THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

Case no: 631/2005

In the matter between:

PIET CHRISTIAAN ENGELBRECHT NO

AND PAULA JACOBA VAN DER WALT NO APPELLANTS

and

SENWES LIMITED RESPONDENT

Coram: MPATI DP, STREICHER, CLOETE, MLAMBO JJA *et* MALAN AJA

Date of hearing: 21 NOVEMBER 2006

Date of delivery: 30 NOVEMBER 2006

Summary: cession of life policy in securitatem debiti – claim for recession – settlement agreement made order of court - interpretation

Citation: Engelbrecht and Van der Walt NNO v Senwes 2006 SCA 166 (RSA)

JUDGMENT

Malan AJA:

[1] This is an appeal with leave of the court a quo against a judgment and an order of Van Coppenhagen J dismissing the appellants' claim for a declarator that the estate of the deceased, Mr PV de Wet, is entitled to recession of an insurance policy on his life which he had ceded in 1989 as security for his indebtedness to the respondent, Senwes, and upholding a counterclaim by the latter for payment of the proceeds of the policy. The appellants are the executors in the estate of the deceased who passed away after institution of the action.

[2] These proceedings arise from an action Senwes instituted against the deceased for payment of R 397 152,78 plus interest and costs in respect of goods sold and delivered and credit provided. The action was settled on 5 September 2000. It is common cause between the parties that the deceased had been a shareholder in Senwes and a member of its predecessor, Sentraalwes Koöp, and that as security for his indebtedness to Senwes a mortgage bond for an amount of R 130 000 was registered over his immovable property in addition to the cession of the policy referred to. At the time of settlement the policy was

expected to yield approximately R 197 000 (the covering amount or ‘dekkingsbedrag’).

[3] The terms of the settlement were recorded by the court and made an order on the same day. It reads as follows:

‘[1] Die verweerder onderneem om aan eiser die bedrag van R73 000 voor of op 28 Februarie 2001 te betaal.

[2] Die verweerder onderneem om aan eiser die bedrag van R130 000 voor of op 5 September 2001 te betaal.

Teen betaling van laasgenoemde bedrag, sal die eiser toestem dat die verband no 11213 van 1984 wat oor ‘n onroerende eiendom van die verweerder geregistreer is, gekanselleer word.

[3] Die verweerder onderneem om polis no 10998671X1 op sy lewe die opbrengs waarvan eiser die sessionaris is, in stand te hou.

[4] Die verweerder aan eiser die bedrag van R20 000 te betaal as bydrae tot regskostes voor of op 5 Oktober 2000.

[5] Indien die verweerder in verstek sou wees met betaling van enige van die bedrae soos voormeld stem hy toe dat eiser vonnis kan neem soos gevorder in die dagvaarding.’

[4] On the same day the action was settled Mr GW de Wet, the son of the deceased, who was present at court, entered into an agreement with Senwes undertaking to maintain and pay regularly all premiums in respect of the policy until it paid out. In addition, he undertook, in the event of his failure to maintain the policy, liability to Senwes for the amount the policy would have yielded had

the premiums been maintained.[1] At the time of settlement the deceased was of an advanced age and in bad health. He passed away on 26 July 2005.

[5] Van Coppenhagen J, construing the terms of the settlement agreement, held that the confirmation of the cession and the recordal that Senwes is the cessionary of the proceeds of the policy meant that Senwes was entitled to the proceeds. He thus rejected the contention, also advanced in this court, that, because the cession was in securitatem debiti, the policy had to be returned to the deceased on payment of the debts reflected in paragraphs 1, 2 and 4 of the settlement agreement.

[6] The court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement. The approach to be followed was summarized in *Coopers & Lybrand and others v Bryant* [2]:

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[1] The undertaking reads as follows:

'1. AANGESIEN SENWES BEPERK die sessionaris is ten aansien van die opbrengs van 'n polis by SANLAM met nr 10998671X1 op die lewe van PAUL V DE WET, welke polis lewensdekking bied.

2. ONDERNEEM voormelde WILLEM GIDEON DE WET om alle premies tav die polis tydig in stand te hou en gereeld te betaal, totdat die polis uitkeer of uitbetaal.

3. Sou voormelde WILLEM GIDEON DE WET versuim om die polis in stand te hou soos voormeld, sal hy teenoor SENWES BEPERK aanspreeklik wees vir die betaling van die bedrag wat die polis sou uitkeer of uitbetaal het, indien die premies in stand gehou was.'

[2] 1995 (3) SA 761 (A) 767E-768E.

'I proceed to ascertain the common intention of the parties from the language used in the instrument. Various canons of construction are available to ascertain their common intention at the time of concluding the [contract]. According to the "golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, some repugnancy or inconsistency with the rest of the instrument …

The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself …

The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) 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 …

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted …

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions …'

[7] The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence.[3] There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when

[3] *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 184A-C.

they contracted, are part of the context and explain the 'genesis of the transaction' or its 'factual matrix'. Its aim is to put the Court 'in the armchair of the author(s)' of the document.[4] Evidence of 'surrounding circumstances' is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty.[5] Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide 'sufficient certainty'.[6]

[8] The language of the settlement agreement in this case is not ambiguous. Evidence of surrounding circumstances is therefore neither necessary nor admissible to determine the intention of the parties. The background facts referred to above, which are not contentious, were 'matters probably present in the minds of the parties when they contracted' and of which the parties were both aware.[7]

[9] In clause 5 of the settlement agreement the deceased accepted that should he not perform in terms of the settlement, judgment as claimed in the summons might be taken against him. The amount claimed by Senwes in the

[4] *Sun Packaging v Vreulink* above 184 A-C. See *Total SA (Pty) Limited v Bekker NO* 1992 (1) SA 617 (A) at 624F-H; *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) 464J-465C.

[5] *Delmas Milling Company Limited v Du Plessis* 1955 3 SA 447 (A) at 454G-455A; *Sun Packaging v Vreulink* above 184C-D; *Total SA (Pty) Limited v Bekker NO* above 624I-J.

[6] *Delmas Milling v Du Plessis* above 455A-B; *Sun Packaging v Vreulink* above at 184B-C.

[7] *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) 459G-460B.

summons approximates to the total of the amounts of R 73 000 and R 130 000 referred to in clauses 1 and 2 added to the expected value of the policy, ie R 197 000. Clause 5 makes it clear that should the deceased default Senwes would be entitled to claim the amount set out in the summons. The deceased would be in default if any of the amounts referred to in paragraphs 1, 2, 3 and 4 is not paid.

[10] The amounts in paragraphs 1, 2 and 4 are specific. Paragraph 3 does not refer to specific amounts but to the proceeds ('opbrengs') and premiums of the policy. The proceeds and the premiums can only relate to amounts of money to be paid. It follows that the provisions of clause 5 also apply to non-payment of either the proceeds or the premiums envisaged by clause 3. Should there be default in payment of any of these amounts Senwes becomes entitled to the whole of the amount claimed in the summons, the capital of which approximates to the total of R 73 000, R 130 000 and the expected proceeds of the policy. Significantly, clause 2 provides for cancellation of the mortgage bond over the deceased's immovable property on payment of the R 130 000 but clause 3 does not provide for a cancellation of the cession should any of the amounts stipulated not be paid. The implication is clear: clause 3 makes provision for a third instalment to discharge the debt claimed.

[11] An important background consideration is the undertaking by Mr GW de Wet, an uncontentious fact of which the parties were both aware, to maintain the policy until it is paid out and to pay, if in default, to Senwes the amount the policy

would have yielded had the premiums been maintained. The inference can only be that clause 3 entitles Senwes to the proceeds. I come to this conclusion whether or not the policy was ceded entirely or ceded merely in securitatem debiti. The words of clause 3 that Senwes is the cessionary of the *proceeds* in the context of the settlement agreement make this conclusion unavoidable. Clause 3 does not provide security for payment of the amounts set out in clauses 1, 2 and 4 but entitles Senwes to the proceeds of the policy.

[12] It follows that the appeal should be dismissed. In view of the dismissal of the appeal no order need be made on the conditional counter appeal.

The appeal is dismissed with costs.

F R MALAN

Acting Judge of Appeal

CONCUR:

MPATI DP

STREICHER JA

CLOETE JA

MLAMBO JA