Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**
Circulate to Magistrates:	YES / **NO**

Heard: 19 – 20 June 2022
Heads of argument submitted: 03 August 2022
Judgment delivered: 28 October 2022

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 1989/2020

In the matter between:-

LIBERTY GROUP LTD **PLAINTIFF**

and

JUAN CHRISTIAAN JOHANNES CORNELIUS N.O. **FIRST DEFENDANT**
STEPHANUS JOHANNES BECKER N.O. **SECOND DEFENDANT**

JUDGMENT

Stanton AJ

INTRODUCTION:-

[1] In this tragic matter, a motor vehicle accident on 7 January 2018 resulted in the death of Mr PA Becker and Mrs DJ Becker.

[2] Prior to Mr PA Becker's death, the plaintiff had issued a life insurance policy to him in terms of which Mr PA Becker was the life insured and Mrs DJ Becker was his nominated beneficiary.

[3] The plaintiff made payment of the benefit under the policy to the first defendant, the executor in the estate of the late Mrs DJ Becker, in the *bona fide* and reasonable belief that the payment was due to the first defendant. Subsequent to the payment, it came to the plaintiff's attention that Mrs DJ Becker was certified as dead at 00h15 on 8 January 2018 and Mr PA Becker was certified as dead at 03h10 on 8 January 2018.

[4] The plaintiff's cause of action in terms of which it now claims repayment of the amount of R1,379,515.72, is the *condictio indebiti.*

[5] The only issue placed in dispute on the pleadings is whether Mrs DJ Becker pre-deceased Mr PA Becker. According to the first defendant's plea, Mr PA Becker pre-deceased Mrs DJ Becker.

[6] The question that requires adjudication by this Court is the time of death of each deceased relative to one another.

[7] The Supreme Court of Appeal in the matter of ***PPS Insurance Co Ltd And Others v Mkhabela,***[1] confirmed the principles pertaining to the acquisition of rights to the proceeds of an insurance policy as follows:-

> *"It is well established that a nominated beneficiary does not acquire any right to the proceeds of a policy during the lifetime of the policy owner. It is only on the policy owner's death that the nominated beneficiary is entitled to accept the benefit and the insurer is obligated to pay the proceeds of the policy to the beneficiary. Until the death of the policy owner, the nominated beneficiary only has a spes (an expectation) of claiming the benefit of the policy - the nominated beneficiary has no vested right to the benefit.*
>
> *It follows that, if the nominated beneficiary predeceased the policy owner, she would have had no right to any benefit of the policy at the time of her death. Put simply,*

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[1] 2012 (3) SA 292 (SCA) paragraphs 7 and 8.

when the nominated beneficiary dies, the spes evaporates. It falls away. The fact that a nominated beneficiary accepts the nomination cannot change this.

Likewise, where, as here, the insured expressly reserves the right to change or cancel the nomination, the nominated beneficiary has no claim to the benefit of the policy until the insured's death. For if the insured subsequently chooses another beneficiary thereby revoking the first, the first nominee's acceptance becomes nugatory. And, where the insured does not revoke the nomination of the nominated beneficiary, as in this case, the beneficiary is in exactly the same position as if there were no revocation clause. In other words, until the death of the insured the nominated beneficiary has no right to claim any benefit of the policy. This means that, because Ms Mkhabela died before her daughter, her spes logically expired at the same time. There was thus no enforceable right that was transmissible to the Mkhabela estate. The benefit remained with the insured, Ms Sebata, until her death approximately two months later, when it fell into her estate."

[8] Where several people die in the same disaster ("*commorientes*") it may be of importance to establish who died first in order to determine whether one inherited from the other, because a person can only inherit from another if he or she is alive at the other's death.

[9] Accordingly, if Mr PA Becker pre-deceased Mrs DJ Becker, the benefit will be payable to the first defendant. If Mrs Becker did not survive him, or if they died simultaneously, the benefit will be payable to estate late PA Becker.

[10] In the matter of ***Nepgen, N.O. v Van Dyk, N.O.***[2] ("*Nepgen*"), the Court, after confirming that no presumption of simultaneous death exists in South African law, held that the following approach is to be followed when a determination is to be made about the sequence of death:-

"Well, we have to decide the matter in the ordinary way: we have to decide where the balance of probabilities lies, and here we must remember that we are not entitled to decide the matter on mere conjecture or even on faint probability. There must be a preponderance of reasonable probabilities, not conjecture or surmise."

THE EVIDENCE:-

[11] Sergeant Lindeni Daniel Ndwenkuku, a detective in the employment of the South African Police Service and Mr Daniel Tilley, an emergency care

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[2] 1940 E.D.L., 123 at page 130. Confirmed in Ex Parte Graham [1963] 4 All SA 45 (D) at page 47. Also see Greyling NO v Greyling NO en Andere [1978] 2 All SA 35 (T) at page 40.

practitioner employed by the Department of Health, Emergency Medical Services, Western Cape, testified on behalf of the plaintiff. Warrant Officer Wagenaar, a police officer in the employment of the South African Police Service, was subpoenaed by the first defendant to testify.

[12] Sergeant Ndwenkuku testified that when he arrived on the scene at approximately 00h15 on 08 January 2018, Ms DJ Becker had already been declared dead and Mr PA Becker was being removed from the motor vehicle. He confirmed that Mr PA Becker was declared dead at 03h10 due to the fact that it took longer to remove Mr PA Becker's body from the motor vehicle. His evidence was that the time of certification of death does not equate to the time of death, as certification is only done on extraction of a deceased body from a motor vehicle.

[13] Mr Tilley testified that he arrived at the scene of the accident approximately five minutes after he received the call to attend to the scene and that he was the first paramedic to arrive on the scene. He observed that the driver's side of the vehicle in which the Beckers were travelling was lodged under the truck with which it had collided and that rubble or stones had fallen onto the driver's side. His assessment at the scene was that both Mr PA and Mrs DJ Becker were already deceased upon his arrival.

[14] Under cross-examination, Mr Tilley confirmed that he would not be able to dispute Warrant Officer Wagenaar's version that she and her partner were the first responders at the scene, as he was not there at the time that she was. He also confirmed that he would not be able to dispute Warrant Officer Wagenaar's statement that she felt Mrs DJ Becker's pulse and that Mrs DJ Becker made gargling sounds. When it was put to him that Mrs DJ Becker, who was seated in the back middle of the motor vehicle, would not have been exposed to the same force as Mr PA Becker was exposed to, Mr Tilley's response was that she would not have experienced the same blunt trauma as Mr PA Becker, but that she would have had the same force of inertia. He conceded that the most damage to the vehicle was where Mr PA Becker was seated. When confronted with a statement that Mr PA Becker would have

died immediately but Mrs DJ Becker could still have been alive, Mr Tilley stated that he is of the opinion that Mr PA Becker would have died immediately. He did not express an opinion on whether Ms DJ Becker would probably still have been alive.

[15] Warrant Officer Wagenaar's pertinent evidence in her examination in chief, which was confirmed to a great extent during cross-examination, was that:-

15.1 On her arrival at the scene at 00h20 she witnessed a motor vehicle that had collided with a truck and that the biggest impact was on the driver's side of the vehicle;

15.2 She could only see the upper side of Mr PA Becker's head and he never showed any reaction, he made no movement or noise;

15.3 Mrs DJ Becker was making soft snoring noises;

15.4 She felt a pulse when she touched Mrs DJ Becker's left arm;

15.5 When she attempted to feel the pulse again, there was none;

15.6 Certification of death only takes place once a person has been extracted from a vehicle;

15.7 It took approximately two hours to extract Mr PA Becker from the motor vehicle;

15.8 She spoke to the minor's parents to ascertain whether they have a medical aid, whereafter she accompanied the minor to the hospital;

15.9 She opened the docket early in the morning;

15.10 She did not specify in her written statement that Mr PA Becker was already deceased on her arrival or that Mrs DJ Becker was still alive

on her arrival as she deemed it unnecessary for purposes of opening the docket. According to her, all that was required for the opening of the docket, was that both Mr PA Becker and Mrs DJ Becker were deceased;

15.11 She read Mrs SC La Grange, Mrs DJ Becker's mother's statement into the record. According to paragraph 4 of Mrs SC La Grange's statement "*The two police members who arrived first on the scene, felt the pulse of my daughter, the deceased, and informed me that she is still alive.*" Paragraph 5 of Mrs SC La Grange's statement reads "*... they removed me from the car and later my grandchild (Elandie Cornelius). After her, they went to assist my daughter, who still had a weak pulse. Minutes later the paramedics declared her deceased.*"

[16] Under cross-examination, Warrant Officer Wagenaar conceded that she had recorded the time of the accident incorrectly on the accident report and that she did not mention the fact that she felt Mrs DJ Becker's pulse or that she had heard her make a sound. She, however, adamantly stated that she did feel Mrs DJ Becker's pulse, despite the fact that she did not include this aspect in her written statement.

[17] When questioned on why Warrant Officer Wagenaar refused to speak to the plaintiff, but continued speaking to the first defendant's legal team, she said that after receiving numerous telephone calls from the respective legal representatives of the parties, she obtained advice from the South African Police Service's legal department and informed the legal representatives that she would only testify if subpoenaed to do so.

[18] At the end of the second day of the trial, the first defendant brought an application in terms of the provisions of section 3(1)(c) of the Law of Evidence Amendment Act, Act 45 of 1988 ("Law of Evidence Amendment Act"), for the admission of a statement given under oath by Ms SC La Grange, dated 21 March 2018. Mrs SC La Grange passed away on 09 August 2018.

[19] Section 3(1)(c) of the Law of Evidence Amendment Act, provides that:-

> *"Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless*
>
> *(a) ...*
> *(b) ...*
> *(c) the court, having regard to –*
>
> *(i) the nature of the proceedings;*
> *(ii) the nature of the evidence;*
> *(iii) the purpose for which the evidence is tendered;*
> *(iv) the probative value of the evidence;*
> *(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
> *(vi) any prejudice to a party which the admission of such evidence might entail;*
> *and*
> *(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."*

[20] Section 3(1)(c) of the Law of Evidence Amendment Act requires that the Court should have regard to the collective and interrelated effect of all the considerations in paras (i) - (iv) of the section and any other factor that should, in the opinion of the court, be taken into account. The section introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require.[3]

[21] Zeffert and Paizes,[4] with regard to the evaluation of the factors set out in section 3(c), warn that:-

> *"Since the person upon whose credibility the probative value of the evidence depends is, in the case of hearsay evidence, not subjected to the curial devices designed to identify, assess and eliminate those aspect of the evidence that render it potentially unreliable, it is important for a court to (a) understand what the potential dangers are; (b) consider the extent to which those dangers actually arise in the case before it; and (c) identify factors that tend to reduce or even eliminate those dangers. Only then will a court be in a position to determine the extent of the prejudice caused to an adversary by the denial to that party of the benefit. The dangers to which a court*

[3] Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security 2012 (2) All SA 56 (SCA) para 31.
[4] The South African Law of Evidence, Second Edition, page 401.

must be alert are (a) insincerity on the part of the absent declarant or actor; (b) erroneous memory (c) defective perception; and (d) inadequate narrative capacity."

[22] In ***S v Ramavhale,***[5] the Court held that a Judge should *"hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so"*

[23] According to the plaintiff, Mrs SC La Grange's statement should, in the interest of justice, not be admitted for the following reasons:-

23.1 The statement was given approximately seven weeks after the accident, which has an impact on the reliability of the evidence;

23.2 The collision was a tragic event for Ms SC La Grange and as such her recollection of the accident would have been impaired;

23.3 The statement was given at a time when the family was already embroiled in a dispute as to which estate is entitled to the payment of the benefit, and could possibly not be truthful as Mrs SC La Grange would have wished that her grandchildren (Mrs DJ Becker's children) benefit from the payment;

23.4 The statement constitutes "*double hearsay*" as Mrs SC La Grange relays what she was told by the unnamed police officers on the scene; and

23.5 The plaintiff's inability to cross-examine Mrs SC La Grange is prejudicial and affects the probative value of the evidence.

[24] I agree with Mr Ismail's submission that the evidence is not tendered for a direct purpose to establish that Mrs SC La Grange had observed that Mrs DJ Becker was alive after the impact, but rather to confirm Warrant Officer Wagenaar's evidence.

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[5] 1996 (1) SACR 539 (at 649 d).

[25] Subparagraph 3(1)(c)(vi) requires a consideration of the prejudice to the plaintiff, which the admission of the hearsay evidence might entail. If the evidence is tendered to establish that Mrs CJ Becker was alive after the impact, this is a fundamental issue. The plaintiff's inability to cross-examine Mrs SC La Grange is highly prejudicial. Cross-examination, rather than Mrs SC La Grange's version of events, would have been the only effective tool to ascertain the truth.

[26] In my view there is little doubt that the plaintiff would be prejudiced if Mrs SC La Grange's written statement is admitted into evidence. In weighing up all the relevant features referred to in section 3(1)(c) of the Act, I can come to no other conclusion than to find that Mrs SC Las Grange's statement constitutes hearsay evidence and should therefore not be admitted into evidence.

[27] The plaintiff requested me to admit into evidence by way of affidavit the post-mortem examinations of the bodies of Mr PA Becker and Mrs DJ Becker for the purpose of establishing that the injuries suffered by Mrs CJ Becker were comparable to, if not worse than, the injuries suffered by Mr PA Becker.

[28] In support of its request, the plaintiff relied on section 22 of the Civil Proceedings Evidence Act, Act 25 of 1965 ("the CPEA") that provides:-

> *"(1) Whenever any fact ascertained by any examination or process requiring any skill in bacteriology, biology, chemistry, physics, astronomy, anatomy or pathology is or may become relevant to the issue in any civil proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is in the service of the Republic or of a province or in the service of or attached to the South African Institute for Medical Research or any university in the Republic or any other institution designated by the Minister for the purposes of this section by notice in the Gazette, and that he has ascertained such fact by means of such examination or process, shall, subject to the provisions of subsections (2) and (3), on its mere production by any party in such proceedings be admissible in evidence to prove that fact.*
>
> *(2) No such affidavit shall be so admissible unless a copy thereof has been delivered by the party desiring to avail himself thereof to every other party to the proceedings at least seven days before the date of production thereof.*
>
> *(3) The person presiding at such proceedings may, upon the application of any party thereto, order that the person who made such affidavit be called to give*

oral evidence in the proceedings or that written interrogatories be submitted to him, and any such interrogatories and any reply thereto purporting to be a reply from such person, given on affidavit, shall likewise be admissible in evidence in such proceeding."

[29] The first defendant opposed the application on various grounds, namely that the pathologist is not a public officer, that the documents are not public documents and that it contains hearsay evidence.

[30] Mr J Swanepoel, counsel for the first defendant, relied on the judgment of ***Northern Mounted Rifles v O'Callaghan,***[6] where the Court pronounced that:

"I understand a public document there to mean a document that is made for the purpose of the public making use of it and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards." Those, then, are the characteristics of a public document, according to Lord BLACKBURN. It must be made by a public officer in the execution of a public duty, it must be intended for public use, and the public must have a right of, access to it. Nor, I think, does the last characteristic cease to be a true one, because it is subject to certain exceptions. There are, of course, cases where, for reasons of State, documents which undoubtedly in their nature are public documents are privileged from production. But that is an exception, and it does not affect, the correctness of the definition of "public document" to which I have referred."

[31] According to the first defendant, a pathologist is not a public officer as the contents of a post-mortem report is not in the public interest and it is not intended for public use.

[32] Mr J Swanepoel argued that a post-mortem report contains information of an intensely private nature, and if it be regarded as a public document, any person would be of right to ask for the document, which would infringe on a person's constitutional right to privacy as encompassed in section 14 of the Constitution. In support of his argument, he referred me to Regulations 14(1)

[6] 1909 TS 174 at 177. See also S v Karge & Another 1971 (3) SA 470 (T) and Tselentis Mining (Pty) Limited and Another v Mdlalose and Others 1998 (1) BCLR 104 (N) at page 114.

promulgated in terms of the National Health Act, Act 61 of 2003[7] regarding the rendering of forensic pathological services, which reads:

> *"The person in charge of a designated facility must set up control measures in order to ensure that only authorised persons have access to records relating to post mortem examinations and to the storage facility in which records are kept."*

[33] Furthermore, Regulation 14(2)(m) provides that unauthorised persons who access any type of information about the death investigative process shall be guilty of an offence.

[34] I am not persuaded that a post mortem report has the characteristics of a public document. The two post-mortem reports were, on the mere production thereof, accordingly not admitted into evidence.

EVALUATION OF THE EVIDENCE:-

[35] It is trite that the plaintiff bears the overall onus to prove its case, on a balance of probabilities.[8]

[36] This matter stands to be adjudicated according to Warrant Officer Wagenaar's direct evidence.

[37] Mr Ismail submitted that Warrant Officer Wagenaar's evidence was unsatisfactory as she could not explain why she noted less important facts, yet failed to record crucial ones. Mr Ismail contended that Warrant Officer Wagenaar was in all probability mistaken regarding the crucial facts pertaining to the pulse she felt and the noises made by Mrs DJ Becker; and that her evidence was tainted by *"the family war"*, pressure and *"bullying"*. Mr Ismail contended that I should regard her evidence as unreliable in view of the fact that the time of the accident was incorrectly captured on the accident report.

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[7] Government Notice 359, published in Government Gazette dated 23 March 2018.
[8] Govan v Skidmore [1952] 1 All SA 54 (N) page 57.

[38] In dealing with instances where a single witness testifies directly about a particular fact, I am guided by the following remarks by the Appellate Division's remarks in ***S v Sauls***[9]:-

> *"...There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPFF JA in* S v Webber *1971 (3)* SA *754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."*

[39] I was favourably impressed by Warrant Officer Wagenaar, who presented her version in a forthright manner without deviating from the essence thereof, notwithstanding thorough cross-examination. It was noticeable that she did not endeavour to pad her version and that she correctly made relevant concessions with regard to the contents of her written statement. Her explanation for not including crucial facts was satisfactory. In my view, Warrant Officer's evidence was consistent, credible and reliable.

CONCLUSION:-

[40] On a proper evaluation of the evidence, I can come to no other conclusion than to find that the deaths were not simultaneous, but that Mr PA Becker pre-deceased Mrs DJ Becker. Mrs DJ Becker accordingly had an enforceable right that was transmissible to her estate.

ORDER:

In the result the following order is made:-

The plaintiff's claim is dismissed, with costs.

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[9] S v Sauls [1981] 4 All SA 182 (AD) page 186. See also Doorewaard and another v S [2020] JOL 49054 (SCA) at paragraph [22].

STANTON, A

ACTING JUDGE

On behalf of plaintiff:	Adv. R Ismail (o.i.o Van de Wall Incorporated)
On behalf of defendant:	Adv. J Swanepoel (o.i.o Haarhoffs Incorporated.)