THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 389/2020

In the matter between:

DISCOVERY LIFE LIMITED **APPELLANT**

and

HOGAN, MICHAEL WILLIAM **FIRST RESPONDENT**

HOGAN, JOAN HAZEL **SECOND RESPONDENT**

Neutral citation: *Discovery Life Limited v Hogan and Another* (389/2020) [2021] ZASCA 79 (11 June 2021)

Coram: PETSE DP, WALLIS JA, and POTTERILL, ROGERS and POYO-DLWATI AJJA

Heard: 7 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09:45 am on 11 June 2021.

Summary: Insurance policy – interpretation of term of policy by virtue of which the insurer is required to grant the insured a period of 30 days within which to settle unpaid premium – term not operative where non-payment of premium is pursuant to the insured's repudiation of the contract.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Constantinides AJ sitting as court of first instance):

(a) The appeal is upheld with costs.

(b) The order of the high court is set aside and replaced with the following order:

'The application is dismissed with costs.'

JUDGMENT

Poyo-Dlwati AJA (Petse DP, Wallis JA and Potterill and Rogers AJJA concurring):

[1] When Mrs Susan Church decided to cancel her insurance policy with the appellant, Discovery Life Limited (Discovery), she had no inkling of the events that were to befall her six weeks later. While on holiday at the Sani Pass Lodge she was overcome by carbon monoxide fumes from a faulty geyser in the showers, collapsed and died. The present proceedings were brought by her parents, Mr and Mrs Hogan (the respondents), as the nominated beneficiaries under the insurance policy. The amount claimed was of the order of R4 million. Discovery defended the claim on the basis that the policy had been cancelled and it had ceased to be on

risk on 10 September 2018, 12 days before Mrs Church's unfortunate death. Her parents' claim succeeded in the high court and the appeal is with leave granted by the high court.

[2] On 4 December 2015 Mrs Church took out a Discovery classic life plan insurance policy contract (the policy) with Discovery. The policy insured her life for R3 million, which was to escalate until the date of the occurrence of the insured event, being her death. The policy commenced from 1 January 2016. In a telephone conversation on 6 August 2018 with Mr Msutwana, an employee of Discovery, Mrs Church advised him that she had decided to cancel the policy as she was moving over to Liberty Life. She explained to Mr Msutwana that she liked what Liberty Life had offered her, hence her cancellation of the policy.

[3] On 15 August 2018, Mrs Church wrote to Discovery and said that she was cancelling the policy with immediate effect. On 16 August 2018, Mr Mashele, acting on behalf of Discovery, advised Mrs Church's insurance broker by letter that the policy would be cancelled as per Mrs Church's request. He, however, advised the broker that a notice period of 30 calendar days applied to cancellations. On 28 August 2018, Ms Mathabatha, on behalf of Discovery, wrote to Mrs Church's broker and advised that the policy would be cancelled with effect from 1 October 2018. She further advised that the last day of cover would be 30 September 2018, with the final premium payable on 3 September 2018. She reiterated that the cancellation was subject to 30 calendar days' notice period.

[4] On 23 August 2018, and unbeknown to Discovery, Mrs Church instructed her banker, First National Bank, to stop the payment of the debit order in respect of the premium due under the policy for September 2018. As a result, on 3 September 2018, when Discovery submitted the monthly debit order to the bank for payment,

the debit order was returned unpaid with the following remark: ‘payment stopped by account holder’. On 10 September 2018, Mr Makakane, on behalf of Discovery, advised Mrs Church in writing that her policy had been cancelled with effect from 1 September 2018. Mrs Church was also advised as to the process to be followed if she wished to reinstate her policy. On the same date, Discovery also sent Mrs Church a text message on her cellular phone advising her that her policy had been cancelled.

[5] Mrs Church died on 22 September 2018. On 27 September 2018, the respondents, on advice from Mr Coetzer, who was Mrs Church’s erstwhile broker, paid the September premium to Discovery and thereafter notified Discovery of this payment. Discovery responded by sending Mrs Church a letter dated 28 September 2018 titled ‘Reinstatement requirements’. The gist of the letter was that Discovery required a fully completed and signed declaration of ‘health by all lives assured’ form. There was no response to Discovery’s letter. Instead, on 19 November 2018, the respondents submitted a claim under the policy with Discovery. On 22 November 2018, Mr Carls, on behalf of Discovery, advised the respondents that the claim had been declined as the policy had been cancelled with effect from 1 August 2018. This date, however, must have been due to an error on the part of Discovery's representative as it had previously advised Mrs Church that the policy had been cancelled with effect from 1 September 2018. There is no suggestion that Mrs Church had not duly paid the August 2018 premium.

[6] On 25 July 2019, the respondents launched an application in the Gauteng Division of the High Court, Johannesburg (the high court), for payment of the proceeds of the policy with interest. They asserted that as Discovery had elected to hold Mrs Church to the terms of the policy in its correspondence of 16 and 28 August 2018, when she had sought to cancel the policy with immediate

effect, the policy remained in force, both parties having to honour their respective obligations under the contract. Moreover, the respondents contended that Discovery failed to notify Mrs Church of the unpaid September premium as required by the terms of the policy, in terms of which Discovery, before cancelling the policy ,ought to have afforded Mrs Church a thirty-day grace period to pay the outstanding premium. Therefore, as the premium was paid, albeit by the first respondent as the executor of Mrs Church's estate, within the thirty-day grace period, Discovery was obliged to honour the claim and pay out the sum assured.

[7] Discovery opposed the application on the basis that the policy was validly and effectively cancelled on 10 September 2018, with effect from 1 September 2018. Therefore, it contended that at the date of the death of Mrs Church, the policy was no longer in force. Discovery admitted the terms of the policy and those applicable to the grace period for payment of premiums, but contended that those provisions only applied when the insured had defaulted in their obligations by failing to pay the premium timeously. Furthermore, it asserted that those provisions did not serve to extend the policy against the wishes of the insured after the policy had been cancelled, and also did not preclude Discovery from cancelling a policy forthwith in the event of its repudiation. When Discovery received a message from the bank that Mrs Church had stopped payment of her debit order, it was clear to Discovery that Mrs Church did not intend to comply with her contractual obligations under the policy. Therefore, as Mrs Church had repudiated her contract, Discovery had elected to cancel it as per its letter of 10 September 2018, hence its decision to repudiate the claim.

[8] The high court, per Constantinides AJ, found in favour of the respondents. On the issue as to whether the policy was still valid on the date of death of Mrs Church, Constantinides AJ held that:

'The fact that Discovery accepted the payment of the premium albeit from the executor or Susan's broker and the fact that there was no indication or proof provided to either the Applicants or to the court that the final premium paid was held in a suspense account is an indication that the premium was accepted and that the policy was still in existence in line with the emails addressed to Susan informing her that the policy would be effective until 30 September 2018.' [1]

[9] With respect to the non-payment of the premium on 3 September 2018 and Discovery's failure to grant Mrs Church a thirty-day period of grace in accordance with the terms of the policy, Constantinides AJ held as follows:

'[I]t is evident that Discovery by having omitted to afford Susan the grace period, to make payment of the returned debit order it has failed to comply with the terms of the agreement. Discovery by stating that it cancelled the contract with effect from 1 September 2018, does not absolve Discovery from the election it made in the two letters addressed to Susan on 16 August 2018 and 28 August 2018, wherein Discovery had indicated that the final debit order was to be paid on 3 September 2018.'[2]

[10] The central issue in this appeal is whether Mrs Church's instructions to her bank to stop payment of the September premium amounted to repudiation in the light of her previous communication to Discovery purporting to cancel her policy. If so, do the terms of the policy governing non-payment of premiums find application in instances of repudiation, and do the provisions governing unpaid premiums override Discovery's right to cancel the policy for repudiation?

[11] The material terms of the policy provide that:

'Premiums are payable monthly in advance by debit order only.

. . .

[1] Judgment Vol 1 p 162 para 39.
[2] Judgment Vol 1 p 169,para 57.

Month 1: Discovery Life will grant a period of 30 calendar days for you to settle unpaid premiums.
Month 2: If premiums are still not settled, Discovery Life will grant an additional 30 calendar days for you to settle unpaid premiums and cover will be suspended.
Month 3: Discovery Life will cancel your contract if the unpaid premiums are not paid within 20 days from the last recorded debit order date.'[3]

Another relevant term of the policy reads as follows:

'All payment instructions issued by Discovery Life will be treated by your bank as if the instruction had been issued by you personally. Although this authority may be cancelled by you, such cancellation will not cancel the agreement.'[4]

[12] I now turn to consider the respective contentions of the parties in this appeal. Counsel on behalf of Discovery submitted that as of 10 September 2018, the contract between the parties was at an end. This was so, argued counsel, because Mrs Church had made it clear on 6 and 15 August 2018 that she wanted the policy cancelled. Furthermore, despite the fact that Discovery had initially sought to enforce the contract as indicated in its letters of 16 and 28 August 2018, Mrs Church's instruction to her bank to stop payment of the premium payable on 3 September 2018 was an unequivocal indication that she had no intention of continuing with the contract and wanted it cancelled immediately. Therefore, a reasonable person in the position of Discovery would have interpreted Mrs Church's conduct as evincing an intention no longer to be bound by the terms of the contract. This was also made clear by the fact that Mrs Church did not respond to Discovery's letter and text message of 10 September 2018, advising her that the policy had been cancelled with effect from 1 September 2018.

[13] For their part the respondents, argued that the policy could not have been at an end or cancelled on 10 September 2018 as such cancellation was premature.

[3] Vol 1 p 27 lines 56-60.
[4] Vol 1 p 28 lines 16-17.

This was so because the terms of the policy explicitly provided that Mrs Church had a thirty-day grace period within which to pay the September premium. It was further submitted that the policy terms mirrored the provisions of s 52[5] of the Long-Term Insurance Act 52 of 1998 prior to its repeal, whose object was to protect the policyholder in the event of non-payment of premiums.[6]

[14] As I see it, one must have regard to the entire factual matrix of the case leading up to 10 September 2018 in order to ascertain what the status of the policy was on that day. In the telephone conversation between Mrs Church and Mr Msutwana on 6 August 2018, she made it clear that she wanted to move her policy to Liberty as they had offered her something better. It did not end there. On 15 August 2018 she wrote to Discovery cancelling the policy. To ensure that the policy would be cancelled, she instructed her bank on 23 August 2018 not to pay the premium that was due on 3 September 2018. This was after Discovery wrote and reminded her of the thirty-day notice period. And the bank in turn gave effect to her instruction by not honouring the debit order request from Discovery and advising Discovery that she had stopped payment. It was therefore apparent to Discovery that the non-payment of the premium was deliberate.

[15] It is beyond question that when Discovery wrote to Mrs Church on 28 August 2018, advising her that the policy would come to an end on 1 October 2018 and that her last premium would be payable on 3 September 2018, it was

[5] Before its repeal s 52, which was headed 'Failure to pay premiums', read as follows:
'52. Failure to pay premiums –
(1) If a premium under a long-term policy . . . has not been paid on its due date, the long-term insurer shall notify the policyholder of the non-payment, and the policy shall, notwithstanding anything therein to the contrary, in the case of a long-term policy under which there are to be two or more premium payments at intervals of –
(a) one month or less, remain in force for a period of 15 days after that due date; or
(b) longer than one month, remain in force for a period of one month after that due date;
or for such longer period as may be determined by agreement between the parties, and if the overdue premium is not paid by the end of any such period, the policy shall be dealt with in accordance with subsection (2).'

[6] Section 52 was repealed with effect from 28 September 2018 and was thus operative at all material times. With effect from 28 September 2018, the same provision was inserted into the Policyholder Protection Rules (Long-term Insurance) as rule 15A.

oblivious to the fact that Mrs Church had instructed her bank not to pay this premium. Mrs Church's conduct in so doing, could be interpreted in no other way than that she no longer wished to remain bound by the terms of the policy. Come what may, she had no intention of honouring the terms of the policy which required her to give a month's notice and thus to pay the premium for September 2018. Thus, one can accept that she had deliberately repudiated her policy.

[16] As Corbett JA stated in *Nash v Golden Dumps (Pty) Ltd*:[7]

'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract . . . Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to end upon communication of his acceptance of repudiation and rescission to the party who has repudiated.'

[17] This Court has consistently said that the test for repudiation is not subjective but objective.[8] The emphasis is not on the repudiating party's state of mind, on what she subjectively intended, but on what someone in the position of the innocent party would think she intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention as manifested by objective external conduct accordingly serves as the criterion for determining the nature of the threatened actual breach.[9]

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[7] *Nash v Golden Dumps (Pty) Ltd* [1985] 2 All SA 161 (A) at 176; 1985 (3) SA 1 A at 22D-F; *Comwezi Security Services v Cape Empowerment Trust* [2014] ZASCA 22 paras 11 and 12; *Braun Medical (Pty) Ltd v Ambasaam CC* [2014] ZASCA 199; 2015 (3) SA 22 SCA paras 8 and 9; *Du Preez v Tornel Props (Pty) Ltd* [2015] ZASCA 134 para 17; *Micaren Exel Petroleum Wholesaler (Pty) Ltd v Stella Quick Shop (Pty) Ltd and Another* [2020] ZASCA 66 para 11.

[8] See *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 A at 387A-C; [1973] 1 All SA 540 (A). *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 A at 953E-F.

[9] See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] 1 All SA 581 (A).

[18] The insuperable hurdle confronting the respondents is that Mrs Church had been informed by Discovery, at least twice, that she was contractually bound to give 30 days' notice if she wished to cancel her policy. I also have no doubt, taking into account that she was a professional woman, assisted by a financial broker, that she knew of the terms of her policy. She also must have known what the consequences of instructing her bank to stop payment of the premium would be. In fact, she made it clear that she needed to move over to Liberty as they offered her something better. She obviously had no intention of paying two insurance premiums in September, hence she instructed her bank to stop the one in favour of Discovery. Discovery was therefore, perfectly entitled to accept the repudiation and cancel the policy immediately.

[19] This leads me to the issue of whether Discovery ought to have afforded Mrs Church a thirty-day grace period in order to pay her outstanding premium. I think not. But it was submitted on behalf of the respondents that Discovery had an obligation to advise Mrs Church of the unpaid debit order prior to cancelling the policy and afford her 30 days within which to pay the arrear premium. This, however, would be nonsensical for Discovery if one takes into account Mrs Church’s communication with Mr Msutwana on 6 August 2018, her letter to Discovery on 15 August 2018 and her instruction to the bank to stop payment of her debit order. This was not a situation where there were insufficient funds in her account, or the bank had made an error in the non-payment of her debit order. In my view, the thirty-day grace period for an unpaid premium in the policy does not apply in cases where the cancellation is as a result of repudiation by the insured herself of the policy. The grace period only applies where the non-payment of the premium is not in all the circumstances a repudiation of the policy. In the present case, Mrs Church did not need reminding that her premium was unpaid. That it

should not be paid, and that it should remain unpaid, was plainly her inferred intention as evinced by the conduct to which I have referred.

[20] The argument based on the grace period found favour with the high court when it held that '[t]herefore, an express term in the contract concluded between the parties stated that the conduct of Susan to cancel her debit order would not result in the cancellation of the agreement'.[10] In the view I take of the matter one ought not to take the instruction to stop payment in isolation. One has to consider the cumulative effect of the events from 6 August 2018 up to and including 10 September 2018. The argument might perhaps have had some force if Mrs Church's instruction to her bank were considered in isolation without regard to what had occurred prior to this instruction being given. But it cannot prevail for the reasons mentioned in paragraph 19 above. Discovery, therefore, was not obliged to give notice to Mrs Church to remedy the breach before exercising its right to cancel the policy.[11] It elected, rightfully so, to cancel the contract after Mrs Church repudiated.

[21] To sum up, Mrs Church's policy was cancelled not for the non-payment of the premium *per se* but because Discovery elected to accept Mrs Church's repudiation of the contract. As correctly conceded by the respondents' counsel during argument, the grace period provision cannot exclude reliance on repudiation or even a mutual agreement by the parties to cancel the policy. It was submitted, during the course of the argument, that Discovery could not be said to have elected to accept the repudiation and cancel the policy as almost all the letters addressed to Mrs Church were automated responses generated by a computer. Discovery's answering affidavit demystified this when it explained that the various letters were

[10] Judgment Vol 1 p 163 para 42.
[11] See *Taggart v Green* 1991 (4) SA 121 (W) at 126A-B; *Metalmil (Pty) Ltd v AECI Explosives & Chemicals Ltd* 1994 (3) SA 673 (A) at 683H.

sent out by its credit department. Furthermore, each letter responded to a certain set of facts, and was under a signature by different personnel. It can therefore hardly be said that there was no human intervention in the various letters addressed to Mrs Church.

[22] Accordingly, the appeal must succeed and the following order will issue:

(a) The appeal is upheld with costs.

(b) The order of the high court is set aside and replaced with the following order:

‘The application is dismissed with costs.’

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T P POYO-DLWATI

ACTING JUDGE OF APPEAL

APPEARANCES

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