

SOUTH AFRICA / JUDGMENT

Saaiman N.O and Another v Suidwes Landbou (Pty) Ltd (KP177/2018) [2023] ZANWHC 87 (23 June 2023) [2023] ZANWHC 87

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen

CASE / FILE NUMBER

KP177/2018

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NO: KP177/2018

Reportable:

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Circulate to Judges:

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Magistrates:

YES / NO
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Magistrates:

YES / NO

In the matter between: ADRIAAN
JACOBUS SAAIMAN N.O.
First Plaintiff
MARIA
ELIZABETH JOUBERT N.O.
Second Plaintiff
and
SUIDWES
LANDBOU (PTY) LTD
Defendant

Delivered: This judgment was handed down electronically by
circulation to the parties' representatives by email. The date
and time for
hand-down is deemed to be 10h00AM on 23 June 2023.
ORDER
In the result, the

following order is made: The plaintiffs'
main and alternative claims are dismissed with costs on an attorney
client scale.

JUDGMENT

PETERSEN J

Introduction

[1] This is a defended action in which the plaintiffs' in their representative capacity (hereinafter referred to as the Saaiman Trust) claim from the defendant (Suidwes Landbou) damages formulated as a main and alternative claim for an alleged breach of contract alternatively in delict.

[2] The Saaiman Trust's main and alternative claims are formulated as follows:

"PLAINTIFFS' MAIN CLAIM:

7.

7.1 On or about 20 May 2014, and at Leeudoringstad, the Trust and Suidwes Landbou entered into an oral contract (the contract).

7.2 Upon entering into the contract:

7.2.1 the Trust was duly represented by the then trustees thereof, namely Mariëtte Eloize Saaiman (Mariëtte Saaiman) and Adriaan Saaiman;

7.2.2 Suidwes Landbou was duly represented by Peet Struwig and/or Gerhard Booyesen.

8. In terms of the contract it was agreed that:

8.1 The Trust will, in terms of the scheme, insure the life of Mariëtte Saaiman with Liberty Group Ltd (Liberty) for the amount of R 4 500 000.00 (the intended policy);

8.2 Suidwes Landbou will pay the annual contribution payable to Liberty in respect of the intended policy on or before 1 June of each subsequent year;

8.3 Suidwes Landbou will recover the annual contribution paid by it to Liberty in respect of the intended policy by debiting the Trust's current account with the amount thus paid;

8.4 The Trust will cede the contemplated policy to Suidwes Landbou in securitatem debiti;

8.5 The contemplated policy will only be cancelled in terms of the provisions thereof.

It was in the contemplation of the parties at the time of the conclusion of the contract that the Trust would suffer damages for which Suidwes Landbou would be liable to it, should Suidwes Landbou fail to comply with its obligations in terms of the contract.

9. Paragraph 9 omitted or skipped in the numbering in the particulars of claim.

10. The plaintiffs' fulfilled their obligations in terms of the contract in that the Trust:

10.1 Insured the life of Mariëtte Saaiman with Liberty for the amount of R 4 500 000.00 under cover of policy number 5[...]...;

10.2 ceded the policy to Suidwes Landbou in securitatem debiti.

11. Suidwes Landbou:

11.1 duly paid the initial contribution in the amount of R36 047.45 that was payable to Liberty in respect of the policy on or before 1 June 2015;

11.2 recovered the aforesaid amount of R36 047.45 by debiting the Trust's aforementioned current account.

12. Suidwes Landbou, however, breached the contract in that it failed to pay the annual contribution that was payable to Liberty in terms of the policy on or before 1 June 2016.

13. The policy lapsed on 30 June 2016 due to the non-payment of the annual contribution that was payable on or before 1 June 2016.

14. Mariëtte Saaiman passed away on 5 November 2017.

15. On the date of Mariëtte Saaiman's death:

15.1 The policy would have amounted to R4 820 512.50;

15.2 The Trust owed Suidwes Landbou the total amounted to R5 279 956.24 in respect of its accounts.

16. As a result of Suidwes Landbou's aforesaid breach of contract the Trust suffered damages in the amount of R5 279 956.24, alternatively, in the amount of R4 820 512.50 in that the Trust's accounts were not settled by the credit life insurance scheme upon the death of Mariëtte Saaiman.
17. The aforesaid damages flow naturally from the aforesaid breach of contract by Suidwes Landbou, alternatively, were in contemplation of the parties at the time of the contract as likely to result therefrom.
18. In the premises Suidwes Landbou is liable to the plaintiffs in the amount of R5 279 956.24, alternatively, in the amount of R4 820 512.50.

"PLAINTIFFS' ALTERNATIVE CLAIM:

19. Alternatively to paragraphs 7-10 and 16-18 above, and in the vent of it being found that the contract was not concluded, the plaintiffs' plead as is set out below.
 20. The scheme was intended to be to the mutual benefit of Suidwes Landbou as well as its members, including the Trust.
 21. In addition to what is stated in pargarph 6 above, Suidwes Landbou would in terms of the scheme:
 - 21.1 pay the annual contributions payable to Liberty in respect of the life policy concerned;
 - 21.2 recover the annual contribution paid by it to Liberty by debiting the current account of the member concerned with the amount thus paid.
 22. During or about 2014 Suidwes Landbou invited its members, including the Trust, to partake in the scheme.
 23. On or about 20 May 2014, and at Leeudoringstad:
 - 23.1 Mariëtte Saaiman and Adriaan Saaiman, the then trustees of the Trust, informed Suidwes Landbou, duly represented by Peet Struwig and/or Gerhard Booysen, that the Trust:
 - 23.1.1 accepts the aforesaid invitation;
 - 23.1.2 wishes to, in terms of the scheme, insure the life of Mariëtte Saaiman.
 - 23.2 Suidwes Landbou, duly represented as aforesaid, informed the aforesaid then trustees of the Trust that it accepts the Trust as a participant in the scheme, provided that it:
 - 24.1.3.1 insures the life of Mariëtte Saaiman with Liberty for the amount of R500 000.00;
 - 24.1.3.2 cedes the aforesaid intended policy to Suidwes Landbou in securitatem debiti.
- (*Incorrect sequential numbering extracted from particulars of claim.)
24. No paragraph 24 exists.

25. The Trust complied with both the foresaid conditions.
26. In the premises Suidwes Landbou owed the Trust a duty of care to ensure that the policy remains operative during the lifetime of Mariëtte Saaiman by paying the annual contributions payable to Liberty in respect thereof timeously.
27. Suidwes Landbou:
 - 27.1 Duly paid the initial annual contribution in the amount of R37 047.45 that was payable to Liberty in respect of the policy on or before 1 June 2015.
 - 27.2 recovered the aforesaid amount of R36 047.45 by debiting the Trust's aforesaid current account.
28. Suidwes Landbou, however, breached its aforesaid legal duty in that it wrongfully and intentionally, alternatively, negligently, failed to pay the annual contribution that was payable to Liberty in terms of the policy on or before 1 June 2016.
29. In acting as aforesaid, Suidwes Landbou was negligent in one or more or all of the following respects:
 - 29.1 it failed to pay the annual contribution that was payable to Liberty in terms of the policy on or before 1 June 2016, whilst it could and should have done so;
 - 29.2 it failed to notify the Trust that the annual contribution that was payable on or before 1 June 2016 was not paid by it, whilst it could and should have done so;
 - 29.3 it failed to react to the notice of non-payment that was issued by Liberty, whilst it could and should have done so;
 - 29.4 it failed to take the reasonable steps that were necessary to ensure that the life of Mariëtte Saaiman remains covered by the policy, alternatively, by the scheme, whilst it could and should have done so;
 - 29.5 it, in general, failed to ensure that the life of Mariëtte Saaiman remains covered by the policy, alternatively, by the scheme, whilst it could and should have done so.
30. Solely as a result of the fact that Suidwes Landbou breached its legal duty as foresaid:
 - 30.1 the policy lapsed on 30 June 2016 due to the non-payment of the annual contribution that was payable by Suidwes Landbou in respect of thereof on or before 1 June 2016;
 - 30.2 the Trust suffered damages in the amount of R5 279 956.24, alternatively, in the amount of R4 820 512.50.
31. The aforesaid damages of R5 279 956.24, alternatively R4 820 512.50 flows from the fact that:
 - 31.1 Mariëtte Saaiman passed away on 5 November 2017;
 - 31.2 the policy was no longer in force on the date of Mariëtte Saaiman's death;

31.3 the sum of the outstanding balance due to Suidwes Landbou by the Trust in respect of its accounts on the date of Mariëtte Saaiman's death were not settled by the credit life insurance scheme upon the death of Mariëtte Saaiman.

31.4 the outstanding amount owed by the Trust to Suidwes Landbou in respect of its accounts on the date of Mariëtte Saaiman's death was R5 279 956.24;

31.5 the policy would have amounted to R4 820 512.50 on the date of Mariëtte Saaiman's death.

32. In the premises Suidwes Landbou is liable to pay the Trust the amount of R5 279 956.24, alternatively, the amount of R4 820 512.50."

The

issues

- [3] The issues are succinctly encapsulated in the plea of Suidwes Landbou in which it traverses the *facta probanda* relied on in the Saaiman Trust's particulars of claim. The particulars of claim sets out the background to the *causa* which is central to the adjudication of the dispute between the parties. Suidwes Landbou implemented a credit life insurance scheme for its members. The Saaiman Trust was invited to participate in the credit life insurance scheme, but it declined the invitation to participate in the credit life insurance scheme for its members.
- [4] In terms of clause 16 of the general terms and conditions of the agreement between the parties, the Saaiman Trust was specifically obliged to maintain sufficient life insurance on the life of Mariëtte Saaiman to secure its liability to Suidwes Landbou (clause 16.1). The Saaiman Trust having declined to participate in the credit life insurance scheme of Suidwes Landbou was obligated to cede an individual life policy to Suidwes Landbou (clause 16.3). The premiums payable in respect of the ceded life policy would be for the account of the Saaiman Trust, but would be paid by the defendant on behalf of the Trust, when same became due and payable. The premiums would then be recovered from the Saaiman Trust by debiting the premiums paid against the Trust's account in Suidwes Landbou's books of account (clause 16.4). Suidwes Landbou was indemnified against any liability whatsoever to the Saaiman Trust in the event of Suidwes Landbou for whatever reason failing to make payment of premiums due in terms of any life insurance policy (clause 16.5). The Saaiman Trust in fact insured the life of Mariëtte Saaiman with the insurance house Liberty and ceded the policy to Suidwes Landbou.
- [5] The premiums paid by Suidwes Landbou would only be paid by it in terms of clause 16.4 if there was sufficient credit available to the Saaiman Trust in terms of the credit agreements concluded between the Trust and Suidwes Landbou. In 2015, Liberty, being the Saaiman Trust's insurance broker requested payment of the premium from Suidwes Landbou on or before 1 June 2015 to which it acceded and accordingly as per its agreement with the Trust debited the trust's

current account with the premium amount paid by Suidwes Landbou.

- [6] Suidwes Landbou admits that it did not pay the insurance premium requested by Liberty in 2016 which was due and payable on or before 1 June 2016. Suidwes Landbou specifically pleads that the Saaiman Trust had no further credit available to it in terms of its agreement with it and was in arrears with its obligations against Suidwes Landbou. As a result, the payment of the insurance premium could not be debited to any of the Trust's accounts with Suidwes Landbou. Thus, Suidwes Landbou had no obligation to pay the premium to Liberty. Suidwes Landbou asserts that it was indemnified against any liability flowing from any non-payment of the premiums by itself.
- [7] Suidwes Landbou pleads that it advised the Saaiman Trust of the lapsing of the life policy with Liberty on 27 July 2016, with the Trust taking no steps to reinstate the policy. The Saaiman Trust maintains that it only became aware of the cancellation of the policy when it wanted to claim against the policy when the insured Mariëtte Saaiman passed away on 5 November 2017. Suidwes Landbou admits the date of death of Mariëtte Saaiman and that the policy was no longer in force at the time of her death.
- [8] Suidwes Landbou accordingly denies that the Saaiman Trust suffered damages as a result its failure to pay the premiums in respect of the Liberty life policy alternatively as a result of the Saaiman Trust's failure to renew the policy upon being advised of its lapsing in July 2016.
- [9] Suidwes Landbou denies that the Saaiman Trust participated in its group scheme as the Liberty life policy was not a policy governed by the principles applicable to its scheme. Suidwes Landbou further denies that there was any legal duty on it to pay the premiums due on the Liberty life policy or that it was negligent in any other manner.

Summary of the relevant evidence

- [10] The Saaiman Trust relied on the single evidence of the first plaintiff, Adriaan Jacobus Saaiman (Mr Saaiman). At the close of the case for the plaintiff, Suidwes Landbou applied for absolution from the instance, which application was dismissed by this Court with costs. Suidwes Landbou subsequently when the action was enrolled following the dismissal of its application for absolution from the instance, closed its case.
- [11] Mr Saaiman testified that he is a trustee of the Saaiman Trust. In 2014 the Saaiman Trust applied for credit from Suidwes Landbou when himself, his deceased mother Mariëtte Saaiman and a certain Pretorius who is now also deceased were Trustees of the Saaiman Trust. Mr Saaiman, a certain Peet Struwig (broker at Suidwes Landbou), Bernard Van Zyl (a financial advisor) and Mariëtte Saaiman were present during the discussions about the credit loan application.
- [12] Mr Saaiman agreed that Mr Struwig informed them that one of the conditions for the grant of the credit loan was a life insurance policy. Mr Struwig explained the difference between two options, either credit life insurance or life insurance, with the latter being the cheaper option. Mr Saaiman understood the difference between the two to mean that the Credit Life

insurance worked on the debt on the Trust account whilst the Life Insurance was a once off payment. The Credit Life insurance was a product of Suidwes whilst Life Insurance would be taken with Liberty. The Trustees opted for the Life Policy

with Liberty with premiums payable annually. The policy was to be ceded to Suidwes to cover the Trust's indebtedness to it. It was agreed that Suidwes would pay the annual premiums to Liberty on behalf of the Trust.

[13] When the Saaiman Trust applied for the credit facility in 2014 from Suidwes Landbou it was approved and the Trust could utilize the funds to purchase seed, fertilisers, diesel and pesticides as surety for the harvest. The loan would be repaid when the harvest was delivered. Suidwes Landbou insisted on paying the life policy knowing that it was in the name of the Trust. The premium was for the account of the Saaiman Family Trust. When the first premium was paid it would be recovered once the harvest was delivered. The first premium was payable on 31 July 2014 and the second premium a year later on 31 July 2015. The 2016 premium was not paid and the life policy was cancelled by Liberty. Mrs Mariëtte Saaiman, whose life was covered under the policy passed away on 5 November 2017, and the Trust learnt of the cancellation of the policy a few days thereafter. There was resultantly no cover for the Saaiman Family Trust and by implication for the loan. The policy cover was for R4.8 million and

covered the life of Mrs Mariëtte Saaiman, as this option was cheaper than insuring both the Mrs Saaiman's life and that of Mr Saaiman.

[14] The sequence of events leading to the cancellation of the policy was traversed as follows in the evidence of Mr Saaiman. On 25 June 2016, a letter was addressed by Liberty to Suidwes Landbou, which loosely translated reads as follows: "Change of action on policy ceded to yourselves. The policy holder requested us to effect a change to the policy or we have taken an action which could influence the policy. Since the policy is ceded to yourselves, we must keep you updated. A copy of a letter sent to the policy holder is attached." The letter was addressed to P.O. Box 5[...] Leeudoringstad, Suidwes Landbou's registered address. The letter addressed to the Saaiman Trust on the same date was sent to its registered address at P.O. Box 2[...] Boshoff. The letter addressed to the Saaiman Trust loosely translated reads as follows: "We have not received a premium on the policy. This letter explains how outstanding premiums could affect your policy benefits and how the premiums can be kept up to date. Thank you if you have already paid the amount. In that event please ignore this letter. Outstanding premiums affect your policy benefits. Your policy is designed to provide financial cover against unexpected incidents. It is important that you do not lose this valuable cover as a result of arrear premiums. As at date of this letter we have not received the premium of R38 752.79 as no cash payment has been made." According to Mr Saaiman, the first time he saw the aforesaid correspondence was when he consulted with his attorney early in 2018.

- [15] Mr Saaiman maintains that after the cancellation of the policy in 2016, Suidwes Landbou continued providing credit to the Trust and did not advise them that the policy had lapsed or that the Trust did not have sufficient life cover to cover its indebtedness to Suidwes Landbou. Mr Saaiman further disavows receipt of the latter addressed to the Trust by Liberty at the postbox number provided by the Trust.
- [16] The following relevant evidence emanated from the detailed and protracted cross examination of Mr Saaiman. The particulars of claim speak to the main and alternative claims being based on an oral agreement, which Counsel for the plaintiffs' belatedly sought to relegate to an oversight in typifying the nature of the agreement. It is telling that Mr Saaiman made a damning concession that no oral contract existed outside of the written agreement.
- [17] The loan agreement was entered into on 28 January 2014 for an amount of R2.4 million which was paid to the Saaiman Family Trust. With interest, the total amount repayable was R4.7 million. The first insurance premium on the life insurance policy with Liberty was due on 30 September 2014, which the Trust paid. An Addendum was signed on 28 January 2014 between Suidwes Landbou and the Saaiman Trust which was to form part of the agreement. Incorporated in this Addendum was an agreement that the Saaiman Trust would pay the premiums to Liberty for the life insurance policy it opted for. Whilst Mr Saaiman sought to distance the Trust from this agreement, maintaining that Suidwes Landbou was responsible for payment of the premium and not the Trust, he agreed that the wording of the agreement was not incorrect. That, however, he still persisted in was not the agreement between the Trust and Suidwes Landbou. Ultimately, he conceded that the contract was correct in its wording and that the Trust was responsible for the payment of the premium.
- [18] Paragraph 16.5 of the Addendum was read to Mr Saaiman, who indicated that he did not understand what "vrywaar" or "indemnify" meant. It was explained to him that it meant Suidwes Landbou was indemnified from any damages or claims pursuant to the payment of the insurance policy if the insurance policy did not pay out, which he elected not to comment on. Later he volunteered that he understood the import of the the clause.
- [19] Clause 25.5 of the Addendum was pointed out to Mr Saaiman which provides that the agreement as described in clauses 1 and 2 constitutes the full agreement between the parties as agreed to between them. The non-variation clause which provides that that no variation of the agreement would be binding unless written and signed by both parties was read to Mr Saaiman which he agreed with. He similarly agreed that terms which were not embodied in the agreement would not form part of the agreement.
- [20] Later when confronted with the main agreement with similar clauses inclusive of a non-variation clause and indemnification clause, Mr Saaiman sought to avoid all questions in this regard and relegated the provision of an answer to these pressing questions to his legal team.

- [21] Mr Saaiman was painstakingly taken through the Saaiman Family Trust's breach of the loan agreement when it exceeded its credit limit. He was very evasive by maintaining that the Trust had not exceeded its credit limit in breach of the agreement. An exercise was embarked upon to demonstrate to Mr Saaiman the breach of the loan agreement by the Trust when it exceeded its credit limit. At this point he readily conceded that the Trust had breached the agreement and that Suidwes Landbou was entitled to suspend service of the agreement. To this end, it was highlighted to Mr Saaiman that suspension of service of the agreement would include making payment of the premiums in terms of the policy. He conceded this assertion.
- [22] Mr Saaiman at this stage of the cross examination made a very damning concession that Suidwes Landbou did not have to make payment of the premium. He, however, remained adamant this concession did not mean that he was conceding the fact that the Saaiman Trust had no case.
- [23] Mr Saaiman was next taken to the particulars of claim drafted by his attorney in consultation with himself and his brother as representatives of the Trust. In passing he was asked how his attorney came to be in possession of the Liberty letter which he claims was not received by the Trust. According to Mr Saaiman his attorney requested the letter from Liberty. Mr Saaiman was asked to comment on paragraph 12 of the particulars of claim which reads that: "Suidwes Landbou however breached the contract in that it failed to pay the annual contribution that was payable to liberty in terms of the policy on or before 1 June 2016.", in light of his concession that Suidwes Landbou did not breach the contract, which is contrary to the *facta probanda* set out in paragraph 12 of the particulars of claim. He still maintained that the Trust had a case.
- [24] When confronted with paragraph 15.1 and 15.2 of the particulars of claim which reads that: "On the date of Mariette Saaiman's death; 15.1. the policy would have amounted to R4 820 512.50. 15.2. The Trust owed Suidwes Landbou the total amount to R5 279 956.24 in respect of its accounts", Mr Saaiman once again conceded that Suidwes Landbou did not breach the agreement as alleged and that the amounts claimed, being damages in the amount of some R5 000 000.00, or in the alternative, in the amount of R4 800 00.00, was not damages suffered by the Saaiman Trust.
- [25] The aforesaid was elaborated upon with Mr Saaiman as follows. It was put to Mr Saaiman that the reason for the alleged damages was the fact that the Trust's accounts were not settled by the credit life insurance scheme and which the Saaiman Trust itself had not settled. Mr Saaiman maintained that the accounts/debt would have been settled had the life policy paid out. As to who would be suffering damages as a result of the policy not paying out, Mr Saaiman maintained that both the Saaiman Trust and Suidwes Landbou would be suffering damages.

[26] On whether there was any basis to claim R5 279 956.24 alternatively R4 820 512.50 from Suidwes Landbou, Mr Saaiman maintained that if he had those amounts he would have settled the debt held with Suidwes Landbou and his books would have been clean. Mr Saaiman was, however at pains to explain how the Saaiman Trust was entitled to the proceeds of the policy and suffered a loss if they owed Suidwes Landbou the amounts it purports to claim, when the policy was ceded to it.

The interpretation of the agreement between the parties

[27] The Saaiman Trust in its particulars of claim relies on an oral agreement between the parties which Mr Saaiman disavowed in his evidence. No application was made or persisted in for an amendment of its particulars of claim to rely on a written agreement. The Saaiman Trust belatedly in its heads of argument downplay its reliance on an oral agreement by relegating same to a mere incorrect labelling or typifying of the agreement as an oral agreement. The evidence of Mr Saaiman which constitutes the *facta probantia* in support of the *facta probanda* in the particulars of claim, however unequivocally speaks to an oral agreement as the underlying cause for the Liberty policy. The Saaiman Trust emphatically pleads that: "...on or about 20 May 2014, and at Leeudoringstad, the Trust Suidwes Landbou entered into an oral agreement (the contract)."

[28] An issue inextricably linked to the evidence of Mr Saaiman and the *facta probanda* on the cause of action is the cross examination of Mr Saaiman and his understanding of the written agreement between the parties. The Saaiman Trust in this regard places much reliance on the ratio in *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC* (44/2014)

[2015] ZASCA 62 (17 April 2015), where Mpati P said:

"[11] As to the evidence of the witnesses on what they believed or thought the agreement meant, it needs be remembered that we are here dealing with the interpretation of a contract. Consequently, what the parties and their witnesses ex post facto think or believe regarding the meaning to be attached to the clauses of the agreement, and thus what their intention was, is of no assistance in the exercise. In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012

(4) SA 593; [2012] ZASCA 13 (SCA) this court (per Wallis JA) said this with regard to the construction of a document:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.'

And further:

‘Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would I use its counterpart in a contractual setting, “the intention of the contracting parties”, because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself.’ (Footnotes omitted.)

[12] What was said in Endumeni Municipality regarding the expression ‘the intention of the parties’ is in line with what was expressed by Greenberg JA more than six decades ago in *Worman v Hughes & others* 1948

(3) SA 495 (A) at 505, namely:

‘It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties’ intention was, but what the language used in the contract means . . . ’

It follows that the testimony of the parties to a written agreement as to what either of them may have had in mind at the time of the conclusion of the agreement is irrelevant for purposes of ascertaining the meaning of the words used in a particular clause.”

[29] The following sentiments expressed, commencing at paragraph 7 and leading into paragraph 8 of *Shakawa* finds equal applicability to the peculiar facts and circumstances of the present action:

“[7] Imprefed (Pty) Ltd v National Transport Commission 1993

(3) SA 94 (A) at 107C-110A...

[8] In that case this court said:

‘At the outset it need hardly be stressed that:

“The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.”

(*Durbach v Fairway Hotel Ltd* 1949

(3) SA 1081 (SR) at 1082.)

This fundamental principle is similarly stressed in *Odgers’ Principles of Pleading and Practice in Civil Actions in the High Court of Justice* 22nd ed at 113:

“The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.”

The degree of precision obviously depends on the circumstances of each case. More is required when claims are based upon the provisions of a detailed and complex contract, in which numerous clauses confer the right to additional payment in differing circumstances

- a contract, moreover, in which such payments are to be determined, calculated and claimed in different ways depending on which clause is relied upon. In addition, as already pointed out, the contractor may choose to base the cause of action on some common law ground (breach of contract, enrichment or delict) quite unrelated to any additional payments for which the contract provides. Particularly in this context, it goes without saying that a pleading ought not to be positively misleading by referring explicitly to certain clauses of the contract as identifying the cause of action when another is intended or will at some stage – in this case at the last possible moment – be relied upon. As it was put by Milne J in *Kali v Incorporated General Insurances Ltd* 1976

(2) SA 179 (D) at 182A:

“... a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.”

[30] In my view, the reliance by the Saaiman Trust on paragraphs 11 and 12 of *Shakawa* does not find applicability to the peculiar circumstances of the present action. The reason is elementary; the issue is not predicated

on a question of interpretation of a complex agreement. In fact, the issue is limited to clauses in the agreement which the Saaiman Trust agreed to, which is clear and unequivocal in its reading. More importantly, the import of the clauses gauged from the evidence of Mr Saaiman is that it was well understood by him. There is accordingly no need for this Court to embark on the process of interpretation

enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012

(4) SA 593; [2012] ZASCA 13 (SCA). Mr Saaiman conceded under cross examination that the written agreement was the only agreement entered into between the parties

which constituted the full agreement. The written agreement contained a non-variation clause and made no provision for any oral agreement.

Discussion

[31] I turn to the reliance on an oral agreement as asserted in the particulars of claim. It follows axiomatically that the Saaiman Trust in relying on an oral agreement in its particulars of claim which it claims Suidwes Landbou breached in circumstances where the written agreement made no provision for any oral agreement and where Mr Saaiman readily conceded that there was in fact no oral agreement, that Suidwes Landbou was not in breach of any agreement. No damages could consequently have been suffered by the Saaiman Trust. Laid bare, this is a textbook example where the *facta probantia* inherent in the evidence of Mr Saaiman does not prove the *facta probanda* pleaded in the particulars of

claim.

[32] The Saaiman Trust's case in any event fails on the written agreement. On both scores, this should signal the end of the matter for the Saaiman Trust as it has failed to satisfy the burden of proving its case on a balance of probabilities. I extrapolate on the written agreement below.

[33] The case for the Saaiman Trust is bedeviled with shortcomings predicated on an interpretation of the written agreement. Mr Saaiman's concessions in that regard all but concedes the case for the plaintiffs'. I turn to highlight the shortcomings with brevity.

Clause 16 of the Agreement

[34] Clause 16 of the Agreement implicates the life insurance policy and the rights and obligations attached thereto. Loosely translated, the relevant portions thereof reads as follows:

"16 COMPULSORY INSURANCE

16.1 The client is obliged to take out the following insurance and to maintain same for as long as this agreement is in effect, and if not provided by Suidwes to cede same to Suidwes:

16.1.1 Life insurance which covers the extent of the loan;

16.1.2 ...

16.2 ...

16.3 The client has a choice in respect of life insurance to:

16.3.1 participate in the group credit life insurance scheme of Suidwes (if the client qualifies to participate in the scheme);

16.3.2 or to cede to Suidwes an individual life policy which provides the same cover as the group credit life insurance scheme.

16.4 Any premiums payable, whether as a result of the client's participation in the group credit life insurance scheme of Suidwes or in respect of an individual life policy ceded to Suidwes, is for the account of the client and will be paid by Suidwes on behalf of the client, when such premiums are payable, and will be recovered from the client by debiting such premiums against the client's account in Suidwes books.

16.5 The client indemnifies Suidwes against any liability whatsoever in respect of the client, his estate, his legal successors or any other person if Suidwes for any reason whatsoever does not secure the credit life insurance or if the insurance company for any reason whatsoever refuses or fails to make payment in terms of the insurance.

16.6...

16.7...”

- [35] It is clear that the obligation to secure insurance vested with the Saaiman Trust which it was obliged to cede to Suidwes Landbou. The Saaiman Trust was further obliged to ensure that it remained in force and maintained for the duration of the agreement with Suidwes Landbou.
- [36] The most telling clause of the agreement is clause 16.5 which indemnifies Suidwes Landbou from all liability for any reason whatsoever, if Suidwes Landbou does not acquire the credit life insurance or if the insurance company (Liberty) for any reason whatsoever refuses or fails to make payment in terms of the insurance. In re-examination, an attempt was made to introduce an argument that there is a difference between credit life insurance which is covered under the indemnification clause and life insurance which the Saaiman Trust opted for.

The National Credit Act 34 of 2005 (the NCA): Life Insurance

- [37] A belated argument raised on behalf of the Saaiman Trust, seemingly as a matter of last resort, is predicated on the NCA. A distinction is sought to be drawn between life insurance and credit life insurance, so as to avoid the consequences of clause 16. To dispel this argument regard must be had to the applicable definitions of credit insurance and credit life insurance in the NCA. The NCA defines credit insurance as follows:

“means an agreement between an insurer, on the one hand, and a credit provider or a consumer or both, on the other hand, in terms of which the insurer agrees to pay a benefit upon the occurrence of a specified contingency, primarily for the purpose of satisfying all or part of the consumer’s liability to the credit provider on a credit agreement as at the time that the specified contingency

occurs, and includes –

- (a) A credit life insurance agreement....”

Credit Life Insurance in turn is defined as follows:

“includes cover payable in the event of a consumer’s death, disability, terminal illness, unemployment, or other insurable risk that is likely to impair the consumer’s ability to earn an income or meet the obligations under a credit agreement.”

- [38] It is common cause that the parties entered into a credit agreement. Suidwes Landbou sought protection from the risks inherent in credit agreements by offering the Saaiman Trust the option of its group scheme for its members or to secure its own life insurance policy. The Saaiman Trust whilst seeking protection under the group life scheme invitation from Suidwes elected not to take up the offer but instead opted for the Liberty life insurance policy.

[39] The contention that there is a difference between credit life insurance and a life insurance policy is a thinly veiled argument. The fact is that the Saaiman Trust elected to take out a life insurance policy with Liberty which it ceded to Suidwes Landbou to comply with its obligations under its credit agreements with Suidwes Landbou. The life insurance policy from Liberty is covered the definition of credit insurance and more specifically credit life insurance as one of the manifestations of credit insurance.

[40] The belated credit life insurance/life Insurance argument which in any event was not pleaded by the Saaiman Trust in its particulars of claim, must accordingly fail.

The alternative claim in delict

[41] The Saaiman Family Trust submit that it has proven that Suidwes Landbou failed to pay the annual life insurance premium which was due on or before 1 June 2016; that it failed to notify it that the said premium was not paid and/or that it failed to react to a notice of non-payment issued by Liberty Life and failed to take reasonable steps to ensure that the life of Mariëtte Saaiman remained covered by Liberty Life.

[42] For the reasons set out in respect of the main claim predicated on breach of contract, I do not deem it necessary to consider the alternative claim in delict in any great detail. In a nutshell, the positive obligation to keep the life insurance policy extant rested with the Saaiman Trust and not Suidwes Landbou. Liberty Life informed the Saaiman Trust in writing of the breach in its obligations and as a courtesy informed Suidwes Landbou. There is no indication in the agreements between the Saaiman Trust and Suidwes Landbou placing any obligation on the latter to inform the former of any breach. The alternative claim is without merit.

Conclusion

[43] The plaintiffs' main and alternative claims stand to be dismissed.

Costs

[44] The agreement provides for costs on an attorney client scale and I can find no basis to order otherwise.

Order

[45] In the result, the following order is made:

The plaintiffs' main and alternative claims are dismissed with costs on an attorney client scale.

A H PETERSEN

JUDGE OF THE HIGH COURT,

APPEARANCES

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Prepared on 12 October 2026 · Esheria