

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2865/2006

In the matter between:-

R.D VAN WYK N.O.

Appellant

versus

SANLAM LEWENSVERSEKERING BEPERK

Respondent

CORAM:

VAN ZYL, J *et* MOCUMIE, J

JUDGEMENT BY:

VAN ZYL, J *et* MOCUMIE, J

DELIVERED ON:

11 FEBRUARY 2010

[1] The appellant was originally Mr. C.W (Christiaan) Breet, an adult male who resided at No. 29 Ross van Niekerk Street, Kroonstad, Free State Province. Mr. Breet (“the deceased”) had subsequent to the institution of these proceedings passed away on 26 January 2008. On the day of hearing this appeal, an application in terms of Court Rule 15(2) to have the appointed executor of the deceased estate, Mr. Roelof Daniel van Wyk (“Mr Van Wyk”), a practising attorney of Kroonstad in the Free

State, substituted as the appellant. The application was made with the consent of the respondent and with leave of this Court. We were of the view that there could be no prejudice to the respondent by its grant. The executor was before the court and had in fact deposed to an affidavit pertaining to the application for condonation from which it appears that he was and is in fact the attorney of first instance on behalf of the deceased. The substitution of the appellant by Mr Van Wyk was therefore granted.

- [2] The respondent is Sanlam Insurance Limited, a private company registered in terms of the South African Company Act, 61 of 1973, with its registered office situated at No. 2 Strand Avenue, Bellville, Western Cape Province.
- [3] This is an appeal against the judgment of the Magistrate, Kroonstad, delivered on 12 February 2008. The appellant instituted action against the respondent in the Magistrate's Court, Kroonstad, for breach of contract against the respondent. Besides its plea on the merits, the respondent

raised a special plea that the Magistrate's Court, Kroonstad, had no jurisdiction to entertain the application as, *inter alia*, the contract was not concluded in Kroonstad but Bellville. The court *a quo* agreed with the defendant and upheld the special plea by finding that the acceptance of the offer by respondent constituted the conclusion of the contract, which action occurred in Bellville and not in Kroonstad.

CONDONATION

[4] Advocate Reinders, on behalf of the appellant, also applied for condonation for the late prosecution of this appeal and the late filing of the appeal record. An opposing affidavit had been filed on behalf of the respondent and Mr Cronjé, on behalf of the respondent, duly addressed us on this issue during argument. We will consequently deal with the application for condonation first. The magistrate delivered his judgment on 12 February 2008. Mr Van Wyk, on behalf of the deceased, filed a notice of appeal on 18 March 2008.

- [5] Rule 51(3) of the Magistrate`s Court Rules provides that an appeal must be noted within 20 days after the date of the judgment appealed against or within 20 days after the clerk of the court has provided the party seeking the appeal with a copy of the written judgment, whichever period may be longer. In terms of Rule 51(4) of those Rules an appeal is noted by means of the delivery of a notice of appeal. The notice of appeal should therefore have been filed on 11 March 2008.
- [6] Mr Van Wyk avers in his affidavit that he was given instructions on 12 February 2008 “by the deceased” (which does not make sense considering that the deceased passed away in January 2008 already) to file an appeal against the judgment of the magistrate’s judgment whereby the respondent’s special plea was upheld with costs. However he only filed the required notice of appeal on 18 March 2008.
- [7] Rule 50(1) of the High Court Rules provides that an appeal must be prosecuted within 60 days of the date on which the notice of appeal was filed. If no such step is taken it shall be

deemed that the appeal has lapsed. Considering that the notice of appeal was filed on 18 March 2008, the 60 days time period expired on 18 June 2008. In addition Rule 50(4)(a) provides that the appellant must make a written application to the registrar within 40 days from the date on which he filed the notice of appeal for the allocation of a date on which the appeal can be heard. In terms of Rule 50(7)(a) the appellant must simultaneously therewith lodge with the registrar two copies of the appeal record.

[8] The notice in terms of Rule 50(4), as well as the copies of the record, were only filed on 5 September 2008.

[9] It is trite law that an appellant in a case such as this must show two things in order to succeed with an application for condonation:

9.1 An acceptable explanation for the respective delays; and

9.2 That there are reasonable prospects of success on the merits. See **Salojee & Another v Minister of**

Community Development 1965 (2) SA 139 (A) and
Melane v Santam Insurance Co Ltd 1962 (4) SA 531
(A).

THE EXPLANATION FOR BEING OUT OF TIME

[10] In regard to the first of the requirements Mr Van Wyk states in somewhat vague terms in the notice of application for condonation that:

- “3. Ek het opdrag ontvang van Appellant om appel aan te teken teen die uitspraak van Landros van Kroonstad gelewer op 12 Februarie 2008 toe die respondent se spesiale pleit geslaag het met koste. Die Agbare Hof word respekvol verwys na die kennisgewing van appel wat of 18 Maart 2008 geliaseer is.
4. Ek het op 28 Maart 2008 aan my korrespondente, Rosendorff & Reitz Barry, Bloemfontein opdrag gegee om voort te gaan om die appel voort te sit en die appelrekord voor te berei.
5. My korrespondente het onmiddellik Krino Transkribeerders te Frankfort versoek om voort te gaan om ‘n transkripsie van die getuienis van hierdie saak te maak. .

6. Op 2 Julie 2008 het Krino Transkribeerders ons in kennis gestel dat die hofrekord getik is en dat betaling van hulle moet geskied alvorens dit ontvangs geneem kan word.
7. Ek het onmiddellik gereel dat betaling van die bedrag van die maak van die hofrekord aan Krino Transkribeerders gedoen word. Ek is in kennis gestel dat die hofrekord deur Krino Transkribeerders aan my korrespondente, Rosendorff & Reitz Barry, verskaf is en wel op 17 Julie 2008.
8. My korrespondente het onmiddellik voortgegaan om die appelrekord voor te berei en dit by die hof te liasseer.
9. Die Appellant vra respekvol dat die kondonاسie vir die laat liassering van die appelrekord, vanwee die feit dat die vertraging te wyte was daaraan dat die appelrekord op 'n laat stadium van Krino Transkribeerders ontvang is."

[11] We are, by no means, satisfied with the aforementioned explanation for the following reasons:

- 11.1 No explanation was advanced why the Notice of Appeal was filed out of time.
- 11.2 On 19 May 2008, thus already two months after the notice of appeal was filed, the appellant sent a request to Krino

Transcribers to transcribe the mechanically recorded evidence. Krino requested the cassettes for transcription on 22 or 23 May 2008 from the magistrate's court and provided the appellant with the transcribed record only on 17 July 2008. No explanation is provided why it took from 18 March 2008 to 19 May 2008 to request the transcription of the record from Krino.

11.3 Despite having received the transcribed record on 17 July 2008, the copies of the record and the notice in terms of Rule 50(4) were only filed on 5 September 2008, without any explanation for the delay.

11.4 The respondent drew Mr Van Wyk's attention to the applicable Rules and urged compliance but he remained indifferent.

[12] We are consequently of the view that the appellant tendered no proper reasonably acceptable explanation for the respective delays. However, the merits of the appeal is not without some prospects of success and in the exercise of our discretion and the particular circumstances of this matter, we consider it in the

interest of justice and in the interest of both parties that the application for condonation be granted and that the merits of the appeal be dealt with and finalised. However, considering the overall poor merits of the condonation application and the absolute absence of reasonable explanations for the respective delays, it is appropriate that the appellant be ordered to pay the costs of the said application, including the costs of opposition thereof.

MERITS OF THE APPEAL

[13] We now turn to consider the merits of the appeal. The background facts are briefly these. The deceased and his spouse, Mrs Anna E Breet, resided in Kroonstad during 1988. In September 1988 they approached Mr B.C.J van Wyk, an insurance broker at the branch premises of the respondent in Kroonstad. They applied to the respondent for a retirement policy, combined with certain further benefits, through Mr Van Wyk by filling in an application form and signing it. A copy of the application form is annexed to the pleadings as annexure NB1.

On 26 September 1988 they were informed by way of an acceptance letter by respondent that their application has been accepted on the conditions set out in the policy document. A copy of this letter, as well as a summary of benefits, is attached to the pleadings as annexure NB2 and NB3. A copy of the policy document as such is attached to the summons as annexure A. The commencement of the policy was 1 November 1988 with the maturity date thereof 1 November 2008. The respondent as indicated above had its principal office in Bellville, Western Cape where all its administrative and management functions were performed. Administrative functions included processing, approval and issuing of policy contracts and subsequently pay out of policies in the event of claims being lodged. It also had a branch office in Kroonstad, Free State.

[14] The policy document under the heading “Sterftevoordele” provides as follows:

“By die dood van die eerssterwende van die versekerdes voor 1 November 2008 is die grootste van

- Saldo van die Beleggingsrekening en die
- Dekkingsbedrag

betalbaar.

Die dekkingsbedrag is R30558.”

Clause 3 of the policy document furthermore provides as follows:

“BELEGGINGSWAARBORG

Indien die saldo van die Beleggingsrekening by dood, ongeskiktheid of `n traumatise gebeurtenis betaalbaar is, sal dit nooit minder wees nie as wat dit sou wees indien beleggingsbonusse deurgaans teen 4% per jaar verklaar is (met inagneming van die werklike verhalings ten opsigte van die koste van dekking).”

[15] The deceased paid his premium from the date of commencement (1 November 1988) by debit order and as agreed upon in the insurance contract. His spouse passed away on 12 August 2005 on which date he became entitled to

the death benefits in terms of the policy. He submitted a claim in terms of the policy with the respondent. The respondent accepted the claim and paid the deceased R38 086, 48.

[16] The appellant alleged in the summons that from the date of commencement of the policy (1 November 1988) until 31 October 2005 the deceased had already paid R35 148, 29 (thirty five thousand one hundred and forty eight rand and twenty nine cents). The investment value of the policy calculated at a minimum average growth of 12% should have yielded returns of R88 612, 32 (eighty eight thousand six hundred and twelve rand and thirty two cents).

[17] It was therefore alleged in the summons that the respondent by not paying the deceased the aforesaid amount, committed breach of contract. The balance between the two amounts, being R50 525, 84, was therefore claimed.

[18] Although the judgment of the court *a quo* dealt with the point *in limine* both on the basis of section 28(1)(a) and section 28(1)(d)

of the Magistrates` Courts Act 32 of 1944, Mr Reinders conceded at the outset of the hearing of the appeal that appellant cannot rely on section 28(1)(a) for purposes of founding jurisdiction in Kroonstad, as was also determined in the judgment of the court *a quo*. This concession was in our view correctly made and we do not consider it necessary to deal any further with this aspect. The only issue that should therefore be determined, is whether the court *a quo* is vested with the necessary jurisdiction in terms of section 28(1)(d), for purposes of which the whole of the cause of action should have arisen in the district of Kroonstad.

[19] In this regard Mr Reinders submitted that the contract was only concluded once the deceased was informed of respondent`s acceptance of the offer by means of the letter annexed to the pleadings as annexure NB3, which letter was received by the deceased in Kroonstad. With regard to the breach of contract, which is also part of the cause of action, Mr Reinders submitted that the payment of the wrong amount constituted the breach of

the contract, which payment took place in the bank account of the deceased in Kroonstad.

Mr Cronjé, on behalf of the respondent, submitted that because of the terms of the offer made by the deceased and his late wife, the contract was concluded in Bellville at the time when respondent accepted the offer in Bellville and that communication of such acceptance was not necessary in order for the contract to have come into existence. In the alternative he submitted that should we find that communication of the acceptance was necessary, the contract was only concluded when the first premium was paid, which premium was to be paid by debit order into the bank account of respondent in Bellville. With regard to the contract breach, he submitted that the alleged breach could only have been constituted by wrong actuarial calculations on behalf of the respondent, which actions again took place in Bellville and not in Kroonstad.

[20] At the outset we wish to address the issue that was raised during the evidence and again during the hearing of the appeal

pertaining to the relevancy of the head office (principal place of business) of respondent considering the existence of its branch office in Kroonstad. It appears to us that for purposes of jurisdiction the principal place of business of respondent where all the administrative and management functions are carried out, is to be considered to be in Bellville. The Supreme Court of Appeal recently reaffirmed this legal position in **Leibowitz t/a Lee Finance v Mhlana and Others** 2006(6) SA 180 (SCA) when it stated:

“[9] ...Relying on *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (A) the Court a quo held that where a company has a branch office within the jurisdiction of the Court that place should be regarded as its principal place of business for purposes of jurisdiction. However, in *Malawana* this Court interpreted Rule 4(1) (a) (v) [of the Uniform Rules of Court] in terms of which service of a summons on a company 'shall be effected . . . by delivering a copy . . . at its principal place of business within the Court's jurisdiction' (758I - J and 762A - E). It held that *Federated Insurance's* branch office in East London was its principal place of business within the jurisdiction of the Court concerned (at 762F). However, there is a vast difference between 'a company's principal place of business' and 'a company's principal place of business within the court's

jurisdiction'. The principal place of business of a company for jurisdictional purposes is the place where the central control and management of a company are situated (Bisonboard at 496C). The Court a quo therefore erred in holding that the Court of first instance had jurisdiction over the insurance companies by reason of their principal places of business being situated within the Transkei.”(Our emphasis)

[21] It is common cause between the parties that Annexure NB1 was an offer made to the respondent. Mr Reinders strongly relied on the judgment in **Gardener’s Grapevine CC v Flowcrete Precast CC and Another** 2009 (1) SA 324 (NPD) for his argument that knowledge of the acceptance of the offer is necessary before it can be said that the contract has been concluded. In that instance the offer and the acceptance thereof were sent via fax transmission. At 326I – 328E of the judgment the following *dicta* appear:

“In my view the first respondent was required to signify its acceptance of the offer in two ways. Firstly, by signing and dating the document and, secondly, by communicating that acceptance to the plaintiff by means of fax transmission. Mere signature and

dating of the document would not, in my opinion, have established *consensus ad idem* necessary for a contract to come into operation. This view is wholly consonant with the legal principles set forth by the Supreme Court of in the case of **Jamieson v Sabinco** 2002(4) SA 49 (SCA) at para 5 where

Farlam JA said:

“Parties who communicate by telephone, telex or telefacsimile transmission are ‘to all intents and purposes in each other’s presence’ (to use an expression used by *Parker LJ in Entores Ltd v Miles Far East Corporation*) [1955] 2 QB 327 (CA) [1955] 2 ALL ER 493) at 337) and the ordinary rules applicable to the conclusion of contracts made by parties in each other’s physical presence apply, viz the contract comes into existence when and where the offeree’s acceptance is communicated to and received by the offeror. This has been held to be the legal position in the case of contracts concluded over the telephone (*Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl* 1965 (4) SA 475 (E), approved by this court in *S v Henckert* 1981 (3) SA 445 (A) at 451 B) and contracts concluded by telex (*Entores Ltd v Miles Far East Corporation (supra)*, approved by the *House of Lords in Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft GmbH* [1983] 2 AC 34). By parity of reasoning the same principle must apply

where the parties are in communication with each other by telefacsimile transmission (see *Gunac Hawkes Bay (1986) Ltd v Palmer* [1991] 3 NZLR 297 (HC)...'

It is overwhelming probable and in accordance with good business common sense that the plaintiff would need to be made aware of the acceptance so that it in turn could commence to perform its part of the bargain. It follows therefore that the contract in question was concluded when the signed exh B was received by the plaintiff in Durban.” (Own emphasis)

[22] However, in our view the aforesaid facts (and consequently the principles) are to be distinguished from the current facts, as in the current matter the respective documents were sent by post, in which instance a different rule applies. The work of **RH Christie, The Law of Contract in South Africa, 5th ed**, at p. 70 is a good point of reference where the following is stated:

“Many contracts are made by post every day, and this convenient practice necessarily gives rise to difficulties over the application of the general rule that a contract is not concluded until the offeree`s acceptance has been communicated to the offeror. If this rule were to be applied it would bear very hard on the offeree for, having done

everything he could reasonably possibly be expected to do, by posting his letter of acceptance, he would find himself without a contract if, for reasons beyond his control, the letter were lost in the post or delayed until after the offeror had withdrawn his offer.....The commercial inconvenience of such a state of the law is manifest, and it is not surprising that, to avoid such inconvenience, the English House of Lords laid down in *Dunlop v Higgins (1848) 9 ER 805* that a contract negotiated through the post is concluded by the posting of the letter of acceptance.”

The learned author then refers to the judgments in **Cape Explosives Works Ltd v SA Oil and Fat Industries Ltd** (1) 1921 CPD 244 and **Kergeulen Sealing and Whaling Co Ltd v Commissioner of Inland Revenue** 1939 AD 487, on the basis of which he remarks (at p.72) that the rule that the posting of the letter of acceptance concludes the contract, has been accepted into our law.

[23] This principle would have had the result that in the current instance, where the letter of acceptance was posted in Bellville, the contract should be considered to have been concluded in

Bellville. But, in the current matter the general rule is in our view not applicable, as the parties specifically agreed as to how and when the contract will be considered to have been concluded, in which instance their stipulation of their intention has to be applied. In this regard we again refer to **The Law of Contract in South Africa**, *supra*, at p.72:

“The acceptance into our law of the rule that the posting of the letter of acceptance concludes the contract must not be regarded as imposing the rule upon parties to a contract in all circumstances and whether they like it or not. It being open to an offeror to specify the method of acceptance, it follows that he may expressly stipulate that the rule shall apply and the posting of a letter of acceptance shall conclude the contract, or he may expressly stipulate the contrary by requiring that the letter be delivered to him or even to be read by him before the contract can be taken as concluded. Dealing with such a situation, where the intention of the parties is expressed, *Stratford CJ* said in the *Kergeulen* case at 503:

‘Indeed it seems to me that no authority is needed to support so sound a principle as that the intention of the parties must always prevail.’

The *Cape Explosives* and *Kergeulen* cases were concerned with situations in which the intention was not expressed....SA *Yster en Staal Industriële Korporasie Beperk v Koschade* 1983 (4) SA 837 (T) 842-843by holding that the rule applies only when no other intention appears from the agreement.”

[24] The offer in this matter, annexure NB1 to the pleadings, contained the following stipulation under the heading “Onderneming deur aansoeker:

Ek stem toe dat die versekering `n aanvang neem op die laaste van die aanvangsdatum genoem in die polis, die datum waarop Sanlam skriftelik die aansoek aanvaar en die datum waaarop die eerste premie betaal word.”

[25] Consequently and as a result of the intention of the parties so expressed, the argument on behalf of the appellant that knowledge of the acceptance by the deceased was necessary for the contract to be considered to have been concluded, does not hold water. The contract came into existence upon the acceptance of the offer by Sanlam, which acceptance occurred

in Bellville where the letter of acceptance was posted and the policy was issued.

[26] Considering the alternatives expressed in the aforesaid intention of the parties, it must in the alternative be considered that the contract was concluded upon payment of the first premium. In this regard it is evident from the offer as well as the evidence that payment of the premium was performed by debit order into the bank account of Sanlam, which once again must be considered to have taken place at the head office in Bellville.

[27] The general principles regarding the conclusion of an insurance contract are also quite in accordance with the aforesaid expressed intention of the parties and the findings based thereupon. In this regard the following is stated in **The South African Law of Insurance, Gordon & Getz, Fourth Edition**, at p. 136-137:

“The insurance contract is complete only when the insurer accepts the proposal unconditionally... If a policy is issued in

accordance with the terms of the proposal³³, there is *prima facie* acceptance of the proposal³⁴. The policy is enforceable from the date of its issue,³⁵ even though the premium has not been paid at the time of the loss in respect of which the proposal seems to enforce it...³⁶ Once the proposal has been unqualifiedly accepted, the contract is complete...³⁷ “

³³ **Clark v African Guarantee & Indemnity Co Ltd** 1915 CPD 68; **Bushby v Guardian Assurance Co Ltd** 1916 AD 488.

³⁴ **African Guarantee & Indemnity Co v Gouldridge** 1922 CPD 2 at 5.

³⁵ **Bailey v SA Liberal Life Insurance Co** 1928 CPD 463 at 467, **McKenzie NO v Southern Life Association of Africa** 1952 (4) SA 523(A).

³⁶ **British Oak Insurance Co Ltd v Atmore** 1939 CPD 9 *cf* **National Employers Mutual General Insurance Association v Myerson** 1938 TPD 11.

³⁷ **Dicks v SA Mutual Fire & General Insurance Co** 1963 (4) SA 501 (N) at 504.

[29] Our finding that the contract was concluded in Bellville and not in Kroonstad, has the result that the court *a quo* did in fact not have the necessary jurisdiction in terms of section 28(1)(d). It therefore is unnecessary to deal with the jurisdiction issue pertaining to the other elements of the appellant's cause of action such as the breach of contract.

[30] Consequently the special plea was correctly upheld by the court

a quo, albeit partly on a different basis.

[31] In the circumstances the following order is made:

1. The appellant's application for condonation is granted.
2. The appellant is directed to pay the respondent's costs relating to the condonation application on an opposed basis.
3. The appeal is dismissed with costs.

C. VAN ZYL, J

B.C. MOCUMIE, J

On behalf of the appellant:

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Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of the respondent:

Adv P. R. Cronje
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