

WILCOCKS, N.O., v. VISSER (BORN LOUW) AND  
NEW YORK LIFE INSURANCE CO.

1910. November 16. MAASDORP, C.J., and FAWKES and  
WARD, JJ.

*Practice.—Pleading.—Application to strike out.—Parol evidence.*

Where H, deceased, had made V, his wife, the beneficiary in a life insurance policy issued by N Y Co. on H's life, and it was pleaded (1) that under a notarial deed of separation entered into between H and V the words "assets of the joint estate" would in law include the right to the proceeds of the policy, and (2) that there had been a separate oral agreement between H and V that H should keep the policy alive for the benefit of the children of their marriage, *Held*, that the paragraph in which the oral agreement was set up must be struck out on the ground that it added to the written contract consisting of the notarial deed of separation.

The plaintiff's declaration reads as follows :—

(1) The plaintiff is a merchant residing at Jagersfontein, and is the executor testamentary in the estate of the late Cornelis Johannes Visser, in his lifetime also of Jagersfontein.

(2) The first defendant is the surviving spouse of the aforesaid deceased Cornelis Johannes Visser, to whom she was married in community of property on the 1st March, 1893.

(3) The second defendants are a company with limited liability, carrying on business in the Orange Free State Province and elsewhere.

(4) In or about the year 1906 the said deceased insured his life with the second defendants for the sum of £2000.

(5) In the policy issued the second defendants agreed to pay the said sum of £2000 to the first defendant or to such beneficiary as might thereafter be designated by the deceased.

(6) Subsequently to the issue of the said insurance policy the conjugal relations between the deceased and the first defendant became so strained and intolerable that steps were taken at the instance of the first defendant with a view to an action for judicial separation and the division of the joint estate. Thereafter in or about November, 1909, negotiations were entered into between the first defendant and her late husband with a view to an agreement providing for a separation and division of the joint estate.

(7) On or about the 16th November, 1909, while the said negotiations were proceeding, the deceased executed a will, whereby he revoked all previous wills and instituted as his sole and universal heirs the children of his marriage with the first defendant.

(8) On or about the 24th January, 1910, a notarial deed of separation was entered into between the deceased and the first defendant, under which full provision was made for the division of the joint estate, the deceased, in consideration of a payment of £2780 to the first defendant, being empowered to take over and become possessed of all the assets of the joint estate, with the exception of a certain insurance policy on the life of the first defendant.

(9) At or about the same time it was agreed between the deceased and the first defendant that deceased should use his utmost endeavours to keep the policy on his life alive for the benefit of the children of their marriage.

(10) Thereafter the first defendant and the deceased separated and acted upon the said notarial deed, steps for making which an award of Court were in progress at the time of the latter's death.

(11) By reason of the premises the designation of the first defendant as the beneficiary under the said policy on the life of the deceased has been revoked.

Wherefore the plaintiff prays for:—

- (a) An order declaring that the first defendant is not entitled to claim the proceeds of the policy effected by the second defendants on the life of the said Cornelis Johannes Visser, deceased.

- (b) An order declaring that the plaintiff is entitled to the proceeds of the said policy, for the benefit of the heirs under the will of the said deceased.
- (c) An order calling on the second defendants to pay the proceeds of the said policy to the plaintiff in his said capacity.
- (d) General relief.
- (e) Costs of suit as against the first defendant.

The first defendant's plea reads as follows:—

(1) The defendant admits pars. 1, 2 and 3 of plaintiff's declaration.

(2) The defendant admits pars. 4 and 5, but refers this honourable court to the terms and conditions of the said policy.

(3) Defendant admits pars. 6 and 8, but says that neither at the times therein mentioned nor at any time did the herein-before-mentioned policy belong to or form a portion of the joint estate of the deceased Cornelis Johannes Visser and the first defendant.

(4) Defendant admits par. 7 of the plaintiff's declaration.

(5) Defendant denies pars. 9 and 11 of said declaration.

(6) Defendant admits par. 10.

Wherefore first defendant prays that the plaintiff's claim may be dismissed with costs.

The plaintiff joined issue in his replication.

The first defendant made application to strike out par. 9 of the declaration under Rule of Court 35, the third clause of which reads as follows: "If any argumentative or irrelevant or superfluous matter be stated in any pleading, such matter shall, if shown to the court or a judge in Chambers by way of motion, be struck out of such pleading with or without payment of costs as the court or judge shall direct."

*Dickson* (with him *P. U. Fischer*), for the first defendant: There was a contract between the deceased and the first defendant, which was written and valid, *i.e.* the deed of separation referred to in par. 8. Par. 9 sets up a separate oral agreement which varies the terms of the document.

*Blaine, K.C.* (with him *Streeten*), for the plaintiff: There are

two grounds on which the plaintiff proceeds. First, if his contention that the words "assets of the joint estate" include the proceeds of the policy, and that under the deed of separation the right to the proceeds vested in the husband is correct, the designation of the first defendant as beneficiary was cancelled thereby, and nothing which is contradictory of or at variance with par. 8 is alleged in par. 9. Consequently both paragraphs can stand, and par. 9 is merely another means of showing that the first defendant agreed that her designation as beneficiary should be cancelled. Secondly, if the contention that the words "assets of the joint estate" do not cover the proceeds of the policy, plaintiff relies on par. 9 as a distinct agreement.

[MAASDORP, C.J.: If this policy was part of the joint estate it would be covered by par. 8. If not, you are trying to make us imply that the written contract was varied by a verbal agreement.]

MAASDORP, C.J.: When I first read this notice of application to strike out par. 9 of plaintiff's declaration it seemed to me that the paragraph was not of importance. But after hearing Mr. *Blaine* I see that it was absolutely essential to have this paragraph dealt with at this stage. He states that the policy was made in favour of Mrs. Visser, the agreement being that the second defendants were to pay the first defendant the proceeds of the policy on the death of the deceased. If no sufficient cause is shown why the proceeds should not be paid to the first defendant they must be so paid. Has anything arisen since the insurance was effected to alter the position? It is alleged in par. 5 that the first defendant is entitled to the proceeds. Then under par. 8 she was to hand over the joint estate to the deceased. What was the joint estate? According to the declaration then the policy belonged to the first defendant. We say nothing as to the facts, but on the declaration this policy belongs to the first defendant, and is excluded from the joint estate. Mr. *Blaine* wishes to allege another agreement which varies or adds to the notarial deed of separation. The law does not allow this. If there was such an agreement as that referred to in par. 9, it ought to have been included in the deed of separation. Mr

*Dickson* has shown that this agreement is additional, and par. 9 must therefore be struck out with costs.

FAWKES and WARD, JJ., concurred.

Plaintiff's Attorneys: *Botha & Goodrick*; First Defendants Attorney: *C. J. Reitz*.

