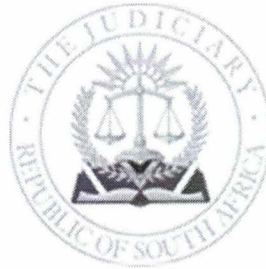


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 17326/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

30 August 2021

N. Mdalana

In the matter between:

PHILLIP SIPHIWE NGWENYA NO

Applicant

And

OMBUDSMAN FOR LONG-TERM INSURANCE

First Respondent

NEDGROUP LIFE ASSURANCE COMPANY LIMITED

Second Respondent

NEDBANK LIMITED

Third Respondent

JUDGMENT

Mdalana-Mayisela J

[1] This is an application for review brought in terms of Uniform Rule 53 under common law. The applicant seeks to review and set aside a decision of the first respondent dated 16 January 2017, refusing leave to appeal to the Appeal Tribunal against a final determination dated 18 November 2016. The applicant also seeks an order for payment of R40 000.00 against the second and third respondents. The second respondent is opposing the application.

[2] Much of the background set out hereafter is common cause. The applicant is the husband of the late Mrs Ngwenya, and the executor of her estate. The applicant is bringing this application in his representative capacity. On 7 September 2011, at the third respondent's Southgate branch, the deceased applied for a loan of R40 000.00 and a Credit Life policy ("the policy") by completing a pre-agreement quotation with a duly authorised third respondent's representative. On 19 September 2011, the deceased and the representative of the third respondent signed an application for a secured personal loan document. This document was a combination of the forms required for the Loan and the policy. The purpose of the policy was to operate as security for the R40 000.00 personal loan in the event of deceased's death. The policy was covered by the second respondent. According to the second respondent, the policy was concluded with the deceased on 19 September 2011.

[3] The third respondent disbursed the loan amount of R40 000.00 to the deceased's bank account on 29 September 2011, which was repayable in 60 instalments commencing from 1 October 2011. The first insurance premium in the amount of R104.71 was debited from the deceased's bank account on 4 October 2011.

[4] The deceased died on 24 September 2012. The applicant notified the second respondent of her death on 1 October 2012 and the requisite documentation was submitted on the same day for assessment of the claim under the policy.

[5] Following the assessment of the claim, the second respondent found that the deceased consulted with medical practitioners and was treated for a medical condition which was related to the cause of the death, since 10 June 2011, which was prior to the commencement of the policy. On 19 March 2013, the second respondent rejected the claim on the basis of an exclusion under the policy, which provided that liability

would not arise where death resulted from a condition that pre-existed the existence of the policy, if such death occurred before the expiration of 12 months from the date of commencement of the policy. The applicant lodged a complaint to the first respondent in relation to the rejection of the claim. The first respondent gave a provisional determination on 13 October 2016 finding against the applicant. The applicant submitted further submissions on 26 October 2016. The first respondent gave the final determination on 18 November 2016, dismissing the applicant's claim.

[[6] On 14 December 2016 the applicant filed an application to the first respondent for leave to appeal to the Appeal Tribunal against the first respondent's final determination. The first respondent refused leave to appeal. It is this decision that the applicant seeks to have reviewed and set aside.

[7] The applicant in his notice of motion in prayer 2 is seeking payment of the amount of R40 000.00 against the second and third respondents. I first dispose of this prayer. The applicant is not seeking the review and setting aside of the final determination of the first respondent and the substitution thereof, instead he wants to appeal that decision. Rule 3.5 of the Rules of the Ombudsman for Long Term Insurance provides that a determination made by the Ombudsman shall be binding on the subscribing member concerned. Therefore, the applicant cannot disregard the final determination and seek payment in this court without first seeking that it be reviewed and set aside, and substituted. The relief sought in prayer 2 cannot be sustained at this stage.

[8] During argument Counsel for the applicant submitted that the review is brought both under common law and under section 6(2)(e)(iii) of the Promotion of Administrative Justice Act No, 3 of 2000 ("PAJA"). No mention of PAJA is made anywhere in the papers filed by the applicant in this application. In any event the reliance on PAJA is misplaced in that the exercise of power by the first respondent does not fall within the ambit of PAJA. The first respondent is the Ombudsman established in terms of the Financial Services Ombud Schemes Act 37 of 2004. Its functions include determining disputes between subscribing members of the long-term insurance industry and their respective policy holders. PAJA applies to administrative decision taken by organ of state. Section 1 of PAJA defines administrative action to mean any decision (being of an administrative nature) taken by an organ of state when

exercising a constitutional or public power or performing a public function in terms of legislation which adversely affects the rights of any person and which has a direct, external legal effect. The impugned decision does not constitute an administrative action as defined in PAJA and the first respondent is not an organ of state (see *De Lange v Ombudsman for Long Term Insurance and Others* (919/2011) (2012) ZAECPEHC 45 (26 June 2012) paragraphs [10] to [11]).

[9] I now deal with a review under common law. The applicant after his leave to appeal application was dismissed by the first respondent he did not apply to the Appeal Tribunal for leave to appeal against the first respondent's decision. He brought this review application. Rule 6.1 of the Ombudsman Rules provides that a complainant who or a subscribing member which feels aggrieved by any determination by the Ombudsman may apply to the Ombudsman for leave to appeal against it to a designated Appeal Tribunal. In terms of Rules 6.6 and 6.7 the Appeal Tribunal is vested with power to determine all issues of a procedural or evidentiary nature, and its decision shall be final and binding. The applicant has not exhausted the internal remedy provided by the Rules of Ombudsman. However, because this review application is brought under common law, the existence of internal remedy is not in itself sufficient to defer access to judicial review until it has been exhausted (see *Koyabe v Minister for Home Affairs* ZACC 23 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC).

[10] The grounds for review under common law were stated in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152 A-E. The Appellate Division held as follows:

'Broadly in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and tenets of natural justice (see National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 735F-G; Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A) at 895B – C; Theron en Andere v Ring van Wellington van die NG Sendingkerk in Sui-Afrika en Andere 1976 (2) SA 1 (A) at 14F-G). Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously

or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforesaid. (see cases cited above; and Northwest townships Pty Ltd v Administrator Transvaal, and Another 1975 (4) SA 1 (T) at 8D-G; Goldberg and Others v Minister of Prisons and Others (supra) at 48D-H; Suliman and Others v Minister of Community Development 1981 (1) (A) at 1123 (A).) Some of these grounds tend to overlap.'

[11] The central issue for determination in this review is whether the first respondent committed a reviewable error in determining the applicant's leave to appeal application. The main issue in dispute between the parties is the inception and commencement date of the policy, and whether the deceased died before the expiration of 12 months period referred to in the exclusion.

[12] It is common cause between the parties that the policy was signed by the deceased and the second respondent's representative on 19 September 2011 and that the deceased died on 24 September 2012. Regarding the nature and scope of the policy, it provides credit life cover (death and disability cover) to the third respondent for those clients who have a valid loan agreement with the third respondent, who qualify for cover in terms of the policy and who wish to be covered. On written request to the third respondent, a third respondent's client who qualifies under the policy shall be covered in the event of death and disability (life assured). In the case of a valid claim, the proceeds of the policy will be credited to the third respondent. It is underwritten by the second respondent. It is silent about its inception and commencement dates save for the further advance commencement date, where it provides that if the life assured takes a further advance against the loan, all exclusions and pre-existing clauses will apply to the increased loan amount with effect from the date of the advance.

[13] The second respondent, during the determination of the claim by the first respondent, submitted that the inception date of the policy is 29 September 2011 and

the commencement date is 1 October 2011. The applicant submitted to the first respondent that the commencement date is 19 September 2011 because that is the date on which the agreement was concluded between the parties. The first respondent in the provisional determination found that the commencement date is 1 October 2011 in accordance with the screenshots of the bank systems.

[14] After the applicant made further submissions challenging the provisional finding, the first respondent made a final determination that the commencement date is 1 October 2011. Again the first respondent made that determination relying on the second respondent's submission, and also on the policy which provides that the first premium is due and payable together with the 1st instalment on the loan. Thereafter premiums are due monthly on the instalment date of each successive month until expiry of the loan term or cancellation of the loan by the third respondent. Premiums will be paid monthly to the second respondent within 15 business days of the date on which the premiums are due and payable by the life assured to the third respondent.

[15] The applicant applied for leave to appeal to the Appeal Tribunal against the final determination of the first respondent on the grounds *inter alia* that the first respondent erred in not finding that the policy between the deceased and the second respondent was concluded on 19 September 2011 when it was signed by both parties, and that the deceased started participating in the Credit life policy scheme from that date.

[16] The first respondent in refusing leave to appeal concluded that, although it could be said that the applicant's submissions may be arguable on appeal, he was satisfied that there is no reasonable prospect of success on appeal.

[17] The applicant contends that the first respondent in determining the applicant's complaint ignored relevant considerations and failed to apply his mind to the relevant issues and that he should have granted leave to appeal to the Appeal Tribunal on the basis that there is a prospect of success on appeal. The applicant further submits that the leave to appeal decision should be declared unreasonable because it was not supported by the expressed terms of the policy. The alleged relevant considerations that were ignored are as follow:

[17.1] Paragraph 15 of the Pre-agreement quotation which provides that '*should the client accept this quotation, this together with the terms and conditions, shall become the Agreement between Nedbank and the client*'; and that the agreement together with policy were signed on 19 September 2011.

[17.2] That the policy was dependent on the existence of the loan agreement and as such the participation in the policy, with no express terms in the policy to the contrary, commenced when the loan agreement was granted and the policy was approved by the second respondent.

[17.3] That in terms of the law of contract, disbursement of the loan to the deceased's bank account was only a delivery, and consensus between the parties had been reached when the loan agreement and the policy were signed on 19 September 2011.

[18] The applicant further contends that the first respondent was wrong in his interpretation of the policy, specifically the meaning he attributed to participation in the insurance scheme and the commencement thereof.

[19] The second respondent contends that the first respondent considered the applicant's submissions, applied a correct test applicable to the application for leave to appeal with reference to case law, analysed the relevant terms of the loan agreement and policy, and properly applied his mind to the matter before making his decision.

[20] The second respondent further contends that the applicant is not alleging any gross irregularity in the leave to appeal proceedings, has failed to prove that the leave to appeal decision is reviewable under common law, and his disagreement with first respondent's conclusions of law and fact does not suffice for a review.

[21] An error of law can, in appropriate circumstances, found a review in terms of the common law. This is so when the error is material and affects the outcome of the proceedings. If, for example, a statutory criterion was wrongly interpreted by a tribunal and on application of the correct approach the facts do not support the impugned decision, a review ought to succeed. So too, where it can be said that the tribunal

asked itself the wrong question or based its decision on some matter not prescribed for its decision or failed to apply its mind to the relevant issues in accordance with the behests of a statute (see *Hirt & Carter (Pty) Ltd v Amtsen N O and Others* (277/2020) [2021] ZASCA 85 (18 June 2021)).

[22] It seems to me that this a matter which turns on interpretation of the contract concluded by the parties particularly in light of the fact that the contract is silent on when the 12 months commences. The first respondent interpreted the contract and concluded that the commencement date was when the loan amount of R40 000,00 was disbursed to the deceased, and not at the time when the contract was signed. The applicant argues otherwise and contends that the commencement date was when the contract was signed. In the light of the view that I take of this matter I decline to proffer my interpretation of the contract.

[23] I agree with the first respondent in his ruling dismissing the leave to appeal that the matter raises an arguable point of law on appeal. I however do not agree with the first respondent that after finding that the matter raises arguable point of law on appeal, that he came to the conclusion that the appeal would have no prospects of success. The converse is in fact true. To this end leave to appeal should be granted to the Appeal Tribunal. That being the case it follows that the decision refusing leave to appeal should be reviewed and set aside.

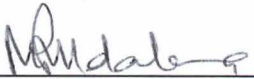
[24] It will serve no purpose to remit the matter back to the first respondent for reconsideration of his decision to refuse leave to appeal. The first respondent has already provided his detailed reasons why he is of the view that leave to appeal should be refused. The first respondent has already found that the matter does raise arguable point of law on appeal. It is on this basis that I am inclined to substitute the decision of the first respondent and grant leave to appeal to the Appeal Tribunal.

[25] I see no reason why costs should not follow the event.

[26] In the result the following order is made:

ORDER

1. The decision of the first respondent dated 16 January 2017, refusing leave to appeal to the Appeal Tribunal in case no 2016/XX/2146 is reviewed and set aside.
2. Leave to appeal is granted to the Appeal Tribunal against the first respondent's final determination dated 18 November 2016.
3. The second respondent is ordered to pay the costs of this application.


MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 30 August 2021

Appearances:

On behalf of the Applicant: Adv N Ralikhuvana
Instructed by: Mudzusi Mulobela Attorneys

On behalf of the second respondent: Adv H Pretorius
Instructed by: Clyde & Co Inc.