

Jordaan NO v Lustig & others
[2008] JOL 22218 (W)

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Judgment Date(s): 15 / 11 / 2007
Hearing Date(s): 26 / 10 / 2007
Marked as: Unmarked
Country: South Africa
Jurisdiction: High Court
Division: Witwatersrand Local
Judge: Mathopo J
Bench: RS Mathopo J
Parties: Gerald Louis Jordaan NO (P); Darren Louis Lustig (1D), Liberty Group Ltd (2D), Annja Jordaan (née Wasielewski) (3D)
Appearance: Mr WJ de Bruyn, Charles Sherman Kruger & Prosper Incorporated (P); Mr RL Selvan, Gishen-Gilchrist Inc (D)
Categories: Action – Civil – Substantive – Private
Function: Confirms Legal Principle

Key Words

Insurance – Deceased estate – Beneficiary under insurance policy – Cancellation of

Mini Summary

As executor in the deceased estate of his son, the plaintiff sought an order against the second defendant, an insurer, to pay the proceeds due in terms of the policy of the deceased to his estate.

The deceased and the first defendant were shareholders and/or partners in a restaurant business in respect of which four insurance policies on the life of the partners of the business were obtained. When the business relationship terminated, the first defendant resigned as a director/shareholder and the deceased insured his own life and nominated the first defendant as a 60% beneficiary and his wife as a 40% beneficiary. The policy was taken for business purposes only. The parties subsequently orally agreed that the beneficiaries to the policies would be cancelled. The deceased had however, failed to give the requisite written notice to the second defendant to revoke/cancel the nomination of the first defendant as beneficiary in one of the policies.

The defendant's case was that since the deceased did not change the nomination of the first defendant as a beneficiary before his death, he remained entitled to claim such benefit.

Held that the plaintiff's witnesses were credible and satisfied the court that the first defendant had admitted after the death of the deceased that he was not entitled to a benefit. The court found that his subsequent conduct was mere opportunism. It found further that the failure by the deceased to change the particulars of the beneficiary with the insurer was an oversight.

Judgment was granted in plaintiff's favour.

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MATHOPO J

Introduction

[1] The plaintiff, Gerald Louis Jordaan (Senior), a chartered accountant by profession, the executor in the estate of his late son Gerald Louis Jordaan Jnr ("the deceased"), seeks an order against the second defendant, Liberty Life, to pay proceeds due in terms of the policy of the deceased to his estate.

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[2] Liberty Life and the third defendant Annja Jordaan, the widow of the deceased did not oppose action and elected to abide the decision of this Court.

Background

[3] The following facts are common cause and not in dispute:

3.1

Deceased and the first defendant were childhood friends and shareholders and/or partners in a restaurant business in Springs, each having 51% and 49% shareholding respectively.

3.2

That four policies were obtained purely and solely for business purposes. Each and every one of the policy documents record that the cross-insurance was for business purposes on the life of a "partner". They did not conclude a buy and sell agreement.

3.3

The business relationship terminated on 1 September 2003 and the first defendant, in writing agreed to relinquish 49% of his shares in the business for the sum of R100 000 plus one Opel Kadett motor vehicle.

3.4

He resigned as a director/shareholder on 6 September 2003.

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3.5

By means of policy number 569443562300 the deceased insured his own life and nominated the first defendant as a 60% beneficiary and his wife (the third defendant) as a 40% beneficiary. This policy was taken for business purposes only. No cover existed for any other reason but as partners.

3.6

At the time when the policy aforesaid was issued the death benefit was approximately R382 000 and the value of the first defendant's 60% benefit was R229 000. At the time of the death of the deceased the death benefit was the sum of R613 915.

3.7

During January 2004 the deceased and the first defendant pursuant to the clause:

"Insurance Policy still to be discussed (in the September 2003 agreement) orally agreed:

(a)

to cancel reciprocal benefits in terms of the key-man policies;

(b)

to waive or relinquish any benefit in terms of such policies."

3.8

The relevant policies which were subject to discussion and agreement were described in paragraph 5.3 of the plaintiff's particulars of claim as follows:

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Date	Policy No	Owner	Life assured	Amount
1/3/1996	56070991800	1 st Defendant	Deceased	R200 657
1/3/1996	56070990100	Deceased	1 st Defendant	R200 657
1/3/1996	56943561600	Deceased	1 st Defendant	R228 226
1/5/1999	56943562300	Deceased	Deceased	R382 000

3.9

The first three policies which were key-man policies were surrendered pursuant to the agreement. It was thus left for the deceased to cancel the beneficiary in terms of the policy number 56943562300.

3.10

The deceased failed to give the requisite written notice to the Liberty Life to revoke/cancel the nomination of the first defendant as beneficiary.

Issue

[4] Whether in January 2004, the parties agreed to cancel the reciprocal benefits in terms of the policy and to waive or relinquish such benefits.

[5] The plaintiff's case is that pursuant to the January 2004 agreement the deceased through an oversight omitted or failed to advise Liberty Life to remove or cancel the name of the first defendant as a beneficiary in terms of his policy number 569443562300 (*sic*) issued by Liberty Life.

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[6] The defendant's case is that since the deceased did not change the nomination of the first defendant as a beneficiary before his death, he remained entitled to claim such benefit from Liberty Life.

Evidence for the plaintiff

[7] The plaintiff called five witnesses in support of his case. Mr Jordaan Senior the father and appointed executor of the deceased's estate testified that the deceased communicated to him and his wife prior to his death that the nomination of the first defendant as beneficiary had been cancelled and that all the proceeds of the policies would be applied for the benefit of the third defendant and the minor children.

[8] At the funeral of his son, he spoke to the first defendant about the fact that the deceased had omitted to remove his name as a beneficiary and his reaction was that "he will sign the waiver or declaration because he is not entitled to the money but the wife and kids". As a result of the agreement he prepared a declaration which was taken by the third defendant to the first defendant for signature. The declaration read as follows:

"That prior to the death of Louis Gerald Jordaan Id no. 6701055159088, *it was agreed that he would take the necessary steps to amend Liberty Life policy number 569443562300 (sic) by deleting my name as a beneficiary (my emphasis) but unfortunately did not do so*

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prior to his death. That I am not regarded as a beneficiary and waive any rights in and to the said policy."

[9] During cross-examination he reiterated that since he expected the first defendant to honour his promise he did not think of formalising it or any other legalities. He was adamant that during the discussion, that the first defendant did not indicate any other reason why he was entitled to the benefits. His evidence was that the deceased through an oversight failed to advise Liberty Life to remove the name of the first defendant.

[10] His evidence was corroborated in all material aspects by his wife Mrs Jordaan Senior who was present during the discussion at the funeral.

[11] Mrs Annja Jordaan, the third defendant, also testified that prior to the death of the deceased he communicated to her that the nomination of the first defendant as beneficiary had been cancelled and that all the proceeds of all the policies would be applied for her and the minor children. She was given a declaration by the plaintiff to present to the first defendant at his place of business. The first defendant's response after reading it was to the effect, he had consulted, *inter alia*, his lawyer and was not prepared to sign the document. He instead offered her R20 000 and remarked that he was "lucky" and further informed her that he was entitled to the money because he was not adequately compensated during the dissolution of the business and remarked that he thought that the deceased had well taken care of her. During cross-examination it was put to her that the deceased and first defendant reconciled and became friends and visited each other after the dissolution. She denied the proposition and stated that their relationship had become strained.

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[12] Mr Alex Wasielewski, the brother to Annja Jordaan, testified that at the funeral the defendant approached him and voluntarily informed him that "further funds had since become available which would assist the deceased's wife and the kids" referring to the proceeds of the policy. According to this witness, the first defendant unequivocally informed him that he was not entitled to the proceeds or benefits.

[13] The last witness for the plaintiff was Mr Hans Meyer, a Liberty Life insurance broker, who testified that prior to the dissolution of the business he consulted the deceased, after assessing his portfolio advised him that policy number 56943562300 was not ideally suited as a key-man policy for their business purposes and suggested that he effect necessary changes in the beneficiary form. The deceased informed him that the business relationship was coming to an end and that he would correct the position by removing and/or cancelling the defendant as a beneficiary. Changes were not effected by the deceased notwithstanding that on 27 June 2003 he faxed the change beneficiary form to the deceased.

Evidence for the defendant

[14] Darren Lustig testified in support of his case and called his wife as a witness. He confirmed the common cause facts and agreed that after sending the letter dated 1 September 2003, relinquishing his shareholding from the company he was paid and later resigned as a

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director on 6 September 2003. He confirmed paragraph 7 of his plea that a discussion took place between him and the deceased to surrender the policies taken on the life of the deceased so as to obtain the surrender value thereof and that indeed he was paid the surrender value thereof. The relevant portion of his plea in paragraph 7 read as follows:

"Ad paragraph 8

7.1

In about January 2004, on the telephone, a discussion took place between the first defendant and the deceased as to whether the first defendant should surrender the policies taken out on the life of the deceased, of which he was the owner;

7.2

The upshot of the discussion was the first defendant would surrender the policies on the life of the deceased so as to obtain the surrender value thereof;

7.3

The first defendant did surrender the policies on the life of the deceased and was paid out the surrender value thereof."

[15] He disputed that at the funeral he informed Jordaan Senior that he was not entitled to the benefit and stated that he was taken aback by the conduct of Jordaan Senior in discussing the policy at the funeral when everybody was emotional about the deceased's death.

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[16] He agreed or conceded that the wife of the deceased came to see him at his shop but denied telling her that "he got lucky" and offering her R20 000. He testified that he offered the deceased's wife R100 000 for the two minor children's education.

[17] During cross-examination on a number of occasions he conceded that the agreement to cancel the policies related to all four policies. Notably in his evidence-in-chief he used the word "agreed" to dispose of the policies and when he was pressed further by Mr *De Bruyn*, for the plaintiff, he conceded that the agreement was to cancel all the policies. In response to the court's question regarding the cancellation of the agreement he agreed that the cancellation would entail that "*you are not covered by him (deceased) and the deceased also not covered by him*" (my emphasis). This evidence was in stark contrast to his plea. However, he was adamant that the deceased deliberately did not want to cancel his name as a beneficiary because he wanted to benefit him. He gave four reasons why the deceased deliberately did not cancel his name as a beneficiary, namely:

- (a) That the amount of money that he got out of the sale of the business was not commensurate with his efforts.
- (b) That the deceased may have felt guilty because his drug addiction caused the breakdown of the business.
- (c) Their friendship.

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- (d) That he was advised by an accountant that he may be exposing himself to donation tax should he renounce the benefits.

[18] He never disputed that the declaration incorrectly recorded what was agreed between the parties. It appeared that his refusal to sign was based purely on a change of mind and not that he disagreed with the contents of the declaration.

[19] Again, during his evidence-in-chief he described the termination of business relationship as attributable to the deceased's drug addiction problems. In his words he stated that because of the said problems he really wanted to get out of the business thus demonstrating that he did not want to have anything to do with the deceased or any business relationship with him. Quite surprisingly, during cross-examination and for the first time [he] stated that he approached the deceased during October 2003 (exactly a month after the dissolution of the business) to join him in his new Kodak shop. This crucial evidence was not put to any of the plaintiff's witnesses and neither did he testify about it during his evidence-in-chief.

[20] He testified further that the relationship between him and the deceased was "extremely close" and "shared everything together", "he was like my brother", "he was my soul mate", and "his pictures are close to my heart". During the cross-examination it was put to him that he was opportunistic, greedy and wanted to deprive the widow and minor children. He could not give any cogent reason for his entitlement to the policy save the reasons mentioned in paragraph [17], *supra*.

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[21] This is the conspectus of the evidence which I must evaluate. In the light of the above, four questions need to be considered:

- (a) Whether pursuant to the January 2004 agreement relating to the "insurance policies" the first defendant agreed to the cancellation of all four policies.
- (b) Whether the first defendant informed the plaintiff's witnesses that he was not entitled to the benefits in terms of the policies.
- (c) Whether the deceased deliberately did not cancel the first defendant as a beneficiary to enable him to benefit in terms of his policies.
- (d) Whether the deceased through an oversight omitted to remove or cancel the first defendant as a beneficiary in his policy.

[22] The outcome of this case hinges on the evaluation of the general probabilities in the various witnesses' testimony.

[23] On the central issue whether the deceased deliberately intended the deceased to benefit in terms of his policy, there are irreconcilable differences. A tendency generally employed by courts in resolving factual disputes of this nature is to be found in the case of *Stellenbosch Farmers' Winery Group Ltd & another v Martell et cie & others* 2003 (1) SA 11 (SCA) [also reported at [2002] JOL 10175 (SCA)-Ed].

Page 12 of [2008] JOL 22218 (W)*Submissions for the plaintiff*

[24] Mr *De Bruyn*, for the plaintiff, argued that the probabilities in this matter favour the version of the plaintiff that there was an agreement to cancel all the policies and that through an oversight the deceased failed to advise Liberty Life to remove or cancel the name of the defendant as a beneficiary.

[25] He urged me to accept the evidence of the plaintiff's witnesses who confirmed that the deceased during his lifetime communicated to them his intention to cancel the first defendant as beneficiary and provide for his wife and minor children. Furthermore, he urged me to accept the evidence of the plaintiff's witnesses, that the defendant at the funeral confirmed to them that he was not entitled to the benefits and was under the impression that his name had been removed pursuant the January 2004 agreement.

[26] Another reason for the acceptance of the plaintiff's case, he argued, is that the defendant at no stage either at the funeral or when Mrs Annja Jordaan presented him with the declaration form did he dispute that the declaration recorded incorrectly what was agreed upon instead told her that "he was lucky" and gave four different reasons why the deceased wanted him to benefit from his policy.

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[27] Finally he submitted that the first defendant was an unreliable, dishonest witness who contradicted himself and fabricated his evidence as the trial progressed and gave evidence which was completely at variance with his plea. The unreliability or improbability of his evidence, he argued, emerged during the cross-examination when he revealed new evidence which was not put to the plaintiff's witnesses and also not given during his evidence-in-chief. This new evidence, *inter alia*, related to the new business venture in October 2003 and the R100 000 offer to the widow.

Defendant's submission

[28] Mr *Selvan*, for the defendant, briefly submitted that since the deceased had not changed nomination of Mr Lustig as beneficiary before his death, he remains entitled to claim such benefits from Liberty Life. He argued that the deceased's failure to remove the defendant as the beneficiary is consistent with the defendant's evidence that he deliberately wanted to benefit him.

[29] He argued that once the first defendant had relinquished his shares, the fetter on the deceased's right to nominate the beneficiary in the place of first defendant fell away. He submitted further that there was no agreement relating to the policy in dispute and urged me to accept the evidence of the first defendant

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[30] In my view, this argument is misplaced and contrary to the evidence or concessions made by the first defendant during cross-examination when he conceded that the January agreement related to the cancellation of all the policies. He referred me to the following cases in support of his submission:

- (i) *Botes NO v Afrikaanse Lewensversekeringsmaatskappy Bpk & 'n ander* 1967 (3) SA 19 (W);
- (ii) *Ex parte Macintosh NO In re Estate Barton* 1963 (3) SA 51 (N) at 57E-F;
- (iii) *Ex parte Calderwood NO In re Estate Wixley* 1981 (3) SA 727 (Z) at 736H-737C;
- (vi) *Hees NO v Southern Life Association Ltd* 2000 (1) SA 943 (W) [also reported at [2000] JOL 5928 (W)-Ed].

The aforesaid cases are clearly distinguishable from the present case and do not support the first defendant's case.

Assessment of evidence

[32] The plaintiff's witnesses gave evidence in a clear and coherent manner, their demeanour in the witness box demonstrated to me that they were not biased towards the defendant. They made concessions

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without any difficulty. Since they are closely related to the deceased. I approached their evidence with the necessary caution required when dealing with witnesses who have a potential of bias. There is however nothing in their evidence to suggest that they were less than frank and bias. They all impressed me as honest, credible and reliable.

[33] I accept their evidence that the defendant, who was unaware of the fact that he was still a beneficiary, informed them at the funeral that he was not entitled to the benefits. I accept further that when the defendant was presented with the declaration form by Mrs Annja Jordaan, he did not dispute or deny that it recorded the incorrect facts not agreed upon instead offered a variety of inexplicable and preposterous explanation why he was now entitled to the money. In my view, this clearly indicates

that the defendant was aware that he was not entitled to any benefits in terms of the policy after the January 2004 agreement was concluded.

[34] Another aspect which makes plaintiff's case more probable than the defendant's, is that the policies were taken solely for the purpose of the business and the business having been dissolved and the defendant having been paid the surrender values thereof. In my view, there was no need for the deceased to retain the defendant as a beneficiary in his policy to the detriment of his wife and young children. No evidence to support the deceased's generosity or liberality has been advanced by the defendant save the four inexplicable reasons.

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[35] In the premises, I find the defendant's evidence improbable, less satisfactory and unreliable when weighed against the evidence of the plaintiff's witnesses. He contradicted and fabricated his evidence to the extent that crucial aspects of his evidence were not put to the plaintiff's witnesses when they testified and such aspects emerged only when he gave evidence-in-chief or during cross-examination. By way of illustration it was not put to the witnesses, that after the split he discussed a further business venture with the deceased during October 2003 and also of crucial importance, it was not put to Mrs Annja Jordaan when she gave evidence that he offered her R100 000 for the kids.

[36] In my view, the totality of his evidence reveals that he is not only untruthful, but opportunistic and his conduct is tantamount to the proverbial "snatching at a bargain" to the detriment of his best friend's widow and children.

Conclusion

[37] I find that the plaintiff's witnesses were truthful, reliable and honest and that they corroborated each other in all material respects particularly that the defendant at the funeral informed them that he was not entitled to the benefits thus confirming that the January 2004 agreement related to the cancellation of all four policies.

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[38] I accept that the first defendant's failure to deny or dispute the contents of the declaration when it was presented to him by the widow is another factor which supports the plaintiff's case about the existence of the agreement to waive the beneficiary. In my view, it was open to the defendant to challenge the contents of the declaration when it was presented to him. His explanation that he was "lucky" and the offer to pay the widow indicates to me that he was opportunistic and attempting to "snatch at a bargain" and it militates strongly against the acceptance of his evidence.

[39] Another factor which militates against his evidence, is the fact that the underlying purpose or reason why he was nominated as a beneficiary was purely for business purposes as a partner; the business having been dissolved or terminated and the deceased and the first defendant having agreed in January 2004 to cancel all the policies, there was no basis in law for him to remain as a beneficiary. His explanation that the deceased wanted to benefit him out of sheer generosity or liberality to the detriment of his family is without merit and I accordingly reject it.

[40] Finally, it is clear to me that the failure by the deceased to change the particulars of the beneficiary with Liberty Life is an oversight, which is supported but the objective evidence of all the plaintiff's witnesses and the improbable and rejected evidence of the first defendant.

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[41] In the result I accept that the plaintiff has discharged the onus on a balance of probabilities that he is entitled to the relief claimed.

I therefore make the following order:

1. The plaintiff in his capacity as cited is entitled to the full proceeds from policy 56943562300.
2. The first defendant is directed to pay the costs of this action.

