THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 202/2017

In the matter between:

VASANTHI NAIDOO	**APPELLANT**
and	
DISCOVERY LIFE LIMITED	**FIRST RESPONDENT**
NAIDOO SD	**SECOND RESPONDENT**
NAIDOO G	**THIRD RESPONDENT**
NAIDOO VD	**FOURTH RESPONDENT**
NAIDOO J	**FIFTH RESPONDENT**

Neutral citation:	*Naidoo v Discovery Life Limited & others* (202/2017) ZASCA 88 (31 May 2018)
Coram:	Shongwe ADP, Wallis and Mbha JJA and Hughes and Schippers AJJA
Heard:	10 May 2018
Delivered:	31 May 2018

Summary: Contract law – risk-only policy containing beneficiary clause – *stipulatio alteri* – such policy cannot be an asset in the estate of the policyholder and of joint estate from marriage in community of property – such a policy not an insurance policy in terms of s 15(2)(*c*) of the Matrimonial Property Act 88 of 1984.

ORDER

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

(1) The appeal is dismissed with costs.

(2) The second to the fifth respondents must bear their own costs.

JUDGMENT

Mbha JA (Shongwe ADP and Wallis JA and Hughes and Schippers AJJA concurring):

[1] This appeal raises two questions. The first is whether a risk-only life insurance policy with a beneficiary nomination clause is an asset of the policyholder during his or her lifetime; and the second, whether the nomination of a beneficiary by a policyholder married in community of property, constitutes an alienation of that policy as contemplated in s 15(2)(*c*) of the Matrimonial Property Act 88 of 1984 (the Act).The Gauteng Division of the High Court, Johannesburg, answered both questions positively. The appeal is with leave of this court.

[2] The basic facts are the following. The appellant and Mr Merglen Naidoo (the deceased) were married in community of property on 17 July 1996.

[3] On 23 May 2002, the deceased made an application to the first respondent (Discovery) for a joint life assurance with policy number 5100022093 (the policy). In terms of the policy, the deceased was defined as the principal life insured and the owner of the policy. The deceased nominated the appellant as the beneficiary of the proceeds of the policy upon his death. The policy provided further that the owner could instruct Discovery in writing to change the beneficiary at any time and that the appointment of a beneficiary was revocable at all times during his lifetime. Importantly, the policy provided that a nominated beneficiary was not entitled to any benefits during the lifetime of the principal life assured.

[4] It is common cause that the policy was a risk-only policy meaning that it had no monetary value unless and until the person whose life was insured died. It had no investment portion and thus no surrender value. It also provided that no benefits would be payable on its cancellation.

[5] On 11 October 2011 the deceased wrote to Discovery and requested a change of beneficiary details to reflect both his parents, his brother and his sister as beneficiaries to the policy. It is common cause that the appellant was unaware of this change.

[6] After the deceased's death on 6 March 2012, the newly appointed beneficiaries accepted the benefits of the policy by claiming payment of the proceeds in the total sum of R3 174 357 and Discovery duly made payment to them. The new beneficiaries were

subsequently joined as third parties in the proceedings in the court a quo by Discovery on the basis that in the event the court were to find that the nomination of such third parties, who have since been paid the proceeds of the policy, was in breach of s 15(2)(*c*) of the Act, the third parties would be liable to indemnify Discovery. These conditional claims were based on unjustified enrichment. Discovery did not pay any amount to the appellant and denied that it had any liability to do so.

[7] Counsel for the appellant contended that the aggregate of rights and obligations under the policy vested in the joint estate, which included the right to nominate a beneficiary, receive payment of the sum insured and revoke a nominated beneficiary. Therefore, so it was contended, the deceased could not nominate the third parties as beneficiaries without the appellant's written consent as envisaged in s 15(2)(*c*) of the Act.

Was the policy an asset of the policyholder during his lifetime?

[8] This court has authoritatively determined that a contract in favour of a third party underlies the legal concept of a beneficiary clause in a life insurance policy.[1] The policyholder (*stipulans*) contracts with the assurer (*promittens*) that an agreed offer will be made by the assurer to a third party (the beneficiary), with the intention that on acceptance of that offer by the beneficiary, a contract will be established between the

[1] *Borman en De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (3) SA 488 (A) at 506H.

beneficiary and the assurer. The offer involved is that the insurer will pay the proceeds of the policy to the beneficiary.[2]

[9] The beneficiary clause is currently widely used in assurance contracts and this can be attributed to two main factors. First, the policy proceeds are immediately made available to the beneficiary on the death of the policyholder, without the beneficiary having to wait until the deceased's estate is wound up before he or she can claim and receive the policy proceeds. Secondly, the policy proceeds do not form part of the deceased estate for purpose of the calculation of the executor's remuneration. Clearly, at the heart of those two main advantages is the avoidance or bypassing of the deceased estate.[3]

[10] When a policy is a risk-only policy, as in this case, payment of the policy proceeds occurs only upon the death of the insured life. It follows that by definition the policy proceeds can never be paid to the policyholder or the beneficiary during the lifetime of the insured life. The only rights that the policyholder has during his or her lifetime emanate from the policy itself. Typically these are the contractual rights to nominate a beneficiary and to change the beneficiary nomination, the right to cede the policy and the right to terminate the policy.[4]

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[2] Henckert 'The life assurance policy, beneficiary clauses and marriage: a few aspects' (1994) *TSAR* 513.
[3] Henckert (above).
[4] *Hees NO v Southern Life Association Ltd* 2000 (1) SA 943 (W) at 948A–E,; *Ex Parte Calderwood NO: In Re Estate Wixley* 1981 (3) SA 727 (Z) at 736B-C.

[11] This court has determined that the policy itself is not an asset in the estate of the policyholder. As Rabie JA described it in *Borman en De Vos NNO* (above at 507A): 'where a person has paid the premiums but has no corresponding claim during his or her lifetime, it can be said that an asset has been separated or withdrawn from his estate'. (My translation.) This court affirmed that approach in *Pieterse v Shrosbree NO & others*[5] and said that in the ordinary course the proceeds of an insurance policy will go directly to a nominated beneficiary.

[12] As the policy in issue was a risk-only policy which could not be an asset in the estate of the deceased, on the strength of the authorities referred to above, it follows that it could never be an asset in the joint estate. During the deceased's lifetime the appellant had no right to receive the proceeds of the policy and therefore viewed from this perspective, the policy was also not an asset in the joint estate.

Was the nomination of a beneficiary an alienation under section 15(2)(*c*)?

[13] Section 15 of the Act reads, in relevant parts, as follows:

'(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not without the written consent of the other spouse-

(a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;

[5] *Pieterse v Shrosbree NO & others, Shrosbree NO v Love & others* [2004] ZASCA 129*;* 2005 (1) SA 309 (SCA) para 12.

(b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;

(c) alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;

(d) alienate or pledge any jewellery, coins, stamps, paintings or any other assets forming part of the joint estate and held mainly as investments;

(e) withdraw money held in the name of the other spouse in any account in a banking institution, a building society or the Post Office Savings Bank of the Republic of South Africa;

. . . .'

[14] The law relating to the interpretation of legislation in this country is well-settled. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[6] this court expounded the principle as follows:

'[18] . . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions *in the light of the document as a whole and the circumstances attendant upon its coming into existence* . . . The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

. . .

[26] . . . in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on

[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA)

which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. *An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration*.'(My emphasis.)

[15] The main purpose of the Act was to repeal the common law rule in terms of which a husband obtained the marital power over the person and property of his wife.[7] The effect is that husband and wife are now equal partners and she can enter into legal transactions on her own. Section 15(1) of the Act reinforces the general rule that a spouse in a marriage in community of property may perform any juristic act regarding the joint estate without the consent of the other spouse.

[16] Section 15(2)(*c*) of the Act creates an exception to the general rule by prohibiting a spouse married in community of property from alienating an asset in the joint estate without the written consent of the other spouse. Clearly, whilst the intention of the legislature was to give both spouses equal right of disposal with regard to the joint estate, that does not indicate a general intention that they should act jointly in all transactions. Except in special reserved cases, the legislation enabled them to exercise that competence independently of each other.

[17] With this in mind, it follows that when examining whether a spouse is prohibited in terms of s 15(2)(*c*) of the Act from dealing with impugned property without the written

[7] Section 11(i) of the Matrimonial Property Act 88 of 1984.

consent of the other spouse, the crucial enquiry is whether such property forms part of the joint estate. If the said property cannot be regarded as 'forming part of the joint estate' then s 15(2)(*c*) of the Act is not applicable and the spouse may deal with such property as he or she pleases.

[18] Applying the principles of interpretation in *Endumeni* (above), the words 'insurance policies' found in s 15(2)(*c*) cannot be read in isolation. They must be interpreted consistently with the other financial instruments listed in the section and with the catch-all phrase 'any similar assets', to refer to insurance policies that are assets. In this context they clearly include policies having a current value, such as endowment policies or retirement annuities that can be surrendered or made paid up. Pure risk policies such as life, motor, fire and theft or household goods policies are of a different character. They are contracts for the provision of an indemnity in the event of a future risk occurring. The interpretational issue is whether they are 'insurance policies' in terms of the section, in other words are they assets of the joint estate.

[19] The words must also be interpreted consistently with sub-paragraphs (a) – (e) in the section referring specifically to assets in the joint estate consisting of other real rights and property like mortgages, servitudes over immovable property, jewellery, coins, investments, money and so forth. Clearly, the meaning to be ascribed to the word 'asset' depends on the context.[8] Thus in *Ex Parte Logan* 1929 TPD 201 (at 203) assets were described as property that could be applied to the payment of debts.

[8] *Benoni, Brakpan and Springs Board of Executors, Building Society and Trust Co. Ltd v Commissioner for Inland Revenue* 1921 TPD 170 at 173.

[20] From the above it follows that not every contractual right constitutes an asset. Hence, the rights of the policyholder in a risk-only policy before the death of the insured life are not assets and do not constitute 'insurance policies' as envisaged in s 15(2)(*c*). A contractual right that confers a power on the policyholder to appoint a beneficiary to receive the proceeds of a policy upon the death of the insured life, is not a right that can be applied to the payment of debts. The rights the deceased had during his lifetime to deal with the policy, were not assets at all. If they were assets, these rights do not constitute an insurance policy within the meaning of s 15(2)(*c*) of the Act.

[21] The restrictions imposed by s 15(2)(*c*) of the Act apply only to alienation of insurance policies that are assets and form part of the joint estate. This section finds no application to the facts in this case.

[22] The appellant's reliance on *Ndaba v Ndaba*[9] is misplaced. This case is clearly distinguishable as it dealt with a pension interest which is an asset analogous to the right to be paid a surrender value under an insurance policy with an investment portion. The policy in issue here has no investment portion and no surrender value.

[23] The nomination of a beneficiary to receive the proceeds of a life insurance policy and the subsequent revocation of such nomination accompanied by the substitution of new beneficiaries does not in any event constitute the transfer of a right constituting an asset in the joint estate. It is merely the exercise of a contractual right created by the policy.

[9] *Ndaba v Ndaba* [2016] ZASCA 162*;* 2017 (1) SA 342 (SCA) para 35*.*

[24] In this case, the deceased after nominating his family members as beneficiaries, retained the right to cancel that nomination and nominate someone else. He has not disposed of anything. He never lost the rights that he had under the policy. He retained those rights until his death.

[25] For these reasons, the nomination of the third parties as beneficiaries did not constitute an alienation of the policy within the meaning of s 15(2)(*c*) of the Act and the appeal must fail.

[26] The third parties elected to appear at the hearing of the appeal in support of the arguments of the respondent. This was purely a precaution on their part and added nothing to the debate before us. They asked for an order that their costs be paid by the respondent, but I can see no justification for making such an order. In my view they should pay their own costs.

[27] I accordingly make the following order:

(1) The appeal is dismissed with costs.

(2) The second to the fifth respondents must bear their own costs.

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B H Mbha

Judge of Appeal

APPEARANCES:

For Appellant:	J C Pieterse
Instructed by:	Corne van de Venter Incorporated, Johannesburg
	c/o Honey Attorneys, Bloemfontein
For First Respondent:	A J Lamplough
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