



REPUBLIC OF SOUTH AFRICA

**IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

REPORTABLE

In the matter between

CASE NUMBER : 146 / 02

GUSTAV MARTHINUS JOHANNES PIETERSE APPELLANT

and

GARY MARK SHROSBREE
SAREL ALBERTUS COETZEE
JOHANNES MARTHINUS ABRAHAM LOUW NNO
In their capacities as the Trustees of the
Insolvent Estate of the Late Amelia Pieterse

FIRST RESPONDENT

DEBORAH VAN ROOYEN NO
In her capacity as Trustee of the Insolvent
Estate of Gustav Marthinus Johannes Pieterse

SECOND RESPONDENT

MOMENTUM GROUP LIMITED

THIRD RESPONDENT

AND

In the matter between

CASE NUMBER : 435 / 03

GARY SHROSBREE NO

APPELLANT

and

COLLEEN CHERRY LOVE
MAUREEN EUNICE LOVE SECOND RESPONDENT
SANLAM LIFE INSURANCE LIMITED

FIRST RESPONDENT

THIRD RESPONDENT

CORAM : MPATI DP, STREICHER, FARLAM, HEHER JJA AND PONNAN AJA

DATE OF HEARING : 10 SEPTEMBER 2004

DATE OF DELIVERY : 23 SEPTEMBER 2004

SUMMARY

Long Term Insurance Act 52 of 1998- s 63 - does not purport to regulate the payment of the proceeds of a life policy.

J U D G M E N T

PONNAN AJA

[1] ' ... [O]ne might say of the law on the effect of insolvency on insurance policies, as did Oscar Wilde of truth (*The Importance of Being Ernest* (1895) Act 1), that it is a subject "rarely pure and never simple".¹

[2] Despite the outward trappings, the real and substantial issue in each of these appeals is whether the trustee of an insolvent deceased's estate is entitled, in preference to the nominated beneficiaries, to the proceeds of certain insurance policies, for distribution to the deceased's creditors. That entitlement, so it is asserted, derives from section 63 of the Long Term Insurance Act 52 of 1998 ('the Act'). Dissonant decisions on that subject are now on appeal before this court, in each instance with leave of the court a quo. The first, a decision by Pillay AJ, has been reported *sub nom Shrosbree and Others NNO v Van Rooyen NO and Others* 2004 (1) SA 226 (SE) ('the Pieterse matter') and, the second, a judgment by Plasket AJ has been reported *sub nom Love and Another v Santam Life Insurance Ltd and Another* 2004 (3) SA 445 (SE) ('the

¹ Alistair Smith: 'The Protection of Insurance Policies from Insolvency under section 63 of the Long Term Insurance Act 52 of 1998' (2000) 12 SA Merc LJ p 94

Love matter').

[3] With the leave of the Deputy President of this court both appeals were heard on the same day. The background necessary for a determination of each appeal and the relevant facts which had been agreed between the parties, were succinctly set out and filed of record pursuant to the provisions of SCA Rule 8(8)(e).

[4] Those facts in the *Pieterse* matter are:

4.1 The appellant and Amelia Pieterse were married to each other out of community of property.

4.2 Amelia Pieterse ('the deceased') committed suicide on 28 September 2000.

4.3 The appellant was at all relevant times an unrehabilitated insolvent, his estate having been sequestrated on 16 August 1995.

4.4 The second respondent Deborah van Rooyen NO is the trustee of the insolvent estate of the appellant.

4.5 Three minor children were born of the union between the appellant and the deceased.

4.6 During her lifetime the deceased operated, either in her personal capacity or through her close corporation (G & A Agencies CC) a money lending business on a large scale. The three appointed trustees of the insolvent estate of the deceased have been cited as the first respondent ('the trustees').

4.7 Gary Mark Shrosbree one of the trustees is also the co-liquidator of G & A Agencies CC.

4.8 The deceased in conducting her money-lending business obtained investments from a large number of investors, which she diverted through the various entities controlled by her. At the time of her death the deceased, in her personal capacity, owed investors in excess of R 20 million.

4.9 It was not possible for the deceased to have repaid any of the investors nor could she have contemplated that possibility at the time of her death. The entire scheme devised by the deceased was an

unlawful and illegal one.

4.10 The deceased proposed for and was issued with various insurance policies, including three life policies by Momentum Group Limited, the third respondent, namely policy numbers 90269438; 904278930 and 90676356 ('the three policies').

4.11 The premiums on those policies were paid by the deceased during her lifetime.

4.12 The nominated beneficiary in each instance was the appellant ('the nominated beneficiary').

4.13 The application for the sequestration of the deceased's estate was lodged on 21 November 2000. A provisional order issued on 8 February 2001 and the estate was finally sequestrated on 7 March 2001.

4.14 After the death of the deceased the appellant accepted the policy benefits and claimed payment thereof. In terms of all three policies, the total policy benefits, excluding interest, amounted to R 2 127 297,00.

4.15 All three policies were in existence for less than three years at the time of the deceased.

[5] Those facts in the *Love* matter are:

5.1 The first respondent is the widow of the late Roger Jennings Love ('the deceased').

5.2 The second respondent is the mother of the deceased.

5.3 The first respondent and the deceased were married to each other out of community of property on 16 June 1979.

5.4 The estate of the deceased was provisionally sequestrated on 27 September 1989 and a final order of sequestration issued on 5 October 1989.

5.5 On 29 January 1996 the deceased proposed for and was issued with policy number 15461978X7 ('the policy') by Sanlam Life Insurance Limited, the third respondent, which commenced on 1 April 1996.

5.6 On 6 February 2001 the first and second respondents were nominated the beneficiaries to the policy in proportions of 80 and 20% respectively ('the nominated beneficiaries'), which was recorded by the third respondent on 16 February 2001.

5.7 On 17 February 2001 the deceased committed suicide.

5.8 On 2 March 2001 the first and second respondents accepted the benefits of the policy.

5.9 At the time of his death the deceased was hopelessly

insolvent.

5.10 On 14 March 2001 a provisional sequestration order was issued and the deceased's estate was finally sequestrated on 11 April 2001.

5.11 The appellant, Gary Mark Shrosbree is the Trustee of the insolvent estate of the deceased ('the trustee').

5.12 The benefits in terms of the policy amounted to R500 000.

5.13 At the time of his death the policy was in existence for a period in excess of three years.

[6] In the *Pieterse* matter the trustees, as the applicant in the court a quo, sought a declaratory order that they own the three policies on the deceased's life. The nominated beneficiary sought, by way of a counter application, an order that he or the trustee of his insolvent estate (who had taken no part in those proceedings) owns the three policies. In the *Love* matter, the nominated beneficiaries sought a declarator that they were entitled to the proceeds of the policy in the proportions of 80 and 20% respectively. The trustee, in a counter application, sought, in addition to certain ancillary relief, an order that the nomination of the beneficiaries was a voidable disposition (which was not persisted with on appeal) and that he is entitled to all of the proceeds of the policy. Neither of the insurance companies took an active part in the proceedings either in the courts below or in this one. In each matter the application succeeded and the counter application failed, with costs following the result. The reasons for the trustees succeeding in the one

matter and failing in the other appear in the reported decisions of the courts a quo and require little by way of elaboration.

[7] The Long Term Insurance Act 52 of 1998 ('the LTIA') (section 73 read with Schedule 4) repealed the Insurance Act 27 of 1943 ('the old Act') with effect from 1 January 1999.² The provisions of the old Act (sections 39 and 41 - 44) dealt with the effects of insolvency on life policies and although detailed, were complicated and convoluted and in some respects costly.³ Its successor, section 63 of the LTIA, reads:

'Protection of policy benefits under certain long-term policies. –

(1) Subject to subsections (2) and (3), the policy benefits provided or to be provided to a person under one or more assistance, life, disability or health policies in which that person or the spouse of that person is the life insured and which has or have been in force for at least three years (or the assets acquired exclusively with those policy benefits) shall, other than for a debt secured by the policy –

- (a) during his or her lifetime, not be liable to be attached or subjected to execution under a judgment of a court or form part of his or her insolvent estate; or
- (b) upon his or her death, if he or she is survived by a spouse, child, stepchild or parent, not be available for the purpose of the payment of his or her debts.

(2) The protection contemplated in subsection (1) shall apply to –

² See Proc R127 of 1998 in *Government Gazette* 19596 of 18 December 1998.

³ Ken Douglas: 'The Protection of Life Assurance Policies' (1988) 10 *Modern Business Law* p71.

- (a) assets acquired solely with the policy benefits, for a period of five years from the date on which the policy benefits were provided; and
 - (b) policy benefits and assets so acquired (if any) to an aggregate amount of R50 000 or another amount prescribed by the Minister.
- (3) Policy benefits are only protected as provided in –
- (a) subsection (1)(b), if they devolve upon the spouse, child, stepchild or parent of the person referred to in subsection (1) in the event of that person's death; and
 - (b) subsection (1)(a) and (b), if the person claiming such protection is able to prove on a balance of probabilities that the protection is afforded to him or her under this section.'

[8] A contract of life insurance comes into existence when a person ('the proposer') proposes for the insurance which is accepted by the insurer. The person on whose death the insurance is payable is the life insured. The person who is entitled to enforce the benefits payable under the policy is the owner. The proposer, the life insured and the owner may be the same person or two or three different persons. A proposer may effect the insurance either in his/her own favour or in favour of someone else. If the proposer effects the insurance in favour of someone else, the contract of insurance is a contract for the benefit of a third party and may be accepted by such third party who thereupon

becomes the owner. Policies commonly entitle the owner to nominate a beneficiary on condition that the nomination will confer no rights on the nominated beneficiary during the owner's lifetime. The legal nature of such a nomination is *a stipulatio alteri* (a contract for the benefit of a third person).

[9] In such a case the policy holder (the '*stipulans*') contracts with the insurer (the '*promittens*') that an agreed offer would be made by the insurer to a third party (the '*beneficiary*') with the intention that, on acceptance of the offer by that beneficiary, a contract will be established between the beneficiary and the insurer. What is required is an intention on the part of the original contracting parties that the benefit, upon acceptance by the beneficiary, would confer rights that are enforceable at the instance of the beneficiary against the insurer, for that intention is at the 'very heart of the *stipulatio alteri*' (Ellison Kahn: 'Extension Clauses in Insurance Contracts' (1952) 69 SALJ 53 at 56). Thus the beneficiary, by adopting the benefit, becomes a party to the contract (see *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 625 D-G).

[10] On the death of the insured, provided that the nomination has not been revoked during the insured's lifetime, any claim to the policy proceeds by the beneficiary against the insurance company would be

based on the contract of insurance between the deceased and the insurance company. It is to the insurance company and no one else that the beneficiary would have to look for payment. Section 63 does not regulate the payment of the proceeds of the policy, because the beneficiary appointment, until revoked, has the effect that payment of the proceeds will be made to the beneficiary and not the estate of the deceased.

[11] Section 63 refers to assistance, life, disability or health policies. Those are defined in s 1 of the LTIA. The protection afforded by s 63 of the LTIA applies to 'the policy benefits' provided or to be provided to a person under one or more of the specified types of policies or the assets acquired exclusively with those policy benefits. The policy benefits which are protected are those payable to the protected person in terms of a protected policy which has been in force for at least three years. The assets which are protected are those which have been acquired solely or exclusively with the benefits of the relevant policy. The protection in relation to such assets operates for a period of five years after the date upon which the relevant policy benefits were provided. The protection is limited to an aggregate amount of R50 000,00 or such other amount as may be prescribed by the Minister.

[12] In the ordinary course the proceeds of an insurance policy will go

directly to a nominated beneficiary. Absent s 63, on the death of the policy holder, the trustee of such person's insolvent estate would not have any claim to those policy proceeds. Nothing to the contrary is provided in s 63. Section 63 does not purport to divert the proceeds of an insurance policy from a nominated beneficiary to the insolvent estate of a deceased policy holder. Nor, for that matter, does such a trustee, by virtue of s 63, become a creditor of the nominated beneficiary. Section 63 does not vest either trustee in each of these two cases with any interest in and to the proceeds of the policies. It follows that reliance by the trustees on s 63 was misplaced. More so, it must be added, in the *Pieterse* matter where all three policies were in existence for less than the stipulated three years at the time of the deceased's death. It follows that the trustees in each case had to fail in their quest for the declaratory relief sought by them.

[13] In the result:-

13.1 In the *Pieterse* matter:

- (a) The appeal is upheld with costs;
- (b) The order of the court a quo is set aside and replaced with the following:
 - (i) The application is dismissed with costs;
 - (ii) It is declared that the second respondent, Deborah van Rooyen NO, in her capacity as the trustee of the insolvent estate of Gustav Marthinus Pieterse, is entitled to the proceeds of the Momentum Life Policies Numbers 90269438, 90478930 and 90676356;
 - (iii) The respondent in the counter application is ordered to

pay the costs of the counter application.’

13.2 In the *Love* matter, the appeal is dismissed with costs.

V M PONNAN

ACTING JUDGE OF APPEAL

CONCURRING:

MPATI DP

STREICHER JA

FARLAM JA

HEHER JA