

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

CASE NO: A279/2013

DATE: 15 OCTOBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

**MMABOTHINI VICTORIA XABA**

**First Appellant**

**NYAKALLO TSHEPO XABA**

**Second Appellant**

**KOPANA MPOLOKENG XABA**

**Third Appellant**

and

**NOBANTU PASCALINE RUTH XABA NO**

**First Respondent**

**SANLAM LIFE INSURANCE LIMITED**

**Second Respondent**

**SABC PENSION FUND**

**Third Respondent**

**MASTER OF THE HIGH COURT, PRETORIA**

**Fourth Respondent**

**SOUTH AFRICAN BROADCASTING**

**CORPORATION LIMITED**

**Interested Party**

**JUDGMENT**

Tuchten J:

1. This is an appeal against a decision of Tolmay J, given in the opposed motion court of this Division. Leave to appeal was refused by the learned judge but granted by the SCA on petition. The case concerns the right to receive the death benefits payable by the second respondent (“Sanlam”) under a policy on the life of the late Patrick Tebogo Xaba (“the deceased”).
2. The first respondent is the executrix in the estate of the deceased. The first respondent was married to the deceased at the time of his death. Under the last will of the deceased, the first respondent is the sole heir of the deceased.
3. The first appellant is the former wife of the deceased. They were divorced on 29 July 1998. The second and third appellants, both majors, are the sons born of the marriage between the deceased and the first appellant.
4. As they did at the hearing before the court *a quo*, the appellants, on the one hand, and the first respondent on the other, appeared at the appeal through counsel. The other parties abide.
5. During his lifetime, the deceased was employed by the interested party (“the SABC”) and was a member of the third respondent (“the Fund”).
6. The SABC procured a group life policy for its employees with the Old Mutual Life Insurance Company (“Old Mutual”). The terms of the Old Mutual policy do not appear from the record. It seems that Old Mutual gave the SABC power to obtain nominations from SABC employees who were insured under the Old Mutual policy of beneficiaries under the Old Mutual policy.
7. On 9 March 1993, the deceased completed and signed a form (“the Old Mutual form”). The part of the Old Mutual form relevant for present purposes reads as follows:

**Nomination form**

Pension fund and Group Life Assurance Scheme of the SABC

Member.....Mr TP Xaba

Membership number ..... 0[...]

I, (full name) TEBOGO PATRICK XABA born on [...], hereby revoke all previous nominations and request the Fund, in the event of my death, to pay the amount which may become payable from the Fund as a result of my death, or such portion thereof as is specified below, to the person mentioned below subject to the provisions of the rules of the Fund. I realise that in certain circumstances the

Fund will, in terms of the rules of the Fund, be compelled to ignore my request.

8. Space is provided on the Old Mutual form below the material I have quoted for the insertion of the names of the beneficiaries chosen by the person completing the form, certain particulars of such beneficiaries and the part of the benefits which the person filling in the form wished to bestow on each such beneficiary.

9. In this space on the Old Mutual form, the deceased inserted the names of the three appellants and the other information required. He bestowed 50% of the benefits embraced under the Old Mutual form on the first appellant and 25% of such benefits on each of the second and third appellants.

10. At the foot of the Old Mutual form, the following appears:

NB: Written notice should be given on a similar form to the Fund if you wish to alter or supplement this nomination in any way.

11. The learned judge *quo* found that the nomination applied both to the benefits accruing from the Fund and from the Old Mutual policy. This finding was not attacked on appeal and I shall assume that it was correctly made.

12. There is no suggestion on the papers that the deceased ever completed a form in which he altered or supplemented the nomination and I shall therefore accept that he did not do so.

13. Pursuant to a policy change within the SABC, the Old Mutual policy was replaced as from 1 July 2004 by policy no. 18988 441 x 4 underwritten by Sanlam. Under an endorsement to the policy (styled endorsement no. 4) executed on 18 November 2009, Sanlam bound itself to provide insurance to the employees of certain employers including the SABC "... provided the provisions of the Policy are complied with by the EMPLOYERS."

14. Under clause 2.1 of Schedule 2 to the Sanlam policy, every employee is entitled to become an insured. It is common cause on the papers that the deceased became an insured under the Sanlam policy. There are according to the provisions of the policy at least two ways that this can happen. As the case was argued on the basis that the deceased was indeed an insured, no more need be said on this topic.

15. Counsel for the appellants submitted that the Sanlam policy constituted a contract between the SABC and Sanlam but not a contract between the SABC and the employee or between Sanlam and the employee. I do not think that this can be correct. In my view the provision of the policy which I quoted in paragraph 13 above created a stipulation for the benefit of SABC employees. Upon acceptance of the benefits of the stipulation in his favour, the employee becomes a party to the policy and acquires rights against Sanlam and

the SABC and also incurs obligations, most notably the obligations to provide certain information to Sanlam and to pay premiums when they fall due. See in this regard Schedule 2 clause 2.1(2) for an obligation to provide information and Schedule 8 clause 8.1(1) for an obligation to pay premiums.

16 . Clause 3.3(1) of Schedule 3 of the Sanlam policy deals with how an insured must nominate a beneficiary:

The benefits ... are intended to be applied for the benefit of the INSURED's nominee(s) designated on a prescribed nomination form purported to be signed by the INSURED and in the proportions indicated on that form or, failing such nomination, for the benefit of the estate of the INSURED. The EMPLOYER must endeavour to arrange for this form to be completed and signed by the INSURED and must keep it on file. At the death of the INSURED the EMPLOYER must -

(a) instruct SANLAM to which nominee(s) the benefit must be paid and in what proportions (which instruction SANLAM may accept as being in accordance with the nomination form on file) or, failing a nomination by the INSURED, provide SANLAM with the details of the estate of the INSURED to whom the benefit must be paid (in which case SANLAM may accept that no nomination was made); or, alternatively

(b) instruct SANLAM to pay the benefit direct to the EMPLOYER whereupon the EMPLOYER will be responsible to pay the benefit to the nominee(s) or, failing which, the INSURED's estate.

17. A form ("the Sanlam form") was developed and prescribed for the purpose of clause 3.3(1) of Schedule 3. It provides for the submission to the SABC (on behalf of Sanlam) of substantially the same information as that contained in the 1993 nomination form which the deceased completed and signed. The Sanlam form declares as follows:

#### NOMINATION FORM -SABC PENSION FUND ANDGROUP LIFE ASSURANCE BENEFITS

I ... hereby revoke all my previous nominations and request the Trustees of the SABC Pension Fund to pay any amounts which may become payable from the Fund and/or the Group Life Insurance as a result of my death, or such portion as is specified below, to the person(s) mentioned hereunder subject to the provisions of the Rules of the Fund and the Terms of the Insurance Scheme. I realise that in certain circumstances the Trustees will, in terms of the Rules of the Fund and the

Terms of the Insurance Scheme, be compelled to ignore my request.

18. At the foot of the Sanlam form there appears the following:

NB: WRITTEN NOTICE SHOULD BE GIVEN ON A SIMILAR FORM TO THE FUND IF YOU WISH TO ALTER OR SUPPLEMENT THIS NOMINATION IN ANY WAY. IF THERE ARE MORE THAN 4 NOMINEES, A SECOND FORM MAY BE APPENDED TO THIS PAGE.

19. Under Schedule 3 to the Sanlam policy, death benefits are payable in respect of an insured who dies while he or she is an employee. It is not in dispute that death benefits are payable in respect of the deceased. But Sanlam is uncertain to whom the benefits should be paid. The appellants contend that by virtue of the Old Mutual form which the deceased signed in 1993 nominating them as beneficiaries for the Old Mutual policy and the deceased's election not to withdraw that nomination or make a new one, the nomination was transferred to the Sanlam policy. On that reasoning, the appellants claim that the benefits should go to them.

20. The first respondent, on the other hand, contends that the 1993 Old Mutual form is ineffectual as to the nomination of beneficiaries under the Sanlam policy. On that reasoning, the first respondent claims that no nomination was made under the Sanlam policy and that the death benefits should accordingly fall into the deceased estate.

21. In finding against the appellants, the learned judge *a quo* held that the Fund and the Sanlam policy are two separate entities and that the benefits payable from the Fund are to be distinguished from the benefits payable under the policy. When Old Mutual ceased to be the underwriter under the Old Mutual policy, the learned judge held, the agreement between the Old Mutual and the SABC ceased to exist. A new agreement pertaining to group life insurance came into existence when the SABC entered into the agreement with Sanlam. As the Sanlam policy only came into existence in July 2004, reasoned the learned judge, no valid nomination could have been made in 1993 because there was no contract in existence between the SABC and Sanlam at that point in time.

22 . A nomination of a beneficiary under an insurance policy is a species of *stipulatio alterius*, as it is called in *LAWSA*, 2nd ed, vol 12 part 2 paras 88-93, a third-party contract. In such a contract, one of the parties (the stipulator) agrees with another (the promisor) that the promisor will render a performance to a beneficiary. The beneficiary acquires rights under the contract when the beneficiary accepts the benefit stipulated in his favour.

23. This situation must be distinguished from a contract under which the stipulator nominates a third party to receive benefits under the contract on behalf of the stipulator. Such a third party is known as a *solutionis adjectus causa*.

24. It has been authoritatively accepted that the nomination of a beneficiary under an insurance policy is an

example of a *stipulatio alteri*. See *Mutual Life Insurance Co of New York v Hotz* 1911 AD 556. Applying that model to the present case, it is clear, for the reasons which follow, that the Old Mutual form signed in 1993 can have no impact on the Sanlam policy.

25. The Sanlam policy contains within itself the potential to create two categories of third-party contracts; firstly between insurer, employer and insured (upon acceptance of benefits by the insured); and, secondly between insurer, employer, insured and beneficiary (upon acceptance of benefits by the beneficiary nominated by the insured). Sanlam stipulated how its relationship with any such third party in the second category was to be created: the SABC on behalf of Sanlam would endeavour to procure that the Sanlam form was completed, whereafter the SABC would keep the completed form on file. That did not happen. It was no part of the contract to which Sanlam and the deceased became parties that nominations made by the deceased under the Old Mutual policy would be, as it were, carried over to the Sanlam policy. Clause 3.3(1) of Schedule 3 of the Sanlam policy, even when read with the provisions of the blank Sanlam form which I have quoted, makes this clear. It therefore follows that no benefits were stipulated in favour of any beneficiary in relation to the Sanlam policy. There were accordingly no benefits under the Sanlam policy for any beneficiary to accept. The appellants therefore did not become parties to the contract of insurance between the deceased and Sanlam evidenced by the Sanlam policy. Nor is there any provision in the Sanlam policy creating the appellants *solutiones adjectus causa*.

26. It therefore follows, in my view, that not only do the appellants have no rights to claim payment of the death benefits payable in respect of the deceased under the Sanlam policy, but that Sanlam itself has no right to discharge its liability under its policy by making payment of these death benefits to the appellants.

27. It emerged during argument that paragraph 3 of the order of the court *a quo*, following prayer (iii) of the notice of motion, directs Sanlam to pay the death benefits in question “in terms of Clause 3.3(1 )(b)” of the Sanlam policy. In fact, as counsel for the first respondent immediately conceded, this direction ought to have referred to clause 3.3(1 )(a). This error does not affect the merits of the dispute which, as counsel for the appellants accepted in argument, concerned whether the appellants or the first respondent were ultimately entitled to the benefits in question. The order I propose will correct this error.

28. As to costs: the first respondent has achieved substantial success and must get her costs. Her counsel asked for the costs of two counsel. Senior counsel for the first respondent appeared, according to the judgment, alone in the court *a quo*. The legal issues were straightforward. The facts were not in dispute. I do not think that the costs of two counsel would be justified as between party and party.

29. I propose the following order:

1. The reference to clause 3.3(1 )(b) in paragraph 3 of the order of the court below is replaced by a reference to clause 3.3(1 )(a).
2. For the rest, the appeal is dismissed.
3. The appellants, jointly and severally, must pay the first respondent's costs in the appeal.

NB Tuchten

Judge of the High Court

10 October 2014

I agree.

W.Hughes

Judge of the High Court

10 October 2014

I agree. It is so ordered.

MW Msimeki

Judge of the High Court

10 October 2014

For the appellants:

Adv K Tsatsawane

Instructed by TGR Attorneys

Sandton

For the first respondent:

Adv AJ H Bosman SC and Adv APJ Boucher

Instructed by WF Boucher Attorneys

