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[1] **THE SUPREME COURT OF APPEAL**

[2] **OF SOUTH AFRICA**

[3] **CASE NO: 569/03**

Reportable

[4] In the matter between

[5] **HOLLARD LIFE ASSURANCE COMPANY LIMITED**
Appellant

[6] and

[7] **G J VAN DER MERWE NO**

Respondent

[8]

[9] Before:Scott, Mthiyane, Conradie, Van Heerden JJA et Ponnan AJA

[10] Heard: 19 November 2004

[11] Delivered: 30 November 2004

[12] ***Summary:****Interpretation of exclusion clause in insurance*

policy – whether accidental, wholly self-inflicted injury falling within ambit of clause

[13]

[14] **JUDGMENT**

[15]

[16] **VAN HEERDEN JA**

[17] There were two main issues in the action giving rise to this appeal: firstly, the interpretation of an exclusion clause in an insurance policy and, secondly, the *locus standi* of the executor of an insured's deceased estate to claim benefits in terms of the policy in a situation where the insured had ceded all his rights under the policy to a third party as security for a debt owed by him to the cessionary.

[18] The appellant is Hollard Life Assurance Company Ltd ('Hollard'), the insurance company in question, while the respondent is the executor of the deceased estate of the insured, Jean Pierre van der Merwe ('the deceased').

[19] On 30 June 2001, the deceased concluded a written agreement of insurance ('the policy') with Hollard, whereby the latter undertook to pay the outstanding liability due by the deceased to Wesbank under an instalment sale agreement ('the credit agreement') in the event of, *inter alia*, the death of the deceased. The credit agreement between the deceased and Wesbank, relating to a motor vehicle, was concluded in early July 2001. In terms of the policy the deceased ceded to Wesbank 'all [his] rights, title and interest in and to this Policy…as collateral security for the outstanding debt in terms of the Credit Agreement entered into by [him] with the Credit Grantor [Wesbank]'.

[20] A few weeks after the conclusion of these agreements, the deceased accidentally shot himself with his own firearm and, in consequence, died. At the time of his death, he was still indebted to Wesbank under the credit agreement.

[21] The respondent and Wesbank duly notified Hollard of a claim in terms of the policy, but Hollard rejected the claim, relying on an exclusion clause in the policy which reads as follows:

[22] '1**. EXCLUSIONS APPLICABLE TO DEATH, DISABILITY AND DREAD DISEASE**

[23] **No amount shall be payable if in our [Hollard's] Opinion:-**

[24] …

b) the claim is in any way due or traceable to, or arises directly or indirectly, entirely or partially from:

[25] …

[26] (ii) suicide, self-inflicted injury or self-inflicted illness, whether intended or not, or voluntary exposure to danger or obvious risk of injury.'

[27] When sued in the Pretoria High Court for the benefits allegedly payable under the policy, Hollard pleaded that, as the cause of the deceased's death was 'self-inflicted injury', the abovementioned exclusion clause applied and the claim was thus not covered by the policy. In addition, so it was alleged, as the deceased had ceded all his rights under the policy to

Wesbank, the respondent had no *locus standi* to enforce any claim against Hollard in terms thereof.

[28] In the court below, the matter was approached on the basis of a stated case, the common cause facts simply being recorded prior to argument. Prinsloo AJ held that, notwithstanding the cession *in securitatem debiti* by the deceased to Wesbank, the respondent (as executor of the deceased's estate) could enforce the ceded rights against Hollard, despite the fact that the debt secured by the cession had not been extinguished. With reference to the decision of this court in *Leyds NO v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk & andere*,[1] the learned judge construed the cession as a pledge of the rights under the policy to Wesbank (the cessionary), the insured (the cedent) retaining ownership (*dominium*) in the ceded rights. By analogy with the 'rule' established in the case of *National Bank of South Africa Ltd v Cohen's Trustee*[2] - namely that, on the insolvency of the cedent *in securitatem debiti*, the trustee of his or her insolvent estate is entitled to enforce the ceded right and administer the proceeds thereof as an asset in the insolvent estate, subject to the preferential right of the cessionary as pledgee – Prinsloo AJ held that, on

[1] 1985 (2) SA 769 (A) at 780A-H.

[2] 1911 AD 235.

the death of the cedent (the insured), the executor of his deceased estate could enforce a claim under the policy against Hollard, subject to Wesbank's right to repayment of the amount still owing to it under the credit agreement.

[29] Shortly before the commencement of the trial, the respondent took cession of any claim Wesbank may have had against Hollard under the policy and amended the particulars of claim accordingly. In a consequential amendment to its plea, Hollard alleged that any claim Wesbank may have had under the policy had prescribed by the time of the attempted cession, Wesbank not having complied with a provision in the policy requiring the institution of legal proceedings against Hollard within a specified period of time. The court below rejected Hollard's allegations in this regard, construing the time bar provision in the policy as being applicable only to the insured.

[30] As regards the reliance by Hollard on the abovementioned exclusion clause,[3] Prinsloo AJ was of the view that 'the most reasonable and logical …interpretation is that all the acts, namely suicide, self-inflicted injury, self-inflicted illness and voluntary exposure to harm presuppose the common element of deliberate intent.' On a 'strict interpretation', the

[3] See para 5 above.

phrase ‘whether intended or not’ in the exclusion clause should apply only to the immediately preceding words, ie ‘self-inflicted illness’, and not to the words ‘self-inflicted injury’. According to the learned judge-

[31] ‘Bearing in mind the dictionary meaning of “*inflict*” and the fact that all the other actions in the exclusion clause presuppose intent, an interpretation that “*self-inflicted injury*” can be contrived without intent, would appear to be incongruous. If one then relies on the assistance of the *contra proferentem* and *eiusdem generis* constructions, such an interpretation becomes far-fetched and unacceptable. Quite apart from the question of interpretation…the notion of excluding liability on the ground of “*self-inflicted injury which is not intended*” can lead to absurd results. It would mean that the innocent insured who falls into an uncovered manhole at night and injures himself will not be protected by the policy. The same applies to the innocent insured who eats a contaminated can of sardines or drives into an invisible stationary object at night on the highway. In my view, such an interpretation will not be tolerated in the light of the principles referred to above.’

[32]The court concluded that the incident in which the deceased shot himself ‘by accident and without intent or any other form of fault or unreasonable exposure to danger’ did not fall within the ambit of the exclusion clause relied on by Hollard. Moreover, even if this interpretation of the exclusion clause was not correct, the court found that Hollard’s ‘attempt to avoid liability by going to the preposterous extreme of including the words “whether intended or not” in a general exclusion of this nature is *contra*

bonos mores so that the exclusion, to that extent, is rendered unenforceable.' The respondent's claim under the policy thus succeeded. With the leave of the court below, Hollard appeals against all these findings.

[33] In view of the conclusion to which I have come regarding the interpretation of the exclusion clause, it is unnecessary to deal with any of the other issues canvassed in the court below. I deliberately refrain from expressing an opinion as to the correctness or otherwise of the findings of Prinsloo AJ on those issues It was common cause that Hollard was of the opinion that the respondent's claim fell within the ambit of this clause. The respondent did not attack the reasonableness of this opinion as such,[4] but contended that it was based on an incorrect interpretation of the clause in question. Obviously, if on a proper interpretation of the clause – which is a matter of law[5] – the exclusion of Hollard's liability does not apply to unintentional self-inflicted injuries of the kind which caused the death of the deceased, then Hollard's opinion was wrongly formed and is consequently of no effect.

[4] It would seem that, in forming an opinion on whether or not the factual circumstances allegedly giving rise to a claim under the policy fell within the ambit of the exclusion clause, Hollard was obliged to act reasonably (see, for example, RH Christie *The Law of Contract in South Africa* 4 ed (2001) 114-115 and the cases there cited; cf also *Damsell v Southern Life Association Ltd* (1992) 13 ILJ 848 (C) at 851G-852C and 859G).

[5] See *Van Zyl NO v Kiln Non-Marine Syndicate No 510 of Lloyds of London* 2003 (2) SA 440 (SCA) para 11 at 447H.

[34] The principles governing the interpretation of an insurance policy were set out by this court in *Fedgen Insurance Ltd v Leyds*[6] as follows:

[35] 'The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise… Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted…; for it is the insurer's duty to make clear what particular risks it wishes to exclude…. A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy…'

[36] In the *Van Zyl NO* case (*supra*), this court also quoted with approval from the judgment by King J in *Barnard v Protea Assurance Co Ltd t/a Protea Assurance*[7] to the following effect:

[37] 'Now it is an accepted principle in interpreting insurance contracts that it is the duty of the insurer to make it clear what particular risks he wishes to exclude. The principle is stated by May in the following terms: "No rule in the interpretation of a policy is more fully established, or more imperative or controlling, than that which declares that, in all cases, it must be liberally construed in favour of the insured so as not to defeat without a plain necessity his claim to an indemnity which in making the insurance it was his object to secure."'

[6] 1995 (3) SA 33 (A) at 38B-E (other case references omitted); recently re-affirmed by this Court in *Van Zyl NO v Kiln Non-Marine Syndicate No 510 of Lloyds of London* 2003 (2) SA 440 (SCA) para 6 at 445H-446G.

[7] 1998 (3) SA 1063 (C) at 1068B-C.

[6] [7] 10

[38] And (at 1068D):

[39] 'From this it would follow that if a term in a policy ("term" in the sense of designation) is capable of both a broader and narrower meaning it is that which is favourable to the insured, in other words to the upholding of the policy, which must be employed.'

[40] With regard to the *onus*, the position is as follows:[8]

[41] 'The ordinary rule is that the insured must prove himself to fall within the primary risk insured against, whilst the onus is on the insurer to prove the application of an exception: *Eagle Star Insurance Co Ltd v Willey* 1956 (1) SA 330 (A) at 334A - 335F.'

[42]In view of the reasoning followed by the court below, the following *dictum* of this court in the even more recent case of *Metcash Trading Ltd v Credit Guarantee Insurance Corporation of Africa Ltd*[9] is apposite:

[43] '"According to our law … a policy of insurance must be construed like any other written contract so as to give effect to the intention of the parties as expressed in the terms of the policy, considered as a whole. The terms are to be understood in their plain, ordinary and popular sense unless it is evident from the context that the parties intended them to have a different meaning, or unless they have by known usage of trade, or the like, acquired a peculiar sense distinct from their popular meaning"

[44](*Blackshaws (Pty) Ltd v Constantia Insurance Co Ltd* 1983 (1) SA 120 (A) at 126H–127A). If the ordinary sense of the words necessarily leads to some absurdity or to some

[8] *Van Zyl NO v Kiln Non-Marine Syndicate No 510 of Lloyds of London,* above para 7 at 446F-G.

[9] [2004] 2 All SA 484 (SCA) para 10 at 488b-f.

repugnance or inconsistency with the rest of the contract, then the Court may modify the words just so much as to avoid that absurdity or inconsistency but no more (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464–6; *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38B–E). It must also be borne in mind that:

[45] "Very few words … bear a single meaning, and the 'ordinary' meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation and the nature of the transaction as it appears from the entire contract' (*Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646B). It is essential to have regard to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract (*Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768A–B; *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 1)."'

[46] Contrary to the view of Prinsloo AJ in this regard,[10] the ordinary rules of grammar dictate that the comma before and after the phrase 'self-inflicted injury or self-inflicted disease' in the exclusion clause makes the qualification 'whether intended or not' (appearing immediately after such phrase) applicable to both instances and not only to 'self-inflicted disease'. Counsel for the respondent conceded as much. Moreover, as counsel for

[10] See para 9 above.

Hollard correctly contended, Prinsloo AJ's conclusion that the kind of *unintentional* self-inflicted injury which had caused the death of the deceased in this case was not covered by the wording of the exclusion clause effectively negates the words 'whether intended or not' in that clause, contrary to the general rules governing the interpretation of contracts.[11]

[47] Counsel for the respondent contended that, should the exclusion clause be interpreted so as to apply to the circumstances of the deceased's death in the present case, this would lead to absurd results. As indicated above,[12] the court below accepted this argument. I disagree. If the words 'self-inflicted injury or self-inflicted disease' are interpreted restrictively, as they must be,[13] then only injuries or diseases which are *entirely* inflicted upon himself or herself by the insured will be covered. An injury or disease which is caused *partly* by the actions or omissions of the insured, but in conjunction with the action or omission of some other party or some other contributory factor, will fall outside the ambit of the exclusion clause. In the examples

[11] See, for example, *Wellworths Bazaars Ltd v Chandlers Ltd* 1947 (2) SA 37 (A) at 43, where Davis AJA quoted with approval the following passage from *Ditcher v Denison* 11 Moore PC 325 at 357: '*It is a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompt to ascribe – should not without necessity or some sound reason, impute – to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.*' See also *Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd & others* 1984 (1) SA 61 (A) at 70C-D.

[12] See para 9.

[13] See *Van Zyl*'s case (para 12 above) para 6 at 445J-446B.

of absurd consequences given by Prinsloo AJ (falling into an uncovered manhole, eating contaminated sardines, driving into an invisible stationary object at night), the injury or disease is inflicted on the insured only partly by his or her own actions. Without the intervention, whether by act or omission, of some other party or some other contributory factor (the removal and non-replacement of the manhole cover, the manufacture and/or sale of contaminated sardines, the leaving of the offending object in the path of traffic), the injury or disease would not have occurred.

[48] Whether or not a particular injury or disease is entirely 'self-inflicted' will obviously depend on the facts of that particular case and, in forming its opinion in this regard, Hollard will be obliged to act reasonably.[14] The court below held, in effect, that because in certain hypothetical instances, it may be doubtful whether or not the injury or disease was 'self-inflicted', the words 'whether intended or not' in the exclusion clause should simply be ignored. In the present case, the injury was clearly 'self-inflicted' in the sense discussed above and the approach of the court below, in my view, exceeds the bounds of interpretation of contracts.

[49] I also do not agree with the court below that 'including the words "whether intended or not" in a general exclusion of this nature is *contra*

[14] See footnote 4 above.

bonos mores so that the exclusion, to that extent, is rendered unenforceable.' Although the qualification might be an unusual one, an insurer is entitled to circumscribe the risks which are covered by the policy and to determine the insurance premium accordingly.[15] It certainly cannot be said that the respondent discharged the onus of showing that the 'clear effect' of the exclusion clause, restrictively interpreted as set out above, is contrary to public policy or that 'there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the [exclusion clause] according to [its] tenor'.[16]

[50] It follows from the above that the death of the deceased fell within the ambit of the exclusion clause and hence did not give rise to a claim in terms of the policy.

[51] ***Order***

[52] In the circumstances, the following order is made:

[53] (a) The appeal succeeds with costs.

[54] (b) The order of the court below is set aside. In its place is

[15] See *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (SCA) at 38G-H.

[16] *Juglal NO & another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) para 12 at 258D-G, referring to *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 8C-9G. Cf also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 9-10 at 34D-E.

substituted:

[55] *'The plaintiff's claim is dismissed with costs, including the qualifying fees of the defendant's expert, Professor HJ Scholtz.'*

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[57]

[58] B J VAN HEERDEN
JUDGE OF APPEAL

[59]

[60] **CONCUR:**

[61] SCOTT JA

[62] MTHIYANE JA

[63] PONNAN AJA

[64]