

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER : ~~43769/2021~~

43769/2018

|                   |                             |                           |
|-------------------|-----------------------------|---------------------------|
| (1)               | REPORTABLE                  | NO                        |
| (2)               | OF INTEREST TO OTHER JUDGES | NO                        |
| (3)               | REVISED                     |                           |
| <u>19/12/2022</u> |                             | <u><i>[Signature]</i></u> |
| DATE              |                             | SIGNATURE                 |

In the matter between:

SKOK, DAVID N.O.

Applicant

and

DUMBRILL, LINDSAY ROSS

1<sup>st</sup> Respondent

LOVELL, DENNIS

2<sup>nd</sup> Respondent

KILLIAN, PETER JOHANNES

3<sup>rd</sup> Respondent

DAVIDSON, ALAN HERBERT

4<sup>th</sup> Respondent

|                                                                                   |                                  |
|-----------------------------------------------------------------------------------|----------------------------------|
| <b>THE COMMISSIONER OF THE COMPANIES AND<br/>INTELLECTUAL PROPERTY COMMISSION</b> | <b>5<sup>th</sup> Respondent</b> |
| <b>ADCOCK INGRAM HOLDINGS LIMITED</b>                                             | <b>6<sup>th</sup> Respondent</b> |
| <b>SANLAM LIFE INSURANCE LIMITED</b>                                              | <b>7<sup>th</sup> Respondent</b> |
| <b>THE SOUTH AFRICAN REVENUE SERVICES</b>                                         | <b>8<sup>th</sup> Respondent</b> |
| <b>ROBERT SKOK &amp; SONS (PTY) LTD</b>                                           | <b>9<sup>th</sup> Respondent</b> |

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## J U D G M E N T

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**VAN DER BERG AJ**

- [1] The applicant brings this application in his capacity as executor of the estate of his late father, Robert Skok.
- [2] Mr Robert Skok was the sole shareholder of a company Robert Skok & Sons (Pty) Ltd ("*Robert Skok & Sons*") when the seventh respondent ("*Sanlam*") issued a policy to the company in 1981. He sold his shareholding during or about 1990. Mr Robert Skok passed away in 2001. The policy matured in 2007. The applicant seeks an order that the proceeds of the policy be paid to the estate, either by Sanlam or by Robert Skok & Sons.
- [3] The applicant submits that the sale of shares agreement had a tacit term that the policy did not form part of the sale. The applicant has painstakingly attempted to reconstruct the events of the last four decades. Neither the applicant nor his witness who deposed to the founding affidavit has personal knowledge of these events.

[4] In the notice of motion the applicant seeks the following relief:

*"1. That the seventh respondent [Sanlam] be directed to pay the proceeds under policy number 3959513X7 to the applicant in his capacity as executor of the estate of the late Robert Skok and that the applicant be directed to deal with and distribute such proceeds in terms of the last will and testament of the late Robert Skok;*

**2. *Alternatively to prayer 1 above: -***

*2.1. That the fifth respondent be directed to reinstate the company, Robert Skok & Sons (Pty) Limited, in its records [The company has been reinstated and this relief has become moot];*

*2.2. That the seventh respondent be directed to make payment of the proceeds of policy 3959513X7 to Robert Skok & Sons (Pty) Limited, once the company is so reinstated;*

*2.3. That Robert Skok & Sons (Pty) Limited be directed to take receipt of the proceeds under policy number 3959513X7 and make payment of such proceeds to the applicant, in his capacity as executor of the estate of the late Robert Skok, whereafter the applicant is directed to deal with and distribute such proceeds in terms of the last will and testament of the late Robert Skok;*

*2.4. Alternatively to prayer 2.3 above, that the sixth respondent be directed to transfer the shares in Robert Skok & Sons to the applicant."*

[5] Robert Skok & Sons has been joined as the ninth respondent. At some point it was deregistered, but it has been reinstated to the Companies Register.



- [6] The sixth respondent is cited by the applicant "by reason of the being the holder of the issued shares in Robert Skok & Sons". The sixth respondent however disputes that it is a shareholder.
- [7] The sixth and ninth respondents are the only respondents who oppose the application.
- [8] The first to fourth respondents are the surviving persons whose lives were assured in terms of the policy. They have not entered a notice to oppose the application, although the first and third respondents have deposed to affidavits on behalf of the sixth respondent.
- [9] Sanlam is cited as the seventh respondent. It served a notice to abide.
- [10] The fifth respondent is the Commissioner of the Companies and Intellectual Property Commission. In that the sixth respondent has been reinstated, the fifth respondent no longer has any interest in this application. SARS is cited as the eighth respondent as "it may be entitled to taxes" in respect of the policy.

#### **COMMON CAUSE FACTS**

- [11] Despite the passage of time, many of the facts in this application are common cause or not in dispute, even though there is a dearth of detail regarding the main events.
- [12] The late Mr Robert Skok was the sole shareholder of Robert Skok & Sons. During February 1981 he caused Sanlam to issue a single premium policy to

Robert Skok & Sons (*the policy*). In terms of the policy and its schedule:

1. The proposer was Robert Skok & Sons.
2. The single premium in the amount of R137 800.00 was payable and paid.
3. The lives of some individuals were assured in terms of the policy (the first to fourth respondents are the only surviving assured).
4. The sum assured was stated as R485 342.00, which amount became payable on 1 March 2007,<sup>1</sup> subject to the proviso that one or more of the lives assured is at that date still alive.
5. In the event of all the persons whose names are listed as assureds having passed away before 1 March 2007, the once-off premium together with a surrender value would become payable. The money would become payable upon the death of the last surviving person whose name is listed as an assured.
6. Robert Skok & Sons has the option to request that the maturity date be deferred beyond 1 March 2007.

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<sup>1</sup> In the decision of the consultant to the Ombud for Long-term Insurance referred to below it is recorded that Sanlam extended the maturity date to 2012, and that Sanlam stated that the maturity value in 2012 was over R4.1m.

- [13] The assured sum became payable on 1 March 2007, the assured lives not having passed away before the maturity date.
- [14] During or about 1990 Mr Robert Skok sold all his shares in Robert Skok & Sons to Premier Pharmaceutical Company Limited ("*Prem-Pharm*").
- [15] During 1996 Adcock Ingram Holdings Limited (cited as the sixth respondent) merged with Prem-Pharm. Not much detail of the merger has been furnished by any of the parties. The applicant alleges that the sixth respondent became the sole shareholder in Robert Skok & Sons, whereas the sixth and ninth respondents allege that the sixth respondent is the shareholder of Adcock Ingram Limited, who in turn is the sole shareholder of Robert Skok & Sons. However, apart from a plea of misjoinder raised by the respondents, nothing turns on this factual dispute for reasons set out below.
- [16] On 18 May 1999 Robert Skok & Sons was deregistered.<sup>2</sup>
- [17] Mr Robert Skok passed away on 7 March 2001.
- [18] The assured sum became payable on 1 March 2007.
- [19] The first and third respondents approached the insurance ombudsman during/or about 2015 and a consultant adjudicator to the insurance ombudsman advised that neither the first respondent nor the third respondent had any claim to any benefits in terms of the policy. The advice is not binding,

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<sup>2</sup> In the record it is also reflected that the date of deregistration was 5 April 2000, but nothing turns on this discrepancy.



and as the first to fourth respondents have not opposed this application, not relevant.

[20] On 21 June 2016 Robert Skok & Sons was reinstated to the Companies Register. This occurred pursuant to proceedings instituted by the applicant.

[21] This application was launched in November 2018.

[22] Robert Skok & Sons was initially not joined to the application. An unopposed application to join Robert Skok & Sons as the ninth respondent was granted on 13 August 2019.

#### **APPLICANT'S ADDITIONAL EVIDENCE**

[23] The deponent to the founding affidavit and the supplementary founding affidavits is Mr Stephen Vivian ("*Vivian*"), who is described as the general legal counsel for Lombard's Insurance Company Limited. It is clear that he has no personal knowledge of the acquisition of the policy (and the purpose thereof) or the sale of the shareholding (and the commercial reasons for the sale).

[24] In the founding and supplementary founding affidavits he makes several assertions that the applicant contends are admissible inferences, while the sixth and ninth respondents contend these statements are mere speculation. Over and above the common cause facts referred to above, Vivian gave the following evidence.

[25] Vivian says that his research (which commenced in 2011) revealed that Mr

Robert Skok controlled the company and managed it for his sole benefit and that the company held its assets "on behalf of Mr Skok".

[26] Vivian assumes that one of the benefits of the policy "may have been" to defer the payment of income tax. Vivian further assumes ("my assumption") that the premium is removed from the company's annual income and no tax becomes payable for the year 1981.

[27] Vivian points out that Robert Skok could have excluded the policy from the sale transaction, for example by surrendering the policy in terms of a clause in the policy whereafter it could have been distributed by way of dividends to the sole shareholder (being himself).

[28] It is also stated that the late Mr Skok may have forgotten about the policy when he sold his shares. The sixth and ninth respondents agree in the supplementary answering affidavit that "this is the likely scenario."

[29] Vivian gives hearsay evidence of what a certain Mr Erasmus told him. Mr Erasmus was the managing director of Robert Skok & Sons at the time it was acquired by Prem-Pharm. Mr Erasmus informed Vivian that Robert Skok & Sons was acquired "for the specific and sole purpose of housing [a newly formed business]".

#### **APPLICANT'S DEPONENT'S OPINIONS/CONCLUSIONS**

[30] Vivian draws a number of conclusions in his affidavits.



[31] Vivian makes the following statement:

*"From what I have been able to ascertain, the sole purpose of Prem-Pharm's acquisition of the shares in Robert Skok & Sons, was directed at acquiring access to assets which vested in the company. These assets excluded the policy or any of the proceeds payable in terms thereof."*

[32] Vivian continues:

*"As explained, it was never the intention of Prem-Pharm, Adcock Ingram, or for that matter Robert Skok, that the proceeds or benefits payable in terms of the policy should form part and parcel of Prem-Pharm's acquisition of the shares in Robert Skok & Sons."*

[33] Vivian's ultimate conclusion is the following:

*"I am advised, which advice I accept, that has the officious bystander,<sup>3</sup> at the time, raised the question whether the policy forms an integral part of the sale of shares transaction, both Robert Skok at Prem-Pharm would have confirmed that the policy and its proceeds are to be excluded."*

[34] These "conclusions" are Vivian's opinions on matters which the court is called upon to rule on. Whether these conclusions or opinions are justified is dealt with below.

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<sup>3</sup> The deponent refers to the "officious bystander test" which is discussed below.

## DISCUSSION

### *Company a distinct legal entity*

- [35] It is trite that a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own, separate from those of its shareholders. Its property is its own and not that of its shareholders. This follows from the separate legal existence with which a company is by statute endowed.<sup>4</sup> This principle applies even if the company in question has only one shareholder.<sup>5</sup>
- [36] Vivian's statement that the late Mr Robert Skok was the only shareholder in the company, that he may have controlled the company and managed it for his sole benefit and that the company held its assets on behalf of Mr Skok is therefore legally untenable.
- [37] The starting point is that it was the shares that were sold (by the shareholder) and not the underlying assets that were sold (by the company). It must be accepted that as things now stand Robert Skok & Sons is entitled to the proceeds of the policy. Before and after the sale of shares the proceeds of the policy formed part of the assets of Robert Skok & Sons. The proceeds never were the assets of any of the shareholders of Robert Skok & Sons.

<sup>4</sup> *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others* 2018 (4) SA 71 (SCA), paragraph 27; *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 550-551 (following the principle enunciated in *Salomon v A Salomon & Co* [1897] AC 22)

<sup>5</sup> *Salomon (supra)*; *Lipschitz and Another NNO v Landmark Consolidated (Pty) Ltd* 1979 (2) SA 482 (W) at 488

- [38] The question is therefore not as submitted by the applicant that one should ask whether the *"policy was to be included as part of the sale"*. The benefits of the policy (an asset of the company) were neither included nor excluded from the sale; only the shares were sold.

*Can a tacit term be imported?*

- [39] A tacit term is an unexpressed provision of a contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and its surrounding circumstances.<sup>6</sup>

- [40] In my view there are a number of reasons why a tacit term as contended for by the applicant cannot be imported into the agreement concluded between Mr Robert Skok and Pharm-Pem and why Vivian's conclusions or opinions cannot be accepted.

- [41] *Firstly:* The fact that the express terms of the sale agreement are unknown poses an insurmountable hurdle for the applicant.

- [42] In *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd*<sup>7</sup> Rumpff JA held:

*"When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the*

<sup>6</sup> *Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531-532

<sup>7</sup> 1965 (3) SA 150 (A) at 175C



*Agreement, there is any room for importing the alleged implied term.”<sup>8</sup>*

- [43] A sale of shares agreement can be done on a handshake, but more often than not the terms are contained in complex written agreements, which may contain warranties and non-variation clauses. In this matter, there is no evidence of what the express terms of the sale of shares agreement between Mr Robert Skok and Prem-Pharm were. It is therefore impossible to state whether any tacit term sought to be imported into the agreement by the applicant would have been contrary to any of the express terms of that agreement.
- [44] It is also unclear whether Robert Skok & Sons was a party to that agreement or what its rights and obligations were in terms of the agreement. As indicated above, the proceeds of the policy were an asset of Robert Skok & Sons. No tacit term relating to the policy can be imported if the agreement were only between Mr Robert Skok and Prem-Pharm.
- [45] The application for this reason alone stands to be dismissed.
- [46] *Secondly:* The tacit term sought to be inferred must be necessary in the business sense to give efficacy to the contract. In *Wilkens v Voges*<sup>9</sup> Nienaber JA said:

*“The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are*

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<sup>8</sup> The reference to “implied term” in the context is a reference to a “tacit term”.

<sup>9</sup> 1994 (3) SA 130 (A) at 137

*intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional."*

[47] The parties have no power to supplement the bargains between parties by adding a term that they would have been wise to agree upon, although they did not.<sup>10</sup>

[48] In this case the contract is quite effective without having to import any tacit term.

[49] *Thirdly:* A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it has been suggested to them at the time.

[50] In *City of Cape Town (CMC Administration) v Bourbon-Leftley*<sup>11</sup> Brand JA said (own emphasis, references to other cases omitted):

*"...a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so. It follows that a term cannot be inferred because it would, on the application of the well-known 'officious bystander' test, have been unreasonable of one of the*

<sup>10</sup> *TechniPack Sales (Pty) Ltd v Hall* 1968 (3) (SA) 231 (W) at 236F-G

<sup>11</sup> *City of Cape Town (CMC Administration) v Bourbon-Leftley* 2006 (3) SA 488 (SCA) at para 19, per Brand JA



*parties not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time."*

- [51] There is no evidence from which a specific inference can be drawn what the parties would have done had they applied their minds to the issue. This is so even if Vivian's evidence of the following is accepted: that Mr Robert Skok forgot about the policy and that Prem-Pharm was oblivious of the policy when they concluded the sale agreement; that the purpose of the acquisition of the policy was to obtain some tax benefit; that the intention Prem-Pharm was to acquire the shareholding in the company to house a newly formed business.
- [52] The parties (if they applied their minds to the issue) may have adjusted the purchase price of the shares (because the underlying assets would have included the policy which may have increased the value of the shareholding).
- [53] The first and third respondents deposed to affidavits that there were underlying agreements between Robert Skok & Sons and seven key employees (including the first respondent and the third respondents) that on maturity of the policy the investment would be paid to them, or have come to some other arrangement altogether. It is thus a plausible inference that Mr Robert Skok may have insisted that an agreement be reached to benefit the assured, which may have been inconsistent with the tacit term the applicant now contends for.



- [54] There are a host of other plausible inferences as to what the parties would have done had they applied their mind to the issue. There is simply not enough evidence to infer that the parties would necessarily have agreed that the proceeds of the policy were to be excluded from the sale agreement.

### SUBSIDIARY ISSUES

- [55] The sixth respondent raised a special plea of misjoinder, alleging that it is not a shareholder of the sixth respondent. In the light of my findings above, it is not necessary to deal with this plea separately. It was not argued *in limine*.
- [56] The sixth respondent brought an application to strike out certain parts of Vivian's founding affidavit. Much of the hearsay evidence given by Vivian became common cause. A bigger problem is he advanced certain conclusions or opinions which were not justified. In view of the findings I have made, it is not necessary to make a specific finding on the application to strike out, as there is in these circumstances no prejudice to the sixth respondent.

### COSTS

- [57] It was submitted on behalf of the applicant that in the event of the application not succeeding, the costs should be paid out of the proceeds of the policy. Such a cost order may be appropriate in circumstances where co-heirs or co-beneficiaries in a deceased estate have a dispute about a certain asset. This is not the case here.
- [58] The sixth and ninth respondents asked for a cost order *de bonis propriis*

against the applicant jointly and severally with the estate on the attorney and client scale. At the hearing they did not persist in seeking this order.

- [59] The normal rule should apply, i.e. that costs should follow the result and are to be paid by the estate on a party and party scale.

### ORDER

- [60] The following order is made:

1. The application is dismissed.
2. The costs of the application are to be paid by the deceased estate of the late Robert Skok.

A handwritten signature in black ink, appearing to read 'Van der Berg', is written over a horizontal line.

**VAN DER BERG AJ**

## **APPEARANCES**

### **For the applicant:**

Adv R Stockwell SC  
With him Adv A B Berkowitz  
Instructed by:  
Keith Sutcliffe & Associates Incorporated

### **For the sixth and ninth respondents:**

Adv A Bester SC  
Instructed by:  
Shandu Attorneys Incorporated

Date of hearing: 17 October 2022

Date of judgment: 19 December 2022