IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 50820/2008

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

18/08/16
DATE

SIGNATURE

18/8/2016

In the matter between:

BONITAS MEDICAL FUND Plaintiff

and

LOUIS PASTEUR HOSPITAL HOLDINGS (PTY) LTD Defendant

JUDGMENT

Baqwa J

Claim for payment arising out of a cession – *Alternatively rectification of a cession agreement – Alternatively payment based on* ***condictio indebiti*** *– Tacit term – Nature thereof – Costs award – Based on dishonest defence and petulant and scurrilous demeanour of defendant's witness.*

Summary

This action arises out of an agreement in which the parties agreed to establish the Louis Pasteur Hospital in Pretoria. They entered into two main agreements, namely, the shareholders' agreement and a funding agreement. The shareholders' agreement resulted in a shareholding of 74% / 26% in favour of the defendant. Funding was to be undertaken on a pro rata basis by agreement after the respective initial financial contributions. The plaintiff was also required to cede an investment policy to the defendant to be utilised as security to enable the defendant to raise funds through a financial institution (First National Bank). It was initially the common intention of the parties that in regard to whatever policy was ceded to the defendant as security, the beneficial ownership thereof would remain with the plaintiff. It was further a tacit term of the agreement that the plaintiff would be entitled to the proceeds thereof upon maturity. In that eventuality, the plaintiff would cede a replacement policy to the defendant. With the effluxion of time and after a period of about ten years the defendant claimed beneficial ownership of the policies which had been ceded to it. As a result of that claim the defendant misappropriated the proceeds of those policies when they matured giving rise to the present claim.

Held, that even though the issue of beneficial ownership had not been expressly dealt with in the funding agreement, it was a tacit term within the agreement.

Held, that the plaintiff was entitled to the proceeds of the policies based on the tacit term.

Held, further that the plaintiff was entitled to costs on an attorney and client basis not only due to the dishonest defence raised by the defendant but also on the basis of the petulant and scurrilous demeanour of the defendant's witness during which he resorted to wholly unjustified and grossly defamatory accusations against the plaintiff's lead counsel.

Annotations:

Reported cases

Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie SA and Others 2003 (1) SA 11 SCA

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 592 (SCA)

Unica Iron and Steel v Mirchandani 2016 (2) SA 307 SCA

Food and Allied Workers Union (FAWU) v Ngcobo N.O. 2014 (1) SA 32 (CC)

Protea Assurance Co. Ltd v Januszkiewicz 1989 (4) SA 292 (W)

Statutes

Prescribed Rate of Interest Act 55 of 1975

Medical Schemes Act 131 of 1998

Introduction

[1] This is an action by the plaintiff for payment by the defendant of the proceeds of two Sanlam Investment policies totalling R44 245 360.68. The plaintiff claims that the defendant has breached an agreement in terms of which the policies were ceded and that it is entitled to the full proceeds thereof.

[2] The defendant claims that it is entitled to the proceeds of the policies ostensibly because the cessions were ceded out-and-out in "*exchange*" for a credit entry in the defendant's books of account in favour of the plaintiff and repayable at the discretion of the defendant's Board.

[3] The case had previously been heard by this court on 5 September 2011 when judgment was granted by default against the defendant.

[4] The defendant applied for rescission of judgment which was opposed but was granted and the matter again proceeded to trial. Some of the issues traversed at the rescission application have been referred to in this trial.

The Parties

[5] The plaintiff is Bonitas Medical Fund ("*Bonitas*"), which is a medical aid scheme registered in terms of the Medical Schemes Act 131 of 1998 and which was previously registered in terms of the now repealed Medical Schemes Act (Act 72 of 1967) and which carries on business at Bryanston Gate Office Park, 170 Curzon Road, Bryanston, Randburg.

[6] The defendant is Louis Pasteur Hospital Holdings (Pty) Ltd ("*LPH*"), a company duly registered and incorporated in accordance with the laws of the Republic of South Africa which carries on business as a healthcare service provider and which has its registered address at 8th floor, Room 842, 374 Schoeman Street, Pretoria and its principal place of business at 4th floor, Louis Pasteur Medical Centre, corner Schoeman and Prinsloo Streets, Pretoria.

[7] The defendant was previously known as Maraba Hospital and Medical Centre (Pty) Ltd ("*Maraba*").

The Background

[8] On 11 October 1994 at Johannesburg the plaintiff and the defendant who were duly represented, concluded a written agreement which has been referred to in these proceedings as the shareholders' agreement. The express terms of the shareholders' agreement which are recorded in writing are common cause and **inter alia** include the following:

8.1 It was recorded that the LPH had been formed with the intention of operating the hospital, and

8.2 "*The hospital*" was defined as "*a private hospital known as the Louis Pasteur Medical Centre, on the corner of Schoeman and Prinsloo Streets, Pretoria*".

[9] The shares in the issued share capital of LPH would be held as to 74% by Louis Pasteur Medical Investments Ltd (LPMI) and 26% by the plaintiff. The main business of LPH would be to operate the business of the hospital.

[10] Clause 6 of the agreement dealt with financing and provided, **inter alia** as follows:

"***6 FINANCING***

6.1 Bonitas will, when it subscribes for shares in the company in terms of 2.6, pay the amount of R2 000 000 in cash to the company, as the full subscription price payable for those shares.

[...]

6.3 LPMI and Bonitas shall, in proportion to their respective shareholdings in the company, furnish the security necessary for the financing of medical and hospital equipment up to a maximum of R6 000 000. The medical and hospital equipment acquired with the secured borrowed funds in terms of this clause will include, inter alia, the items listed in annexure "B"

6.4 Bonitas shall by no later than fourteen days after the signature date lend an amount of R1 000 000 to the company on loan account. This amount shall accrue interest at the prime rate plus 2%. The capital amount with interest thereon shall be repaid to Bonitas when the board of directors of the company resolves that there are sufficient funds available which are in excess of its requirements for the purpose of the company's business and subject to the availability of after-tax profits.

[...]

6.6 To the extent that any further funds required by the company for its working capital and medical equipment, LPMI and Bonitas shall, if they agree thereto, furnish the necessary security for those funds, in proportion to their respective shareholding in the company."

[11] Clause 10 provided as follows:

"10 GOOD FAITH

The parties shall at all times during the currency of this agreement, observe the principle of utmost good faith towards one another in the performance of their obligations in terms of this agreement."

[12] Further, clause 13 contained the following provisions:

> "*13.1 This agreement, together with the appendices thereto, constitutes the sole record of the agreement between the parties in regard to the subject matter thereof.*
>
> *13.2 Neither party shall be bound by any representation, express or implied term, warranty or promise or the like not recorded herein or reduced to writing and signed by the parties or their representatives.*
>
> *[...]*
>
> *13.4 No addition to, variation, or agreed cancellation of this agreement or any of the appendices hereto shall be of any force or effect unless in writing and signed by or on behalf of the parties.*"

[13] The position after the conclusion of the shareholders' agreement was that the LPMI subscribed to 444 shares in LPH whilst the plaintiff subscribed to 156 shares.

[14] Not long after the shareholders' agreement had been entered into a situation arose which necessitated the raising of further funds to bolster the financial sustainability of the defendant.

[15] During February 1996, the defendant duly represented by Dr Mohamed Adam (Dr Adam) and Frikkie Lloyd who was the defendant's financial advisor and company secretary and who was also acting as a representative of a company or close corporation known as "*Affin*", made a proposal titled "*FINANCIALS STRUCTURING PROPOSAL FOR MARABA HOSPITAL AND MEDICAL CENTRE (PTY) LIMITED*" to the plaintiff. This document is later referred to as '*the Affin proposal*'.

[16] The Affin proposal recorded, **inter alia**, the following:

16.1 In paragraph 1 ("*Background*") thereof:

"*1.1 AFFIN has been mandated to obtain the necessary funding to pay for the equipment to be used in the operating of the Louis Pasteur Hospital. An amount of R9 million is required.*

Lifecare is also demanding advance payment for drug purchases or acceptable security. The amount required is estimated at R500 000.

In addition cash flow productions indicate that in the short-term the company will also require additional working capital of R1, 7 million.

1.2 The financiers which AFFIN approached so far have set demanding security requirements, that is 50% of the facility must be covered by "good security". Good security is described as easily realisable assets such as debtors, property or investments. If "less good" security is offered (cession of shares, personal guarantees etc.) the requirements is even higher.
The reason for this demanding security arrangement is the lack of a trading record for Maraba.

1.3 *Funding will be organised from several financiers i.e.*

Wesbank	*R5 million*
Investec/Rand Merchant	*R4 million*
Lifecare	*R0.5 million*
First National Bank	*R1, 7 million*

1.4 *Whilst most of the above borrowings can be supported by 80% of the expected debtors it is not possible to split the debtors or make more than one cession. No single financier which to be second in the queue by accepting a reversionary cession.*

Trading projections indicate that debtors will reach R5, 5 million when a 55% occupancy is achieved and R7 million at 65% occupancy.

1.5 *In terms of the shareholders' agreement with LPMI, Bonitas undertook to provide surety to cover 26% of the equipment funding and support the full working capital requirement whilst LPI undertook to ensure, from its own funds, the necessary building within which 180 beds and 6 theatres can be installed and operated."*

16.2 Paragraph 2 dealt with the "*proposal*" as follows:

"2.1 *In order to maximise a cession of debtors it is proposed that the debtors are ceded to Bonitas in full. Bonitas must then cede an insurance policy with a surrender value equal to 80% of the debtors plus the Bonitas suretyship commitment in respect of the equipment funding to First National Bank. Ideally it should cover the amount of 80% of the level which debtors will achieve at 55% occupancy (80% of R5, 5 million, that is R4, 4 million plus 26% of R9 million that is R2, 3 million).*

2.2 *First National Bank will then issue the following guarantees against the respective facility:*

	Guarantee	*Facility*
To Wesbank	*R2, 5 million*	*R5 million*
To Investec/RMB	*R2, 0 million*	*R4 million*
To Lifecare	*R0, 5 million*	*R0, 5 million*
To First National Bank	*R1, 7 million*	*R1, 7 million*
Total	*R6, 7 million*	*R11, 2 million*

It is envisaged that the above guarantees can be re-negotiated annually in response to the trading progress of Maraba.

2.3 *In addition to the benefit to Maraba of maximising efficiency of the security value of its debtors it will also limit the exposure of Bonitas to its current investment and the shareholder undertaking in respect of equipment."*

[17] On 2 February 1996 at a meeting of the plaintiff's Finance Committee subsequent to discussions the following was recorded:

"*...that the Fund may sign cession of Sanlam Policy No. 13113913X1 in respect of facilities available to Maraba Hospital and Medical Centre (Pty) Ltd at First National Bank and that*

YEKANI RICHARD TENZA

in his capacity as Principal Officer, may sign the necessary forms on behalf of the Fund."

[18] On 8 February 1996 and at a special meeting of directors of the defendant, Mr Y. Tenza (Tenza) who was at the time a principal officer of the plaintiff and chairman of the Board of Directors of the defendant and Mr B. M. Mofokeng, the then chairman and director of the Board of Trustees of the plaintiff informed the defendant of the plaintiff's acceptance of the Affin proposal. This was duly recorded in the minutes of the meeting.

18.1 Both parties refer to the agreement reached on 8 February 1996 as the funding agreement and whilst the terms of the agreement are in issue, both the parties agree that the terms thereof included an agreement that the plaintiff would cede a Sanlam policy to the defendant.

18.2 Effect was given to the funding agreement when the plaintiff ceded a policy held by it with Sanlam Ltd (Sanlam) under policy number 13113913X1 to the defendant on 9 February 1996 ("*the first policy*"), the defendant thereafter ceded the policy to FNB on 9 February 1996.

[19] Subsequently, the plaintiff surrendered the said policy and as a result, Sanlam issued two cheques on 30 August 1996 in favour of the plaintiff. The cheques constituted the surrender value of the first policy. This necessitated the replacement of the first policy.

[20] As a result of the said surrender and on 2 December 1996 the plaintiff ceded two further Sanlam policies with policy numbers 13780308X6 and 13780309X4 to LPH in replacement of the first policy. According to the plaintiff the policies were ceded to the defendant on the same basis and the same terms and conditions as the first policy even though this is contested by the defendant. On 2 December 1996 the defendant in turn ceded the policies to FNB.

[21] The policies matured on 1 December 2006 and the proceeds thereof at maturity amounted to R39 293 353.34 which was according to the defendant reinvested and restructured resulting in the payment of the total sum of R44 245 360.68 to the defendant.

[22] It is common cause that a portion of the proceeds of the policies was applied towards the settlement of the defendant's indebtedness with regard to a facility which was extended to the defendant by FNB. The defendant thereafter retained and utilised the balance of the proceeds of the policies for its own benefit.

The Pleadings

[23] According to the plaintiff the funding agreement was the basis for the cession of the policies. Whilst the defendant agrees that the funding agreement was concluded it differs with the plaintiff regarding the terms thereof.

[24] The basis of the plaintiff's claim is the payment of the proceeds of the two policies to the defendant which the plaintiff contends was as a result of a breach of the funding agreement. The defendant denies that it breached the funding agreement.

[25] Alternatively the plaintiff seeks a rectification of the cession document in terms of which the two policies were ceded to reflect what it alleges was the common intention of the parties, namely, that the plaintiff remained the beneficial owner of the policies. The defendant denies that there are any grounds for rectification of the policies.

[26] In the further alternative, that is, in the event that this court should find that the funding agreement was not concluded, the plaintiff claims payment of the proceeds of the policies on the basis of unlawful enrichment or **condictio indebiti**. The defendant also denies this claim.

Issues to be Determined

[27] According to the plaintiff, the material express and/or implied terms of the funding agreement were:

> "*7.1 Bonitas would cede an insurance policy with a surrender value of R6.7 million to First National Bank of Southern Africa Limited ("**FNB**") to secure the funding to be provided by FNB to LPH on overdraft to fund the acquisition of equipment by and to meet the working capital requirements of LPH as contemplated by the Affin proposal ("**the FNB facility**");*
>
> *7.2 the cession agreement(s) whereby the insurance policy was to be ceded would be accessory to the funding agreement;*
>
> *7.3 LPH would not be permitted to increase its lending against the FNB facility without the prior consent of Bonitas;*
>
> *7.4 LPH would cede and assign its debtors book in securitatem debiti to Bonitas;*
>
> *7.5 if, subsequent to the cession(s) of the policy, LPH no longer requires use of the policy as security and is able to itself secure its debts which were previously secured by the policy, LPH would:*
>
> *7.5.1 immediately procure replacement security so as to release the policy from any security which it was used for; and*

7.5.2 LPH would immediately re-cede or procure the re-cession of the policy back to Bonitas;

7.6 If, prior to the date contemplated in paragraph 7.5 above, the policy has reached its maturity date and Sanlam has made payment in respect thereof:

*7.6.1 LPH (and/or FNB) would be entitled to request Bonitas to provide replacement security to the satisfaction of FNB to enable LPH to continue to have access to the FNB facility up to an amount equal to that provided for in terms of the FNB facility in February 1996 (or such other amount as may have been agreed to by Bonitas) ("**the agreed exposure**");*

7.6.2 in the event that replacement security is called for and provided by Bonitas as contemplated in paragraph 7.6.1 above, then and in that event, LPH would be obliged to pay or to procure the payment of the full proceeds of the policy to Bonitas;

7.6.3 in the event that replacement security is called for, but not provided by Bonitas as contemplated in paragraph 7.6.1 above, then and in that event –

7.3.6.1 FNB would be entitled to apply the proceeds of the policy up to an amount equivalent to the agreed exposure; and

7.3.6.2 LPH would be obliged to pay or to procure the payment of the balance of the proceeds of the policy to Bonitas."

[28] On the contrary, the defendant's contention is that the terms of the funding agreement were:

"*7.1.1 the Plaintiff agreed to cede outright to the Defendant a Sanlam policy of adequate value which the Defendant would, in turn, cede to FNB in securitatem debiti as security for FNB's funding from time to time to the Defendant;*

7.1.2 the Defendant would credit the Plaintiff's loan account in the books of the Defendant with an amount equal to the value of the policy on the date of the outright cession on which date the Defendant would become the owner of the policy. The loan account would be repayable to Bonitas when:

7.1.2.1 the board of directors of the Defendant resolves that there are sufficient funds available which are in excess of its requirements for the purposes of the Defendant's business and subject to the availability of after-tax profits, alternatively

7.1.2.2 the Defendant was able to do so.

7.1.3 the Defendant would to secure the loan cede, in securitatem debiti, its entire debtors book to the Plaintiff."

The Breach

[29] The breach which the plaintiff alleges was committed by the defendant is in relation to the facility which was granted by FNB to the defendant. The plaintiff alleges that on a date unknown to it and without obtaining the plaintiff's prior permission, the defendant unilaterally and in breach of the funding agreement increased the FNB facility to an amount in excess of the exposure that had been agreed to. The plaintiff however was not privy to the exact amount with which the facility was increased.

[30] Further, the plaintiff contends that in circumstances where FNB and/or the defendant had failed to request the plaintiff to provide replacement security to the satisfaction of FNB to enable the defendant to have continued access to overdraft facilities, the defendant applied a portion of the proceeds of the policies in order to settle its indebtedness under the FNB facility and thereafter retained the remaining portion of the proceeds of the policies for itself and failed to pay the proceeds to the plaintiff.

[31] The defendant denies that it breached the funding agreement.

The Loan Account

[32] The defendant contends in its plea that it was out of the terms of the funding agreement that "*the plaintiff's loan account in the books of the Defendant would be created with an amount equal to the value of the policy on the date of the outright cession.*" The defendant further contends in the same vein that upon creation of the loan account "*the Defendant would become the owner of the policy.*"

The Approach to Factual Disputes

[33] The determination of the terms of an agreement involves not only the weighing of the evidence presented by the parties but also the contents of the contemporaneous documents. The approach was succinctly summarised by Nienaber JA in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie SA and Others** 2003 (1) SA 11 SCA at para 5 when he held as follows:

"The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows: To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv), and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability and improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[34] **In casu**, the court has to consider not only what the purpose of the funding agreement was but also the words used in the contract and any possible ambiguity in those words. The court also has to consider the contextual setting in which the contract was carried out and the subsequent conduct of the parties which may be probative of the common intention of the parties when they entered the contract.

The Evidence

[35] The plaintiff presented the evidence of two witnesses, namely Tenza and Mofokeng whilst the defendant called only one witness, Adam.

[36] Tenza was employed as a Principal Officer of the plaintiff in 1994 and was involved in the setting up stages when the defendant was established as a hospital. He testified how he was involved as a representative of the plaintiff not only when the shareholding was determined but also when the funding agreement was entered into. He was also involved in various Board activities and in correspondence with various parties with a view to ensuring that the defendant was established as a viable entity. He testified how the plaintiff had been established as one of the medical schemes which had been established for segregated communities and how when they reached a stage where they had excess funds, they decided to establish private hospitals aimed at serving previously disadvantaged communities.

[37] It was during this stage that he was introduced to Dr Adam (Adam) and subsequently involved in bringing the defendant into existence. The initial step was to enter into the shareholders' agreement which was then followed by the funding agreement.

[38] Tenza's evidence was by and large corroborated by Mofokeng and his responses can be described as candid and succinct. He did not pretend to be well-versed with all the activities he was involved in as a Principal Officer and was prepared to concede reliance on the advice of his staff on matters regarding which he did not possess sufficient knowledge. More importantly, it was never put to him or suggested under cross-examination that he was untruthful in any material respect. The crux of Tenza's evidence was that at all material times the policies which had been ceded by the plaintiff to the defendant remained the property of the plaintiff and that the plaintiff would be entitled to the proceeds thereof. He refuted the suggestion that the plaintiff had parted with ownership of the policies in favour of the defendant. His evidence was in line with a body of objective evidence in Board minutes, financial statements and correspondence between the parties.

[39] Tenza was criticised by the defendant's counsel as an unconvincing witness in that though able to read he would allege failure to understand the contents of documents that were presented to him. On the face of it this criticism would appear to be valid but the cogency of Tenza's evidence will be dealt with below.

[40] The second witness was Berman Mofokeng (Mofokeng) who was a 76 year old gentleman who had been involved with the plaintiff since 1982 as a member of the plaintiff's Board of Trustees until 1998. He was a signatory to the shareholders' agreement between the plaintiff and the defendant. He was a member of the plaintiff's Board of Directors and the plaintiff's Finance Committee. He participated in the meetings of these controlling structures and as such was an active participant in the establishment of the defendant as a hospital. Mofokeng testified that despite the plaintiff being a minority shareholder in the defendant it also ceded certain policies to the defendant to enable the defendant to utilise the policies as security when raising funds to finance the defendant's operations.

[41] Mofokeng testified that the policies constituted an investment of members' funds and that the plaintiff would remain owners of the policies. He also stated that the plaintiff would remain entitled to the proceeds of the policies. He was dismissive of the notion that the defendant would be entitled to the proceeds of the policies. Similarly to Tenza, Mofokeng's evidence was in line with contemporaneous documentary evidence such as Board minutes, correspondence and financial statements. It was also not suggested to him under cross-examination that he was an untruthful witness. The overall impression, therefore, of both Tenza and Mofokeng was that they were credible witnesses.

[42] Defendant conceded that Mofokeng was not in himself an unsatisfactory witness but went on to submit that his evidence does not contribute to determining the issues. The weight given to Mofokeng's evidence largely emanates from fact that he had sat as a director in Board meetings in which critical matters relating to the defendant's operations were discussed. He was for example, present in the Board meeting of 20 August 1999 which is more fully discussed (**infra**).

[43] The defendant called Dr Mohammed Adam (Adam) who admitted under cross-examination that at all material times he was "*the controlling mind*" of the defendant who had become a director of the defendant from 2002 onwards. Adam admitted that the policy which was initially ceded by the plaintiff to the defendant was ceded as security.

[44] Adam testified regarding the initial discussions with the plaintiff's officials with a view to establishing the defendant. He was also involved in the negotiations which resulted in the shareholders' agreement and the funding agreement. More importantly, however, whilst Adam admitted that the initial cession by the plaintiff was as security, he testified that the policies which were subsequently ceded to replace the initial policies were an outright cession which resulted in ownership of the policies by the defendant and that this entitled the defendant to do whatever they wished to do with the policies. Adam relied for his evidence regarding the cession of the policies on the cession document which recorded that the cession was an "*outright cession*". Whilst Adam's evidence was in line with the cession document, his evidence was contradicted by numerous contemporaneous documents such as Board minutes, correspondence and financial statements.

[45] Adam was confronted with these contradictions and it was upon this confrontation that he became evasive and resorted to long-winded and rambling explanations even when expected to respond to a simple question. For example, Adam was confronted with the Board minutes of a meeting which was held on 20 August 1999. Paragraph 4.5 of the minutes reads as follows:

"*Mr Lloyd advised that the facility of R 10 million is now in place. Mr Nkosi tabled a letter from Bonitas dated 18th August 1999 advising of problems with regard to the ownership of the two policies ceeded (sic) to the company. The Board confirmed that it was always the intention of the company that Bonitas remains the beneficial owner of the policies and that any benefits declared by Sanlam will belong to Bonitas...*"

Present at this meeting was Adam's brother (M. A. Adam) and Lloyd who had acted as financial director of the defendant and who would have been au fait with the manner in which the policy and policies were ceded to the defendant.

[46] Adam, in the face of this reality contended that as a result of being misled by Nkosi (Tenza's successor as the plaintiff's Principal Officer from January 1997) an incorrect resolution was passed by the defendant at the Board meeting of 20 August 1999. According to Adam, Nkosi, a late comer to the negotiations and arrangements which were entered into to enable the defendant to become operational had managed to mislead the key players to those negotiations and arrangements. This notion of being misled by Nkosi was to become thematic in Adam's evidence.

[47] Adams evidence was riddled with internal and external contradictions which seemed to demonstrate a tendency to be mendacious. This is exemplified by an instance in his evidence in chief when he testified that an alleged oral agreement was concluded prior to the Affin proposal (funding agreement) in terms of which the defendant was to provide the full working capital. When cross-examined and after it was pointed out to him that there was a non-variation clause in the shareholders' agreement which precludes this, he changed his evidence and for the first time, he contended that the alleged oral agreement was concluded prior to the shareholders' agreement, which was in October 1994. In addition, realising that the version conflicted with the shareholders' agreement, he then contended that the shareholders' agreement had to be rectified to bring it in line with the true intention of the parties. This was not the defendant's pleaded case.

[48] The defendant did indeed bring an unsuccessful application to amend its plea to allege an oral agreement concluded during December 1995 to January 1996 relating to the provision of full working capital. When asked in re-examination when the oral agreement was concluded, he reset his sails to contend for an oral agreement in line with the dismissed amendment by testifying that it was concluded in December 1995 to January 1996. It was difficult to keep up with the various versions which he presented in his testimony on various aspects of the defendant's case.

[49] Adam also resorted to a tendency to be petulant in the witness box and persisted despite a warning from the court to desist from doing so. He demonstrated this attitude in defamatory attacks on the plaintiff's senior counsel seemingly to deflect attention from questions which required simple answers. His evidence was peppered with the hallmarks of a dishonest witness.

Financial Statements

[50] It was Adam's evidence that the surrender value of the first policy on 8 February 1996 was approximately R10, 5 million whereas the amount paid out by Sanlam was R11 634 848.00.

[51] It is also common cause that the value of the policies which were ceded as replacement of the first policy was R12, 2 million.

[52] The defendant's evidence is to the effect that after what it claims as an outright cession, the value of the policies ceded was to be reflected in the defendant's financial statements as a loan account.

[53] The audited financial statements of the defendant, duly approved by the board of directors for the years 1996 to 2008 were presented as Bundle "*E*" during the trial.

[54] Adam became a member of the board of directors only from 2002 onwards. No director of the defendant was called to contradict what was reflected in the financial statements for the period from 1996 until Adam became a director. Not even Lloyd who is reflected in the financial statements as a company secretary was called to give evidence. The defendant's auditors were also not called to give evidence.

[55] Tenza was however a director of the defendant when the financial statements for the financial year ended 31 March 1996 were presented, discussed and approved. Mofokeng is reflected as director in the 1996, 1997 and 1998 annual financial statements.

[56] Absent any challenge regarding the correctness of the financial statements, they must be accepted as accurately reflecting the defendant's financial position during the period in question.

[57] It was Tenza's uncontested evidence that with regard to the 1996 annual financial statements he did not expect to see the first policy reflected as an asset.

[58] Further, Tenza was not aware of any loans save for those recorded in the annual financial statements and he stated that had he seen the surrender value of the policy reflected as a loan he would have questioned it.

[59] He confirmed that the recordal in respect of the cession of debtors (namely that it was "*security for the Sanlam investment policy*") was correct and in line with his understanding of what had been agreed.

[60] It is an undisputed fact that the annual financial statements from 1996 to 2006 do not reflect the policy and thereafter the policies, as an asset or assets in the defendant's books.

[61] The only loan reflected from the plaintiff to the defendant is a loan of R1 million in the financial statements from 1996 to 2006.

[62] The directors' report in the 1998 and 1999 annual financial statements record expressly that the policies are "*owned by the shareholders*".

[63] Tenza also testified that the defendant never sought the consent of the plaintiff when dealing with assets regarding which it was the owner but that regarding the policies the defendant did seek the plaintiff's cooperation and consent.

[64] Adam did try explaining these inconsistencies by reference to a misunderstanding allegedly caused by Frikkie Lloyd's letter dated 30 July 1996. The explanation however could not hold any water as Adam was neither a director nor author of the letter at the relevant time. His reference to the letter also constituted inadmissible evidence as Lloyd was never called to confirm or deny same.

[65] If one accepts the defendant's version, it stands without reason that the value of the policy or the policies, would have been, if not the biggest, then one of the major assets of the defendant and even one of the most basic understanding of the defendant's financial statements would have called for it to be reflected. The only logical reason, therefore for the exclusion of this asset or assets from the annual financial statements could merely be because they were not considered to be the defendant's assets.

[66] Equally if it is accepted that the cession resulted in a loan by the plaintiff to the defendant, the alleged loan would have been the biggest or alternatively one of the defendant's biggest liabilities which would materially alter the defendant's ability to declare dividends to its shareholders. Logically, therefore failure to reflect such loan in the defendant's books would seem to indicate that there was never such a loan.

[67] There is also no suggestion that in terms of good governance the directors failed to uphold their fiduciary obligations to consider the financial statements independently. There is no evidence that the directors challenged or disagreed with what was reflected in the financial statements.

[68] It is however, common cause that there was an eventual change in the 2006 financial statements which in light of the history and chronology of events since 1996 can only be described as inexplicable. I also take judicial cognisance of the fact that the change also occurred when litigation had begun between the parties by way of an urgent application in 2006 with Adam's direct involvement.

Requests for Increase in FNB Facilities

[69] It is common cause as reflected in various minutes of the defendant's board of 3 February 1997, 7 February 1997 15 February 1997 and 10 March 1997 that the defendant requested the plaintiff to allow increased usage of the security provided by the plaintiff.

[70] These requests are not supportive of the defendant's version.

The Conduct of the Parties

[71] As alluded to (**supra**) the common intention of the parties must also be established with reference to the conduct of the parties in the course of implementation of the agreements they had entered into.

[72] In a letter penned by Lloyd dated 9 September 1999 to Sanlam under the heading "*Share Allocation Policy Number 13780308X6 and 13780308X4*", the following is recorded (**inter alia**):

"*I refer to our telecom of today and confirm as follows:*

1. *The above policies were issued to Bonitas medical fund.*

2. *Bonitas ceded the policies to Maraba Hospital and Medical Centre (Pty) Ltd to enable the hospital to use the policies as security in the process of borrowing funds from First National Bank.*

3. *At all times it was the intention that Bonitas remains the owner of the policies and be the recipient of any benefits which may be declared by Sanlam.*

4. *Maraba or FNB will only be entitled to exercise their rights under the policy in case of default by Maraba.*

5. *Should the cessions (sic) which you hold not imply the above, we would like to amend same to give effect to this.*

6. *The above implies that the shares which were allotted to Maraba in June 1998, should have been allotted to Bonitas Medical Fund.*

Will you kindly arrange for the correction and let Bonitas have the necessary share certificates."

[73] The contents of Lloyd's letter are in line with Adam's statement under oath in (the then) Transvaal Provincial Division case number 39184/2006 ("*The 2006 interdict application*"). In paragraph 64 of Adam's answering affidavit, he avers as follows:

"*At a meeting of the board of directors of the fourth respondent [LPH herein] on 20 August 1999 Mr Nkosi tabled the aforesaid letter from the applicant [Bonitas] to the fourth respondent. The board confirmed that [Bonitas] remained the beneficial owner of the policies and that any benefits declared by [LPH] would belong to it. The board authorised Lloyd to do what was necessary to give effect to the aforesaid. A true copy of an extract of the minutes of this board meeting is annexed hereto as Annexure "MA6".*"

Annexure 6 referred to by Adam expressly records the "*uncorrected*" version of paragraph 4.5 of the board minutes of 20 August 1999 which has been referred to (**supra**).

[74] Paragraph 64 of Adam's affidavit is a direct contradiction of his own evidence under oath tendered in the present proceedings. An attempt is made both by Adam is his evidence and by the defendant's counsel in his heads of argument to explain away this glaring contradiction. The explanation is to the effect that Adam was misled by Nkosi or alternatively Lloyd. This explanation ignores the fact that what was recorded on 20 August 1999 was subsequently approved in a subsequent Board meeting as a correct recording of the minutes. I do not find the explanation convincing.

The First Cession

[75] The cession of the first policy in terms of the funding agreement was executed by a cession recorded in a Sanlam standard form which was filled out by a Mrs Sandy Ashby, an FNB employee.

[76] The document records that the policy was ceded "*as security for debt: loan or advance*" and according to the plaintiff the second set of policies were ceded on the same basis in replacement of the first policy.

[77] The description regarding the first policy is consistent with clause 6.6 of the shareholders' agreement and an interpretation of the funding agreement that the cession was for the provision of security for the purpose envisaged in clause 6.6 and the funding agreement.

The Replacement Cessions

[78] On the evidence the first policy was surrendered by the plaintiff inadvertently but the position was corrected by means of replacement cessions of two further policies.

[79] However, a conundrum arises from a reading of the second cession document which records in paragraph 5 (8) "*outright cession: yes*".

[80] On the evidence, the form was again completed by an FNB employee and according to Tenza he relied upon his staff when signing the agreement and did not have an understanding of the different types of cessions. Tenza was however unequivocal that the second cession was intended as a replacement of and on the same terms as the first cession.

[81] It has been submitted on behalf of the plaintiff that in terms of clause 6.6 of the shareholders' agreement and in terms of the funding agreement, the cession required from the plaintiff was solely for the purposes of security and in fulfilment of its obligation to provide security and that the recordal in paragraph 5 (8) of the second cession is at variance with and irreconcilable with the wording of the first cession and Tenza's letter of 28 October 1996.

[82] The plaintiff further submits that the records obtained from Sanlam show that after cession of the first policy on 9 February 1996, the plaintiff continued to make payments of the premiums due in respect of that policy. There is no dispute that the defendant did not contribute any payment for the policies.

[83] It was Tenza's evidence that on 2 July 1996 he wrote to Ashby and informed her that the plaintiff had decided to make all policies held with Sanlam fully paid-up. It is therefore argued on behalf of the plaintiff that the decision to make the policies paid-up was in keeping with the parties' agreement that the plaintiff effectively remained the owner of the policies. It is also notable that there is no evidence that the defendant complained regarding the plaintiff's fundamental decision to make the policies paid-up.

Frikkie Lloyd's Correspondence with the Defendant's Auditors in June and July 1996

[84] On 25 July 1996 the defendant's then auditors requested further information from Lloyd who was the defendant's co-managing director in order to finalise the 1996 annual financial statements. He was asked for "*Copy of the agreement between Maraba and Bonitas Medical Fund in respect of the loans granted to date, including details of sureties provided and interest payments.*"

[85] In Lloyd's response of 30 July 1996 he contended for only the R1 million loan emanating from the shareholders' agreement and made reference to the Affin proposal or funding agreement.

[86] Lloyd did not refer to a loan in the sum of the surrender value of the first policy and did not claim the value of the policy as an asset. This is in keeping with the plaintiff's version and contradictory to the defendant's version.

[87] It is significant that Lloyd was not called to testify regarding aspects such as this letter, the contents of which run parallel to Adam's testimony.

The Surrendering of the First Policy

[88] It is undisputed that the first policy was surrendered and that the plaintiff was paid the sum of R11 634 848.00 by Sanlam. According to the defendant's version, it was entitled to those proceeds yet, Adam admitted that those proceeds were never demanded or claimed by the defendant.

[89] The conduct of the defendant regarding the first policy was inconsistent with the conduct of an 'owner' yet the defendant's case is that the proceeds of the policies ought to be viewed and treated differently.

[90] This inconsistency in the defendant's case is not supportive of the version that has been presented in the defendant's evidence. On the contrary, the conduct of the defendant seems to be corroborative of the plaintiff's version.

Interpretation of the Funding Agreement

[91] The funding agreement was concluded in the context of clauses 6.3 and 6.6 of the shareholders' agreement and in that context, in terms of clause 6.6 the shareholders were to provide security in proportion to their shareholding for further funding required if agreed.

[92] The Affin proposal and consequent funding agreement was an agreement as envisaged in clause 6.6 and as such falls to be interpreted in the light of that clause.

[93] Paragraph 1.5 of the Affin proposal expressly refers to the shareholders' agreement and it sought to record the plaintiff's obligation as a shareholder (in terms of clause 6.6) to provide security in proportion to its shareholding, that is 26%.

[94] The requirement set out in paragraph 2 of the proposal, namely the cession of the policy ought to be interpreted in the context of clauses 6.3 and 6.6 of the shareholders' agreement.

[95] When regard is had to the context in which the funding agreement was concluded and the subsequent conduct of the parties the conclusion is inescapable that on a proper construction and interpretation of the funding agreement, the cession of the policy and thereafter the policies could only have been for the purposes of security and that the plaintiff was accordingly entitled to remain the beneficial owner, entitled to the proceeds of the policies save to the extent that FNB had called upon the loan and utilised the security to satisfy its claims.

[96] This conclusion finds support in the approach to the interpretation of documents as stated by Wallis JA in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 592 (SCA) para 18 in which he held as follows:

"*[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*"

[97] **In casu**, the manner in which the parties carried out their agreement must also be considered as part of the contextual setting in ascertaining the parties' intentions regarding the funding agreement. As stated by Leach JA in **Unica Iron and Steel v Mirchandani** 2016 (2) SA 307 SCA at paragraph [21]:

"*In considering the validity of this argument, it is unnecessary to deal in any depth with the principles applicable to the interpretation of contracts. They must now be regarded as well settled, particularly in the light of recent judgments of this court [...]. As Lewis JA stated in North East Finance:*

"The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded."

All that needs to be added is that it can be accepted that the way in which the parties to a contract carried out their agreement may be considered as part of the contextual setting to ascertain the meaning of a disputed term [...]. As is stated in R H Christie's The Law of Contract in South Africa 6 ed (2011) at 117, relying upon Breed v Van den Berg 1932 AD 283 at 292-293, this is because the parties' subsequent conduct 'may be probative of their common intention at the time they made the contract."

[98] It was submitted on behalf of the plaintiff that it was a tacit term of the funding agreement that notwithstanding the cession of the policies, the plaintiff was to remain the beneficial owner of the policies and entitled to the net proceeds thereof.

[99] The approach to tacit terms was succinctly enunciated by Cameron J in **Food and Allied Workers Union (FAWU) v Ngcobo N.O.** 2014 (1) SA 32 (CC) at paragraph [37] as follows:

"This is not correct. The Union's argument seeks to find in the parties' agreement a tacit term that the Union's obligation was merely to get the matter to the Labour Court, whether before or after the cut-off. A tacit term is an unspoken provision of the contract. It is one to which the parties agree, though without saying so explicitly. The test for inferring a tacit term is whether the parties, if asked whether their agreement contained the term, would immediately say, "Yes, of course that's what we agreed." Before a court can infer a tacit term, it must be satisfied that there is a necessary implication that they intended to contract on that basis."

[100] Further, it was held in **Wilkin v Voges** 1994 (3) SA 130 (AD) 136H – 137C that:

"The paramount issue is the alleged tacit term. A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The Inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. 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 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."

[101] **In casu**, the parties are in agreement that the consequence of the cession agreements was not a donation. Given the context which has been referred to above and in particular paragraphs 6.3 and 6.6 of the shareholders' agreement, I accept the submission by the plaintiff that the tacit term of the funding agreement was that notwithstanding the cession of the polices, the plaintiff would remain the beneficial owner of the policies and the proceeds thereof.

[102] In the circumstances I do not deem it necessary to deal with the alternative claim of a rectification of the replacement cession.

The Proceeds of the Policies

[103] The policies which the plaintiff ceded to the defendant matured on 1 December 2006 and the proceeds thereof on maturity were R39 293 353.34 which was then according to the defendant reinvested and restructured and proceeds in the sum total of R44 245 360.68 were thereafter paid out to the defendant.

[104] Adam conceded that FNB did not call up the loan which was secured by the policies.

[105] On the evidence the defendant appropriated the proceeds of the policies. In the circumstances where FNB and/or the defendant had failed to request the plaintiff to provide replacement security to the satisfaction of FNB to enable the defendant to continue to have access to overdraft facilities, I find that the defendant breached the funding agreement by applying a portion of the proceeds of the policies in order to settle the defendant's indebtedness under the FNB facility and/or retaining a portion of the proceeds of the policies for itself and not paying the proceeds of the policies to the plaintiff.

[106] As a matter of law, the plaintiff is entitled to interest on the sum of R44 245 360.68 at the prescribed rate of interest as provided for in terms of Section 1 of the Prescribed Rate of Interest Act 55 of 1975. The prescribed rate of interest given the time of the issuing of summons on 29 October 2008 would be subject to the in duplum rule.

Costs

[107] It is trite that costs must follow the result. The plaintiff submits that the costs be awarded to the plaintiff on an attorney and client scale for various reasons.

[108] The plaintiff submits that the defence as advanced by the defendant in the trial was demonstrably false and dishonest. I accept that where the defendant had for all intents and purposes accepted that the plaintiff was a beneficial owner of the policies for a period of about ten years and reflected that position in its financial statements, engineering a change of that status on no justifiable basis can be justifiably described as dishonest.

[109] The plaintiff further bases its application for costs on an attorney and client scale on the petulant demeanour of the defendant's controlling mind, Adam who resorted to unjustified grossly defamatory accusations against the plaintiff's lead counsel and persisted therewith notwithstanding warnings from the bench.

[110] In the matter of **Protea Assurance Co. Ltd v Januszkiewicz** 1989 (4) SA 292 (W) at 292 F - G the court awarded costs on an attorney and client scale as a mark of extreme displeasure at the defendant's attorney's conduct in making scurrilous attacks upon the plaintiff and his attorney. I find that Adam's conduct in these proceedings can be equated to the conduct referred to in the Januszkiewicz case and that costs should be awarded on a similar scale. I do not find as argued by the defendant's counsel that Adam's conduct was provoked by unduly robust cross-examination. On the contrary the tenour of robustness was a direct result of Adam's petulant conduct.

[111] The plaintiff further submits that Adams conduct under cross-examination justifies a **de bonis propriis** cost order against him personally. I am not persuaded that such an order is the appropriate one in the circumstances.

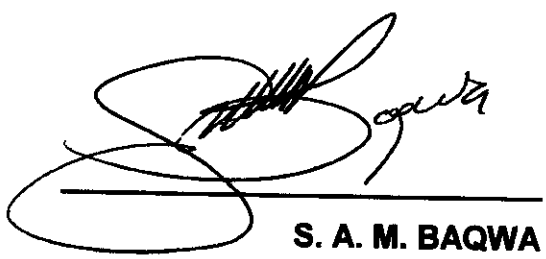
WHEREFORE the following order is made:

1. The defendant is ordered to pay the plaintiff:

   1.1 The sum of R44 245 360.68

   1.2 Interest on the sum of R44 245 360.68 at the rate of 15.5% per annum calculated from 29 October 2008 to date of payment, but limited to no more than R44 245 360.68.

2. Cost of suit on the scale as between attorney-and-client, which costs are to include the costs occasioned by the employment of two counsel.



S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on:	12 - 20 May 2016 and 1 June 2016
Delivered on:	18 August 2016
For the Plaintiff:	Advocate M. Maritz (SC) Advocate D. R. van Zyl
Instructed by:	Gildenhuys Malatji Incorporated
For the Defendant:	Advocate B. W. Burman (SC) Advocate G. W. Girdwood
Instructed by:	Terry Mahon Attorneys