



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case no: 20850/2014

**Not Reportable**

In the matter between:

**SHAKIRA MALANI**

**First Appellant**

**WAHEEDA MALANI**

**Second Appellant**

**MOHAMED ZAKARIA MALANI**

**Third Appellant**

**NASEEM FATHIMA MOHAMED ANWAR**

**Fourth Appellant**

And

**NATALIA FINANCIAL BROKERS CC**

**Respondent**

**Neutral Citation:** *Malani v Natalia Financial Brokers CC* (20850/2014) [2014] ZASCA 84 (31 May 2016)

**Coram:** Theron, Wallis and Mathopo JJA

**Heard:** 17 May 2016

**Delivered** 31 May 2016

**Summary:** Negligence - Claim for pure economic loss based on omission – No evidence that the insured had instructed the insurance broker to amend beneficiary on a policy – The appellants, as disappointed beneficiaries, failed to establish negligence on the part of the insurance broker.

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## ORDER

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**On appeal from:** KwaZulu Natal Division of the High Court, Pietermaritzburg (Koen J sitting as court of first instance):

The appeal is dismissed, with costs.

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## JUDGMENT

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**Theron JA (Wallis and Mathopo JJA concurring):**

[1] The appellants, children of the late Ahmed Ebrahim Malani (the deceased), instituted action in the KwaZulu Division of the High Court (Pietermaritzburg) against the respondent, Natalia Financial Brokers CC, an insurance brokerage, in which they claimed damages based on the alleged wrongful and negligent failure of one of its members, Mr Krishna Bangaru, to cause them to be substituted as beneficiaries on a life policy which the deceased held with Old Mutual Life Assurance ('Old Mutual'). The claim is based on the alleged negligent breach of a legal duty owed to them by Mr Bangaru to submit a beneficiary appointment form, signed by the deceased, to the insurance company, in terms of which they were appointed as beneficiaries on the policy. The high court, (Koen J), dismissed their claim, finding that they had failed to prove that they had suffered damages, the quantum of any damages and that such damages arose from the conduct of the respondent. It is against this finding that the appellants appeal, with the leave of the high court.

[2] The background facts are set out briefly. The deceased had taken out a life policy ('the policy') with Old Mutual to the value of five million rand. During September 1995, he ceded the policy to Nedperm Bank Limited ('Nedbank') as collateral security for his indebtedness to Nedbank.

[3] On 27 May 2006 the deceased nominated Ms Jayanthri Naidoo, his 'childhood sweetheart' and with whom he was engaged in a romantic relationship,

as the sole beneficiary on the policy. It was common cause that the respondent had no part in taking out the policy nor with the appointment of Ms Naidoo as a beneficiary. The deceased was married a number of times and had fathered five children. He was a heavy drinker and his abuse of alcohol became progressively worse over the years and adversely affected his health.

[4] It was common cause that on 28 March 2008, a meeting was held at the offices of Mr Sangham, an attorney, friend and business partner of the deceased. Mr Bangaru, Mr Ally Malani, the brother of the deceased, and Mr Sangham were present at the meeting. On the evidence of Mr Sangham and Mr Malani, a beneficiary appointment form, signed by the deceased, and nominating the appellants as beneficiaries on the policy, was handed to Mr Bangaru at that meeting. His alleged negligence lay in a failure to submit the change of beneficiary form to Old Mutual. The primary issue in the case was whether Mr Bangaru was indeed given this form on that date with instructions to submit it to Old Mutual. He denied that the form was given to him at that meeting or that he had seen it prior to receiving the summons.

[5] In a subsequent note, Mr Sangham recorded what had transpired at the meeting as follows:

- '1. R5M
  - (a) Write to OM requesting a copy of cession to Perm, within 10 days.
  - (b) Change beneficiary to children of AEM.
- 2. Momentum
  - (a) Request copy of cession to Nedcor within 10 days.
- 3. Personal life – Annual Premium'.

[6] On 31 March 2008, an employee of the respondent, acting on the instructions of Mr Bangaru, sent a letter to Old Mutual, which reads:

'Please note above policy is ceded to Permanent Building Society, please can we have copies of the original cession forms'.

A letter from Mr Bangaru was attached from which it was evident that Mr Bangaru acted for the deceased and was his nominated broker. It is apparent therefore that Mr Bangaru carried out the first instruction in Mr Sangham's note. The more

controversial issue related to the meaning of the reference to a change of beneficiary in respect of this policy.

[7] Mr Bangaru testified that Mr Malani and Mrs Zora Malani, the deceased's sister, visited his office on 2 April 2008 and requested that he substitute the appellants as beneficiaries on the policy. According to Mr Bangaru, he informed them that he could only accept instructions from the deceased. He said that he had, in a letter dated 9 April 2009 sought clarification from the deceased. The letter reads, in relevant part:

'Your brother and sister came in to see me on the 02/04/2008 to change the beneficiary on your policy which was ceded to Nedbank policy number: 9827898 and beneficiary J Naidoo.

I informed them that I could not do this without your written instruction and they are the 3rd party.

Please advise what I should do.'

Evidence was led of a post book entry reflecting that the respondent had sent a letter to the deceased on 15 April 2008.

[8] The deceased died on 3 December 2009. At the time of his death several amounts secured by the cession remained unsatisfied. The fact that these amounts were owing to Nedbank was overlooked and the full proceeds of the policy were paid to Ms Naidoo on 28 December 2009.

[9] Subsequent to the death of the deceased, and during 2010, Mr Sangham, together with Mr Bangaru, attended a consultation with counsel with regard to possible action against Ms Naidoo. The consultation was terminated at an early stage. It would appear that counsel was concerned at the prospect of a possible action against Mr Bangaru. But before the consultation was terminated Mr Sangham had taken the opportunity to leaf through Mr Bangaru's file. It is significant that when the conference started Mr Bangaru was not asked why he had not submitted the beneficiary nomination form to Old Mutual and that no mention was made of any such form.

[10] The appellants accepted that their claim was delictual in nature. In order for the appellants to succeed in their claim they had to establish the existence of a

duty of care owed to them by the respondent and the breach of such duty. They also had to prove that in consequence of such breach they suffered damages and the quantum thereof. On the facts of this case, the appellants were required to establish that the respondent (i) had a legal duty to take steps to change the beneficiary on the policy; (ii) was instructed to do so; (iii) negligently did not do so; (iv) by its conduct or omission, caused the proceeds of the policy to be paid to Ms Naidoo instead of the appellants, and (v) the quantum of their damages.

[11] The conduct which the appellants contend was unlawful, was Mr Bangaru's failure to furnish Old Mutual with the beneficiary nomination form, alternatively, the failure to contact the deceased and follow up the oral request to change the beneficiary.

[12] The high court considered the issues of causation and quantum first because it was of the view that those issues were dispositive of the entire action. The high court assumed, for purposes of the judgment, that the appellants had satisfied the requirements of wrongfulness and negligent omission.

[13] The policy under consideration contained an express term that the deceased had the right to nominate a beneficiary and that a nomination of a beneficiary and an amendment or cancellation thereof had to be in writing and would only become effective on receipt thereof by Old Mutual. The high court reasoned that the true wishes of the insured in nominating a beneficiary should not be defeated by a contractual provision inserted for the benefit of the insured. It was of the view that the beneficiary nomination form should be given effect as the will of the insured, irrespective of whether Old Mutual's prescripts were complied with. On this basis it held that the appellants' action was against Ms Naidoo and their claim against the respondent could only succeed for any shortfall not recovered from Ms Naidoo.

[14] Interesting though these issues might have been from a legal perspective they did not arise unless it was shown that Mr Bangaru was in fact given the beneficiary nomination form and instructed to send it to Old Mutual. I prefer therefore to start with the factual dispute. Both parties agree that the deceased did

not give instructions to the respondent personally. The instructions were relayed through intermediaries.

[15] On the probabilities, had Mr Bangaru been given the beneficiary appointment form, signed by the deceased on 28 March 2008, there could have been no conceivable reason for him not to have included a paragraph in the letter dated 31 March 2008 to Old Mutual, to that effect and attach the form. It has not been suggested that there would have been any advantage or benefit to Mr Bangaru not to carry out instructions to remit the form to Old Mutual.

[16] The objective evidence supports Mr Bangaru's version that the only instructions he received in respect of a change of beneficiary came from the deceased's brother and sister at a meeting on 2 April 2008. It is likely that there was such a meeting because he had to deal with the cession of another policy from the deceased to his brother and the relevant cession form is dated 2 April 2008 and there is no dispute that Mr Bangaru dealt with that appropriately. On 9 April 2008 he addressed the letter quoted in para 7 to the deceased recording that meeting. No reliable evidence was tendered to show that this letter was a forgery as contended by the appellants. The only basis for this contention was that a different font was used in this letter and other letters written by Mr Bangaru. Mr Bangaru's explanation that he had a number of computers operated by different staff members at his office and this accounted for the differences in the font, was, in my view, reasonable. On the evidence the only letter that this post book entry could relate to was the letter dated 9 April 2008. The appellant accepted and rightly so, that the post book was not forged.

[17] On the appellant's version, the respondent was instructed, some twenty months before the deceased's death, to change the beneficiary on the policy. During this time, and prior to the death of the deceased, no enquiry was made as to whether the respondent had carried out this instruction. A note by Mrs Malani, dated November 2009, about a month before her brother's death, reflected that she was advised that Ms Naidoo was still the beneficiary under this insurance policy, but that provoked no enquiry as to why Mr Banagru had not sent the beneficiary nomination form to Old Mutual. After the death of the deceased, the

appellants took no steps to enquire about the policy from Old Mutual. This inaction on the part of the appellants is at odds with the probabilities.

[18] An inherent untruth surfaced in the evidence of Mrs Malani, when she stated that she had taken the deceased to see Mr Bangaru and the deceased had, in her presence, instructed Mr Bangaru to change the beneficiary. Her evidence in this record was as follows:

‘Did he not say that to you? - - - Did Mr Bangaroo tell you that I came into his office with my brother Ahmed, together with him, to change this policy. I went – it was just Ahmed and myself, with the instructions from Mr Naren Sangham, please take Ahmed there, Zora, you take Ahmed and go there’. And then every Friday we have lunch at my house, for the past thirty some odd years, lunch on a Friday at my house. And I remember very clearly taking Ahmed with me and going, and Ahmed instructing him in front of me, which satisfied me, and we both walked back to my house. We went walking and we came back walking.

Is this Ahmed the deceased? --- Yes, Ahmed the deceased.’

This evidence is contrary to the appellants’ pleaded case as well as evidence led on their behalf at the trial.

[19] Another improbability in the appellants’ case relates to what transpired at the meeting with counsel. There was no suggestion at that meeting, that the appellants were in a possession of a beneficiary appointment form signed by the deceased. It is difficult to understand why, in these circumstances, Mr Sangham, who acted for the appellants, would have arranged a consultation, with a potential defendant, much less perused the contents of his file. The potential for a conflict of interests was obvious.

[20] While the high court said it did not make a firm factual finding on whether the appellants had discharged the onus of proving that the respondent owed the appellants a duty of care, it did conclude that:

‘If the matter came down to a straight evaluation of the evidence and the merits, I would have been inclined to conclude that the Plaintiffs had in any event not discharge the onus overall.’

This is suggestive, that if it had been called upon to do so, it would have made a finding adverse to the appellants. I have no reservations in finding that the

appellants have not discharged the onus resting on them. They failed to establish that the deceased had instructed the respondent to change the beneficiary on the policy. This was fatal to their case.

[21] For these reasons, the appeal is dismissed with costs.

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**L V Theron**  
**Judge of Appeal**



## APPEARANCES

For Appellants:

AJ Rall SC

Instructed by:

BJ Nicholson Attorney, Pietermaritzburg

Webbers, Bloemfontein

For Respondent:

AJ Dickson SC

Instructed by:

Vennis Attorneys, Pietermaritzburg

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