IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE
(2) OF INTEREST TO OTHER JUDGES
(3) REVISED.

CASE NO: 97177 /2017

13/12/2017

In the matter between:

ANNA JOHANNA KRUGER Plaintiff

and

SUSAN KRUGER N.O. First Defendant
THE MASTER OF THE HIGH COURT, PRETORIA Second Defendant

JUDGEMENT

Bagwa J

[1] In this action the applicant seeks an order declaring that the first defendant and the deceased estate of G. H. J. Kruger (the Estate) are obliged to retain her on a Medical Aid Fund Plan with benefits similar to the Executive Plan of Discovery Medical Fund Scheme.

[2] The plaintiff also seeks an order against the first defendant and the Estate to re- register her on a Medical Scheme Plan with benefits similar Executive Plan of Discovery Medical Fund Scheme without delay, and to maintain her on the said plan until her re-marriage, or death, or

alternatively the payment of R1 190 637.00 plus interest.

The Parties

[3] 3.1 The plaintiff is the former spouse of the deceased who resides at [….] Pretoria.

3.2 The first defendant was the wife of the deceased at the time of his death and is currently the exutrix in the Estate whilst the second defendant is the Master of the High Court. Gauteng cited in his official capacity as such. The second defendant has not filed any pleadings in this matter.

[4] The plaintiff also claims an actuarially calculated amount in terms of prayer 3 of her particulars of claim. The parties agreed that the quantum of the once-off payment claimed be separated from other issues and be postponed **sine die.**

The Issues

[5] 5.1 The issues for determination are firstly whether there was an obligation after the deceased's death for the Estate to retain the plaintiff on a medical aid scheme or whether the liability of the Estate terminated upon his death.

5.2 Secondly, it has to be determined whether the plaintiff is entitled to the same benefits as provided for by the Discovery Executive Medical Plan.

Background

[6] 6.1 The plaintiff and the deceased were married in 1983 in community of property and the marriage was dissolved by decree of divorce incorporating a settlement between the parties. The dispute

between the parties arises out of clause 3 of the said settlement agreement.

6.2 Section 3 of the settlement agreement reads as follows:

" 3. DISCOVERY MED/ES:

3.1 Die Eiser onderneem om die Verweerderes op sy Discovery Mediesefonds te hou op sy koste, welke verpligting sal voortduur totdat die Verweerderes hertrou of te sterwe souk kom, welke die eerste mag plaasvind, met dien verstande dat Eiser se verpligting beperk word tot lidmaatskap premies en Verweerderes self aanspreeklik sal wees vir mediese uitgawes wat nie deur die mediesefonds gedek word nie.

3.2 Insoverre dit nodig is word dit op rekord geplaas dat die verpligting vervat in hierdie paragraaf nie as *onderhoud beskou sal word nie."*

[7] What is evident from a reading of clause 3 is that the deceased accepted the liability at his cost to keep the plaintiff on his Discovery Medical Fund and that the duration of the liability would be until re-marriage or death of the plaintiff. Further clause 3.2 specifies unequivocally that the liability to provide for the plaintiff's fund contributions did not amount to payment of maintenance by the deceased.

[8] What the determination of the issues mentioned above comes down to is the interpretation of clause 3 and this would require the application of the interpretation rules in our law.

<u>The Rules of Interpretation</u>

[9] 9.1 The traditional approach to interpretation of contracts is to be found in numerous decisions of our courts. Thus it was held in **Sassoon Confirming and Acceptance Co. (Pty) Ltd v Barclays National Bank Ltd** 1974 (1) SA 641 A at 646 B that the first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties.

9.2 In determining the ordinary grammatical meaning of the words, the entire contract must be looked at in order to determine from the context what meaning the language used was intended to convey. See **Swart v Cape Fabrics (Pty) Ltd** 1979 (1) SA 195 A at 202 C.

9.3 In **Coopers & Lybrand v Bryant** 1995 (3) SA 764 A at 768 B - C it was held that reference may be had to the factual context in which the contract was concluded with reference to the genesis and purpose of the agreement which in all probability influenced the minds of the parties when they contracted.

9.4 In **Total SA (Pty) Ltd v Bekker N.O** . 1992 (1) SA 617 at 624 J to 625 D it was held that where the language in its context unambiguously reveals the intention of the contracting parties, no recourse may be had to surrounding (as opposed to contextual) circumstances in order to derive a different meaning.

[10] The above approach has been interrogated and criticised by some of the judgments in the Supreme Court of Appeal and the approach to construction of agreements has been restated to establishing the intention of the parties within the context in which the agreement was reached. In **Bothma-Batho Transport (edms) Bpk v S Bothma & Seun Transport (Edms) Beperk** 2014 (2) SA 494 SCA para 12 the following was stated:

" That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant

medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is ·essentially one unitary exercise'."

[11] The issue of interpretation of contracts was further elucidated by Wallis JA in the matter of **National Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) in para 18 as follows:

··interpretation is the process of attributing meaning to the words used in a document, be it legislation. some other statutory instrument, a contract, having regard to the context provided by reading the particular provision or provisions of the document 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. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

A Tacit Term

[12] 12.1 Mr Bergenthuin. for the plaintiff has submitted that in determining the issues, it could be considered a tacit term in the contract under consideration ·that the Estate would be liable for retention of the plaintiff on a medical-scheme after the death of the deceased.

12.2 A tacit term is based on an inference of what both parties to a

contract must or would necessarily have agreed to, but which for some reason remained unexpressed. Acceptance of the existence thereof depends on the facts and its importation into the contract can only be allowed if the parties would necessarily have agreed upon such a term if it was suggested to them at the time of entering into the contract.

12.3 The test for establishing the existence of tacit terms which has been recognised and applied is the so-called *" bystander test'.* In terms thereof, the inference of a tacit term can be justified if both parties to a contract would upon a question of a bystander: *"What will happen in such* a *case"* have replied *" of course, so and so will happen, we did not trouble to say that. it is too clear."*

[13] **In casu,** the plaintiff testified that during the subsistence of the marriage she and the deceased considered and agreed to getting the very best medical aid cover for themselves. This had been the position from the inception of the marriage whilst the deceased was still a student and the plaintiff was paying for his study fees and paying the medical scheme premiums. This had continued through the marriage and this was still the case when the settlement agreement was entered into. This evidence establishes the context in which clause 3 has to be interpreted. The question that has to be asked is whether the parties were accustomed to anything different in terms of medical cover or whether the plaintiff would have entered into a contract which would have left her without medical cover at any time before she re-married or died. The answer to this question would have to be considered also in relation to the medical history of her family. She testified that some family members had died of cancer and that she was particularly cautious to ensure that she had medical cover for the rest of her life time. In this context, the importation of a tacit term seems to be justified by the context and circumstances.

<u>Liability of the Estate</u>

[14] As a general rule the rights and obligations in terms of an agreement are transferred to the estate of a party to a contract at the time of his or her passing. The executrix is entitled to sue upon a contract if the deceased could have sued had he been alive. By the same token, the executrix may be sued by a party to a contract who was entitled to sue another party prior to the latter's death. See **Lorentz v Melle** 1978 (3) SA 1044 TPO at 1057 C - F.

[15] **In casu,** the parties contractually agreed that the deceased would retain the plaintiff on a medical scheme. The deceased died before the plaintiff and in my view it was logical that his estate would be liable to honour the contractual agreement of the deceased. As alluded to earlier it would be absurd to infer that the contractual obligation of the deceased terminated at his death given the context of how the parties had dealt with matters pertaining to medical cover.

[16] In **Hughes N. O. v The Master** 1960 (4) SA 936 CPD Herbstein J said:

..*The executor of a deceased person is, as* a *rule, liable in his representative capacity upon all contracts (whether they affect movables, immovable or choses in action) upon which the deceased would have been liable in his lifetime but only to the extent of the assets in the estate of the deceased."*

[17] Commenting on the contractual arrangement of maintenance after divorce Didcott J in **Hodges v Coubrough N. O.** 1991 (3) SA 85 D at 66 D - G said:

" The field of contract is very different from the one where the present case *lies. Everybody may bind his estate, by contract no less firmly than by will, to pay maintenance after his death . And he may settle the maintenance on whomsoever he chooses, on his current wife,* a *former wife,* a *mistress, an employee or anyone else. Whether in* a *given instance that result has*

been produced, whether the liability which was incurred survives the death of the person who assumed it and passes to his estate, depends of course on the terms of the contract. on their true meaning. And that goes too for the kind of contract in question, an agreement between spouses which is made an order of Court on their divorce. So. *like the legislation whenever its meaning* is *sought, the agreement must be interpreted. By no means* is *the enquiry the same, however, since the objects of the exercise differ. The intention which has to be ascertained in the one case is that of Parliament, legislating in general terms and with general effect. In the other it* is *the intention of private individuals, minding their own business and dealing solely with that. They have no occasion to reckon with the common law. They have no reason to worry about issues of policy. Nor do they care* a *fig if the party who is maintained under their arrangements turns out to be better off than somebody else's widow. Then there* is *a further consideration, a rule governing contractual obligations which has no counterpart in the area of those generated statutorily."*

[18] Whilst the dictum in the Hodges decision is contractually speaking, applicable in the present case, **mutatis mutandis,** it must be borne in mind that **in casu,** the parties in clause 3.2 of their settlement agreement specifically pointed out that the payment of monthly medical fund premiums was not a form of maintenance which the deceased had to pay the plaintiff. Evidently this agreement was to prevent an increase in the amount payable which would be the case if the premiums were payable as a form of maintenance. As a result, the obligation to pay monthly medical fund premiums would remain as agreed upon in the settlement agreement, namely, the relevant premiums relating to the Discovery Executive Plan. Similarly, a downgrade in terms of the plan and in terms of the premiums payable would be excluded in terms of the stipulation in clause 3.1 read with clause 3.2.

[19] In the circumstances, whilst I accept the submissions by Mr Bergenthuin regarding the importation of a tacit term which was discussed above, I am

of the considered view that clauses 3.1 and 3.2 are clear regarding both their context and the intended consequences.

[20] In the context of the factual matrix of this case, an interpretation which suggests that the deceased estate would not be liable for the retention of the plaintiff on the Discovery Medical Plan would lead to absurd or unbusinesslike results.

[21] Mr Maritz S. C. has put up a strong argument against the plaintiffs proposition that the Estate should be found liable for the deceased's contractual obligations.

[22] He submits that the deceased's Discovery membership terminated upon his death and that the fact that the plaintiff could have become eligible to membership at that time does not change such termination.

[23] He further submits that the executrix could therefore never have been in a position to keep the plaintiff on the deceased's medical aid fund or plan after the deceased's membership had been terminated.

[24] Contrary to these submissions Rule 6.3 of the Discovery Health Medical Scheme does cover a situation where the main member dies before a beneficiary. It provides for the Scheme to notify the beneficiary to apply to continue membership after the death of the main member. No such notice was received by the plaintiff from the Discovery Medical Scheme. The submission therefore, that the plaintiff could not have been kept as a member post the deceased's death is not sustainable. Mr Sasson, a professional financial adviser confirmed that it is possible in such circumstances for a third party to pay premiums on behalf of a continuing member.

[25] I however accept the submission by Mr Martiz that it is in the very nature of a deceased estate and the appointment of an executor, that a liquidation and distribution account should be framed without delay and once approved, that the estate should be distributed accordingly whereupon the executor will be discharged. I deal with this issue further,

below.

[26] It is common cause that the plaintiff and the deceased had reviewed their medical aid plan annually during the subsistence of their marriage. It was however the theme of the plaintiff's evidence that such reviews were with a view to procuring the best plan possible within a Medical Aid Scheme. This practice had endured throughout their marriage. Even at the time of the settlement agreement, they were covered under Discovery's Executive Plan.

[27] This is the basis on which the plaintiff seeks relief in terms of prayer 1 of the particulars of claim which would have the plaintiff, if granted, retained as a member in the Discovery Executive Medical Aid Plan with the deceased's estate paying the premiums.

[28] During the leading of evidence and address by counsel the question was raised regarding the practicality of an estate paying premiums until the death or re- marriage of the plaintiff.

[29] The Supreme Court of Appeal has held that maintenance orders, if agreed upon, can be granted against deceased estates, there is no question that a similar order can be granted in this case. See **Odgers v De Gersigny** 2007 (2) SA 305 SCA paragraph 7.

[30] It would seem that however for pragmatic reasons, an even better option would be to grant alternative relief in the same format granted in the case of **Wessels v Swart N.O.** 2002 (1) SA 680 TPD. The alternative order would circumvent the complications that would arise from the limited duration of the administration of an estate (in particular sections 35 to 56 of the Administration of Estates Act 66 of 1965). It however presents the plaintiff with the best prospects of obtaining redress in the circumstances.

[31] In the result, I make the following order:

31.1 The first defendant and the deceased estate of G. H. J. Kruger should entertain the plaintiff's claim as a concurrent creditor and payment in respect of the plaintiff’s claim should be in accordance

with such determination.

31.2 That the first defendant pay the plaintiff's costs which shall be paid from the deceased estate and such costs shall include the costs of senior counsel.

S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISIO N, PRETORIA

Hear on:	21 &22 November 2017
Delivered on:	December 2017
For the Plaintiff:	Advocate J. G. Bergenthuin SC
Instructed by:	Couzyn Hertzog & Horak
For the First Defendant:	Advocate J. D. Maritz SC
Instructed by:	Gildenhuys Malatji Incorporated