Case 37- Lapsing

Validity of lapsing of the policy under scrutiny.

Background

1. The complainant took out a Funeral Dignity Plan for the deceased which commenced on 1 July 2013. The policy covered him for a funeral benefit of R18 000 at a monthly premium of R115.00.

2. The insurer states that they received messages from the complainant's bank confirming that there was no authority to debit the May 2014 premium and that there was a stop order placed against the insurer's debit order for June 2014 premium. According to the insurer, the complainant had instructed his bank intentionally that Clientele did not have authority to debit his account and that they must be barred from doing so in future. The policy was cancelled

3. The policy has a provision which states:

   "Should you miss 3 consecutive Premiums your Policy will lapse."

   The complainant contended that he had negotiated with Clientele to reinstate his policy after it had "lapsed" on the same terms as prior to the lapse. The insurer contended that during the reinstatement of his policy new benefits were negotiated. The new benefit was R15 000. When the life insured died Clientele paid out R15 000 and not the R18 000 under the original policy. That gave rise to the complaint.

4. The insurer contends that it is evident that section 52 of the Long term Insurance Act 52 of 1998 bears no application in instances where a policyholder does pay his premium amount (i.e. there is no "missed premium") and thereafter proceeds to instruct his/her agent (i.e. the Bank) to reverse such premium based on the allegation that he never authorised the said premium deduction in the first instance. (Section 52 provided that an insurer must notify the policyholder of non-payment of a premium.) The insurer submits that it would be absurd and illogical to interpret section 52 in a manner which implies that an insurer must inform a policyholder that his/her premium was reversed when such reversal was the result of the said policyholder's instruction to the bank.

5. It is the insurer's assertion that the complainant had repudiated his original policies during May and June 2014 and they had lawfully accepted his repudiation and cancelled the original policies. In doing so, the insurer has relied on the judgment made by the Supreme of Court of Appeal in *Primat Construction v Nelson Mandela Bay Metropolitan Municipality [1075/2016 {2017*] which held that in instances of anticipatory breach of contract the emphasis is not on the repudiating party's state of mind –on what he subjectively intended-but on what someone in the position of the innocent party would think he intended to do. Repudiation is accordingly not a matter of intention but perception. The perception is that of a reasonable person placed in the position of the innocent party. The insurer avers that a new agreement, upon different terms, was agreed between the complainant and the insurer under the "re-sold policies" which terms are binding and fully enforceable.

6. The insurer also argued that the complainant's claim had prescribed presumably in terms of section 11(d) of the Prescription Act No. 68 of 1969 since it arose in June 2014, more than three years ago.

Provisional determination:

7. This matter was discussed at a meeting of adjudicators which took place on 30 November 2018, presided over by Judge R McLaren. Its determination and the reasons appear below.

Section 52 notice

8. The meeting decided that it is unnecessary to consider the issue whether the insurer was obliged to send a notice in terms of the above section where the policyholder denies that the insurer has a right to debit his account for the reasons which will follow hereunder.

Repudiation

9. The insurer bears the onus of proving the repudiation on which it relies. In this regard the following is pointed out:

    1. An objective test is applied to determine whether the conduct of a party to an agreement is a repudiation.

    2. This is said in ***Contract: General Principles*** *by Van Huyssteen, Lubbe and Reinecke (Fifth edition) on pages 350-351:*

        "10.126 To prove repudiation it must be shown that a reasonable person in the position of the plaintiff would infer from the offending conduct that the contractant involved is not going to comply with his duties in terms of the contract, without having lawful ground to refuse performance. The conduct constituting repudiation may take the form of a positive act or an omission to act, but mere failure to perform does not justify a reasonable conclusion that performance is being refused or that it will be defective. There must at least be words or other conduct that can reasonably be interpreted as anticipating eventual malperformance."

    3. Although the onus of proof is to be discharged on the usual balance of probability, it must be borne in mind that a repudiation is not lightly inferred. Compare, for instance what was said in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA) 294 J-294A.*

        "The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, i.e. not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is 'a serious matter' …, requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not lightly to be presumed."

10. In determining whether the conduct of the complainant amounts to a repudiation, an important consideration is the following: the policy would only lapse if three consecutive premiums have been missed. It was noted that the policy was cancelled after the complainant had missed only two consecutive premiums. As such, it was the view of the meeting that the insurer's decision to regard the policy as lapsed was premature and inconsistent with the terms and conditions of this policy.

11. The meeting took the view that the complainant was entitled to arrange his affairs on that footing. If he simply misses two premiums, that cannot be a repudiation. It should not make any difference if he countermands two payments. He had a right to keep the policy alive by paying the third instalment, which would have prevented the lapsing. And the payment would have broken /interrupted the three consecutive month period. If

viewed objectively his conduct must be considered in the light of the fact that contractually he still had a chance to save the policy by paying in July 2014.

12. At reinstatement stage, it may be that the complainant (although he agreed to the terms) had erroneously thought this was a reinstatement. If the insurer did not breach / repudiate the policy by "lapsing" the new agreement would never have been concluded.

Prescription

13. At the outset, it must be stated that the onus of proving prescription rests on the party asserting it. The insurer has failed to provide us with any facts on which it relies to prove that the complainant's cause of action has prescribed. No attempt was made to spell out the nature of the debt that is said to have prescribed. In terms of section 10 of the Prescription Act 68 of 1969 read with section 11(d) of the Act, a debt other than debts mentioned in section 11(a) to (c) is extinguished by prescription after the lapse of a period of three years, save where an Act of Parliament provides otherwise. In terms of section 12(1) of the Act prescription begins to run when the debt is due.

14. A debt is not defined in the Act. The meaning that has been given to the word "debt" since the Prescription Act came into effect has been in accordance with the definition in the New Shorter Oxford Dictionary namely:

> "1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
>
> 2. A liability or obligation to pay or render something, condition of being obligated. "((*see Electricity Supply Commission v Stewarts & Lloyds of SA (Pty)Ltd 1981 (3) SA 340 (A*).

15. This definition was adopted by the Constitutional Court in the matter between *Mokate v Vodacom (Pty) Ltd 2016(4) SA 121 (CC)*. In order to resolve this issue it is necessary to determine the nature of the relief sought by the complainant in this matter. The complainant seeks a declaratory order that the lapsing of his policy was not valid. It is doubtful that such action amounts to a debt as defined in our case law.

16. Assuming that the complainant's right to seek a declaratory order that constituted a debt, the next enquiry is whether such debt became due. In *Umgeni Water v Mshengu [2010] 2821 (A) at 827H-828A*, Ponnan JA stated that a debt is determined as follows:

> "……According to s 12(1) of the Act, prescription shall commence to run "as soon as the debt is due". The words "debt is due" must be given their ordinary meaning. [*The Master v IL Back & Co Ltd 1983(1) SA 986 (A) at 1004F*.] In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately. "

17. In *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd [2014] ZASCA 169* it was held that a debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt a creditor must have complete cause of action in respect of it. The expression "cause of action" has been held to mean : "every fact which it would be necessary for the plaintiff to prove,…in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved"; or slightly differently stated "the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim."

18. It is quite clear in this matter that the complainant only became aware about his cause of action on 31 January 2018 after we pointed out to the insurer that the lapsing of his policy appeared to have been invalid. Therefore, his cause of action did not arise in June 2014 when the insurer decided to cancel his policy. During that time, he was labouring under the mistaken belief that the contract had lapsed. He did not have every fact which would be necessary to prove in order to support his right to judgment. It follows that the complainant's cause of action has not been extinguished by prescription as contemplated in section 11(d) of the Act.

19. It was a unanimous decision of the meeting that the insurer should honour the complainant's claim and pay the benefit on the original policy less the shortfall in premiums and the amount of the benefit that has already been paid.

20. The insurer challenged the provisional determination. It was decided to have a hearing to obtain clarity regarding the complainant's instruction to the bank about the stop payment on the debit order.

21. At the hearing the complainant explained that in 2014 unauthorised debit orders had gone off his bank account. He contacted the bank regarding these debit orders and the bank mistakenly cancelled all his debit orders. He contended that the fact that he contacted the insurer to continue with his policy when he became aware of the non-payment of the premium is a clear indication that he had no intention to repudiate the policy.

22. Further submissions were received from the insurer challenging the correctness of the provisional ruling as follows:

> "Receipt of your email dated 06/05/2019 has reference.
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> Having discussed the issue of reversals and stop payments with the Company's Billings Department, I have been advised that it would have been done in writing.
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> Accordingly, the Company's bank, ABSA, has been in contact with the complainant's bank, FNB. It appears that FNB have requested the branch who performed the reversals and placed the stop payments to provide them with the written authority, but nothing has been provided as of yet.
>
> As it does not appear that the written mandate will be forthcoming, a decision will need to be made without reference to it.
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> In this regard, it should be remembered that the complainant has not provided proof to support that it was not his intention to reverse the premiums or place the stop payment on his account.
>
> Having reconsidered the matter, it remains my opinion, that the policy was correctly repudiated. In this regard, I would like to reiterate that in the case of repudiation when there is anticipatory breach, it is not the intention behind the party's (the complainant's) actions, but what the innocent party (the insurer) believed he intended to do. Regardless of whether it was performed by the complainant or his agent (FNB).
>
> Consequently, it is completely reasonable for the Company to have perceived the complainant's actions (or his agents) as acts of repudiation and to have subsequently repudiated the policies.

Considering that there were legally valid repudiations, it follows that the new terms and conditions agreed to, during the resale, would form the basis of the future cover provided, which both parties would be bound to. It is worth noting that client has not provided any argument to justify why he agreed to these terms, if he wanted the original cover to remain unchanged.

Furthermore, I believe that any subjective argument about the client's intentions (at the time of reversing and placing the stop payments) needs to be weighed up against the above actions, especially without evidence to support the allegations.

In conclusion, I confirm that it is maintained that the policies were correctly repudiated and that cover was provided as per the resale call.

We accordingly await your ruling in this matter."

Final determination:

23. This matter was once again discussed at a meeting of adjudicators on 7 June 2019, presided over by Judge R McLaren. The meeting considered the matter and confirmed its decision as set out in the provisional ruling.

24. Even if such decision is incorrect, which does not seem to be, fairness dictates that the insurer should pay the claim on the basis that the default was capable of being rectified as shown by the facts of this case that the complainant had not intended to repudiate the contract. If it was his intention to do so, he would not have reinstated his policy. This equity or fairness decision was unanimously agreed to by the meeting.

25. The provisional ruling was upheld.

26. In the premises, the insurer is directed to pay the benefit on the original policy less the shortfall in premiums and the amount of the benefit that has already been paid.

27. This determination is final and Clientele is instructed to comply with this determination within 30 days.

Outcome

28. Clientele paid the R3 000 which was in dispute.