is directed) may not be cancelled, commuted or reduced, with reference to 'Requirements in terms of the Pension Funds Act, 1956'.

[24] The respondent contends that the policies in question can in law not be cancelled, and, by virtue of their terms and nature, are not capable of being cancelled as contemplated in Rule 4.5 of the PPR 2017; and further that such fact was disclosed to the applicant, before entering into the policies, as required by the said rule. On the evidence presented, I must agree.

[25] I cannot find that the contracts were not freely concluded or that the clauses in question were not drawn to the attention of the applicant. To the extent that a dispute of fact exists, I similarly cannot find the respondent's allegations as being 'so far-fetched or clearly untenable', that I would be justified in rejecting them merely on the papers.[10]

[26] As for cancellation, the applicant relies on a 'notice of termination' dated 1 December 2020. [11] It is evident that the applicant refers to quoted paragraph 7 of his second complaint of 1 December 2020.[12] The applicant alleges in paragraph 8.8 of the founding affidavit:

'As already mentioned, I received the summary or record or (sic) advice from Mr. Domingo on 25 October 2020. Therefore, my notice of cancellation given on 01 December 2020 was within the prescribed 30 days period.' – [emphasis added].

[27] The allegation in the founding affidavit appears to be factually and legally incorrect. Rule 4.2(b) of the PPR 2017 provides that a policyholder may 'within a period of 31 days after the date of receipt of [the record of advice in the present matter] cancel a policy entered into with an insurer...by way of a cancellation notice to the insurer.' There is no basis in fact or law to declare the applicant's 'notice' 'to be reasonable notice of termination'.[13]

[28] I have in any event found that the policies in question can in law not be cancelled.

CONCLUSION:

[29] In the foregoing, I am not persuaded that the applicant has made out a case for the relief sought. I agree with counsel for the respondent that should the relief sought by the applicant be granted, I would effectively be directing the respondent to act unlawfully.[14]

[30] Upon a consideration of the relief sought in the notice of motion, and the evidence presented in the affidavits, and the applicable law, I must therefore conclude that the application cannot succeed.

[31] Costs should follow the result.

[32] In the result I make the following order:

1. The application is dismissed;
2. The applicant is to pay the respondent's costs.

Y COERTZEN

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 18 March 2024

Date of judgment: 22 October 2024

The judgment was provided electronically by circulation to the parties' legal representatives by email and by uploading the judgment to the electronic case file on Caselines. The date and time for delivery of the judgment is deemed to be at 10h00 on 22 October 2024.

Appearances:

Counsel for the applicant: SN Maseko (heads of argument prepared by JV Skosana) Instructed by: JV Skosana Attorneys, Pretoria Counsel for the respondent: S Mathiba (heads of argument prepared by T Sarkas) Instructed by: Werksmans Attorneys, Stellenbosch

[1] In terms of s 3(1)(b) of the Law of Evidence Amendment Act 45 of 1988, the Court may admit such evidence, if it is of the opinion that such evidence should be admitted in the interests of justice, having regard to: (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account.

[1] In terms of s 3(1)(b) of the Law of Evidence Amendment Act 45 of 1988, the Court may admit such evidence, if it is of the opinion that such evidence should be admitted in the interests of justice, having regard to:

- (i) the nature of the proceedings;
- (ii) the nature of the evidence;
- (iii) the purpose for which the evidence is tendered;
- (iv) the probative value of the evidence;

- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account.
- [2] An entity related to the respondent.
- [3] Section 37B of the Pension Funds Act further provides that in the case of the sequestration or surrender of the estate of person entitled to a benefit payable in terms of the rules of a registered fund, such benefit (subject to certain exceptions) not be deemed to form part of the assets in the insolvent estate of that person and may not in any way be attached or appropriated by the trustee in his insolvent estate or by his creditors, notwithstanding anything to the contrary in any law relating to insolvency.
- [4] General Note 18 has since been withdrawn and replaced by Binding General Ruling 58, dated 4 November 2021, which provides that any annuity so purchased in the name of the retiring member, in the name of the retirement fund or paid directly by such a retirement fund must be compulsory, non-commutable, payable for and based on the lifetime of the retiring member or the value of the member's retirement interest, if applicable. The annuity may not be transferred, assigned, reduced, hypothecated or attached by creditors as contemplated by the provisions of sections 37A and 37B of the Pension Funds Act.
- [6] *Barkhuizen v Napier* 2007
- (5) SA 323 (CC); 2007 (7) BCLR 691 (CC), 66.
- [7] Defined in s 1 as the Financial Sector Conduct Authority established by the Financial Sector Regulation Act.
- [8] In terms of subsection 2(c). See also: *Sanlam Life Insurance Limited v Chigombo* (A14/2024)
- [2024] ZAMPMBHC 71 (30 September 2024), 18.
- [9] GN 1407 of 15 December 2017 in Government Gazette No. 41321.
- [10] *Wightman T/A JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA),
- [11] In terms of prayers 2 & 3 of the notice of motion.
- [12] Para 4(w) of this judgment.
- [13] See prayer 3 of the notice of motion.
- [14] See also: *Sanlam Life Insurance Limited v Chigombo*, 24.

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Prepared on 10 October 2026 · Esheria