THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1162/2015

In the matter between:

PIETER JOHANNES MULLER **APPELLANT**

and

SANLAM LIFE INSURANCE LIMITED **RESPONDENT**

Neutral Citation: *Muller v Sanlam* (1162/2015) [2016] ZASCA 149 (30 September 2016)

Coram: Lewis, Seriti and Willis JJA and Fourie and Potterill AJJA

Heard: 5 September 2016

Delivered: 30 September 2016

Summary: Procedure: Application for reinstatement of an appeal and condonation for late compliance with rules of court refused because of extreme and inexplicable delay, and no reasonable prospects of success on appeal.

Prescription: Debt of long term insurer becomes due when insured dies and beneficiary has knowledge of the death and of the existence of the policy.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Saldanha J sitting as court of first instance).

1 The application for condonation and reinstatement of the appeal on the roll is dismissed with costs.
2 The appeal is struck from the roll.

JUDGMENT

Lewis JA (Seriti and Willis JJA and Fourie and Potterill AJJA concurring)

[1] Mr Muller, the applicant for reinstatement of his appeal on the roll, and condonation of his failure to comply with the rules of this court, claimed from the respondent, Sanlam Life Insurance Ltd (Sanlam), payment of the benefits under four life insurance policies. The policies were all in respect of Muller's former wife, Mrs Muller. They had divorced several years before her death, for business reasons, he alleged. She had been killed in an alleged hijacking incident on 3 September 2006. The policies had been taken out in 2005 and 2006. Muller was the owner of two of the policies and the beneficiary in respect of the other two, which were owned by Mrs Muller. Muller proceeded by way of an application, instituted on 10 May 2011, in the Western Cape High Court, claiming payment of some R8 876 778.

[2] The application was thus brought almost five years after the death of the insured. Sanlam raised several defences, including one that Muller was complicit in the death of his former wife, and prescription. The parties agreed that the defence of prescription should be separated out in terms of rule 33(4) of the Uniform Rules of Court and determined before other issues were considered. Saldanha J ordered that the defence, and any responses to it such as estoppel and waiver, be referred to oral

evidence. Muller testified, as did his insurance broker, Mr G Botha, and Muller's fiancée, Ms H Broodryk.

[3] Saldanha J found that the claim had prescribed and dismissed it, but gave leave to Muller to appeal to this court since he considered that there might be a reasonable prospect of success on appeal arising from the provisions of a new rule promulgated in terms of the Long-Term Insurance Act 52 of 1998. The rules applicable at the time of Ms Muller's death, and at the time when prescription would ordinarily have run, had been promulgated in 2004. The new rule had come into effect on 1 January 2011.

Condonation and reinstatement

[4] Before turning to the argument raised by Muller as to the effect of the new rule, it is necessary to consider whether the appeal that he purportedly lodged should be reinstated, and his non-compliance with the rules of court should be condoned. The following chronology tells a tale of egregious flouting of the rules of this court. Saldanha J handed down judgment on 26 November 2013. He granted leave to appeal to Muller on 20 March 2014. Muller should have lodged his notice of appeal with this court within one month – that is on or before 24 April 2014. He did lodge such a notice with the Registrar of the Western Cape High Court (by then a Division of the High Court) but failed to lodge a notice of appeal in this court timeously or for that matter at all. This, he says, is through inadvertence. It is not clear whether such a notice was ever lodged in this court: no notice appears in the record. He does, however, ask that the late filing be condoned. I will assume in Muller's favour that such a notice was lodged albeit out of time.

[5] Secondly, Muller states in his founding affidavit in the condonation application that he was unable to lodge the record of the proceedings within three months, as required by rule 8(1) of this court. He provides no proper explanation for this failure. On 16 April 2014 Muller's attorneys, T C Botha Inc (T C Botha), instructed another firm, Heyns and Partners (Heyns), to obtain a quotation for the typing of the record. Heyns sent an email request to a transcription service, iAfrica Transcriptions (iAfrica) some two weeks later. Heyns followed up on the request only two months later, on 7 July 2014. Before then, on 5 May 2014, Sanlam's attorneys, Werksmans, had

reminded T C Botha that the record had to be lodged within three months from 16 April 2014.

[6] The attorneys, T C Botha or Heyns, failed to act on this advice, and instructed iAfrica transcription services only on 4 August 2014. Werksmans was advised of this on 10 December 2014 by iAfrica. By then the appeal had lapsed (it actually lapsed in July 2014), but no application for reinstatement or condonation was brought until 11 December 2015, 16 months after it should have been.

[7] This is simply astonishing, especially given that T C Botha had noted on 4 November 2014 that the transcription had been sent to him by Docex the previous week. Yet Heyns had collected the transcript two months before then, on 4 September 2014. No explanation for the two month delay is advanced. To add insult to injury, T C Botha only instructed iAfrica to prepare the appeal record three weeks later, on 27 November 2014.

[8] In February 2015 iAfrica sent to T C Botha a provisional index and requested any outstanding information required for the preparation of the record. T C Botha reacted to the correspondence only three months later, on 5 May 2015, when he asked for input from Werksmans. Again, there is no explanation for the delay.

[9] On 7 May 2015, Werksmans objected to the late response from T C Botha and pointed out that the appeal had already lapsed. Werksmans only provided its input in August 2015, but it considered that the appeal had already lapsed. There was no application for condonation of which the firm was aware.

[10] The record of appeal was ready for collection from iAfrica on 24 August 2015. Yet it was served on Sanlam only 11 weeks later and filed in this court a month after that in December 2015. Again, no proper explanations for these delays have been proffered. Sanlam thus opposes the application for reinstatement and condonation.

[11] Condonation is not to be granted merely because it is sought: ‘it is not to be had merely for the asking’: *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6, where Heher JA said that a full,

detailed and accurate account of the causes of the delay must be furnished so that the court can assess where responsibility lies. In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & Others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11 Ponnan JA said:

'Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.'

[12] These principles were endorsed again in *Commissioner, South African Revenue Service v Van der Merwe* [2015] ZASCA 86; 2016 (1) SA 599 (SCA), para 11. To them must be added the requirement that there should at least be reasonable prospects of success on appeal. If it appears that an injustice may have been done to a party by a court a quo, then that may be weighed against the degree of his or her non-compliance.

[13] I consider that Muller and his legal advisers have conducted this litigation in a deplorable fashion. They have shown no interest at all in pursuing the appeal properly or at all. However, since the court a quo gave leave to appeal on the basis that another court might consider the change in rule to have affected the law of prescription, I think that I should examine the proposition, and the other arguments raised by Muller, albeit briefly, and only in order to determine whether there are reasonable prospects of success on appeal.

The arguments on prescription

Sanlam did not reject the claim until 2011

[14] There are several strings to Muller's bow on prescription. First, he contends that until a claim has been repudiated by an insurer, the debt does not become due. But there is no authority for that proposition. Section 12(1) of the Prescription Act 68 of 1969 provides that 'prescription shall commence to run as soon as the debt is due; s 12(3) states that a 'debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'.

[15] In *Danielz NO v De Wet & another* 2009 (6) SA 42 (C) (paras 48, and 50 to 54) the court stated that the Act applies to insurance contracts as to all other contracts. Traverso DJP stated that in terms of the insurance contract in issue, the debt became due when the insured died. That was the date on which prescription commenced to run.

[16] Muller knew of the death of his former wife and the existence of the policies on that date – 13 September 2006. Thus the debt would have prescribed on 12 September 2009, three years later. That Muller was aware of the debt immediately is confirmed by the fact that he consulted his broker, G Botha, very soon after the death and claims were lodged on his behalf. And he had taken out the policies not long before his former wife's death so he was fully aware of their existence and their terms. Yet no proceedings were instituted until 10 May 2011, more than four years after the debt became due.

[17] Sanlam accepted that it bore the onus of proving that the debt had prescribed. It argued that the contention of Muller that prescription would only begin to run on the date when it rejected his claim was unsustainable. As Nugent JA said in *Duet & Magnum Financial Services CC v Koster* [2010] ZASCA 34; [2010] 4 All SA 154 (SCA) para 24: 'At times the exercise of a right calls for no action on the part of the "debtor", but only for the "debtor" to submit himself or herself to the exercise of the right.'

[18] It was thus not incumbent on Sanlam to accept or reject Muller's claims on the policies. Only when process was served on it in terms of the Act would it be obliged to defend the claim. Thus the numerous queries directed by the broker, G Botha, who represented Muller in dealing with Sanlam, did not require an answer from it, whether accepting the claim or rejecting it.

[19] Although the court considered cases that have dealt with the time at which a debt becomes due, I do not think it is necessary to repeat the established principles again. Muller had all the knowledge of the facts underlying his cause of action on the date of his former wife's death. In *Minister of Finance & others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA) this court said (para 17) that 'time begins to run

against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case "comfortably"' (footnotes omitted).

The change to the Long-Term Insurance rules

[20] Muller argues that these general principles have changed since the promulgation of a new rule16 under s 62 of the Long-Term Insurance Act. The rules promulgated in 2004 were applicable in 2005 and 2006 when the policies were taken out. They did not then in any way affect the running of prescription. The objective of the rules is 'to ensure that policies . . . are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and in the public interest' (rule 2).

[21] Rule 16.1 formerly provided that an insurer must ensure, where it rejects a claim, or disputes the quantum of a claim, that the person entitled to claim a benefit is notified in writing of the reasons for the rejection or the quantum disputed. The latter may within 90 days after the date of notification make representations in respect of the insurer's decision.

[22] The amended rule, which came into operation on 1 January 2011, now provides that an insurer must 'accept, reject, or dispute a claim or the quantum of a claim for a benefit under a policy within a reasonable period after receipt of a claim'. It must notify the policyholder of its decision within 10 days of making it. The rule further obliges insurers to give reasons for decisions, and gives the policyholder 90 days to make representations to it, and to notify him or her of the right to complain under the Financial Services Ombud Schemes Act 37 of 2004.

[23] Muller argues that the new rule applies retrospectively and that because Sanlam did not reject his claim within a reasonable period, prescription has not begun to run. The proposition has only to be stated to be rejected. First, the rules do not purport to change the Prescription Act. They cannot do so. They do no more than protect the interests of insured and insurer. The new rule 16 provides for greater transparency and places burdens on the insurer to act reasonably promptly and to

give information. It also regulates time limitation periods. Rule 16(2)(d) provides that, for the purposes of s 12(1) of the Prescription Act, 'a debt is due after the expiry of the period of prescription referred to in 16(1)*(c)*(ii)'. The latter subsection provides that the policyholder may, 'within a period of not less than 90 days after the date of receipt of the notice [of reasons for the decision] make representations to the relevant insurer in respect of the decision'. Thus, according to this rule, the debt will become due only after the 90-day period has expired.

[24] The statutory provisions regulating prescription are thus affected by the rule, but whether it would have applied to Sanlam's debt need not be decided, given that the debt had prescribed before the new rule had even been promulgated. It could not revive Sanlam's debt. Although Muller has argued that the new rule applies to policies entered into before 1 January 2011, it is not necessary to determine whether this is so. The debt had prescribed long before then.

Estoppel and waiver

[25] Muller argues that Sanlam is estopped from relying upon prescription since it had represented to him, falsely, that the policy benefits were not yet payable as certain documents had not been made available. These included the inquest report, which was obtained only in 2010, and police and prosecutor's reports relating to the criminal charge that Muller might have faced. Sanlam had continued to correspond with G Botha, the broker, until December 2010 when it informed him that it was not yet in a position to make a decision.

[26] A request for documents does not amount to a false representation that prescription would not be relied upon. But Muller in any event testified that he had discussed the matter with his legal representatives, and gained the impression from them that Sanlam could not rely on prescription. So it was not Sanlam that created the false impression, but his lawyers. Moreover, the correspondence and conduct relied upon by Muller to substantiate his assertion that he had been misled by Sanlam's conduct, all occurred after the debt had already become prescribed. Various requests for documents were made by Sanlam and letters were sent by G Botha to Sanlam after 12 September 2009, when the debt had already become prescribed. They could not have had any effect, at that stage, on the running of

prescription. In the previous year, 2008, there had been no exchanges between Sanlam, on the one hand, and Muller's broker and attorneys on the other.

[27] The fact that Sanlam may have added to Muller's false impression – that it would not rely on prescription – is thus of no consequence. If Muller had had proper legal advice, he would have issued summons before September 2009 in order to avoid the spectre of prescription.

[28] As for waiver – in order to show that Sanlam had waived its right to rely on prescription, as Muller contends it did, Muller had to show an unequivocal intention on the part of Sanlam to abandon its right to rely on prescription. That intention can exist only where the creditor has knowledge of the right. The inference that it knowingly abandoned its right to rely on prescription can be drawn only from the objective manifestations of its state of mind. No such inference can be drawn on the facts in this matter. (See *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) paras 15-24.) That argument must thus also fail.

Reciprocity

[29] Muller argued before the high court (although it did not press this point on appeal) that Sanlam's obligation to pay the death benefits was reciprocal to Muller's obligation to pay the premiums. If that were correct, s 13(2) of the Prescription Act would have delayed the running of prescription. The section provides:

'A debt which arises from contract and which would, but for the provisions of this subsection, become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed.'

The argument is without merit, as the high court found. An insurance contract is not reciprocal, particularly where an insured is required to pay the premiums in advance of the insurer's obligation to pay out a benefit. In *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) at 573A-D Trengove JA, relying on *Halsbury's Laws of England* 4 ed Vol 25 (para 548) said that a whole life insurance policy (which Sanlam's policies were) requires an insurer, in consideration for the payment of premiums, to pay a specified sum of money at the end of the insured's life. Trengove JA continued: 'Under whole life insurance, if the policy is kept in force, the sum

insured will become payable whenever death occurs – the only question is *when* it will become payable.'

[30] The performances of the different obligations under the contract are thus not reciprocal. See also 12 *Lawsa* (first reissue, 2002) para 251, where the authors point out that a contract of life insurance is traditionally construed as a unilateral contract: the insured is given an election whether or not to pay the premiums. If he or she does not, the contract comes to an end. In my view, Saldanha J correctly held that the parties' obligations were not reciprocal and that s 13(2) did not save the debt from prescribing.

[31] In the circumstances there are no reasonable prospects of success on appeal and the application for reinstatement and condonation falls to be dismissed.

Costs

[32] Muller has asked that, in the event of Sanlam succeeding, it should not be awarded costs. That is presumably because it had taken so long to respond to Muller's claim. The request is not justifiable. It is true that Sanlam did not act with expedition, and that it continued to entertain queries and respond to letters long after the debt had prescribed. But then Muller and his broker and attorneys were just as tardy and pursued the claim with little vigour. Sanlam is entitled to its costs.

[33] Accordingly:

1 The application for condonation and reinstatement of the appeal on the roll is dismissed with costs.

2 The appeal is struck from the roll.

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C H Lewis

Judge of Appeal

APPEARANCES

For the Appellant:	S Joubert SC (with him E Muller)
Instructed by:	Dr T C Botha Attorneys Inc c/o Heyns & Partners, Cape Town McIntyre & Van der Post Attorneys, Bloemfontein
For the Respondent:	A De V La Grange SC
Instructed by:	Werksmans Attorneys, Cape Town Phatshoane Henney Inc, Bloemfontein