

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



Case number: 34633/2010

Date:

26/10/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

25-10-16

DATE

SIGNATURE

In the matter between:

JHRAJHRSHALALL RAMNARAIN

PLAINTIFF

AND

MOMENTUM GROUP LIMITED

DEFENDANT

JUDGMENT

TOLMAY, J:

- [1] Plaintiff instituted a claim against Defendant based on an insurance policy which was issued by Sage Life for the sum of R 3 000 000-00 (three million rand) payable in the event of Plaintiff's mother, Chandermani Behari's (the deceased) death. The Defendant acquired Sage Life during September 2005.
- [2] Initially the Plaintiff and his brother, Jeenwalall Ramnarain, were nominated as beneficiaries in terms of the policy. On 3 May 2004 a form changing the beneficiary to the Plaintiff only was completed. Plaintiff filed a plea in which liability was denied on several grounds. In addition, the issue of the authenticity of the deceased's signature (the disputed signature) was raised, although the pleadings make no specific mention of this dispute.
- [3] The parties agreed that the issue of the authenticity of the signature should be determined as a separated issue in terms of rule 33(4) of the Uniform rules of Court. The agreement was that para 7 of the particulars of claim read with para 9 of the plea would be the only issue to be determined at this stage.
- [4] Para 7 of the particulars of claim reads as follows:
"During or about 3 May 2004, Chandermani Behari nominated the Plaintiff as the beneficiary, in writing, replacing the previous beneficiary nomination on the policy. A copy of the change of beneficiary is annexed hereto marked "B".

- [5] In par 9 of the plea Defendant denies the allegations in par 7, thereby denying that a change of beneficiary occurred. The authenticity of the signature is not specifically raised. The disputed signature appears in a document called a "Nomination of beneficiary – endorsement".
- [6] It was admitted that the Defendant carries the *onus* to begin, the *onus* of proof however remains in dispute.
- [7] Defendant's counsel indicated that he would call two expert witnesses, while Plaintiff indicated that he would call one expert but may also call the Plaintiff. I was assured that there would be no duplication of evidence and that the separated issue could be dealt with separately conveniently without venturing into the merits of the case. As a result the order in terms of Rule 33(4) was granted.
- [8] It is appropriate to, at this stage already, deal with a predicament that arose during the evidence led by the Plaintiff. Counsel for Defendant indicated during his opening address, that he, if Plaintiff comes to testify, may have to canvass certain remarks that Plaintiff had made historically, only for purposes of determining credibility. During the cross-examination of Plaintiff, Mr Mundell SC for the Defendant, ventured into aspects which fell outside the limited issue before me. Mr Khan SC objected to the questions and indicated that he didn't consult or led any evidence in chief regarding these issues and limited his evidence to the question of the validity of the disputed signature. He

indicated that the Plaintiff would be severely prejudiced if this line of questioning is allowed. Mr Mundell SC however argued that the credibility of Plaintiff is of the utmost importance and if the questions are not allowed Defendant would be prejudiced. It was clear that whatever my ruling would be one of the parties would be prejudiced. I then proposed, in the interest of justice, and in order not to prejudice anyone, that the parties should consider letting me determine the separated issue on the evidence of the experts only. After some debate and consideration Mr Khan abandoned Plaintiff's evidence, which was not completed and I determined the matter on the evidence of the experts only and disregarded the evidence so far led by the Plaintiff in totality.

- [9] The experts who examined the disputed signature as well as specimens testified that they would examine the disputed signature and the specimens to determine similarities and dissimilarities between the disputed signature and the specimens in order to determine the authenticity of the disputed signature. They explained in their reports as well as evidence that the examination of handwriting is based on an analysis of *inter alia* commencing, connecting and end strokes, quality of writing, form and construction of letters, slant of writing, pen lifts or hesitations, pen pressure, basic line of writing, normal variations, spacing of writing, size and proportion of writing, sequence of writing etc.

[10] The Plaintiff called as expert witnesses Mr Bam and Brigadier Hattingh. Both of them compared the disputed signature with three specimen signatures that are known to be the signatures of the deceased. Only copies of the disputed signature and specimen signatures were examined. The disputed signature and the three specimens they examined are reproduced here.

[11] The disputed signature:

[12] The specimen signature:

A1

A2

[13] Mr Bam after examining the disputed signature and the specimen signatures raised certain aspects in his report which, according to him indicate that the disputed signature was probably a forgery. These points were also confirmed in his evidence. He noted the following:

1. In the disputed signature the letter "C" is formed with a straight downward stroke, a sharp angle at the bottom and the final stroke ending higher from the writing line than in the specimen signatures.

In the specimen signature the letter "C" is formed with a normal curve and without any angularity at the bottom.

2. In the disputed signature the commencing stroke of letter "B" is a short, almost horizontal line where it enters the stem of the letter.

In the specimens the commencing strokes of letter "B" are formed with a long diagonally upward stroke entering the stem of the letter.

3. The slant of the top loop of letter "B" is much more upright in the specimen signatures than in the disputed signature.

4. In the specimen signatures the commencing stroke of letter "e" is formed more or less from the stem of letter "B". It is long and straight.

In the disputed signature the commencing stroke is much shorter and curved.

5. The spacing between letters "B" and "e" is about 3 to 4 times wider in the specimen signatures than in the disputed signature.

6. In the disputing signature the connecting stroke between letter "a" and "r" are formed angularly and is lifted from the baseline. In the specimen signature the commencing strokes are formed close to the baseline and are curved at the start.
7. There is a probability that there is a pen-lift in the connecting stroke between letters "a" and "r" in the disputed signature, but because of the photocopy it cannot be determined without any doubt.

[14] Brigadier Hattingh raised the following dissimilarities which according to him point to a conclusion that the disputed signature was probably a forgery:

1. The body of the letter "C" in the disputed signature is formed with a vertical stroke at the left and a sharp turn to the right at the bottom giving the body an almost square appearance. In the specimen signatures the "C" is formed with a rounded body.
2. In the lower portion of the body of the "B" an irregular movement occur with a slight arched movement on the rounded movement. In the specimen signatures the movements are rounded.
3. The spacing between the letters "B" and the following "e" is extremely small while in the specimen signatures the spacing is very wide.
4. The loop of the letter "e" is formed with an almost vertical slant with the curve to the right at the bottom. In the specimens the

loop is formed with a pronounced slant and a curve formed at the left.

5. The spacing between the letter "e" and the following letter "h" is formed smaller in the disputed signature than in the specimen signatures.
6. The letter "h" is formed with a loop at the upper portion of the stem as indicated by the wide stroke while in the specimen signatures no such loop is formed.
7. The body of the letter "h" ends with a sharp curve at the end. A horizontal stroke to the right is formed before the stroke turns upward in the disputed signature. In the specimens the curve is rounded.
8. An abnormal movement in the connecting stroke between the "h" and "a" occur, indicating a hesitation or lifting of the pen in the disputed signature which does not occur in the specimen signatures.
9. The stem of the letter "a" in the disputed signature is formed with a curved movement in the form of a "S" while in the specimen signatures the stem of the "a" is straight.
10. An abnormal movement occurs in the connecting stroke between the "a" and "r" indicating a hesitation or lifting of the pen in the disputed signature which does not occur in the specimen signatures.

- [15] Mr Bam and Brigadier Hattingh concluded that there is a 80% probability that the disputed signature is not that of the deceased based on the dissimilarities between the disputed signature and the specimens examined by them.
- [16] Despite Mr Bam and Brigadier Hattingh relying on certain pen lifts in their evaluation of the signatures they conceded that you can't determine pen stops, pen lifts and hesitations on copies. This must be seen in the context that they only had copies to work from. As a result I can't find on a balance of probabilities that pen stops, pen lifts and hesitations occurred.
- [17] Although Brigadier Hattingh conceded that original signatures are preferable, if available, he said that copies can be used and can still contain identifiable characteristics. Mr Bam was not willing to concede that originals are better. Brigadier Hattingh conceded that the greater the number of times a document have been photocopied the lesser the propensity that an accurate finding will be made. He also conceded that the documents that were examined by him and Mr Bam had been copied on several occasions. He, as far as the preferability of original samples is concerned, testified that to compare genuine signatures with a disputed signature of poor quality serves no purpose. He conceded that the disputed signature was a copy of poor quality.

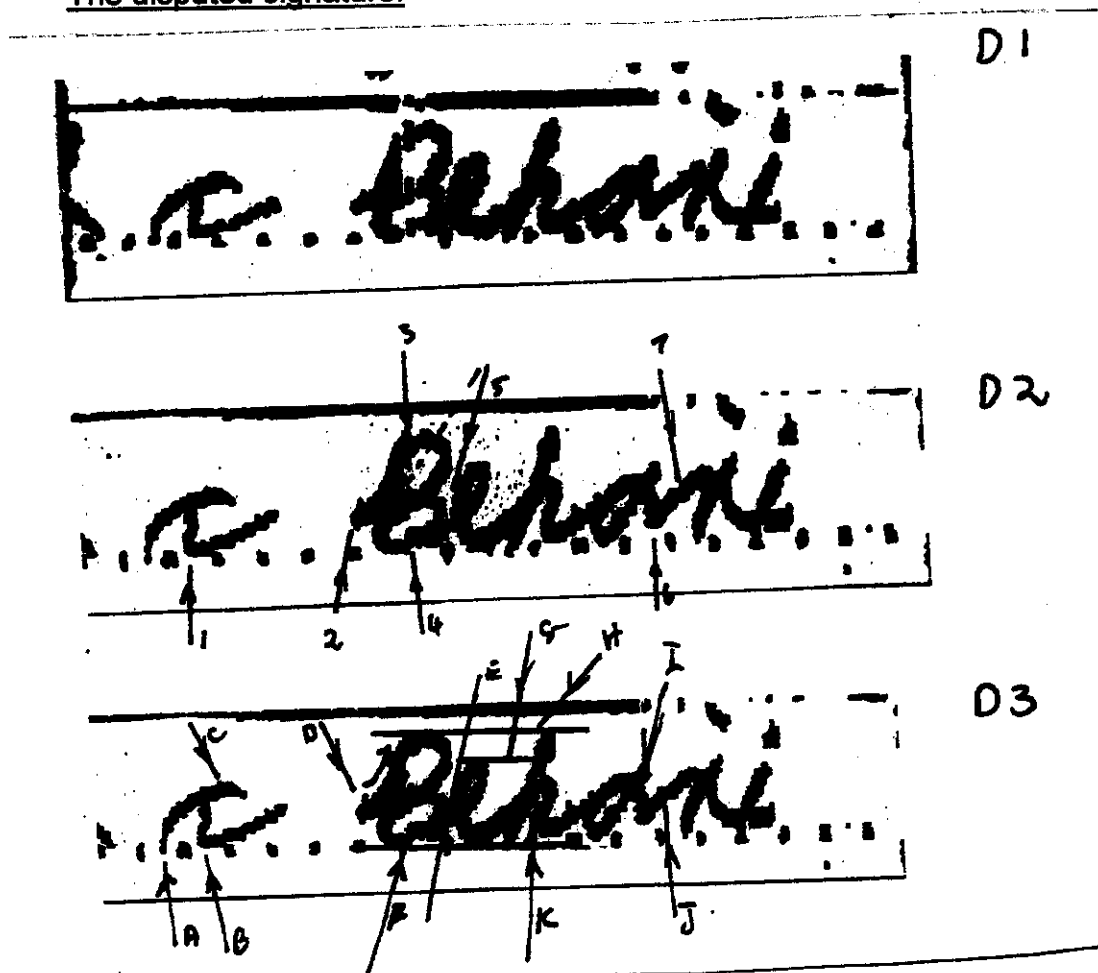
- [18] Brigadier Hattingh testified that a person never signs his signature in exactly the same way, but what is referred to as a master pattern is followed. This master pattern can be placed in a circle of variation which is allowable for a person. As soon as something falls outside that circle it is no longer a variation but a difference. Although Brigadier Hattingh explained that, a difference falls outside the range of variation allowed in a signature, he could not satisfactorily explain how one would differentiate between a variation and a difference. According to him to determine the difference is a question of training, expertise and common sense.
- [19] Mr Irving, the expert for the Plaintiff, testified and concluded that the disputed signature is probably authentic. He said the fact that he had 14 specimens available 7 of which were originals placed him in a better position to evaluate the authenticity of the disputed signature. He examined the deceased's signature on her last will and testament and certain specimens' some of which were originals during 2011 on request of the Plaintiff. During that investigation he concluded that the signatures on the will were indeed authentic. It is common cause between the parties that the 14 specimens examined by him are indeed signatures of the deceased.
- [20] During cross-examination of Mr Irving it transpired that he examined the originals during his 2011 investigation and did not for purposes of this case examine them again. Mr Irving was satisfied that, as he still

had access to his notes and report pertaining to the 2011 investigation, he could rely on his evaluation and inferences pertaining to the original signatures. He and the other witnesses were satisfied that, despite the poor quality of the disputed signature, they could come to a conclusion about the authenticity of the disputed signature.

[21] Mr Bam and Brigadier Hattingh both said that they have, subsequent to filing their reports, examined the specimens available to Mr Irving but still stand by their view that the disputed signature was probably a forgery.

[22] The disputed and specimen signatures examined by Mr Irving are reproduced here.

The disputed signature:



The specimen signatures:

FINAL PAGE OF DOCUMENT 'A' 06/03/2002 (COPY)

C. Behari X

LETTER TO CONVENE FAMILY MEETING 24/10/2006 (COPY)

C. Behari y
Mrs. Behari

AFFIDAVIT 25/08/2003 (COPY)

C. Behari 2
NATURE RIGHT

(A)

POWER OF ATTORNEY TO TRANSFER 14/05/2007 (ORIGINALS)

C. Behari ST1

14/05/2007

C. Behari ST2

MEMORANDUM OF AGREEMENT OF PURCHASE AND SALE 26/04/2007 (ORIGINALS)

Handwritten signature: *C. Behari*
 Date: 26/04/2007
 Stamp: ST3

Handwritten signature: *C. Behari*
 Stamp: ST4

Handwritten signature: *C. Behari*
 Stamp: ST5

Handwritten signature: *C. Behari*
 Stamp: ST6

Handwritten signature: *C. Behari*
 Stamp: ST7

LAST WILL AND TESTAMENT 09/07/1996 (COPIES)

Handwritten signature: *C. Behari*
 Stamp: ST8

Handwritten signature: *C. Behari*
 Stamp: ST9

Handwritten signature: *C. Behari*
 Stamp: ST10

Handwritten signature: *C. Behari*
 Stamp: ST11

(B)

LAST WILL AND TESTAMENT 08/01/2008 (ORIGINALS)

ST12

08/01/2008

ST13

- [23] The original signatures on the deceased's last will and testament are still available at the Masters' Office in Durban. None of the other originals are still available.
- [24] Mr Irving dealt with his own analysis as well as those of Mr Bam and Brigadier Hattingh and concluded that the points of difference between the disputed signatures and the specimen signatures pointed out by Mr Bam and Brigadier Hattingh can be addressed by comparing these variations to similar variations that occur in the specimens examined by him. On a perusal of the specimens it would seem to me that similar variations occur in the broader spectrum of specimens examined by Mr Irving.
- [25] The only variation that Mr Irving could not sufficiently explain is the spacing between the "B" and "e". Mr Irving remarked that despite the

fact that the spacing between these two letters are very small in the disputed signature the spacing between the "B" and "e" varies a lot in the specimen signatures. He conceded however that the small spacing does not re-occur in any of the specimens.

- [26] A comparison of the specimens examined by Mr Irving show a wide range of variation in the way that the deceased executed her signatures. Mr Irving contended that the dissimilarities which could be identified were within the expected range of variation of the deceased's signature. Mr Bam and Brigadier Hattingh were however of the view that the dissimilarities were not within the expected range of variation but constitute differences which point to a conclusion that the disputed signature was a forgery.
- [27] The Court is faced with the conflicting opinions of the experts, and their views on what would constitute a variation within the accepted range and what would constitute a difference. At the end it is still not clear to me how that distinction should be made. After considering the evidence and the disputed signature I am of the view that, but for the spacing between the "B" and "e" all the other variations pointed out by Mr Bam and Brigadier Hattingh also occur within the broader spectrum of specimens considered by Mr Irving. I am also of the view that the spacing between the "B" and "e" varies a lot and that one cannot on this alone found that the signature is a forgery. The deceased's signature varied a lot and on an examination of the disputed signature

and specimens I am of the view that the variations in the disputed signature fall within the range of variation and does not point to a difference which may point to a forgery.

[28] There was a dispute pertaining to who carries the *onus* of proof. In the pre-trial minute Plaintiff admits that it bears the onus to proof an entitlement to avoid the policy. Plaintiff's counsel argued that, Defendant conceded that it carries the *onus*. This admission has got nothing to do with the nomination of the beneficiary but deals with the misrepresentations allegedly made by the Plaintiff and, if proven, would render the policy void. Therefore I can't find that Defendant has conceded that it carries the *onus* of proof.

[29] Determining the *onus* of proof is not a simple issue, it has been eloquently stated as follows:

"The law of evidence is well known for its power both to fascinate and perplex. Even in this arcane field, however, the onus of proof stands out for its extraordinary ability to tantalise the legal mind. Few subjects that are so important a part of the practical workings of a legal system can, at the same time, remain so mysterious, enigmatic and elusive to the questioning mind. It is a concept that seems to recede the harder it is pursued and that resists any effort to define and contain it. It is as if sometimes one is chasing shadows and as if any attempt at coming to grips with the subject can never yield anything of substance".¹

¹ The South African Law of Evidence, D T Zeffert A P Paizes, a A StQ Skeen, 2003, p 46

[30] It is with the aforesaid in mind that I proceed cautiously to consider the question of who carries the *onus*. The general rule is that he/she who asserts must prove and not he who denies (ei. *incumbit probatio qui dicit, non qui negat*).² This on the face of it, simple rule, however opens the door to an interesting and often complex legal debate. The question of what needs to be proven by the one who asserts is not always easy to determine. It is trite that the Plaintiff needs to prove his cause of action. The difficulty arises when a defence is raised which falls outside the ambit of what would constitute the cause of action. Such a special defence ground, which falls outside the confounds of the cause of action, must be proven by the party who relies on it.

[31] In Schmidt, Bewysreg: the following is said:

" ... Die feit dat die eiser al die vooverseistes vir die verweerder se aanpreeklikheid moet bewys beteken egter nie dat die eiser noodwendig elke betwiste feit moet bewys nie. Indien die verweerder 'n feit in geskil plaas wat verhoed het dat die beweerde regshandeling regsgeldig of afdwingbaar word (in Duitsland soms 'n 'rechtshindernde Tatsache' genoem) soos handelingsonbevoegdheid, ongeoorlooftheid, bedrog, ensovoorts, dan is dit die verweerder wat die bewyslas dra. Dié word gesien as feite waarop die verweerder steun en wat buite die eiser se aksiegrond val. Dit is spesiale verweersgronde wat deur die verweerder in geskil geplaas word".³

² Smith's Trustee v Smith 1927 AD 482, 485; Pillay v Krishna, 1946 AD 946 on 952; Mobil Oil southern Africa (Pty) Ltd v Mechin 1965(2) SA 706 (A) 711

³ Schmidt & Rademeyer, 4e uitgawe p 38-39 t.a.v. bedrog sien Malherbe v Ackerman 1944 OPD 91 on 93

[32] It has been found that the *onus* of proof rests on the person that alleges that a will is invalid,⁴ that a contract was entered into,⁵ and that person was *non compos mentis*.⁶ These are but some examples of instances where the *onus* was determined to rest on a specific party irrespective of whether the relevant party was the plaintiff or defendant.

[33] In my view, although Plaintiff carries the *onus* to prove his claim, Defendant disputes a fact that places the legality of the change in nomination in dispute and must consequently prove that the signature is a forgery. This aspect, in my view, falls outside the Plaintiff's cause of action and constitutes a special defence ground. The Defendant needs to prove the special defence ground on a balance of probabilities.

[34] In the light of all the facts of this case I am not satisfied that the Defendant proved on a balance of probabilities that the signature is a forgery.

[35] Consequently I make the following order:

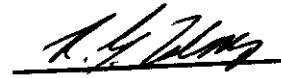
**35.1 It is declared that the disputed signature is not a forgery
and is an authentic signature of the deceased; and**

⁴ Kunz v Swart 1924 AD 618 p 692; Tregea v Godard 1939 AD, 16; Bowes v Friedlander NO 1982(2) SA 504 (K) 509

⁵ Stocks & Stocks (Pty) Ltd v Daly & Sons (Pty) Ltd 1979(3) SA 754 (A) 762; Da Silva v Janowski 1982(3) SA 205 (A)

⁶ Pheasant v Warne 1922 AD 481; Ken Barnard Motor & Bandediens (Edms) Bpk v Pretorius 1970(4) SA 712 (T)

35.2 The Defendant is ordered to pay the costs of the hearing in terms of Rule 33(4).

A handwritten signature in black ink, appearing to read 'R. G. Tolmay', is written over a horizontal line.

R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING: 12 – 15 AUGUST 2016

DATE OF JUDGMENT: 26 OCTOBER 2016

ATTORNEY FOR APPLICANT; RAJESH HIRALALL ATTORNEY

ADVOCATE FOR APPLICANT: KHAN (SC) et R HIRALALL

ATTORNEY FOR DEFENDANT; KEITH SUTCLIFF & ASSOCIATES

ADVOCATE FOR DEFENDANT: T MUNDELL (SC) et K SUTCLIFF