THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 159/11

In the matter between:

PPS INSURANCE COMPANY LIMITED	**First Appellant**
SANLAM TRUST LIMITED	**Second Appellant**
SUPREME LETLAKANA SEBATA	**Third Appellant**

and

SIMON MICHAEL MKHABELA	**Respondent**

Neutral citation: *PPS Insurance Company v Mkhabela* (159/2011) [2011] ZASCA 191 (14 November 2011).

Coram: Harms AP, Lewis, Van Heerden, Cachalia and Seriti JJA
Heard: **1 November 2011**
Delivered: **14 November 2011**

Summary: Third party nominated as beneficiary of life insurance policy – Policy reserving insured's right of cancellation or change of nomination of beneficiary – Nominated beneficiary predeceasing policy holder – Executor of beneficiary estate has no claim to proceeds of the policy.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Tsoka, Victor and Mayat JJ sitting as full court).

The appeal succeeds, with costs, and the order of the full court is altered to read: 'The appeal is dismissed with costs.'

JUDGMENT

CACHALIA JA (Harms AP, Lewis, Van Heerden, and Seriti JJA concurring):

[1] The third appellant is the executor in the estate of the late Mmatishibe Louisa Magdeline Sebata. Although not a party to the original application brought in the court of first instance, he was granted leave to join those proceedings as the third respondent. The first and second appellants are named as parties to the appeal but only the third appellant is pursuing it. The first appellant, which is an insurance company, elected to abide by the decision of the court, and the second appellant decided not to persist with the appeal.

[2] Ms Sebata was the owner of a life policy which the first appellant had issued to her. She had nominated her mother, Helen Mmapule Mkhabela, as the beneficiary of the policy in the event of her death, but reserved the right to change or cancel the nomination 'at any time'. Ms Mkhabela passed away on 26 May 2007. Her daughter died afterwards, on 12 August 2007, when the proceeds of the policy fell due, but without having nominated another beneficiary.

Simon Michael Mkhabela, the respondent and executor of Ms Mkhabela's deceased estate, then claimed the proceeds of the policy in the high court.

[3] The court of first instance (Coetzee J) dismissed his claim with costs and directed that the proceeds of the policy be paid to the third appellant, as executor of the Sebata estate. The learned judge reasoned that when Ms Mkhabela died, her daughter's nomination of her as the beneficiary of the policy ceased to exist. The policy therefore vested in Ms Sebata's estate and not her mother's.

[4] The full court (Tsoka J, Victor and Mayat JJ concurring) took a different view. It held that, once Ms Mkhabela accepted her nomination as beneficiary, and the first appellant recorded this, a binding agreement between her and the first appellant came into effect. On Ms Sebata's death, so the court reasoned, the respondent, as executor of Ms Mkhabela's estate, was entitled to accept the benefit of the policy. The third appellant takes issue with the court's reasoning. The appeal is before us with special leave of this court.

[5] The approach of the full court proceeded from the premise that the insurance agreement between Ms Sebata and the first appellant was a *stipulatio alteri* – an agreement for the benefit of a third party (Ms Mkahabela). It then reasoned as follows:

'The agreement creates a *spes* for Ms Mkhabela. Ms Mkhabela has no rights to the policy during the lifetime of Ms Sebata. The *spes* only becomes a right to Ms Mkhabela on the death of Ms Sebata. The benefit, on the death of Ms Sebata, is open for acceptance by Ms Mkhabela. As she had already died at the time the benefit accrued and her nomination had not been revoked, it remained open for acceptance by the appellant. That Ms Sebata had, during her lifetime, the right to cancel or revoke the nomination of a beneficiary, is beyond question. Ms Mkahabela accepted the nomination on this basis. The nomination of Ms Mkhabela as a beneficiary, not having been revoked by Ms Sebata before her death, remains a valid agreement between Ms Mkahabela and the [insurance company]. On the death of Ms Sebata the proceeds of the insurance company accrue to the estate of Ms Mkhabela. Contrary to the view taken by the Court

below, the agreement between Ms Mkhabela and the [insurance company] did not . . . become extinct . . ..'

[6] The full court was correct in its view that Ms Sebata's nomination of her mother as the beneficiary under the policy was a contract for the benefit of her mother as a third party, which was capable of acceptance upon the death of the policy holder.[1] But it then, with respect, erroneously found that Ms Mkhabela's acceptance of her *nomination* as a beneficiary had some legal significance.

[7] 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.[2] 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.[3]

[8] It follows that if the nominated beneficiary predeceases the policy owner, she would have had no right to any benefit of the policy at the time of her death. Put simply, when the nominated beneficiary dies, the *spes* evaporates. It falls away. The fact that a nominated beneficiary accepts the nomination cannot change this.

[9] 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

1 *Moonsamy v Nedcor Bank Ltd* 2004 (3) SA 513 (D) at 518B.
2 Ibid 518A-B.
3 It should be noted that although the parties referred to *Mutual Life Insurance Co of New York v Hotz* 1911 AD 556, the case does not assist the decision here since the facts were completely different. There, the policy owner claimed the surrender value on his father's death. The court held that the father's estate had already accepted the right that had accrued (not a *spes*) and that the policy owner was not entitled to claim the surrender value.

acceptance becomes nugatory.[4] 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.

[10] That the approach adopted by the full court does not withstand scrutiny was demonstrated by Mr Mundell, who appeared for the appellant. He asked what would have happened to the *spes* if the nominated beneficiary had died two years, instead of two months, before the policy owner, and her estate was finally wound up before the policy owner's death. And the *spes*, not being an enforceable right, is not reflected in the Liquidation and Distribution account. The consequence of the full court's reasoning is that the *spes* would have somehow revived and become enforceable on the death of the policy owner, which is simply not possible.

[11] In the result the appeal must succeed, with costs, and the order of the full court should be altered to read:
'The appeal is dismissed with costs.'

A CACHALIA
JUDGE OF APPEAL

4 D M Davis *Gordon and Getz on The South African Law of Insurance* 4 ed at 335.

APPEARANCES

For 2nd and 3rd Appellant:	A R G Mundell SC Instructed by: Werksmans Inc, Sandton Symington & De Kok, Bloemfontein
For Respondent:	E M Matanda Instructed by: Mankoe Inc c/o Tsebane Molaba Inc, Johannesburg Mphafi Khang Inc, Bloemfontein