THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 307/09

P P MAREE **Appellant**

and

CHRIS BOOYSEN T/A NVM BELEGGINGS & VERSEKERINGSADVISEURS **Respondent**

Neutral citation: *Maree v C Booysen t/a NVM Beleggings & Versekeringsadviseurs* (307/09) [2010] ZASCA 44 (31 March 2010)

CORAM: Navsa, Mlambo and Bosielo JJA

HEARD: **11 March 2010**

DELIVERED: **31 March 2010**

SUMMARY: Agreement in terms of which an insurance broker is entitled to claim commission from the insured in the event of the latter cancelling a long-term insurance policy within the statutory 'cooling-off' period is unenforceable – provisions of the Long-term Insurance Act 52 of 1998, the regulations thereunder and Policy Protection Rules discussed.

ORDER

On appeal from: Free State High Court (Bloemfontein) (Kruger *et* Mocumie JJ sitting as court of first instance).

1. The appeal is upheld with costs.

2. The order of the court below is set aside and substituted as follows:

'(a) The appeal is dismissed and the appellant is ordered to pay 80 per cent of the respondent's costs.'

The Magistrate's order is changed to the following extent:

'(a) The plaintiff's claim is dismissed with costs.

(b) The defendant's counterclaim is dismissed with costs.'

JUDGMENT

NAVSA JA (Mlambo and Bosielo JJA concurring)

[1] The Respondent, Mr Chris Booysen, conducts business as an Insurance broker and consultant, under the trade name NVM Beleggings & Versekeringsadviseurs. He instituted action against the appellant, Mr P P Maree, in the Kroonstad Magistrates' Court, for payment of an amount of R47 638.27, being commission he alleged would have been paid to him over a period of time had the latter not cancelled an insurance policy procured on his behalf. The claim was based on a written agreement between them, the provisions of which will be dealt with in due course.

[2] Mr Maree opposed the action and in a counterclaim sought a statement and debatement of account. The Magistrates' Court dismissed Mr Booysen's claim with costs, on the basis that the written agreement on which the claim was based contravened s 49 of the Long-term Insurance Act 52 of 1998 (the Act), read with the regulations promulgated thereunder. The Magistrate granted Mr Maree's counterclaim. The applicable statutory provisions will be examined later.

[3] Mr Booysen appealed the Magistrates' court decision to the Free State High Court in Bloemfontein, which (Kruger J, Mocumie J concurring) upheld the appeal with costs, substituting the Magistrate's order as follows:

'1.Verweerder word gelas om eiser R47 738, 27 te betaal plus rente teen 15, 5% per jaar vanaf 4 April 2006 tot op datum van finale vereffening.

2. Verweerder se teeneis word met koste van die hand gewys.'

[4] It is against that decision and order that Mr Maree appeals, with the leave of the court below. The background facts are largely uncontested and are set out hereafter.

[5] Mr Booysen had rendered advisory services to Mr Maree, a successful businessman, for approximately 20 years. The seeds of the present antagonism between them were sown when, during July 2006, Mr Booysen advised Mr Maree to have a current Sanlam annuity policy 'paid up'[1] and to replace it with a Momentum Life policy. Mr Maree initially proceeded to follow that advice.

[6] On 17 July 2006, Sanlam, as it was statutorily obliged to, sent Mr Maree a document in which it set out the impact of causing the policy to be 'paid up'. It appears that, following on a further discussion with another Insurance advisor

[1] This means that the policy holder ceases paying premiums and the policy then holds a reduced value upon maturity, relative to premiums paid plus the investment value.

based at a local bank, Mr Maree came to the conclusion that he had been wrongly advised by Mr Booysen and that the latter had been motivated by the commission to be earned on the Momentum Life policy. This, of course, is denied by Mr Booysen, who testified that the advice he gave was based on the fact that continued premiums on the Sanlam policy was not tax-effective for Mr Maree and that, in the long term the former would earn less in commission on the new policy. For reasons that will become apparent it is not necessary to resolve this subsidiary dispute.

[7] On 21 July 2006 in a very curt letter to Mr Booysen, Mr Maree wrote the following:

'Hiermee stel ons u in kennis dat M.C. Ingenieurswerke BK[2] en P.P. Maree, nie meer van N V M Beleggings & versekerings adviseurs se dienste gebruik sal maak nie.

Ons wil nie redes verskaf nie en versoek dat u dit so sal respekteer. Ons kan u verseker dat die besluit nie ligweg geneem is nie en dit sal nie heroorweeg word nie.'

[8] On 25 July 2006 Mr Maree wrote to Momentum Life cancelling the policy that Mr Booysen had procured on his behalf.

[9] On 31 August 2006, Mr Maree wrote a further letter to Mr Booysen, stating that he had decided to replace him with ABSA brokers. The following are the relevant parts of Mr Maree's letter:

'My besluit om ABSA Makelaars (Neels Greeff) as my nuwe makelaar aan te stel is my keuse wat ek hoop jy sal respekteer.

Ek het slegs 'n tweede opinie ingewin nadat ek 'n skrywe vanaf Sanlam, waarvan die opskrif as volg was: "Impak om 'n polis volopbetaald te maak" ontvang het.

Nadat ek 'n tweede, derde en vierde opinie ingewin het, het ek besluit om by Sanlam te bly.'

[10] As a result of Mr Maree's cancellation of the Momentum Life policy Mr Booysen lost the commission he would otherwise have earned. This led to

[2] M C Ingenieurswerke CC is one of Mr Maree's businesses.

further acrimonious exchanges between them and ultimately to the litigation culminating in the present appeal. It is clear from Mr Booysen's evidence that he took the view that he was entitled to compensation because of the effort he had expended in advising the appellant and procuring the best available new policy for him.

[11] In his particulars of claim the following is stated on behalf of Mr Booysen:

'3. Eiser en verweerder het 'n ooreenkoms aangegaan waarvolgens eiser aan verweerder sekere advies gelewer het in verband met sy polis portefeulje, welke advies deur verweerder aanvaar is en is daar sekere polisse uitgeneem in terme van die advies.

4. As gevolg van die advies is Eiser geregtig op sekere kommissie ten bedrae van R47 638, 27.'

[12] At this stage it is necessary to have regard to the agreement on which Mr Booysen's claim is based. The following is the material part of the agreement:

'Ek begryp en aanvaar dat enige versekeringsbesigheid namens my, deur my tussenganger geplaas, voorsiening maak dat my tussenganger deur die betrokke versekeraar vergoed sal word volgens die aard van die produk deur my aanvaar, en soos op die kwotasie van die versekeraar/s aan my voorgelê, aangedui word. Ek en my tussenganger kom ooreen dat sodanige vergoeding deur ons beide aanvaar sal word as vergoeding vir die dienste aan my gelewer. Indien my tussenganger se vergoeding teruggevorder word deur die versekeraar as gevolg van my eie (die polishouer) se optrede tot nadeel van die tussenganger, aanvaar ek, die ondergetekende dat ek steeds verantwoordelik sal wees vir genoemde, ooreengekome vergoeding.'

The 'tussenganger' (intermediary) is a reference to Mr Booysen.

[13] I turn to deal with the manner in which the court below dealt with the Magistrate's findings.

[14] Kruger J recorded that Mr Booysen accepted that he was not entitled to any commission from Momentum Life because of Mr Maree's cancellation of

the policy.[3] The learned judge noted that the Magistrate had decided the matter on the basis that the agreement on which Mr Booysen relied was in contravention of the Act and that Mr Maree's assent amounted to a waiver which was not competent.

[15] The court below found that Mr Booysen, as intermediary, had expended time and energy in procuring the Momentum Life policy and, as a result of Mr Maree's cancellation, was now deprived of the commission he would otherwise have earned. In considering the statutory provisions the Free State High Court held that there was no prohibition against an agreement between an intermediary and his client, in this case, between Mr Maree and Mr Booysen in terms of which the latter was able to look to the former for compensation. It held that the Act did not deprive the intermediary of his right to recover commission that was his or her due. Consequently the court below made the order set out in para 3 above. The question before us is whether these conclusions were correct.

[16] At this stage it is necessary to consider the relevant statutory provisions, beginning with Mr Maree's entitlement to cancel the Momentum Life policy. In terms of Rule 6.1 of the Policyholder Protection Rules[4] (Long-Term Insurance), promulgated under s 62 of the Act, a new policyholder has, what is commonly referred to as a 'cooling-off' period, within which to cancel any policy under appropriate qualifying circumstances. It is undisputed that Mr Maree was entitled in terms of this rule to cancel the policy.

[17] Section 49 of the Act, the applicability of which was debated in the Magistrates' Court, in the court below and before us, provides:

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[3] Mr Maree was entitled in terms of the rules promulgated in terms of the Act to cancel the policy within a 30 day-period of receipt of summarised information from Momentum Life – see para 16 infra.

[4] Government Gazette No 26854, Government Notice No 1129, Regulation 8070.

'No consideration shall be offered or provided by a long-term insurer or a person on behalf of the long-term insurer or accepted by any independent intermediary for rendering services as intermediary as referred to in the regulations, other than commission contemplated in the regulations and otherwise than in accordance with the regulations.'

[18] Importantly, s 56 of the Act provides that an agreement, in terms of which a person who has entered into a long-term policy waives a right to which he or she is by virtue of the Act entitled, is void.

[19] Section 72(1)*(d)* of the Act empowers the Minister to make regulations 'prohibiting any consideration from being offered or provided, or limiting the consideration which may be offered or provided, from, by or on behalf of a long-term insurer to any person for rendering services as intermediary. . .'.

[20] The material parts of regulation 3.2 of the Regulations, promulgated in terms of s 72 of the Act,[5] echoes s 49 and reads as follows:

'3.2 **General limitations.** (1) No consideration shall, directly or indirectly, be provided to, or accepted by or on behalf of, an independent intermediary for rendering services as intermediary, otherwise than by way of the payment of commission in monetary form.

(2) No commission shall be paid or accepted otherwise than in accordance generally with this Part and more particularly as specified in the Table.'

[21] Regulation 3.8, consonant with s 56 of the Act, provides as follows:

'3.8 **Voidness of certain agreements.** *Any agreement, scheme or arrangement* to provide consideration for the rendering of services as intermediary otherwise than in accordance with this Part shall be void.' (My emphasis.)

[22] 'Rendering services as intermediary' is defined in the regulations as follows:

[5] Government Gazette No 19495, Government Notice 1492 of 27 November 1998 as amended.

'[T]he performance by a person other than a long-term insurer or a policyholder, on behalf of a long-term insurer or a policyholder, of any act directed towards entering into, maintaining or servicing a policy or collecting, accounting for or paying premiums or providing administrative services in relation to a policy, and includes the performance of such an act in relation to a fund, a member of a fund and the agreement between the member and the fund.'

[23] Rule 19.1 of the Long-Term Insurance Policy Protection Rules, in line with s 56 of the Act and regulation 3.8, provides:

'No insurer or intermediary may request or induce in any manner a policyholder to waive any right or benefit conferred on the policyholder by or in terms of a provision of these Rules, or recognise, accept or act on any such waiver, and any such waiver is null and void.'

[24] It was submitted on behalf of Mr Booysen that s 49 was designed to regulate the relationship between insurer and intermediary and not the relationship between intermediary and insured. Counsel on behalf of Mr Booysen contended that s 49 ought to be read so as to limit its operation so as to ensure that it does not intrude upon the common-law right of parties to provide separately for 'consideration' as between intermediary and insured.[6] It was submitted that, at the very least, s 49 was ambiguous and that courts should strive to avoid an interpretation that would be absurd.

[25] It was contended further that the regulations and rules should be read in the light of the interpretation of s 49 set out in the preceding paragraph.

[26] It was submitted that an absurdity flowed from holding that the agreement in question was prohibited in terms of the statutory provisions referred to above The absurdity, so it was submitted, was that an intermediary, such as Mr Booysen would be deprived of his commission, notwithstanding the efforts

[6] In this regard Mr Booysen relied on Directive 132.A.ii (LT) of 30 January 2004 issued by the Registrar of Long-Term Insurance (Financial Services Board). In this Directive approving of this interpretation the Registrar's office nevertheless indicated that it intended to promote a legislative amendment to place this matter beyond doubt.

expended in procuring a new policy. No other example of an absurdity was provided by counsel on behalf of Mr Booysen.

[27] The stated purpose of the Policy Protection Rules is to ensure that intermediaries and insurers conduct their business honestly, fairly and with due care and diligence.[7] Several provisions of the Act are designed to protect consumers.[8] The 'cooling-off' period is clearly designed to afford proper time to consider the full implications and impact of the policy in question, without the consumer incurring any financial penalty.

[28] In my view s 49 is not ambiguous. It limits the consideration to be offered by a long-term insurer to persons such as intermediaries to commission as contemplated in the regulations. Furthermore, it restricts the consideration that may be accepted by an independent intermediary for rendering services as such, to commission as contemplated by the regulations.

[29] Regulation 3.2, set out in para 18 is equally clear and echoes the provisions of s 49. Regulation 3.8 referred to in para 18, in even clearer terms, renders void, '*any* agreement, scheme or arrangement to provide consideration for the rendering of services as intermediary' other than in accordance with the regulations. (My emphasis.) It has not been suggested that these regulations, in their emphatic and unambiguous terms are *ultra vires*.

[30] It is common cause that in the circumstances of this case, namely, the cancellation within the 'cooling-off' period, no commission is payable by

[7] See Rule 2 and Peter Havenga *The Law of Insurance Intermediaries* (2001) p 55.

[8] Section 45 of the Act for example is designed to protect the consumer against unscrupulous salespersons who offer the prospective policyholder inducements to enter into policies. The golden thread running through the history of insurance legislation in South Africa is a commitment to consumer protection and to provide protection against undesirable business practices. Section 48 provides for material information to be made available to a policyholder. Section 49 referred to above bears the heading *Limitation of remuneration to intermediaries*.

Momentum Life to Mr Booysen, in terms of the tables and formulae provided for in the regulations.

[31] In my view, the provisions of s 49, read with the regulations referred to in preceding paragraphs, prohibit agreements of the kind on which Mr Booysen relies.

[32] If such agreements were to be enforced it would have the effect of penalising a consumer financially for exercising the statutory right to cancel a policy within the 'cooling-off' period. The result of enforcing the agreement would be to hold a consumer liable for the loss of a commission that never accrued. It is that very situation that the legislature was keen to avoid.

[33] Mr Booysen is aggrieved that he has not been compensated for the effort expended in procuring the Momentum Life policy. The evidence adduced shows that this grievance is exaggerated. Furthermore, Mr Booysen was not unaware of the consumer's right to cancel a policy within the 'cooling-off' period. The statutory provisions relating to restrictions on commission set out above are provisions which should be familiar to intermediaries.

[34] One final aspect remains. The Magistrate's order granting Mr Maree's counterclaim was, in the light of his conclusion in respect of the agreement on which Mr Booysen relied, unnecessary and unjustified and liable to be set aside with an attendant costs order. Before us no time was spent on this issue, save that Mr Maree, in heads of argument, submitted that the Magistrate's order on this aspect should be set aside. In the court below some time was devoted to the appellant's counterclaim. The parties are agreed that 20 per cent is a fair estimate in this regard and that in the event that Mr Maree is successful in the present appeal his entitlement to costs should be reduced in that percentage.

[35] Following on the conclusions reached above the following order is made:

1. The appeal is upheld with costs.

2. The order of the court below is set aside and substituted as follows:

'(a) The appeal is dismissed and the appellant is ordered to pay 80 per cent of the respondent's costs.'

The Magistrate's order is changed to the following extent:

'(a) The plaintiff's claim is dismissed with costs.

(b) The defendant's counterclaim is dismissed with costs.'

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M S NAVSA
JUDGE OF APPEAL

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