



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

**APPEAL CASE NO. A14 / 2024
MC CASE NO. MRCC 10 / 2023**

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

30 September 2024
DATE

.....
SIGNATURE

In the matter between:

SANLAM LIFE INSURANCE LIMITED

APPELLANT

and

NOSIFISO G. CHIGOMBO

RESPONDENT

J U D G M E N T

RATSHIBVUMO ADJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 08H00 on 30 September 2024.

Introduction.

- [1] It is often said that the best economical thing to do when one has a windfall of cash, is to invest it. While this could be true for most people, those who have been in the financial sector long enough know that the best financial advice is the one tailored according to individual's needs. Facts of this case illustrate that even the best financial advice can be disastrous when not suited to fit one's persona. The Respondent's windfall came as an inheritance when her mother passed on. Following this general advice, she opted to invest her inheritance with the Appellant under policy investment called Cumulus Fixed Return. The policy was issued under the insurance licence of Sanlam Developing Markets Limited and administered by Sanlam Life Insurance, which is governed by the Long Term Insurance Act, no. 52 of 1998 (the Long Term Insurance Act).
- [2] On 06 December 2021, the Respondent deposited R320 000.00 into the investment policy referred to above. The policy was to run for five years, from 01 January 2022 until 01 January 2027. By then, the maturity benefit would be R418 368.20. This soon became a dream far-fetched when on 20 January 2022, three weeks from the date of contract, the Respondent applied for a partial withdrawal of R120 000.00 from this investment. This request was processed by the Appellant and the Respondent was paid the amount she required. In early January 2023, the Respondent approached the Appellant for the second time in order to make another partial withdrawal. She needed cash to pay "tuition fees". This request was declined by the Appellant. She then demanded that the

contract be cancelled so that all her investment funds could be returned to her. This too, was refused by the Appellant.

- [3] On 17 January 2023, the Respondent launched an application at the Nelspruit Regional Court (court *a quo*), seeking an order in terms of which, the Appellant is ordered to cancel the contract and pay R167 000.00 to her. The founding affidavit does not disclose how this figure was calculated. The application was opposed on various grounds, mainly, the contractual limitations of *pacta sunt servanda*. The application was however granted by the court *a quo*. The judgment granting this order was delivered about six weeks after the matter was argued. The court *a quo* reasoned that “a party may enter into a contract but if for whatever reason they want to cancel the contract, it is in terms of the law allowed and the court feels it will be untenable to refuse a party or a consumer an opportunity to cancel an agreement in respect of which they entered in a voluntary manner.” It concluded therefore that to force a person to be a party to an agreement wherein she no longer wishes to be, would not be in the interest of justice.

On appeal.

- [4] While a few technical issues were raised as grounds of appeal, they shall not be the focus of this judgment as they have very little impact, if any, on the outcome of the appeal. Moreover, it is often preferred that in litigations such as this one, involving indigent members of the public, where practically possible, judgments should be handed down on their merits, so as to give finality to the litigation, as opposed to judgments on technicalities, which only afford a party in default, an opportunity to remedy the wrong.
- [5] The argument presented before this court on appeal is to a large extent similar to what was presented before the court *a quo*. The Appellant argues that the

court *a quo*, erred in reasoning that what it considered to be in the interests of justice should weigh more than the contractual obligations and the legislative provisions. The legislative provision thereof is section 54 read with regulation 4.2 of the Long Term Insurance Act. It was also submitted that the court *a quo* allowed the Respondent to argue a different case to the one presented before it in the affidavits. It was also argued that to the extent that the court *a quo* relied on the provisions of the Consumer Protection Act, no. 68 of 2008 (the Consumer Protection Act), it based its reasoning on non-existing legal provisions which were not even presented before it.

- [6] The Respondent on the other hand submitted that it entered into a “written agreement with the Appellant, in terms of which the Appellant undertook to invest her funds for five years and that the Appellant will pay back the same with interest after the lapse of five years or at any other time upon demand.” The Respondent submitted before the court *a quo*, as she does before this court, that in refusing to allow her another withdrawal from the invested funds, the Appellant breached the terms of the contract. That breach, so she argues, entitled her to cancel the contract. She alleges that she notified the Appellant of her decision to cancel the contract while visiting its offices, but the Appellant refused to cancel the contract and/or to refund her the invested funds.
- [7] The Respondent further submitted that since the contract between her and the Appellant does not contain a termination clause, the parties can terminate the contract on reasonable notice to another, unless the contract was intended to continue indefinitely, which was not the case *in casu*. The Respondent also submits that she was entitled to cancel a contract based on the Consumer Protection Act. She however did not specify as to what parts of that Act gives her such entitlement. Lastly, the Respondent relied on section 62(2)(c) of the Long Term Insurance Act and quoted it as providing, “a policyholder may

cancel a policy under particular circumstances and within a determined period, and what the legal consequences shall be if he or she does so...”

- [8] In its judgment, the court *a quo* was not detailed on its findings on law. That creates some predicament for the appeal court in that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, motion proceedings cannot be used to resolve factual issues because they are not designed to determine probabilities.¹ Where it seemed to make findings on law, it appears plain that the court *a quo* got the law wrong altogether, as demonstrated hereunder. This leaves this court with no option but to reconsider the application that was presented before the court *a quo*.

Before the court *a quo*.

- [9] From the founding affidavit, it appears as though there were no factual disputes. The Respondent (Applicant before the court *a quo*) went to the extent of attaching a contractual document entered into between her and the Appellant. It formed the basis of her application. She seems to have had a different understanding or interpretation to that of the Appellant. It was only after the answering affidavit was filed by the Appellant (Respondent before the court *a quo*) that the case for the Respondent shifted from what it was in the founding affidavit, to also reflect possible dispute of facts.

- [10] From the founding affidavit, the Respondents makes her case as follows,

“I entered into a written agreement of insurance in terms of which the Respondent undertook to invest the funds invested with them for a period of five years and pay back same with interest after the lapse of five-year period or at any other time upon demand.

¹ See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) per Harms JA, at para 26.

For the purpose of convenience, I refer the Honourable Court to page 2 of the said contract attached, marked, Annexure AA1, which clearly stipulates the amounts to be available for withdrawal for each year for the duration of the contract until maturity is reached.²

[11] The annexure attached by the Respondent to which she made reference reflects the following:

“WHAT IF I NEED CASH

If you need cash, you have various options:

- You can apply for a loan from a bank or any other institution and use your policy as security.
- You can apply to cash in your policy, or you can apply to make a cash withdrawal; against it.

HOW MUCH WILL THE CASH AMOUNT BE THAT I COULD RECEIVE?

The amounts shown below next to particular date indicate the possible cash amount that you could receive, if we assume that our method of calculation, policy charges and the level of long term interest rates remain unchanged.

Date	Possible cash amount R
01/01/2023	306 100
01/01/2024	330 900
01/01/2025	357 600
01/01/2026	386 600

ARE THERE ANY RESTRICTIONS UNDER PRESENT LEGISLATION?

Yes. If you cash in your policy before 01 January 2027, we are not allowed to pay you more than an amount limited by law. So if the cash value of your policy is more than this limited amount, and the balance will remain invested until that date. Also, if you only partially cash in your policy before 01 January 2027, you are not allowed to cash in again before this date. [My emphasis].

The amounts shown below next to a particular date indicate the restricted cash amount.”

² See para 5.1 & 5.4 of the founding affidavit on p. 6 of the paginated bundle.

Date	Restricted cash amount R
01/01/2023	336 000
01/01/2024	352 800
01/01/2025	370 440
01/01/2026	388 962

[12] Even before reading the Appellant's answering affidavit before the court *a quo*, it is obvious that the Respondent's allegations cannot be supported by the contractual document she attached. Nowhere in the contract referred to above is there a provision to the effect that the Appellant undertook to pay back the invested funds with interest after the lapse of five-year period or at any other time upon demand. [My emphasis]. Again, the language used does not stipulate the amounts to be available for withdrawal for each year for the duration of the contract until maturity is reached, as she avers.

[13] Unsurprisingly, the Appellant zoomed into the same contractual document attached by the Respondent to the founding affidavit to restate what is already contained therein, to wit; if a party (the Respondent) chooses to do a partial withdrawal from the policy, she would not be allowed to do another withdrawal until the date stipulated as the last day of the contract. In a surprising turn of events, the answering affidavit prompted the Respondent to present a replying affidavit wherein for the first time, she alleged that nothing was explained to her when she entered into a contract with the Appellant, and that she was only told to sign some documents, without explaining their contents. She also averred that there was an intermediary who helped her in signing these documents.

[14] A reply of this nature invites potential dispute of facts of which case, the *Plascon-Evans* principles become applicable. In the words of Harms JA, it is

well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the [respondent's] version.³

The Law.

[15] Section 54 of the Long Term Insurance Act provides,

“54 Limitation on provisions of certain policies.

(1) A long-term insurer may not-

- (a) undertake to provide policy benefits, or provide policy benefits, under;
- (b) provide consideration upon the surrender of; or
- (c) make a loan upon the security of,

a long-term policy contemplated in the regulations, otherwise than in accordance with the requirements and limitations set out in the regulations.

(2) The requirements and limitations set out in regulations made under subsection (1) apply from the inception of a policy, if the regulation so provide [sic], irrespective of the fact that the policy was entered into before or after the commencement of this Act or the regulations.”

Under section 1 of the same Act, 'policy benefits' is defined as – (in respect of a registered insurer), one or more sums of money, services or other benefits, including an annuity;

[16] Regulation 4.2 provides,

³ See *National Director of Public Prosecutions v Zuma supra*, at para 26

“4.2 Limitations on policies.

(1) Subject to subregulations (2), (3), (4) and (5), a long-term insurer, and any person who acts as intermediary between a long-term insurer and any person in respect of a policy or proposal for a policy, shall not undertake to provide, or provide-

- (a) a policy benefit under a policy during an extended restriction period;
- (b) upon the full or partial surrender of a policy during an extended restriction period-
- (i) if the policy has previously been partially surrendered during the extended restriction period concerned, any further consideration; or...”

[17] Regulation 4.1 defines restricted period as,

“a period of 5 years which commences, if the date concerned is 1 January 1994 or later-

- (a) on the date when the first premium period begins; or
- (b) during a premium period after the first such period, on the first day of the month in which an excess premium is received by the insurer.”

[18] There is nothing in section 62(2)(c) of the Long Term Insurance Act that counters the provisions in section 54 read with regulation 4.1 above. A closer look of this section will reveal that it was actually misquoted. Section 62(2)(c) should not be read in isolation, but section 62 as a whole. It provides,

“62 Protection of policyholders

(1) The Authority, by notice in the *Gazette*, may-

- (a) prescribe rules not inconsistent with this Act, aimed at ensuring for the purpose of policyholder protection that policies are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and in the public interest generally;
- (b) vary or rescind any such rule; and
- (c) determine the period which must elapse before a rule, variation or rescission takes effect after it has been published in the *Gazette*.

(2) Without derogating from the generality of subsection (1) (a), rules may provide-

...

(c) that a policyholder may cancel a policy under particular circumstances and within a determined period, and what the legal consequences shall be if he or she does so...” [My emphasis].

The Authority is defined under section 1 of the Long Term Insurance Act as the Financial Sector Conduct Authority established by the Financial Sector Regulation Act.

[19] The Respondent merely quotes the empowering statutes that authorises a particular body to come up with a set of rules without specifying if such rules have been promulgated yet. Even if such rules exist, there is nothing in the statute empowering the Authority to come up with the rules that would undermine the statutory provisions, especially since that authority would exist as a result of that statute. Such rules would have to be read with the legislative provisions, complementing each other, otherwise they would be unlawful.

[20] This court was referred by the Appellant to the “*Manual on Retirement Funds and Other Employee Benefits*”⁴ where the learned author stipulated the following,

“Limitation on the payment of short term investment benefits

Section 54 continues the demarcation regime imposed previously by section 59D of the 1943 Act. The underlying purpose of this regime is to demarcate the business of the banks and insurers, by essentially preventing insurers to provide “short term” investment benefits.

The demarcation measures are contained in Part 4 of the Regulations. In terms of these measures, payment of investment benefits under certain policies within five years of their inception is restricted.

These restrictions prohibit the payment of investment type benefits, but not death or disability benefits. These restrictions do not apply to fund policies and fund member policies.”

⁴ 2015 Edition, p. 692 para 10.20.11.

[21] In its judgment, the court *a quo* made no reference to the above statutory provisions, although they were referred to already in the Appellant's answering affidavit and its heads of argument. No mention was made of the possible dispute of facts introduced by the Respondent's replying affidavit or how these were approached and resolved. The court *a quo* did however come up with section 24 of the Consumer Protection Act, as a basis for holding that every consumer had a right to cancel the contract. It is not clear where it got this section from as it was not referenced to by any of the parties.

[22] A simple perusal of that Act would have revealed that section 24 does not provide for the cancellation of contracts. Instead, it provides for product labelling and trade descriptions. This aspect was brought to the attention of the presiding Regional Magistrate when the notice of appeal was issued, as it was one of the grounds of appeal. He however missed a golden opportunity to rectify the wrong statutory reference in this regard when on 18 December 2023, he wrote the following as reasons for judgment in terms of Rule 51(1) of the Magistrates Court Rules,

“[F]acts found to have been proved as well as reasons for the judgment are contained in a comprehensive manner in my *ex tempore* judgment. I have nothing else to add to such reasons and I request that they be taken as my reasons for whatever purpose the defendant may need them.”

[23] The hurdle in the wrong reference to the Consumer Protection Act is not only the non-existence of the provisions referred to by the court *a quo*, but it is also doubtful if that Act would find application in a case of this nature. A consumer is defined under section 1 of the Consumer Protection Act as a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business. Service is defined as,

“(c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service-

(i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); or

(ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or the Short-term Insurance Act, 1998 (Act No. 53 of 1998);” [My emphasis].

Conclusion.

[24] It appears from the facts of this case that the Respondent had her opportunity to either cancel the contract as a whole, or do a partial withdrawal, and she chose the latter. The contents of the contractual document she presented, are binding on her and the Appellant. Nothing was advanced by the Respondent that suggests that she could understand the clauses in the written contract. What she expected the court to do is against the legislative provisions that were also incorporated into the contract that she signed. In allowing the Respondent to make a second withdrawal or cancel the contract after making a partial withdrawal, the Appellant would not only be deviating from the agreement, but would also be breaking the law. The appeal has to be allowed.

[25] There is no reason why costs should not follow the outcome.

[26] For the aforesaid reasons, I make the following order:

26.1 Appeal is upheld with costs.

26.2 Order of the court *a quo* is set aside and replaced with the following:

The application is dismissed with costs.



TV RATSHIBVUMO

ACTING DEPUTY JUDGE PRESIDENT

MPUMALANGA DIVISION

I agree.



L COETZEE

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION

FOR THE APPELLANT : ADV S MATHIBA

INSTRUCTED BY : WERKMANS ATTORNEYS

**C/O SEYMORE DU TOIT BASSON ATT
NELSPRUIT**

FOR THE RESPONDENT: MR. AA MILAZI

INSTRUCTED BY : MILAZI AA INCORPORATED

DATE HEARD : 02 AUGUST 2024

JUDGMENT DELIVERED : 30 SEPTEMBER 2024