

SOUTH AFRICA / JUDGMENT

P.W.R v Discovery Life and Another (17/18098) [2023]

ZAGPJHC 481 (15 May 2023)

[2023] ZAGPJHC 481

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

17/18098

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No. 17/18098

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

15.05.23

In the matter between:

PWR Plaintiff and DISCOVERY LIFE LIMITED First Defendant GENESIS ADVISORY SERVICES (PTY) LTD Second Defendant

Neutral citation: PWR v Discovery Life (17/18098) [2023] ZAGPJHC 481 (15 May 2023)

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

WILSON J:

1 The first defendant, Discovery, seeks leave to appeal against my judgment of 31 March 2023, in which I found that Discovery is liable to the plaintiff, PR, under an insurance policy PR held with it. PR's policy promised a "Capital Disability Benefit" in the event that PR became permanently incapable of working as a stockbroker. In my judgment, I held that PR did become permanently incapable of working as a stockbroker on or before 30 November 2015, when his policy lapsed. The policy lapsed because PR stopped paying his premiums. PR stopped paying his premiums

because he had been incarcerated for several months leading up to 30 November 2015. He was also suffering from what turned out to be a combination of post-traumatic stress disorder and bipolar mood disorder. He still suffers from those conditions today. They have incapacitated him, and prevented him from resuming what was, before his incarceration, a very successful career as a stockbroker.

2 Accordingly, PR made a claim under the policy. Discovery repudiated PR's claim on 25 August

2016. However, in my judgment, I found that Discovery was not entitled to repudiate PR's claim. It was instead required, under the policy, to satisfy itself of whether PR's incapacity had in fact become permanent before his policy lapsed on 30 November

2015. Had it done so, Discovery would have come to the conclusion that PR's incapacity was permanent on that date. Accordingly, Discovery was bound to honour PR's claim and to pay out the sum of over R25 million that it was agreed was due to PR if his claim was good.

The meaning of PR's policy with Discovery

3 At the outset of his argument on the application for leave to appeal, Mr. Mundell, who appeared for Discovery, accepted the correctness of the factual findings I made in my judgment. The mainstay of Mr. Mundell's submissions was that, on those accepted facts, I had misconstrued the meaning and application of PR's policy. In my judgment, I found that the insured event, which triggered Discovery's liability under the policy, was the onset of PR's permanent incapacity to act as a stockbroker. I also found, however, that Discovery was entitled to delay payment on the policy until Discovery could reasonably be satisfied that PR's incapacity was permanent on or before 30 November 2015, which is when PR's policy lapsed.

4 Mr. Mundell argued that this is not what the policy in fact means. What it means instead, he argued, is that the insured event is not the onset of PR's incapacity, but the existence of facts that would reasonably have satisfied Discovery of it. This interpretation was said to be consistent with what Mr. Mundell referred to as "the Miller principle": viz. that a claim of wrongful repudiation of an insurance policy of the nature that PR held should be evaluated on the basis of whether the repudiation was reasonable, not whether the repudiation was correct on the facts. Mr. Mundell derived "the Miller principle" from the Supreme Court of Appeal's judgment in *Southern Life Association Limited v Miller* 2005 JDR 0042 (SCA).

5 Mr. Mundell accepted that his take on "the Miller principle" in effect meant that PR could have become permanently incapable of acting as a stockbroker before the policy lapsed, but he would nonetheless have been disentitled to the benefits he bargained for under it merely because Discovery could not have been satisfied of his permanent incapacity until after the policy lapsed. In other words, according to Mr. Mundell, PR could suffer an incapacity, then lose the ability to pay his premiums because of that incapacity, and then not be able to claim under the policy because Discovery had not reasonably been able to satisfy itself of the permanence of the incapacity until after the policy lapsed.

6 The problem with this argument is that “the Miller principle” is not really a principle at all. It is a particular approach the Supreme Court of Appeal took to the particular policy at issue in the Miller case. Its application was entirely dependent on the text of the policy in that case, which specifically provided that the insurer’s

liability would only arise if and when the insurer was reasonably satisfied that the insured in that case was permanently incapacitated.

7 The text of the policy at issue in this case is different. It was common cause at trial that PR’s claim was made under “Category D” of clause 6.3 of the policy. Clause 6.3 is reassuringly headed “[a]n objective and fair system is used to assess the severity of the disability”. A claim under Category D in clause 6.1 “pays out 100% [of the benefit] once it is established, to the satisfaction of Discovery Life, that you are totally and permanently unable to perform your nominated occupation (as indicated on your policy schedule) due to sickness, injury, disease or surgery”. Were that the only provision of the policy bearing on Discovery’s liability, Mr. Mundell’s argument might be correct.

8 However, as Mr. Mundell accepted, the policy must be read as a whole in light of the circumstances under which it was taken out. That means that all the provisions of the policy that bear on the Discovery’s liability must be read together in order to characterise the insured event. As I held in my trial judgment, that meant that I had to consider the language in clause 6.1.1 of the policy, in which it was promised that the Capital Disability Benefit envisaged under Category D of clause 6.3 “pay[s]

a capital amount in the event of you being medically impaired to a degree that you are unlikely to be able to generate an income. This medical impairment may be permanent or temporary” (my emphasis). Mr. Mundell did not suggest that this provision does not mean exactly what it says. Nor did he suggest that I was entitled to ignore it.

9 The crisp question then, is, how the promise of a Capital Disability Benefit “in the event” of permanent medical impairment in clause 6.1.1 is to be read with the promise that the Benefit “pays out” once Discovery is satisfied that the permanent incapacity actually exists. If I were to hold, as Mr. Mundell urged, that all that matters is Discovery being satisfied of the incapacity, I would have to ignore the promise in clause 6.1.1 that the benefit accrues “in the event” of that incapacity.

10 In my trial judgment, I refused to take that approach. I read clause 6.1.1. and 6.3 together to mean that Discovery’s liability under the policy – the insured event – arose at the onset of the permanent incapacity, but that the duty to pay out the benefit was only triggered once Discovery could reasonably be satisfied that incapacity was permanent. That meant that the insured event in this case was the onset of PR’s permanent incapacity, on or before 30 November

2015. Discovery could delay paying out, however, until there were facts in existence from which a reasonable insurer would conclude that PR's incapacity was permanent. In this case, those facts came into existence no later than 1 May 2019. Mr. Mundell was unable to persuade me that there is any other sensible interpretation of the policy.

11 Mr. Mundell urged not just that Discovery's conduct should be evaluated through the lens of reasonableness, but that the very event insured under the policy is Discovery being reasonably satisfied that PR suffers from a permanent incapacity. However, to find that the insured event is Discovery being satisfied of the incapacity not only ignores the primary undertaking made in the policy – that the benefit is paid “in the event” of permanent incapacity – it also deprives the policy of much of its usefulness. It is inconceivable that anyone would take out a policy in circumstances where they could be denied benefits under it simply because they could not pay their premiums between the onset of the incapacity and Discovery satisfying itself that the incapacity was permanent. Mr. Mundell flatly asserted that this exactly what the policy means, but he was unable to point to anything in the text of the policy or the context in which it was taken out that could support such an interpretation.

12 In these circumstances, I cannot say that there is a reasonable prospect that a court of appeal might accept the interpretation that Discovery now urges – especially in circumstances where that interpretation was not spelt out in Discovery's pleadings.

The conduct of a reasonable insurer

13 Mr. Mundell further argued, as a separate ground of appeal, that, even if my interpretation of PR's policy with Discovery is correct, then I was wrong to find that Discovery had acted unreasonably when it repudiated PR's claim. Mr. Mundell argued that there was no information in existence at the point Discovery rejected PR's claim – on 25 August 2016 – that could have triggered what I characterised as its payment obligation under the policy.

14 That is true, but it misses the point. Discovery repudiated PR's claim on the basis that PR's policy had lapsed at the time he submitted his claim. It told PR that it had no information before it on which it could conclude that PR became permanently incapable of acting as a stockbroker on or before 30 November 2015. Critically, it also told PR that it would not consider any information he may in future submit that might allow it to draw that conclusion.

15 If the interpretation of the policy Mr. Mundell advanced in argument on the application for leave to appeal is correct, then Discovery might have been entitled to take that view.

16 But if the policy bears the meaning I ascribed to it in my trial judgment, then Discovery's refusal to consider information that might satisfy it of the onset of PR's incapacity before 30 November 2015 was plainly unreasonable, and at odds with its obligations under the policy. This is because Discovery was under a duty to consider whether the insured event – the onset of the incapacity – had taken place before the policy lapsed. In categorically refusing to consider any such information,

whenever it might come to light, Discovery could hardly be said to have acted reasonably.

17 In truth, then, the challenge to my conclusions about the reasonableness of Discovery's conduct depends on the correctness of the interpretation of the policy Mr. Mundell advanced. It is not a ground of appeal capable of standing on its own.

18 For that reason, it stands no prospects of success, because, as I have already concluded, the argument about the meaning of PR's policy stands no prospects of success.

An incomplete cause of action?

19 Mr. Mundell finally argued that, if my judgment is correct, then PR's cause of action was not complete when he launched his claim in May 2017. The argument, as I understand it, is that, because I had found that Discovery's duty to pay out under the policy was triggered, at the latest, on 1 May 2019, PR's cause of action could only have been completed then.

20 Again, however, this argument only follows if it is accepted that the duty to make payment under the policy and the insured event are the same thing. As I have already held, they are not. PR's cause of action was complete when Discovery repudiated his policy on 25 August 2016, and, in doing so, shut its eyes to the possibility of facts that might have satisfied it of PR's

permanent incapacity. On that date, Discovery repudiated both its duty to indemnify PR for the insured event, and its duty to satisfy

itself of whether and when the insured event happened. These breaches of Discovery's obligations under the policy were all PR needed to sue.

No prospects of success

21 I have set out and addressed Mr. Mundell's arguments at some length because they were not, in Mr. Mundell's words, propositions that Discovery had "fleshed out" at trial. The issue at the outset of the trial appeared to be whether PR's capacity was in fact permanent on or before 30 November

2015. Once the evidence showed that PR's incapacity was permanent by that date, Discovery changed tack and argued that what mattered was not PR's objective incapacity, but the reasonableness of Discovery's subjective assessment of that incapacity. In the face of my conclusion that this argument was incompatible with the text of the policy, Discovery sought, in argument on leave to appeal, to advance a novel interpretation of the policy purportedly based on "the Miller principle", but in fact going further than anything that was said in Miller. As I have concluded, that interpretation is untenable.

22 The fact that Discovery's case has pivoted at every critical stage of the proceedings before me does not of course mean that the arguments it has advanced are necessarily wrong. But I do not think that the inherent weakness of Discovery's case can be entirely divorced from its apparently improvised nature.

23 In any event, for the reasons I have given in my trial judgment, and in this judgment, Discovery's arguments stand no prospect of success on appeal.

No other compelling reason to grant leave to appeal

24 Mr. Mundell finally asked me to accept that leave to appeal should be granted because my trial judgment will have a wide-ranging impact on the insurance industry. The proposition seemed to be that I had departed from "the Miller principle", thereby interfering with the basis on which Discovery, and other insurers, have arranged to underwrite their policies.

25 Mr. Mundell accepted that there was no evidence before me that would allow me to assess that proposition. In any event, if, as I have found, the Miller principle does not apply to this case, then I have not really departed from it. What has instead happened is that Discovery has conducted itself in a manner inconsistent with the objective meaning of its own policy. If that is so, then the impact of my judgment is only on Discovery, and only on claims made under PR's policy of broadly the nature PR made. I cannot accept that this unspecified impact on Discovery is compelling enough to ask the Supreme Court of Appeal or a Full Bench of this Court to entertain an appeal that otherwise lacks prospects of success.

The variation application

26 At the hearing of the application for leave to appeal, PR applied to vary and expand the costs order in my trial judgment. I awarded PR his costs, but I did not specifically refer to a series of expert fees and costs associated with pressing his claim. Apparently, the taxing master in this Division requires a greater level of specificity than I provided in my order. Whether or not that specificity is really required as a matter of law is beside the point. The true intent of my order was that PR should be able to claim his expert costs. There is no reason why I should not spell that out.

27 Discovery did not oppose the application to vary my order. It will be granted.

Order

28 For all these reasons –

28.1 The application for leave to appeal is dismissed with costs, including the costs of one senior counsel.

28.2 Paragraph 52.3 of my judgment dated 31 March 2023 is varied by the addition, immediately after the words "the costs of one senior counsel." of the words "These costs will also include the qualifying and attendance fees and expenses of the plaintiff's expert witnesses, Dr Panieri-Peter and Ms Hala Abu Al-Haj".

28.3 Each party will pay their own costs in the variation application.

S D J WILSON

Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 15 May 2023.

HEARD ON: 12 May 2023

DECIDED ON: 15 May 2023

For the Plaintiff: J Peter SC Instructed by Martini-Patlansky Attorneys For the First Defendant: A Mundell SC Instructed by Keith Sutcliffe and Associates

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