

SOUTH AFRICA / JUDGMENT

Pretorius NO v Stanlib Wealth Management Ltd. (380/06) [2007] ZASCA 77; [2007] SCA 77 (RSA) (31 May 2007)

[2007] SCA 77 (RSA)

COURT

Supreme Court of Appeal

BEFORE

Scott, Brand, Lewis, Combrinck, Theron

CASE / FILE NUMBER

380/06

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Source record**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Case no: 380/06

Not reportable

In the matter between

HERMANUS DEMPERS PRETORIUS NO

1ST APPELLANT

SUSAN ANN PRETORIUS NO

2ND APPELLANT

EDUARD BRAND NO

3RD APPELLANT

and

STANLIB WEALTH MANAGEMENT LIMITED

RESPONDENT

Coram: SCOTT, BRAND, LEWIS, COMBRINCK JJA, and THERON AJA

Heard: 18 May 2007

Delivered: 31 May 2007

Summary: Oral contract to

invest in respondent's
investment fund
established by evidence:

representative of respondent had authority
to bind it.

Neutral citation: This case may be cited as Pretorius NO
v Stanlib Wealth Management Ltd [2007] SCA 77 (RSA)

JUDGMENT

LEWIS JA

- [1] The appellants are the trustees of two trusts, the Seca Trust (Seca) and the Tableau Trust (Tableau). They instituted action in the Cape High Court against the respondent, Stanlib Wealth Management Ltd (Stanlib), for the payment of R5m, which they alleged had been invested on behalf of the trusts (R2.5m each) with Stanlib, and which was repayable on demand. Only the first appellant, Mr Hermanus Pretorius, played a role in the litigation. Stanlib, at the time the investments were made, was called Liberty Specialised Investments (Pty) Ltd and was a wholly owned subsidiary of Liberty Life Group Ltd (Liberty). I shall refer to Stanlib rather than to Liberty Specialised Investments for the sake of convenience.
- [2] Griessel J in the high court granted judgment in favour of the appellants, interest a tempore morae and the costs of two counsel. The basis of his decision was that agents of the parties had concluded an oral agreement in terms of which moneys would be invested on behalf of each trust, which would be entitled to interest on the investments, the capital sum being repayable on demand. A number of other bases for the claim were set out in the particulars of claim, and were argued before the court below. They are no longer in issue.
- [3] Stanlib sought leave to appeal against the decision of the trial court. The grounds on which the application was based were, inter alia, that the court had erred in finding that the onus of proving an oral contract had been discharged; that the agent who had purportedly represented Stanlib had been incorrectly found to have authority to do so; and that the agent of the trusts had intended to pay the sum of R5m not on behalf of the trusts but on behalf of another entity.
- [4] Griessel J granted leave to appeal to the full court only on the first ground, whether an oral contract between the trusts and Stanlib had been proved. The full court (Davis J, with whom Bozalek J and Ndita J concurred) upheld the appeal. It also considered an application to amend the particulars of claim to reflect an alternative claim that a contract between the trusts and Stanlib had been concluded by conduct. The full court found that the oral contract pleaded had not been established and that there was also insufficient evidence of a contract concluded by conduct. It granted absolution from the instance.
- [5] During the course of the hearing in this court it transpired that leave had been given by this court to appeal to the full court against the decision of the trial court on the other grounds raised by Stanlib. The full court did not deal with them, and in view of the conclusion to which I come on the existence of the oral contract, it is not necessary to traverse them save for dealing with the authority of Stanlib's agent. The appeal against the decision of the full court is with this court's special leave.

- [6] The appellants pleaded that on or about 4 April 2002 the trusts, acting through Pretorius, but represented by Mr Wessel du Toit, and Stanlib, represented by Mr Jaco Cloete, agreed that the trusts would invest the sum of R2.5m each with Stanlib. Stanlib denied that there was a contract and denied that Cloete was authorized to represent it. It admitted, however, that two cheques in the sum of R2.5m each, drawn by MAT Securities (Edms) Bpk (Mat Securities), had been deposited in the account of Multivest Corporate Investments Trust (Multivest), one of its investment vehicles. It alleged that the payments had been allocated to a different entity, Henco Trust (Henco), and thus denied that it was obliged to repay the moneys when demand by Tableau and Seca was made.
- [7] The background to the litigation is this. Mrs Amanda Martinson conducted a business, aptly referred to as a pyramid scheme, from 2001 to 2002. Since Martinson and her scheme are but the background to the dispute it is not necessary to deal with them in any detail. Suffice it to say that she accepted large sums of money from investors, promising extraordinary returns – up to 10 per cent per month – and with the capital ran a micro-lending business. Her venture failed when the inflow of funds was less than the amounts she had to pay to fulfil the promise of the large returns. She was sequestered, and her company liquidated. Pretorius and Stanlib each maintains that the agent of the other was part of Martinson's dishonest scheme.
- [8] Du Toit is an investment broker, employed by C-Max Investments (Pty) Ltd (C-Max). His wife is the sole director of the company. Du Toit himself was an unrehabilitated insolvent. When testifying Du Toit said that he had heard in 2001 of Martinson's scheme and of the wonderful returns that investors had been paid. He invested his own money in the scheme. In due course he met Martinson who was looking for bigger investments. She told him that she had developed an investment product with Liberty, and the returns made could finance not only her own business but also some of Du Toit's anticipated schemes. Du Toit did not know how this would actually work, but nonetheless approached clients to invest in the Multivest cash account held by Liberty. He advised them that because the money would be invested with Liberty, investments of the capital would be safe, but that the returns were not guaranteed.
- [9] In the course of looking for new clients Du Toit heard of Pretorius, whom he approached to invest with Liberty. A meeting was arranged between them, which was attended also by an associate of Pretorius, Mr de Goede. Pretorius, in the investment business himself, was sceptical of the large returns that might be gained. But he was interested in the prospect and thought that at least any capital he invested would be safe as it would be held in a cash account with Liberty, a major corporation.
- [10] At the meeting Pretorius told Du Toit that he had set up four family trusts for the purpose of making investments. He brought with him documents (including letters of authority from the Master) showing the existence of the trusts, including Seca and Tableau. He gave the impression to Du Toit that he wanted to invest about R10m because he thought that the more he said he had available the more information he would elicit from Du Toit and the more he would impress him. But he could not get sufficient information from Du Toit as to the

workings of the scheme.

- [11] Du Toit, in order to provide the information that Pretorius wanted, asked Martinson to set up a meeting with a representative from Liberty. Jaco Cloete, then a salaried broker consultant employed by Liberty in Bloemfontein, was asked to meet Du Toit in Cape Town. At their meeting in March 2002 Cloete explained the nature of various Liberty investment products and gave Du Toit application forms to be filled in by his clients.
- [12] Du Toit in turn advised Pretorius of what he had ascertained from Cloete, and assisted Pretorius in filling out application forms for Seca and Tableau. Pretorius also gave him two post-dated cheques, dated 4 April 2002, each in the sum of R2.5m, in favour of Multivest (the account number of which is written next to the payee's name), drawn by Mat Securities and marked 'not transferable'. Mat Securities is controlled by Pretorius, and entered into agreements of loan with each of the trusts. Du Toit then sent the originals of the application forms and copies of the post-dated cheques by courier to Cloete.
- [13] The two cheques were deposited by Du Toit's wife on 4 April 2002, and were paid into the Multivest account at the Standard Bank on 5 April. Stanlib does not deny that the funds were credited to the Multivest account. Prior to the deposit Cloete had sent a deposit form (M65) with an investment number on it. The Stanlib computer system was such that when an application was made on its computer system a number was generated and was reflected on a deposit form. The form sent to Du Toit, and which his wife used when depositing the cheques, was in fact for Henco, an entity unknown to Pretorius. I shall revert to the reason for the incorrect allocation.
- [14] The trial court found that it was 'abundantly clear' that 'the plaintiffs at all relevant times intended investing the amounts in question with the defendant' on the terms pleaded. Their intention was conveyed 'in unambiguous terms to Cloete on behalf of the defendant'. Their intention was made clear also in the application forms supplied to Du Toit by Cloete. 'The cheques were subsequently deposited on behalf of the plaintiffs into the account specifically designated by the defendant (in its own application forms) by means of a deposit slip generated by and supplied on behalf of the defendant. The funds were duly received by the defendant.'
- [15] While the oral agreement between the trusts and Stanlib had not been concluded on 4 April, as originally pleaded, the court found that the discussions between Du Toit and Cloete had 'culminated' in the deposit on 4 April of the two cheques into Stanlib's account. The trusts had amended their particulars of claim to read that the agreement was concluded 'op ongeveer 4 April 2002': this had expanded the ambit of the claim to include oral arrangements made prior to the deposit of the cheques. The contract pleaded had thus been established.

- [16] The full court, on the other hand, concluded that there was no oral contract as pleaded. I shall turn to this finding shortly, but shall deal first with what happened to the funds deposited on behalf of the trusts since it is germane to whether a contract was indeed concluded and to whether Cloete was Stanlib's agent and had the authority to accept the investment.
- [17] Multivest is a trust which owns matured second-hand endowment policies issued by the Liberty Group. When the policies mature Liberty buys them from the policy holders, sells them to Multivest and lends money against the policy. A nominal amount of R1 remains in the policy. When an investor wishes to invest in Multivest the money invested is paid into the policies thus repaying the loan. Each policy has an investment account that determines the value of the policy: the investment is placed in underlying portfolios of unit trusts or other equities.
- [18] The application forms completed by Pretorius and Du Toit reflect the nature of this investment, although the words 'Liberty Cash Account 100%' were written on the forms. Parts of the forms were deleted by Pretorius as being inapplicable: these parts set out the terms of various investment options.
- [19] The manner in which investment applications were processed was described by Mr Martin Rabe, a director of Stanlib, who was at the relevant time a divisional director of Stanlib responsible for legal compliance management and product development. Once an application to invest was received Stanlib used an on-line computer system to create a new policy for the investor. Certain insurance brokers were issued personal computer codes enabling them to load applications for new investments online. Cloete had no code since he was not a broker. But he used the codes of other brokers to load applications. In particular he worked with a brokerage known sometimes as 'Wesvaal Brokers' but also as 'Optimum'. He purported to give them technical support in the use of the computer programme for loading applications.
- [20] When an investment application was placed on the system online the system generated all the policy documents and allocated a sequential number to each policy. The documents had to be signed by the investor before the policy was actually issued. In this case, as I have said, Du Toit had taken application forms with the relevant policy numbers to Pretorius for signature. The original documents could not be found when the litigation ensued, but their existence was not placed in doubt. Part of the set of documents generated when the application was loaded was the M65 deposit form to which I have referred.
- [21] The problem with the system is that it allowed brokers and people in the position of Cloete to abuse their access to Stanlib's investments. In this case policies with serial numbers MV1007248 and MV1007251 were issued to Seca and Tableau on 1 March 2002, long before the application forms for them were completed and submitted. It also transpired that funds belonging to a different investor were allocated to each of the policies in Stanlib's books, at Cloete's request.

- [22] On 4 April 2002 Cloete, acting on the instruction of Martinson, among others, submitted an online application on behalf of Henco, part of Martinson's business, for a total investment of R5m. The policy number was MV1007455. The deposit form that was generated, and which reflected that number, was faxed to Mrs du Toit by Cloete, and the cheques deposited by her on behalf of the trusts were thus credited to the Henco policy. No deposits were ever made into the accounts created for Seca and Tableau. Yet Cloete instructed a finance clerk employed by Stanlib to allocate a sum of R11m, belonging unbeknown to her to a different investor, to the Seca and Tableau policies and to an account opened in the name of C-Max (du Toit's wife's company): R2.5m each to Seca and Tableau and R5m to C-Max. Those allocations were reversed when it was discovered that the funds had already been allocated to the correct investor. This reflects chaos in Stanlib's systems and demonstrates that Cloete did have access to the systems of Stanlib and was able to give instructions to its employee.
- [23] On 4 April 2002, the same date as the cheques drawn by Mat Securities for Seca and Tableau were deposited and credited to the Henco policy, Martinson ceded the policy to Saambou Bank (Saambou) trading as Planet Finance, as security for a loan advanced to one of her companies. Cloete also requested Du Toit to sign a document ceding the C-Max policy (which did not exist since no deposit had ever been made) to Saambou to secure Martinson's obligations.
- [24] Saambou brought an application in the Pretoria High Court claiming the proceeds of the Henco policy ceded to it by Martinson. Stanlib opposed the application on the basis that no payment had been made for the Henco policy. Pending the decision of that court Stanlib applied, during the course of the proceedings in this matter, for a stay of action, asserting that the same policy was being claimed in both this action and the application in the Pretoria High Court. The action in the Cape High Court was not stayed. We were advised that the Saambou litigation was settled. Rabe's evidence in the Saambou application is significant and I shall revert to it.
- [25] Du Toit testified that he had been in Johannesburg on 4 April when he was requested to sign certain documents by Cloete, the import of which he had not appreciated. He was told by Cloete that the cheques deposited had been incorrectly allocated to C-Max (he had never asked for an investment on C-Max's behalf), and the documents would rectify the allocation. He thus agreed to sign a deed of cession of a C-Max policy to Henco. Prior to this he also signed a deed of suretyship on behalf of C-Max in favour of Planet Finance, securing Martinson Financial Services (Pty) Ltd's obligations to it. The document is not dated. Du Toit said, however, that he had been telephoned by Cloete on 28 March 2002 and asked to sign certain documents, which Cloete faxed to Du Toit's parents' home in Groot Brak Rivier. He signed the documents and faxed them back to Cloete, he said (in a letter to Stanlib, to which I shall revert), 'as a gesture of goodwill' to Cloete.
- [26] Stanlib argues now that Du Toit's conduct evinces an intention to deposit the cheques drawn by Mat Securities on behalf of Seca and Tableau in the account of Henco. The inference to be drawn is that Du Toit was involved in the activities of Martinson: he had secured the

funding from Pretorius in order to invest on behalf of Henco, and had been party to ceding the Henco policy to Planet Finance on the same day as the cheques were deposited by his wife. The trial court rejected the argument, finding that it was not consonant with the evidence.

- [27] That evidence, apart from Du Toit's oral testimony, is in letters written by Du Toit to Stanlib demanding rectification of the allocation of the two amounts of R2.5m that should have been paid towards the Seca and Tableau policies. Having received no response from Cloete when he asked him to correct the allocations, Du Toit wrote to a senior official at Stanlib on 21 and 22 May 2002, and to Rabe, on 4 June 2002, explaining the errors that he had discovered and demanding that the correct amounts be allocated to Seca and Tableau. He explained the circumstances under which the deposits were made, and asked for the allocations to be corrected. He explained Cloete's role and the request to sign a cession as moneys had incorrectly been allocated to C-Max. He demanded rectification.
- [28] Pretorius too wrote to Stanlib demanding rectification of the allocations. He had received investment statements from Stanlib that were inconsistent with the investment applications he had made for the trusts. First, they were dated 26 March 2002, before the cheques had been deposited; secondly, they reflected much greater investments than he had made. (They reflected the investments of another entity incorrectly allocated by Stanlib.) He was angry and on discussing the matter with Du Toit was told that Du Toit had already sent the letters referred to to Stanlib.
- [29] Du Toit's letters to senior officials of Stanlib are not consistent with the conduct of a person who is attempting to cover up a conspiracy with Martinson. On the contrary, his reference to Cloete, who could have been asked at any time to explain his conduct and the incorrect allocations, in my view shows his honesty in this respect. If he had been party to any conspiracy with Martinson or Cloete he would hardly have alerted Stanlib to their conduct. This was the view of the trial judge in dealing with the credibility of Du Toit. He said:
- ‘ Shortly after 4 April, he started making enquiries on behalf of the plaintiffs as to when proof of investment could be expected. He repeatedly followed this up, not only telephonically, but also by letter. Whatever criticism may be levelled at Du Toit's astuteness as an investment adviser, I have not been persuaded that he has been dishonest in his dealings . . . ’
- The full court did not comment on this credibility finding, and in my view it is fully justified by the evidence referred to.
- [30] Before turning to the finding of the full court on the existence of a contract on certain terms between the parties I shall deal with the question of Cloete's authority to represent Stanlib in the conclusion of such a transaction, a question not considered by the full court in view of its finding that there was no contract. Stanlib denies that Cloete was its agent: he did not have the authority to represent it generally nor in entering into a contract with the trusts. He was a broker consultant, employed by Liberty, not Stanlib, who was permitted only to provide information and marketing materials on Liberty products, including Stanlib

investments. His role was to provide clarity on investments and procedures and to assist with administrative activities such as collecting investment application forms and sending them to Stanlib.

- [31] Stanlib denies also that Cloete had implied authority to represent it. But the facts suggest otherwise. Cloete had access to the computer systems that allowed for the making of online investment applications: although he did not have his own access code he was able to use the codes of other brokers as he did frequently when loading applications for Wesvaal (Optimum), the brokers for Martinson. And as a result of each application a policy would be created by Stanlib. Although denying Cloete's authority to do this, Stanlib relies on his authority and his conduct in loading the Henco application and creating its policy. Griessel J put the dilemma that Stanlib found itself in as follows:

‘In the final analysis, however, the defendant hoists itself with its own petard. In this case, the defendant resists the plaintiff's claims, essentially on the basis that the funds in question do not belong to Seca and Tableau, but to Henco. But who on behalf of the defendant created the Henco policy documents . . .; who generated the necessary deposit slip so that the Henco policy could be funded; who faxed the deposit slip to Du Toit; who followed up the matter and made repeated enquiries from Mrs du Toit as to when cheques would be deposited? The answer in each instance is Cloete. By the defendant's own tacit admission, therefore, Cloete had the necessary authority to represent the defendant in the transaction vis-à-vis Henco. Against this background, it is opportunistic (to put it no higher) on the part of the defendant to deny that Cloete had the requisite authority to represent it in concluding a similar contract with the plaintiffs.’

- [32] The trial court thus found, correctly in my view, that Cloete had the necessary authority to represent Stanlib in its dealings with the trusts. The question remains whether Du Toit on behalf of the trusts, and Cloete representing Stanlib, entered into an enforceable contract.
- [33] The full court considered that Pretorius's intention to invest in a cash account was inconsistent with the nature of the investment offered by Stanlib, which was in matured policies. Davis J pointed to the application forms as indicative of the nature of the investment, which contrasted with the handwritten words ‘Liberty Cash Account’ on the form. What Pretorius had in mind was an interest-bearing deposit, repayable on demand. There was thus, in the view of the learned judge, no oral agreement as pleaded: ‘The features of the alleged contract as pleaded are inconsistent with the nature and structure of the investment product in which it is alleged the payment of R5m was placed’.
- [34] It seems to me that the approach of the learned judge confuses the agreement to invest with the object of the investment. A simple example illustrates this. If A purchases a model X car from B, they are agreed on the object of the sale: the model X. The fact that A or B does not fully appreciate how the car operates does not mean that there is no consensus on what is being purchased. Thus Pretorius's imperfect understanding of how the investment worked does not mean that he did not intend to invest on behalf of the trusts in Stanlib's matured policies.

- [35] What was intended by the parties? Pretorius's evidence was clear: he wanted to place R2.5m on behalf of Seca and Tableau each in a secure investment (hence the importance of the Liberty reputation); to gain large returns, and at the minimum to be able to recover the capital on demand. The nature of the investment product provided by Stanlib is not at odds with this: as Rabe testified, had Henco not been involved, and had Pretorius asked for return of the capital, Stanlib would have paid it to him. Rabe conceded that if Henco was not the owner of the investment then Seca and Tableau would have been. He could not have done otherwise. In the application by Saambou for the proceeds of the Henco policy, Rabe had denied that Henco owned policy MV1007455, and referred to the cheques from Mat Securities that had been incorrectly allocated to the Henco policy. 'No deposit was accordingly received by [Stanlib] on behalf of Henco Trust and no such investment could accordingly have been ceded as security to anyone.'
- [36] Ironically, a trustee of Henco, Mr P H Ferreira, in deposing to the answering affidavit on behalf of Henco in the Saambou application for the proceeds of the policy, also denied that the funds held by Stanlib under MV1007455 belonged to Henco. And Cloete testified that had he received Du Toit's letter of 21 May he would have rectified the allocations in accordance with Du Toit's request.
- [37] If there were no agreement on or before 4 April 2002 why did Pretorius draw two cheques on the account of Mat Securities in favour of Multivest and give them to Du Toit to be deposited? The cheques were in favour of an investment vehicle admittedly owned by Stanlib. The probabilities are, overwhelmingly, that he intended to invest in the product of Stanlib that would yield a return and where the capital would be repayable on demand. And as I have shown, Rabe's stance was that had the policies been in the names of Seca and Tableau they would have been the owners and entitled to repayment.
- [38] The terms of the oral agreement were pleaded as follows:
- 'Die trusts verskaf elkeen 'n bedrag van R2 500 000 aan Verweerder om deur Verweerder in hul onderskeie name te belê in Multivest Corporate Investment Trust, die Liberty Groep se Geldmarkfonds.
- Die trusts is geregtig op die rente wat deur gemelde beleggings verdien word.
- Die beleggings sal opgeroep en aan die trusts terugbetaal word op aanvraag.'
- [39] In my view the contract pleaded by the appellants was established by the evidence. Du Toit and Cloete, on about 4 April, agreed on behalf of their respective principals that the trusts would together invest R5m in a Stanlib investment account. The capital would be repayable on demand. The trusts performed their obligations when the cheques drawn by Mat Securities were deposited into the Multivest account on 4 April. The trusts are thus entitled to return of their investments. The appeal against the decision of the full court must accordingly succeed.

[40] It is ordered that:

1 The appeal is upheld with costs including those occasioned by the employment of two counsel.

2 The order of the court below is set aside and is replaced with:

‘The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.’

C H Lewis

Judge of Appeal

Concur:

Scott JA

Brand JA

Combrinck JA

Theron AJA

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