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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 641/2021

REPORTABLE: YES/NO

CIRCULATE TO JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

DONOVAN THEODORE MAJIEDT N.O.

First Plaintiff

REINETTE STEYNSBURG N.O.

Second Plaintiff

and

EUGENE PRINSLOO

Defendant

CORAM:

VAN ZYL, J

HEARD ON:

15 FEBRUARY 2022

DELIVERED ON:

29 SEPTEMBER 2022; 19 MEI 2023

[1] This matter deals with the interpretation of Section 63 of the Long- Term Insurance Act, 52 of 1998 (*"the LTIA"*).

Order:

[2] On 29 September 2022 I made the following order:

"1. The benefits of the long-term life insurance policy received by Nelly Arlene

Prinsloo are not protected in terms of the provisions of section 63 of the Long-Term Insurance Act, 52 of 1998.

2. The costs in respect of the determination of the aforesaid separated issue stand over for later adjudication."

I am hereby providing the reasons for the said order.

Background:

[3] This matter was enrolled as a civil trial. At the commencement of the trial I was requested, by agreement between the parties, to order a separation of issues in terms of Rule 33(4). In this regard they provided me with a draft order and I made the following order in terms thereof:

"1. Issues are separated in terms of Rule 33(4) as set out in the bundle entitled 'Separation of Issues - Rule 33(4)';

2. The separated issue to be determined is whether the proceeds of a long-term life insurance policy received by Nelly Arlene Prinsloo are protected (or not) in terms of the provisions of Section 63 of the Long-Term Insurance Act, No. 52 of 1998;

3. Until determination of the separated issue in 2 supra (whether by appeal or otherwise), all further proceedings in the action under case no. 641/2021 are stayed."

[4] The aforesaid "Separation of Issues - Rule 33(4)" bundle (*"the bundle"*) contains a document also titled "Separation of Issues - Rule 33(4)" (*"the Rule 33(4)-document"*), together with annexures thereto. In paragraph 1.2 of the Rule 33(4)-document the parties agreed that I am to determine the separated issue *"on the common cause facts and assumed facts"* set out in the document. The said document was signed by the attorneys of record of both parties.

[5] Both Mr Meintjies, who appeared on behalf of the plaintiffs, and Mr Zietsman, who appeared on behalf of the defendant, submitted heads of argument in support of their respective contentions.

[6] I deem it apposite to quote the better part of the contents of the Rule 33(4)-document, since the contents thereof constitute the basis on which I have to determine the separated issue.

Contents of the Rule 33(4)-document:

"RELEVANT COMMON CAUSE FACTS:

2.

"2.1 The First Plaintiff is Donovan Theodore Majiedt N.O, a major male and insolvency practitioner ...

2.2 The Second Plaintiff is Reinette Steynsburg N.O, a major female and insolvency practitioner...

2.3 The Defendant is Eugene Prinsloo:

2.3.1 a major businessman;

2.3.2

2.3.3 born on the 1[...] of J[...] 1979; and

2.3.4

2.4 Louis Hendrik Prinsloo (ID no. 5[...]2) [hereinafter 'the deceased' or 'the life insured'] and Nelly Arlene Prinsloo (ID no. 5[...]1) [hereinafter 'Nelly' or 'the beneficiary'] were married to each other in community of property on 6 April 1974.

2.5 The Defendant is the son born of the marriage that subsisted between the deceased and Nelly.

2.6 The deceased passed away from natural causes on 14 February 2018 at Bloemfontein.

2.7 On 17 April 2018 ... the relevant Master issued Letters of Executorship in terms whereof Johannes Petrus Daniel Botha was appointed as '*nominee*' of Wessels & Smith Inc. in its capacity as duly appointed '*Executor*' of the deceased joint estate that subsisted between the deceased and Nelly.

2.8 On 10 September 2020, this ... Court issued an order whereby the deceased joint estate of the deceased and Nelly was placed under provisional sequestration in the hands of the Master.

2.9 On 22 October 2020, this ... Court issued an order in terms whereof the deceased joint estate of the deceased and Nelly was placed under final sequestration in the hands of the Master.

2.10 On 24 November 2020, the Master appointed the Plaintiffs as provisional trustees in the insolvent deceased joint estate of the deceased and Nelly.

2.11 The Plaintiffs requested permission of this Court in terms of Section 18(3) of the Insolvency Act, No. 24 of 1936 [hereinafter '*the Act*'] to institute and launch the present proceedings against the Defendant. Although the Defendant cannot accede to the said request, he does not object thereto.

2.12 On or about 27 September 2011, the deceased concluded a life insurance policy with Old Mutual under its Green Light Benefit Scheme for a total death benefit of R10 000 000-00. A copy of the acceptance of the life insurance contract, dated 27 September 2011, is attached marked Annexure 'SC1.1'.

2.13 The benefit was registered on 27 September 2011 under benefit number 0[...] and the life insured was registered as the initial beneficiary. A copy of the initial benefit details is attached hereto, marked Annexure 'SC1.2'

and the Green Light Death Benefit Schedules, together with its terms and conditions in respect of the death benefit 1 and death benefit 4 are attached hereto, marked Annexures 'SC1.3(a)', 'SC1.3(b)', 'SC1.4(a)' and 'SC1.4(b)' respectively;

2.14 Thereafter, and on 30 August 2013, the life insured appointed Nelly as beneficiary of both death benefits covered in terms of the long-term life insurance policy as is evident from a copy of the beneficiary appointment attached hereto, marked Annexure 'SC2';

2.15 As revealed, the deceased/life insured passed away on 14 February 2018, and as a consequence thereof, Old Mutual paid the death benefits of R10 000 000,00 (hereinafter '*the benefit*') in terms of the long-term life insurance policy on 11 April 2018 to Nelly;

2.16 Nelly transferred the benefit received in terms of the long-term life insurance policy on 11 April 2018, to Iceburg Trading 713 CC ('Iceburg'). The Defendant is the sole member of Iceburg; and

2.17 Upon Nelly transferring the benefit to Iceburg, the Defendant caused Iceburg to transfer the benefit to his personal account held at Absa under account no. 4[...] in two tranches of R5 000 000,00 each on 11 April 2018 and 12 April 2018 respectively.

PLAINTIFFS' CONTENTIONS:

3.

The parties attach hereto, a copy of the Plaintiffs' Amended Particulars of Claim, marked Annexure 'SC3' and from which, inter alia, the following assumed facts are relevant, namely:

3.1 The Defendant received the sum of R10 000 000,00 alternatively, the Defendant benefited by the receipt of such sum of R10 000 000,00 from Nelly as the funds of R10 000 000,00 was channelled to the Defendant and/or

flowed to the Defendant as detailed in paragraph 2.15 to 2.17 supra;

3.2 The aforesaid payment/donation/transfer of R10 000 000,00 to the Defendant constitutes a '*disposition*' by Nelly, alternatively the deceased joint estate before the sequestration of the insolvent deceased joint estate as contemplated in Section 2 of the Act;

3.3 At all material times hereto, alternatively at all relevant stages, and more pertinently when the said dispositions were made, the liabilities of Nelly, alternatively the deceased joint estate exceeded her/its assets;

3.4 The disposition by Nelly to the Defendant is liable to be set-aside in terms of any of the eight Claims as detailed in paragraph 17 to 49 of the Plaintiffs' Amended Particulars of Claim.

THE DEFENDANT'S CASE:

4.

The parties attach a copy of the Defendant's Amended Plea hereto, marked Annexure 'SC4' and in particular refer the Honourable Court to paragraphs 11A.6 to 11A.8 thereof and from which it is apparent that the Defendant contends that the benefit of the long-term life insurance policy is protected in terms of Section 63(1)(b) of the LTIA and is therefore not available for the purpose of payment of the debts of the deceased and/or the deceased insolvent joint estate.

ISSUE TO BE DETERMINED:

5.

The issue to be determined is whether the benefit received by Nelly is protected or not in terms of the provisions of Section 63 of the LTIA.

CONVENIENCE:

6.

6.1 The parties agree that the aforesaid issue to be determined can conveniently be decided before any evidence is led and separately from any other question and further that the aforesaid separated issue is a matter of law (interpretation). As such and until final determination [whether by appeal or not] of the aforesaid separated issue, all further proceedings in the action are to be stayed and:

6.1.1 should the Honourable Court find in favour of the Plaintiffs' interpretation of Section 63 of the LTIA, then costs should be awarded to the Plaintiffs in respect of the separated issue and the action will then be re-enrolled in order for the Plaintiffs to prove the assumed facts as well as any other requirements of its Claims against the Defendant; and

6.1.2 should the Honourable Court find in favour of the Defendant's interpretation of Section 63 of the LTIA, then the Plaintiffs' action should be dismissed in toto with costs."

The pleadings:

The plaintiffs' particulars of claim:

[7] One has to be mindful that the claim by the plaintiffs, in their capacity as provisional trustees in the insolvent deceased joint estate of the deceased and Nelly, who were married in community of property, is against the defendant and not against Nelly as such.

[8] In paragraphs 15 and 16 of the particulars of claim the plaintiffs, with reference to the transfer of the benefits by Nelly to Iceburg, a close corporation of which the defendant is the sole member, aver as follows:

"15.

The plaintiffs contend that the aforesaid payments/donation/transfer of R10 000 000.00 to the defendant ... constitute 'dispositions' by Nelly,

alternatively the deceased joint estate before the sequestration of the insolvent deceased joint estate as contemplated in section 2 of the Act [Insolvency Act, 24 of 1936].

16.

At all material times, alternatively at all relevant stages, and more pertinently when the said dispositions were made, the liabilities of Nelly, alternatively the deceased joint estate exceeded her/its assets."

[9] In addition to the plaintiffs' request that the plaintiffs' powers be extended in terms of the provisions of section 18(3) of the Insolvency Act and that the plaintiffs be granted leave, if necessary, to continue with the present action/legal proceeding against the defendant, the plaintiffs claim against the defendant is for payment of the amount of R10 000 000.00, by the defendant to the plaintiffs and further ancillary relief.

[10] The aforesaid claim for the payment of the amount of R10 000 000.00 is based upon the provisions of section 31 of the Insolvency Act. In the alternative to the aforesaid claim, the plaintiffs' claim against the defendant is based on seven alternative claims based on different causes of action, the details of which are not relevant for present purposes.

The defendant's amended plea:

[11] In terms of the Rule 33(4)-document, it is evident that it is the defendant's case that the R10 000 000.00 benefit of the long-term life insurance policy is protected in terms of section 63(1)(b) of the LTIA and is consequently protected from payment of the debts of the deceased and/or the deceased insolvent joint estate... In this regard the following averments are pleaded in the defendant's amended plea:

"11A.4 Upon the death of the deceased, he was survived by Nelly as his spouse and the defendant as his son.

11A.5 Upon the death of the deceased the policy benefits devolved upon

the spouse, alternatively the child of the deceased.

11A.6 The said policy benefits are therefore in terms of section 63(1)(b) of the LTIA not available for the purposes of payment of the debts of the deceased and/or [the] insolvent joint estate.

11A.7 The plaintiffs as provisional trustees of the insolvent joint estate of the deceased and Nelly are therefore not entitled to claim payment of the proceeds of the life insurance policy, so as to make payment of the debts of the deceased and/or [the] insolvent joint estate.

11A.8 Wherefore the defendant requests that the plaintiffs' claim be dismissed with costs."

The parties' submissions on the interpretation of section 63 of the LTIA:

[12] Section 63 of the LTIA determines as follows:

"63 Protection of policy benefits under certain long-term policies

(1) Subject to subsections (2), (3) and **(4)**, the policy benefits provided or to be provided to a person under one or more-

(a) in respect of a registered insurer, assistance, life, disability or health policies; or

(b) in the case of a licensed insurer, policies written under the risk, fund risk, credit life, funeral, life annuities, individual investment or income drawdown class of life insurance business as set out in Table 1 of Schedule 2 of the Insurance Act,

in which that person or the spouse of that person is the life insured and which has or have been in force for at least three years (or the assets acquired

exclusively with those policy benefits) shall, other than for a debt secured by the policy-

(i) during his or her lifetime, not be liable to be attached or subjected to execution under a judgment of a court or form part of his or her insolvent estate; or

(ii) upon his or her death, if he or she is survived by a spouse, child, stepchild or parent, not be available for the purpose of the payment of his or her debts.

(2) The protection contemplated in subsection (1) shall apply to policy benefits and assets acquired solely with the policy benefits, for a period of five years from the date on which the policy benefits were provided.

(3) Policy benefits are only protected as provided in-

(a) subsection (1) (b}, if they devolve upon the spouse, child, stepchild or parent of the person referred to in subsection (1) in the event of that person's death; and

(b) subsection (1) (a) and (b), if the person claiming such protection is able to prove on a balance of probabilities that the protection is afforded to him or her under this section.

(4) Policy benefits are protected as provided for in subsection (1) (a) and (b), unless it can be shown that the policy in question was taken out with the intention to defraud creditors."

[13] Mr Zietsman contended that in terms of section 63 the benefits of the policy as received by Nelly are not liable to be attached or subjected to execution under a judgment of a Court, are not available for payment of the debts of the deceased and do not form part of the insolvent joint deceased estate.

[14] Mr Meintjies contended that a "*person*" as contained in section 63 is to be interpreted to be a reference to "*the policyholder*". Mr Zietsman, however, contended that a "*person*" is to be interpreted to be a reference to "*the beneficiary*".

[15] According to both counsel the consequential/eventual question which will depend on the determination of the last-mentioned interpretation, will be whether the policy benefits are protected, or not, from the creditors of the policyholder (the deceased *in casu*) and/or from the creditors of the beneficiary (Nelly *in casu*).

[16] Within the context of sub-section (1) Mr Zietsman submitted that "*a person*" is -

1. the person to whom the policy benefits are provided or to be provided;
and
2. that person or the spouse of that person is the life insured.

[17] Mr Zietsman pointed out that although the deceased, who was also the life insured, was initially registered as the beneficiary, the deceased on 13 August 2013 appointed Nelly to receive the benefits in terms of the long-term life insurance policy. He contended that Nelly was therefore the "*person*" to whom the policy benefits were "*to be provided*" on the death of the life insured; hence, on the death of the deceased.

[18] Mr Zietsman further submitted that the second limitation is that -

"the person to whom the policy benefits are provided must be the life insured; or the spouse of the person to whom the policy benefits are provided must be the life insured."

[19] Mr Zietsman consequently contended that "*it is common cause that the deceased was the life insured and that Nelly, to whom the policy benefits are*

provided, was his spouse':

[20] It was consequently the contention of Mr Zietsman that Nelly falls within the definition of a "*person*" to whom protection is afforded in terms of section 63(1) of the LTIA.

[21] It was therefore Mr Zietsman's contention that section 63(1) should thus be read, within the facts of this case, as follows:

"(1) Subject to subsections (2), (3) and (4) the policy benefits provided or to be provided to **[Nelly]** under one or more –

(a) ... policies ...

in which **[Nelly]** or the spouse of **[Nelly]** is the life insured and which has or have been in force for at least three years (or the assets acquired exclusively with those policy benefits shall, other than for a debt secured by the policy –

(i) during ... her lifetime, not form part of ... her insolvent estate; or

(ii) upon ... her death, if ... she is survived by a spouse, child, stepchild or parent, not be available for the purpose of the payment of ... her debts."

[22] Mr Zietsman ultimately submitted that, based on the aforesaid interpretation, the policy benefits provided/paid to Nelly, are therefore protected in her favour in that in terms of section 63(1)(a)(i) the benefits are not liable to be attached or subjected to execution and the said benefits do not form part of her insolvent estate.

[23] I will herein later deal with the case law on which Mr Zietsman relied as well as additional case law.

[24] It is not in dispute that the life insurance policy in the present matter has been in force for at least three years and that no debt was secured by the policy as

determined in section 63 of the LTIA. I am consequently not going to deal with these aspects. The issue of fraud provided for in section 63(4) of the LTIA is also not applicable to the present matter.

[25] As stated earlier, Mr Meintjies submitted that "*person*" as contained in section 63 of the LTIA is to be interpreted to be a reference to the policyholder. In response to Mr Zietsman's argument that if "*person*" is to be interpreted to be a reference to "*the policyholder*", the section would have pertinently stated same, Mr Meintjies submitted that the same argument is *mutatis mutandis* applicable to Mr Zietsman's contention that it should be interpreted to be a reference to "*the beneficiary*".

[26] With regard to the approach to be followed for purposes of statutory interpretation, both Mr Meintjies and Mr Zietsman relied on the same case law and the principles which are to be applied. Both counsel relied on the approach as authoritatively set out in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at para [18]:

"[18] ... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in

regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (My emphasis)

[27] The aforesaid approach has since been followed and applied in numerous judgments.

[28] In addition, Mr Meintjies also relied on the judgment of **Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd** 2014 (2) SA 518 (SCA) at para [19], where the following principle was re-confirmed:

[19] It has also long been a construction of interpretation of statutes that, in the absence of express wording to the contrary, the legislature did not intend to alter the law as it had previously stood "

[29] Relying on the aforesaid principle, Mr Meintjies cited section 39 of the Insurance Act, 27 of 1943 (the old Act), which was repealed by the LTIA with effect from 1 January 1999, which read as follows:

"A life policy effected by a person upon his own life, which has insured for a period of 3 years or longer, shall not during his lifetime be liable to be attached in execution of a judgment or order of Court of law, at the instance of his creditors, and shall not form part of his insolvent estate, except in so far as the total value of all such policies, together with the value of all monies and other assets protected under ... and of which such person is the owner exceeds R10 000.00: provided that if such a policy as aforesaid has been pledged, the preceding provisions of this sub-section shall apply only to so much of the value of that policy as exceeds the amount of the liability whose payment the pledge secures."

[30] Mr Meintjies submitted that the aforesaid section 39 of the old Act illustrates that the legislature's intention could only have been that a life policy of a **policyholder who is also the life insured** shall not during the lifetime of **such policyholder** be liable to attachment in execution of a judgment or order of Court of law at the instance of such **policyholder's creditors** and shall not form part of **such policyholder's insolvent estate**.

[31] I have to agree with the aforesaid interpretation by Mr Meintjies. The words "*a life policy effected by a person upon his own life*" is clearly a reference to the policyholder. The words "*his lifetime*", "*his creditors*" and "*his insolvent estate*" can only be interpreted to be a reference to the lifetime, the creditors and the insolvent estate of the policyholder. The subsequent words "*such person*" are clearly then again a reference to the policyholder.

[32] Prior to the amendment of section 63 of the LTIA on 1 July 2018 ("the old section 63"), it was virtually identical to the current section 63 of the LTIA. However, previously, in terms of the old section 63, the protection provided was limited to a maximum amount of R50 000.00.

[33] If the principle in the aforesaid Boschpoort-judgment is to be applied, I agree with the contention of Mr Meintjies that when the wording and interpretation of the old Act and that of the old section 63 are considered, it appears that "*person*" in the current section 63 of the LTIA is to be interpreted as being a reference to the policyholder. Similarly, when the wording and the interpretation of the old Act and that of the old section 63 are considered in relation to the protection provided for, it appears that the protection in the current section 63(1)(a)(i) is to be interpreted as being a reference to the insolvent estate of the policyholder.

[34] Mr Meintjies further relied on the principle enunciated in the judgment of Minister of the Interior v Machadodorp Investments (Pty) Ltd 1957 (2) SA 395 (A) at 404:

"Where the Legislature uses the same word ... in the same enactment, it may reasonably be supposed that out of a proper concern for the

intelligibility of its language, it would intend the word to be understood, where no clear indication to the contrary is given, in the same sense throughout the enactment. This applies with greater force where the same word is repeated in a single sentence. That the same meaning was here intended, may also be gathered from the history of the legislation:"

[35] The aforesaid principle was subsequently followed and applied *inter alia* in the judgment of **More v Minister of Co-Operation and Development** 1986 (1) SA 102 (A) at 115 B - D:

"Where the Legislature has used the same words, in this case the words 'withdraw' (Afrikaans 'trek') or 'the withdrawal' (Afrikaans 'die trek') in the same enactment there is a reasonable supposition, if not a presumption, that it intended the words to bear the same meaning throughout the enactment (*Minister of the Interior v Machadodorp Investments (Pty) Ltd and Another* 1957 (2) SA 395 (A) at 404D - E; *Pantanowitz v Sekretaris van Binnelandse Inkomste* 1968 (4) SA 872 (A) at 879D - E; and *Durban City Council v Shell and BP Southern Africa Petroleum Refineries (Pty) Ltd* 1971 (4) SA 446 (A) at 457A."

See also **Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo** 2010 (2) SA 415 (CC) at para [70].

[36] In further support of his contention that "a *person*" is to be interpreted to be a reference to the policyholder, Mr Meintjies relied on the definition of "*policyholder*" as contained in section 1 of the LTIA, the wording of which is similar to the wording contained in section 63(1):

"Policyholder in respect of a –

- (a) registered insurer, means the person entitled to be provided with the policy benefits under a long-term policy;
- (b) "

[37] Mr Meintjies consequently submitted that it is to be accepted that "a person" is a reference to the policyholder and that "*that person*": "*his/her*" and "*he/she*" are also to be understood as being references to the policyholder, with the result that section 63(1)(a)(ii) is to be interpreted to mean that upon the death of the policyholder, if the policyholder is survived by a spouse, child, stepchild or parent, the policy benefits are protected against payment of the debts of the policyholder and not against payment of the debts of the beneficiary.

The case law regarding the applicability of section 63 in particular circumstances:

[38] Both Messrs Meintjies and Zietsman referred to and relied on the judgment of **Pieterse v Shrosbree NO and Others; Shrosbree NO v Love and Others** 2005 (1) SA 309 (SCA) ("the **Pieterse**- appeal judgment") in which judgment the Supreme Court of Appeal dealt with the appeals against two judgments in relation to the old section 63 of the LTIA (when the protection in terms of section 63 was still limited to the amount of R50 000.00). The first matter on appeal was the one of **Shrosbree and Others NNO v Van Rooyen NO and Others** 2004 (1) SA 226 (SE) ("the **Van Rooyen**- judgment") and the second matter on appeal was the one of **Love and Another v Santam Life Insurance Ltd and Another** 2004 (3) SA 445 (SE) ("the **Love**-judgment"). For the sake of completeness and clarity I need to point out, as did Mr Zietsman during his argument, that in the Headnote of the **Pieterse**-appeal judgment it is wrongly indicated that the **Van Rooyen**-judgment was confirmed on appeal and that the **Love**-judgment was reversed on appeal, since the exact opposite is in fact the correct position, as reflected at the end of the **Pieterse**-appeal judgment, at para [13] thereof.

[39] Both Mr Meintjies and Mr Zietsman interpreted the **Pieterse**-appeal judgment in favour of their respective contentions with regard to the interpretation of section 63 of the LTIA. Both counsel also referred to paragraph [12] of the judgment which deals with the applicable principles in circumstances of the nomination of a beneficiary. However, despite this, it appears, with respect, that both counsel may have overlooked and/or misinterpreted applicable *dicta* in relation to section 63 of the LTIA.

[40] As correctly pointed out by Mr Meintjies, the Pieterse-appeal judgment dealt with the legal position when the policy owner, therefore the policyholder, nominates a beneficiary, in which instance such a nomination constitutes a *stipulatio alteri* (a contract for the benefit of a third person). In this regard the court stated as follows at paragraphs [8] - [9] of the judgment:

"[8] A contract of life insurance comes into existence when a person (the proposer) proposes for the insurance which is accepted by the insurer. The person on whose death the insurance is payable is the life insured. The person who is entitled to enforce the benefits payable under the policy is the owner. The proposer, the life insured and the owner may be the same person or two or three different persons. A proposer may effect the insurance either in his/her own favour or in favour of someone else. If the proposer effects the insurance in favour of someone else, the contract of insurance is a contract for the benefit of a third party and may be accepted by such third party who thereupon becomes the owner. Policies commonly entitle the owner to nominate a beneficiary on condition that the nomination will confer no rights on the nominated beneficiary during the owner's lifetime. The legal nature of such a nomination is a *stipulation alteri* (a contract for the benefit of a third person).

[9] In such a case, the policy holder (the *stipulans*) contracts with the insurer (the *promittens*) that .an agreed offer would be made by the insurer to a third party (the beneficiary) with the intention that, on acceptance of the offer by that beneficiary, a contract will be established between the beneficiary and the insurer. What is required is an intention on the part of the original contracting parties that the benefit, upon acceptance by the beneficiary, would confer rights that are enforceable at the instance of the beneficiary against the insurer, for that intention is at the 'very heart of the *stipulation alteri*' ..."

[41] In paragraph [11] of the said judgment the court dealt with section 63 and stated as follows:

"[11] Section 63 refers to assistance, life, disability or health policies. Those are defined in s 1 of the LTIA. The protection afforded by s 63 of the LTIA applies to 'the policy benefits' provided or to be provided to a person under one or more of the specified types of policies or the assets acquired exclusively with those policy benefits. The policy benefits which are protected are those payable to the protected person in terms of a protected policy which has been in force for at least three years. The assets which are protected are those which have been acquired solely or exclusively with the benefits of the relevant policy. The protection in relation to such assets operates for a period of five years after the date upon which the relevant policy benefits were provided. The protection is limited to an aggregate amount of R50 000 or such other amount as may be prescribed by the Minister." (My emphasis)

[42] But then, most importantly, the Supreme Court Appeal found that section 63 is not applicable in an instance where the policyholder appointed a beneficiary, since the policy benefits will, as a result thereof, be paid to the beneficiary and not the estate of the deceased. In this regard the court found as follows at paragraphs [10] and [12] of the judgment:

[10] On the death of the insured, provided that the nomination has not been revoked during the insured's lifetime, any claim to the policy proceeds by the beneficiary against the insurance company would be based on the contract of insurance between the deceased and the insurance company. It is to the insurance company and no one else that the beneficiary would have to look for payment. Section 63 does **not** regulate the payment of the proceeds of the policy. because the beneficiary appointment until revoked, has the effect that payment of the proceeds will be made to the beneficiary and not the estate of the deceased. (My emphasis)

[12] In the ordinary course, the proceeds of an insurance policy will go directly to a nominated beneficiary. Absents 63, on the death of the policy holder, the trustee of such person's insolvent estate would not have any claim to those policy proceeds. Nothing to the contrary is provided in s 63.

Section 63 does not purport to divert the proceeds of an insurance policy from a nominated beneficiary to the insolvent estate of a deceased policy holder. Nor, for that matter, does such a trustee, by virtue of s 63, become a creditor of the nominated beneficiary. Section 63 does not vest either trustee in each of these two cases with any interest in and to the proceeds of the policies. It follows that reliance by the trustees on s 63 was misplaced..."
(My emphasis)

Further discussion:

[43] As indicated earlier, the appeal against the Love-judgment was dismissed. In my view two findings which were made in the Love- judgment are crucial to the present matter, .which findings are evident from paragraphs [27] - [30] of the judgment, namely:

1. The "*person*" in section 63 of the LTIA is to be interpreted to be a reference to the policyholder/deceased under a life insurance policy in which the deceased or his wife was the life insured and where the policy benefits were provided or were to be provided to the said deceased/policyholder.
2. In an instance where the policy benefits are payable to a third party as the nominated beneficiary under the policy, "third party" meaning a beneficiary who is not also a policyholder, the provisions of section 63 are not applicable.

I deem it apposite to quote the said paragraphs [27] - [30] of the judgment:

"[27] Mr *Smuts* has argued that this interpretation [with reference to the interpretation in the Van Rooyen-judgment which was subsequently reversed on appeal] of the section is wrong because, as it is put in his heads of argument, the section 'relates to "the policy benefits provided or to be provided *to a person* under one or more assistance, life, disability or health policies in which that person or the spouse of that person is the life insured", and in the instant matter, as in the unreported judgment, by virtue of the nomination of beneficiaries, the policy benefits were not "provided or to be

provided" to the deceased, rendering the section inapplicable'.

[28] This interpretation of the section accords with that of Meskin in *Insolvency Law* who says the following:

'Since the section operates only in relation to those policy benefits envisaged by s 63(1) which are provided or to be provided to a person in terms of a policy under which that person, or his spouse is the life insured, where such benefits are provided or to be provided to some other person, the section is of no application. It is accordingly submitted that the section will not apply in relation to policy benefits which are payable, eg, to a beneficiary nominated under the policy, upon the death of the protected person where such beneficiary accepts the relevant benefits, firstly because such beneficiary is not the "person" envisaged by s 63(1) and secondly, because the right to claim the benefits vests in the beneficiary and does not form part of the assets of the deceased estate.'

[29] I am of the view that this is a correct interpretation of s 63 of the Act. It is an interpretation that, simply put, ascribes a consistent meaning to the same word - the word 'person' - when it appears in the section, and is consistent too with the basic premises and principles of insurance law that form the backdrop against which the Act must be interpreted. It follows from this interpretation of the section that I am of the view that the judgment in *Shroobree NO and Others v Van Rooyen NO and Others* is clearly wrong.

[30] The result is that s 63 has no application to this case: the person contemplated by s 63(1) as the potential beneficiary of the protection of the section was in this case the deceased - who did not have any policy benefits provided to him during his life for purposes of s 63(1)(a) - and not his wife or mother. In other words, the section only applied if the policy benefits were provided or were to be provided to the deceased under a life insurance policy - for example, on the attainment of a particular age, or on a particular date, or on the periodical payment of a contract of annuity insurance, or on the payment of bonuses on a life insurance policy - in which

the deceased or his wife was the life insured. It did not apply in this case because the policy benefits were provided to the deceased's beneficiaries in terms of a life insurance policy in which the deceased was the life insured. This means that the policy benefits never were part of the deceased estate from whence they could 'devolve upon' the deceased's wife and mother, to use the language of s 63(3)(a). The right to the policy benefits vested in the applicants and not in the deceased or his estate." (My emphasis)

[44] In an article by Hein Daffue, "Improved Protection for Policy Benefits", Insurance and Tax, Lexis Nexis, Vol. 29, No. 2, June 2014, at paragraph 2.2 thereof, the learned author stated that in terms of section 63, the policy benefits enjoy protection:

"1. During the policyholder's lifetime in that it may not be attached or be subject to execution under a judgment of a court or form part of the policyholder's insolvent estate; or

2. Upon the policyholder's death if the policyholder is survived by a spouse, child, stepchild or parent in that it will not be available for payment of the policyholder's debt." (My emphasis)

[45] The learned author further stated that with a beneficiary appointment, if accepted by the beneficiary at the death of a policyholder who is also the life insured, the policy benefits are payable directly to the beneficiary in which instance, based on the **Pieterse**-appeal judgment, the protection of section 63 is not relevant. (My emphasis)

[46] The same principles were also stated and discussed by Robyn Wynne in an article titled "Important reasons why an Investment in a Life Insurance Policy can Protect an Investor, Insurance and Tax, Lexis Nexis, Vol. 28, No. 4, December 2013, at paragraph 9 thereof.

[47] The aforesaid principles were also discussed and confirmed in two very insightful articles:

1. Z Mabe and E Mbiriri, 'The Payout of a Life Insurance Policy into an Unrehabilitated Insolvent's Estate: Malcolm Wentzel v Discovery Life Ltd: in re Botha v Wentzel (1001/19) [2020] ZASCA 121 (2 October 2020)', PER/PELJ 2022(25)- DOI.

2. M Roestoff and A Borraine, "Is Genomineerde Begunstigdes ingevolge Lewensversekeringspolisse Uitgesluit van Beskerming teen Insolvensie? Wentzel v Discovery Life Limited: In re Botha NNO v Wentzel 2021 (6) SA 437 (SCA)", 2022 (85) THRHR, at p.408 top. 421.

[48] Furthermore, in **Mars: The Law of Insolvency in South Africa**, 10th Edition, 2019, Jutastat, E Bertelsmann *et al*, p.214 - 217, at *paragraph* 10.2.1, the aforesaid principles are similarly stated:

"Section 63 of the LTIA applies only to situations where the protected policy holder (and/or his or her estate) is also the beneficiary under the relevant policy, although the insured life may be his or her own life. or the life of a spouse. Then s 63 will apply, and the relevant policy will be protected in favour of the protected policy holder (and will not form part of his or her insolvent estate), or the specified family members. Prior to the amendment of s 63, the trustee of the insolvent estate would have been entitled to claim any amount exceeding the R50 000. Presently, however, a claim would be relevant only if the policy was taken out to defraud creditors, as contemplated by s 63(4).

Insurance contracts structured as a stipulation in favour of a third party, or where the beneficiary is someone other than the 'policy owner'. will exclude the application of s 63 of the LTIA. The third-party beneficiary will then be entitled to all the policy proceeds, to the exclusion of the insolvent estate. For example, if the insolvent debtor is the 'policy owner', and the life insured is his or her own, or the life of his or her spouse, but the beneficiary is a person other than the insolvent 'policy owner' (such as his or her spouse, child or other third person), s 63 of the LTIA will not apply. The beneficia

(spouse, child or third person) will be entitled to all the policy proceeds if the event that is insured against occurs. Thus the protection envisaged by s 63 of the LTIA relates only to those policy benefits described in s 63(1) 'provided or to be provided to a *person*' under one or more of the policies referred to in that section in which *that* person or his or her spouse is the life insured. If those policy benefits are provided or to be provided to *another person*, the application of s 63 is excluded." (My emphasis)

Conclusions:

[49] I consequently come to the following relevant conclusions:

1. The word "*person*" in section 63 of the LTIA is to be interpreted to be a reference to the policyholder and likewise the words "*his/her*" and "*he/she*" are linked to the word "*person*" and are consequently also to be interpreted to be references to the policyholder.
2. Section 63 is only applicable in instances where the policyholder, or his spouse, is the life insured and the said policyholder is also the beneficiary in terms of the policy.
3. In an instance where a third party, that is somebody else than the policyholder, is appointed as beneficiary and the beneficiary accepts the appointment upon the death of the policyholder, section 63 is not applicable.

The separated issue:

[50] In the present matter, where the deceased as policyholder appointed Nelly as beneficiary, which appointment Nelly accepted upon the deceased's death, section 63 is not applicable.

[51] Therefore, in relation to the separated issue, I have to find that the benefits of the long-term life insurance policy received by Nelly are not protected in terms of

the provisions of section 63 of the LTIA.

Obiter:

[52] It therefore seems that the action will have to be determined on the basis of the Insolvency Act, combined with the relevant principles applicable in circumstances where the parties were married in community of property and the joint estate was sequestrated after the passing of the deceased. However, it must be clear that I do not make any finding in this regard, since I was not called upon to do so.

Costs:

[53] As indicated earlier in the judgment, the parties agreed that should I find in favour of the plaintiffs' interpretation of section 63 of the LTIA, then costs should be awarded to the plaintiffs in respect of the separated issue.

[54] However, in my view, my findings do not fall within the ambit of the aforesaid agreement, in that:

1. Although I do find in favour of the plaintiffs' interpretation that the word "*person*" in section 63 of the LTIA is to be interpreted to be a reference to the policyholder and likewise that the words "*his/her*" and "*he/she*" are also to be interpreted to be references to the policyholder; and
2. Although I agree with the plaintiffs contention that, in circumstances where section 63 is indeed applicable, upon the policyholder's death the policy benefits are protected only against the debts of the policyholder;
3. I, however, substantively differ from the plaintiffs interpretation of section 63 in so far as it was the plaintiffs case that the said section is applicable in the circumstances of the present matter where a third party was appointed as beneficiary and accepted the appointment upon the policyholder's death and received payment of the policy benefits directly and not via the estate of the deceased;

4. Since, according to my finding, section 6;3 of the LTIA is not applicable to the present-matter.

[55] In the circumstances I deem it apposite that the costs in respect of the determination of the separated issue stand over for later adjudication.

[56] For the aforesaid reasons I made the order already cited at the beginning of the judgment.

C. VAN ZYL, J

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