

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO.: 3510/2010

Heard: 27 July 2010

Reportable

Delivered: 16 August 2010

In the matter between

ASHA DEVI MAHARAJ

APPLICANT

and

SANLAM LIFE INSURANCE LIMITED

1ST RESPONDENT

KURT ROBERT KNOOP N.O.

2ND RESPONDENT

EUGENE NEL N.O.

3RD RESPONDENT

M DAWOOD N.O.

4TH RESPONDENT

JUDGMENT

DHAYA PILLAY J

Introduction

1. The applicant claims payment of the sum of R365 700.00 being the proceeds of a policy underwritten by the first respondent. The first respondent pleads set-off of the debt in the amount of R180 623.94 on the basis that the applicant is indebted to it for her share of a debt incurred by Basant Maharaj (Basant) during their marriage to each other in community of property.

The facts

2. The following facts are either common cause or not disputed and are enumerated in sequence of time:
 - 2.1 On 17 April 1989 the applicant and Bassant were married to each other in community of property.
 - 2.2 During the marriage, Basant and the first respondent entered into a broker's contract on 26 November 2007.
 - 2.3 The first respondent issued the policy plan in favour of Basant on 8 August 2008.
 - 2.4 The effective date of the policy was 1 September 2008.
 - 2.5 Between December 2008 and May 2009 various policies which Basant had commissioned lapsed.
 - 2.6 On 10 September 2009, the applicant and Basant concluded a divorce settlement agreement.
 - 2.7 The first respondent sold and ceded its claim against Basant to Debtcor on 20 July 2009.
 - 2.8 On 16 September 2009 Debtcor issued summons against Basant for payment of the sum of R361 000,00 being the amount of the commission recoverable once the policies lapsed.
 - 2.9 The applicant and Basant They were divorced on 7 October 2009.

- 2.10 On 17 November 2009 they varied their settlement so that Basant ceded to the applicant two policies, the proceeds of one such policy being the object of this claim.
- 2.11 The first respondent noted the cession of the policy in its record on 30 November 2009.
- 2.12 Basant's estate was sequestrated provisionally on 28 January 2010.
- 2.13 On 10 February 2010 the first respondent certified that the debt of R361 247.88 was due and payable by Basant to it in terms of the broker's contract.
- 2.14 The applicant did not consent to Basant entering into the broker's contract or to incurring the debt.
- 2.15 On 12 February 2010, the first respondent admitted Basant's claim for sickness during 15 September 2009 to 21 December 2009 and the arbitrator informed Basant of this admission.
- 2.16 Basant's estate was sequestrated finally on 16 February 2010.
- 2.17 On the same day Debtcor re-ceded the claim against Basant to the first respondent.
- 2.18 The applicant launched this application on 18 March 2010 for payment to her of the sum of R365 700.00 by the first respondent together with interest from 3 March 2010, and costs.
- 2.19 The first respondent abandoned its claim for Basant's half share of the debt.

Issues arise for determination

3. Three issues arise for determination:
 - 3.1 Was the applicant's consent to the broking contract a prerequisite in terms of section 15(1) of the Matrimonial Properties Act 88 of 1984 (MPA) for holding her liable for a debt Basant incurred?
 - 3.2 Is the applicant jointly liable to the first respondent in terms of section 17(5) of the MPA?
 - 3.3 Can the first respondent set-off its claim for R180 623.94 being half the debt Basant incurred during the marriage against the applicant's entitlement as cessionary to the proceeds of the sickness policy?

Section 15 (2) Consent

4. The debt arose when the first respondent reversed the commission Basant earned on the lapsed policies. The commission was remuneration. The broker's contract also defines it as such. Nothing in section 15 (2) of the MPA required the applicant to consent to Basant entering into a contract to earn remuneration; consequently, her consent was not required when the commission remuneration was reversed.

Section 17(5) Joint Liability

5. Section 17(5) of the MPA provides:

"Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessaries for the joint household, the spouses may be sued jointly or severally therefor."

6. This section is intended to protect creditors against spouses who try to avoid liability on the basis of arrangements between them of which creditors are unaware. It allows creditors to sue spouses jointly and severally and in their own name without joining the other spouse.¹ Consequently, insolvency of one spouse after divorce does not extinguish the liability of the solvent spouse for debts of the joint estate. The preferred view, however, is that the spouse who did not incur the debt should not be held liable for more than a half share.²
7. Mr K. Maharaj who appeared for the applicant submitted that the debt was not incurred for “procuring necessaries” for the joint household. In the opinion of the Court, the debt was incurred in the course of Basant earning an income for the joint estate in the ordinary course of his business. Therefore, such income was necessary for the joint household. Accordingly, the applicant is jointly liable.

Set-Off

8. To succeed in its defence of set-off, the first respondent must prove the following:
 - (a) the indebtedness of the applicant to the first respondent;
 - (b) that the first respondent’s debt was also due and legally payable;³
 - (c) that both debts are liquidated debts, in the sense that:
 - (i) they are based on liquid documents,
 - (ii) they are admitted,
 - (iii) their money value has been ascertained or is ascertainable,
 - (d) that the reciprocal debt was owed by the applicant to the first respondent.⁴

¹ *Zake v Nedcor Bank Ltd and Another* 1999 (3) SA 767 (SE)

² *BP Southern Africa (Pty) Ltd v Viljoen en ‘n Ander* 2002 (5) SA 630 (O) at 636G-637F

³ *Mohamed v Nagdee* 1952 (1) SA 410 (A); *Schnehage v Bezuidenhout* 1977 (1) SA 362 (O)

The indebtedness of the applicant to the first respondent

9. Mr Maharaj submitted that the applicant was not indebted to the first respondent because the latter has to “prove its claim for necessaries for the joint household”.⁵
10. The Court has found above that the applicant’s consent was not required, and that she is jointly liable for her share of the debt due to the first respondent. Furthermore, Mr Chadwick for the first respondent, pointed the Court to the law of cession in terms of which a debtor may raise against the cessionary a defence such as set-off which it could have raised against the cedent.⁶ In other words, the first respondent could raise the defence of set-off against the applicant as cessionary for a debt incurred by Basant as cedent. Therefore, the applicant remains indebted to the first requirement.

The first respondent’s debt was also due and legally payable

11. The policy became payable on 12 February 2010 and remains due and payable since then.

Both debts are liquidated debts

12. The proceeds of the policy in the amount of R365 700.00 is admitted and the commission due in the amount of R361 24,88 has been ascertained. Both debts are therefore liquid.

Was the reciprocal debt owed by the applicant to the first respondent?

13. Mr Maharaj submitted that the debts must be of the same kind. He expatiated that the nature of Basant’s and consequently the applicant’s

⁴ *Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) at 611J-612C; Amlers Precedents of Pleadings 6 Edition, page 122 -123

⁵ Applicant’s Heads of Argument para 25

⁶ LAWSA (2nd edition) Vol 2 Part 2 para 39

claim to the proceeds of the policy differed from the first respondent's claim for a refund of the commission; the former was a consequence of the payment of premiums whilst the latter arose from the sale of policies; the former relationship was as between insurer and insured, whilst the latter was between principal and agent.⁷

14. This submission is without merit. The Court accepts that both debts must be payable to the same persons in the same capacities,⁸ however, Mr Maharaj's comparison shows only that the *causa* of each debt differs. They are nevertheless liquidated debts due by and to the applicant in her personal capacity, whether as Basant's spouse or assignee of his policy.

15. Mr Maharaj submitted that when the policy became payable on 12 February 2010, no amount was owed by Basant to the first respondent; furthermore, no amount was due to the first respondent who had by 20 July 2009 ceded its debt to Debtcor. Relying on *Siltek v Business Connexion* (081/2008) [2008] ZASCA 136 Mr Maharaj contended that as *concursum creditorum* had already commenced on 28 January 2010 when Basant was provisionally sequestrated, the debt was neither due nor was there mutuality of indebtedness.⁹

16. As stated above, the insolvency of a spouse after divorce does not extinguish the debt of the solvent spouse for debts of the joint estate.¹⁰ *Siltek* does not apply to debts due by the applicant.

Costs

17. Until the hearing, the first respondent persisted in claiming set-off of Basant's debt. Furthermore, Basant ceded his right, title and interest in

⁷ Applicant's Head of Argument para 18.1 and 18.2

⁸ *Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) at 611J-612C; Amlers Precedents of Pleadings 6 Edition, page 122 -123

⁹ Applicant's Head of Argument para 18.1 and 27

¹⁰ *BP Southern Africa (Pty) Ltd v Viljoen en 'n Ander* 2002 (5) SA 630 (O) at 636G-637F

the policy to the applicant to off-set his liability for maintenance of his minor children. Although the applicant holds the policy as cessionary, she also holds it as mother, guardian and custodial parent of her minor children. As such, this application was also to protect their interests. The applicant should be awarded costs.

Order

18. The first respondent is ordered to pay the applicant R185 016.06 being the difference between R365 700.00 and R180 623.94.
19. Each party pays its own costs.

JUDGE DHAYA PILLAY

COUNSEL

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