SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 31 May 2018

STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

***Louis Pasteur Hospital Holdings (Pty) Ltd v Bonitas Medical Fund (*281/2017) [2018] ZASCA 82 (31 May 2018)**

Today the Supreme Court of Appeal (SCA) dismissed an appeal by the appellant, and upheld an order of the Gauteng Division of the High Court, Pretoria. At the centre of the appeal was the right to the proceeds of two Sanlam investment policies paid to the appellant upon maturity.

The appellant, which conducts business as a health care provider, was ordered to pay the respondent, Bonitas Medical Fund (Bonitas), a medical aid scheme, the sum of R44 245 360 with costs.

During 1994 Louis Pasteur Medical Investments (Pty) Ltd (LPMI), a holding company of LPH, and Bonitas embarked on a joint venture to establish a hospital through a then dormant company, Maraba Hospital and Medical Centre (Pty) Ltd (Maraba). In relation to the litigation two documents were of importance, namely, a shareholders' agreement and a funding proposal (Affin proposal).

The shareholders' agreement which was concluded during October 1994 records that Maraba was formed with the intention of operating a hospital. Maraba ultimately mutated into LPH. It was envisaged that the hospital would operate as a private hospital to be known as the Louis Pasteur Medical Institute, conducting business at Louis Pasteur Medical Centre. The shareholders' agreement notes that 74 per cent of the shares in the company would be held by LPMI and 26 per cent by Bonitas.

During February 1996 Bonitas' Finance Committee approved the Affin proposal and authorised the Principal Officer on behalf of the fund, to sign cession of a Sanlam Policy in respect of facilities availed to Maraba Hospital and Medical Centre (Pty) Ltd at First National Bank. The Principal Officer completed the necessary Sanlam forms which gave it notice of the cession of the policy to LPH. That form indicated that it was a cession of the rights in the policy to Maraba (LPH) as security for debt. This was purportedly done in accordance with the terms of the AFFIN proposal. LPH purported to on-cede the policy to First National Bank (FNB). Subsequently, Bonitas surrendered the policy and Sanlam paid it the surrender value.

To ensure that the financing arrangement referred to in the AFFIN proposal remained in place, Bonitas was called upon by LPH to replace the paid up policy which had been provided as security. This it did by agreeing to cede two further Sanlam investment policies to LPH. The necessary form in relation to the cession of the two policies giving notice to Sanlam was once again completed on behalf

of Bonitas by the Principal Officer. The standard form contained an annotation providing the following reason for the cession of the policies: 'Outright cession. Yes'. The policies were once again on-ceded to FNB.

On 1 December 2006 both policies reached their maturity date. The proceeds amounted to R39 293 353. According to LPH the proceeds were reinvested and restructured resulting in a total sum of R 44 245 360 which it ultimately received. Part of the proceeds of the policies was used by LPH to pay off its indebtedness to FNB flowing from the finance facility provided. The remainder was retained for LPH's benefit. Bonitas took the view that it was clear from the shareholders' agreement and the funding proposal that it remained the beneficial owners of the policies. Bonitas was adamant that LPH had no right to the proceeds of the policies. Consequently, during 2008, Bonitas instituted action in the Gauteng Division, Pretoria, for the recovery of the amount ultimately paid to LPH together with interest thereon.

In its particulars of claim, Bonitas alleged that, in terms of the agreement, it remained the beneficial owner of the policy and was entitled to its net proceeds in the event of it not being required as security. It noted that the cession of the policy was accessory to the funding agreement and that LPH would not be permitted to increase its borrowing without Bonitas' prior consent.

On appeal, the SCA held that it was clear that the evidence of the appellant could not be relied upon and that the court below was correct in rejecting the evidence concerning the nature of the cessions. The SCA considered the distinction between an out-and-out cession and a cession *in securitatem debiti*. In terms of the shareholders' agreement, LPMI and the respondent would, in proportion to their respective shareholdings, furnish 'the security necessary' for the financing of medical and hospital equipment 'up to a maximum of R6 000 000'. Further the shareholders' agreement provided for the eventuality of further funding becoming necessary and in that event security would once again be provided by LPMI and the respondent in proportion to their respective shareholding.

In addition it was found that neither the shareholders' agreement nor the agreement, post the funding proposal, entitled the appellant to appropriate the proceeds of the policies. In so doing, the appellant acted in breach of both agreements.

The SCA held further that it was clear that the cession of the two policies was *in securitatem debiti*. It was always intended that the cession would serve as security for the appellant's finance facility with FNB. In the present case there is no question of default, which would have entitled FNB to proceed to obtain payment up to the extent of the security from Sanlam. Importantly the SCA held that it was clear that the word 'surety' where it appeared in the funding proposal was a typographical error and what the parties intended was the word security. The SCA concluded that the essential reasoning and conclusions of the court below could not be faulted.