IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / [redacted].

(2) OF INTEREST TO OTHER JUDGES: YES / [redacted]

(3) REVISED

6 May 2019

DATE SIGNATURE

CASE NUMBER:3O934/2018

In the matter between:

MALCOLM WENTZEL	**APPLICANT**

and

DISCOVERY LIFE LIMITED	**FIRST RESPONDENT**
JOACHIM HENDRIK BOTHA N.O.	**SECOND RESPONDENT**
REINETTER STEYBURG N.O.	**THIRD RESPONDENT**
ZOLILE ABLE DLAMINI N.O.	**FOURTH RESPONDENT**
THE MASTER OF THE HIGH COURT	**FIFTH RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] During May 2018 the applicant, an unrehabilitated insolvent, launched two applications. In the first application, which is the present one (Case 30934/2018) he seeks declaratory relief and, in the second application (Case 30935/2018) he applied for his rehabilitation. The latter application was later withdrawn by him in January 2019.

[2] The relief sought by the applicant is that it be declared that he is the owner and beneficiary of policy 5130640002 resulting from an insurance contract entered into with the first respondent; that the first respondent in terms of the contract, be ordered to pay the total proceeds of the policy to him and that the proceeds not be made payable to the joint trustees ('trustees') of his insolvent estate. The first respondent did not oppose the application and abides the decision of the court, however, the second to the fourth respondent opposed it.

[3] The trustees issued a counter-application in their respective capacities, seeking a declaratory order that they as trustees of the unrehabilitated insolvent estate were intitled to the proceeds of the life policy payable by the first respondent.

[4] Despite being responsible for the administration of the insolvent estate, the fifth respondent did not favour the court with a report in both applications.

BACKGROUND

[5] The applicant and his wife Lizane Wentzel were married to each other in community of property on 25 August 2007. The applicant entered into an insurance contract with the first respondent, which was registered under policy number 513064002 and the inception date thereof was on 1 January 2012. He took out an insurance on the life of his wife and appointing himself as beneficiary of the proceeds of the policy in the event of her

death. The same policy also insured his life and appointed his wife as beneficiary in the event of his death. Lizane Wentzel died on 16 April 2017.

[6] The joint estate of the applicant and his late wife was provisionally sequestrated by order of court on 20 February 2012, and the said order was confirmed on 3 April 2012. The second to the fourth respondents were appointed trustees ('trustees') of the insolvent estate on 20 September 2012. A First and Final Liquidation and Distribution Account dated 24 January 2014 in the joint insolvent estate was filed by them and confirmed by the fifth respondent on 11 July 2014, (copies are annexed).

[7] On 9 May 2017 the applicant as nominated beneficiary to the insurance policy claimed and accepted payment of the proceeds of the insurance policy amounting to R5 240 345.56. The first respondent informed him that the proceeds would be paid over to the trustees of the insolvent estate and he objected. The trustees insisted upon payment being made to the insolvent estate, that is, to them because neither the applicant or his late wife had been rehabilitated when such proceeds became payable by the first respondent.

[8] The applicant averred that the proceeds were payable to him because the first and final liquidation and distribution account in the insolvent estate had been confirmed therefore for all intents and purposes, the administration of the insolvent estate had been finalized and the demand by the trustees was not supported by the present legal position at South African Law.

[9] The trustees averred that three claims were lodged and proved by creditors as reflected in the first and final liquidation and distribution account confirmed by the fifth respondent. Standard Bank of South Africa had two secured claims of R2 091 857.91 and R518 016.86 respectively and Alert Staal (Pty) Ltd had a concurrent claim of R2 958 043.08. After realization of the assets of the insolvent estate a dividend was distributed to the creditors in order of preference amounting to R2 161 038 99, leaving a deficiency of R3 480 986,88.

[10] According to the trustees neither the applicant and / or Lizane Wentzel (prior to

death) had successfully applied for their rehabilitation, the proceeds of the policy were therefore payable to the insolvent estate. Their stance was that the estate of the insolvent remained vested in the trustees until such time that the insolvent is either re-vested therewith pursuant to a composition or the rehabilitation of the insolvent, provided that any property as as contemplated in section 25 of the Insolvency Act 24 of 1936 ('the Act'), which immediately before rehabilitation vested with the trustees, remains so vested in them for purposes of realization and distribution to creditors. This remained the position held by the trustees even though the marriage between the applicant and his late wife was *ex lege* dissolved by death. This position was communicated to the applicant and the first respondent.

[11] They contend that the present declaratory application which precedes the application for rehabilitation seeks to alter the effects of sequestration. The creditors who had proven claims which still remain unpaid in as far as the deficiency was concerned, stood to be prejudiced in their rights to be paid should this application succeed. A point *in limine* was raised of non-joinder in that such creditors had a direct and substantial interest in the application and should have been joined. The application should therefore be dismissed on account of non-joinder or that the applicant should be directed to join such creditors.

[12] In their counter application the trustees reiterate the position that the applicant as an unrehabilitated insolvent remained as such even at the time when the proceeds of the policy became payable to him. The counter application is premised on the terms of section 25 (read with sections 20, 23 and 24) of the Act. The rehabilitation application was opposed on the basis that applicant failed to make a full and frank disclosure of this application and that he stood to receive a substantial amount of money from the first respondent.

[13] The applicant's reply to the main application and opposing affidavit to the counter application confirmed the common cause facts of his position as unrehabilitated insolvent and, that together with the trustees they sought declaratory relief claiming entitlement to the proceeds of the policy. When the trustees intervened in the rehabilitation application it was agreed with them not to proceed with the said application until this application inclusive of the counter applications were finalized.

[14] The applicant contends that the former joint estate was dissolved at the death of his wife on 16 April 2017 and the sequestrated and insolvent joint estate to which the trustees were appointed was dissolved *ex lege* on date of death and the proceeds of the insurance policy only became payable on 9 May 2017.

[15] In as far as it related to the deficiency of the concurrent claim of Alert Staal (Pty) Ltd ('Alert Staal') and pursuant to an insolvency enquiry in the insolvent estate of Zencron Site & Maintenance CC, (Zencron), where applicant was a member, he contended that an agreement was entered into with the liquidator in 2011 for payment of R900 000.00. The applicant understood that the monies were to secure payment to this creditor and because the proceeds of the policy were not payable into the insolvent joint estate, none of the creditors of such estate had any interest in this application. He was under no obligation to give notice of this application to any of the creditors. The point *in limine* on non-joinder of the creditors had no merit especially that the trustees had also not themselves cited or joined the creditors in their counterclaim. The point *in limine* stood to be dismissed with costs.

[16] According to the trustees Alert Staal was not a party to the agreement with the liquidators of Zencron and, the R900 000.00 was not used to liquidate any debt in the applicant's insolvent estate.

THE LAW

[17] Mr Heyns contended that the adjudication of this matter was based on the trite principles that the joint estate of the parties married in community of property is dissolved by *"death of one or both of the spouses, by divorce, by an order of division, or by the change in the matrimonial property system in terms of section 21 of the Matrimonial Property Act or death"* and that consequently the dominium of each spouses vests in that spouse on dissolution; *Corporate Liquidators (Pty) Ltd v Wiggill* 2007 (2) SA 520.

[18] I agree with such submission. However, before a share in the joint estate is distributed, the interested parties report the estate to the Master and an executor is appointed to administer the estate of the deceased person. In this instance, the estate of the

late Lizane Wentzel even though she died insolvent would have to be administered. On instructions of the Master the executor calls for the lodgement of claims against the estate and the liabilities of the joint estate are paid before the remainder or balance of the assets of the joint estates are distributed. The allocation is first to the half share of the surviving spouse, before the other half share of the deceased is dealt with in terms of a will or laws of intestacy. It has always been the position that where a beneficiary has been appointed the insurance policy would be paid to such beneficiary and where none is appointed the proceeds would be paid into the estate.

[19] The question that has to be answered is what effect does the death of the applicant's wife have on the joint estate which was sequestrated. Mr Heyns contends that the trustees only vested with the assets of the insolvent joint estate which 'was terminated or became dissolved on 16 April 2017'. As I see it, while the joint estate is dissolved by death, the status of the applicant and that of his late wife is not changed by her death, until they are released from such as provided in the Act by rehabilitation. It is possible for a surviving insolvent and the estate of a deceased insolvent to acquire assets and, in respect of the latter it is possible for his/her estate to be reported as that of the late so and so who was a party to a marriage in community of property which was sequestrated prior to her death. It seems as contended by the trustees, that the acquisition of the proceeds of the policy present problems for applicant as an unrehabilitated insolvent in relation to the trustees and creditors in the insolvent joint estate.

[20] On sequestration an insolvent is divested of his/her estate which vests in the Master until a trustee is appointed, where after it vests in such trustee, section 20 (1)(a) of the Act. Section 20(2)(b) read with 20(1)(a) provides that the insolvent estate includes all property movable or immovable at date of sequestration, including all property acquired or accruing to the insolvent during sequestration, except as otherwise provided in section 23 of the Act. Sections 79 and 82 (6) also provide for exclusions and or exemptions from the general application.

[21] The trustee remains vested with the insolvent estate until it is re-vested in the

insolvent by way of composition as provided in section 119 of the Act or until the insolvent is rehabilitated in terms of section 127 or 127A of the Act. In *Moodley N.O. v Milne N.O.* 1965 (1) SA 154 (D) James J said at 160 A-C:

> "In my judgement nothing which Mr Gurwitz has urged disturbs Mr Didcott's basic submission that the estate of an insolvent vests in the trustee in terms of section 25(1) of Act 24 of 1936.......Subject to certain statutory exemptions ....subsequently acquired assets vest in the Trustee, see section 23 (1) of Act 24 of 1936, and in my judgment such subsequent acquired assets will only become the property of the estate if they are included in the estate which is re-vested in terms of a deed of composition or if they are the subject of a special order to that effect made by the court on occasion of the insolvent's rehabilitation....The fact that the insolvent is dead would appear not to be a bar to an order of rehabilitation being granted or to an order being applied for at that stage directing that certain assets should fall into the deceased estate. But in such a case the rules regarding notice to creditors and the trustees would still have to be observed."

[22] It is trite that on sequestration a *concursus creditorum* is established and those creditors who have lodged and proved claims, commit themselves to the administration of the insolvent estate by the trustee under the supervision of the Master. No single creditor may therefore enter into any transaction with the debtor that has the effect of prejudicing the body of creditors; Walker v Syfret NO 1911 (AD) 141. The general body of creditors understand the possibility of not being paid in full, but that they may be paid a portion of their claims, the trustee paying according to the scheme provided for in the Act as is applicable to the different categories of creditors. Where there is a deficiency there always remains the possibility of more assets if found, being realised and distributed by the trustee and this in my view is applicable also to the estate of the deceased.

[23] The general body of creditors look to the trustee who has the responsibility to protect their interests in the insolvent estate and in light of a provision in the Act, which allows for creditors meetings to be held and for creditors to prove claims and, sometimes to attend to other business or issues relating to the administration of the insolvent estate. The general body of creditors will always have an interest in the affairs of the insolvent related to his/her

assets before re-vestment as provided in the Act.

[24] In as far as the point *in limine* on non-joinder was raised by the trustees, Ms Lottering contended that the insolvent's election to launch the two separate applications did not absolve him from giving notice to the creditors. I agree, as found in the authorities cited by her in her heads of argument, that the creditors should have been joined and properly notified; Ex Parte Steel 1948 (1) SA 1203 (1) SA 1203 (W) at 1204 and Ex Parte Potgieter 1967 (2) SA 310 (T) at 311 D-E Hiemstra J stated:

> "Dit skyn of .....geoordeel het dat die Transvaalse afdeling in Ex Parte Steel ook bedoel het dat daar persoonlike betekening van 'n kennisgewing met volledige besonderhede aan bewese en onbewese skuldeisers moet wees. Die vorm van kennisgewing word egter nie daar vermeld nie en ek is van oordeel dat dit 'n saak van goedunke van die Hof moet wees. In baie gevalle sal persoonlike betekening aan alle skuldeisers 'n groot beslommernis of self onmoontlik wees."

[25] Although *Potgieter supra* dealt with an application for rehabilitation, which included an application to declare him owner of immovable property purchased during sequestration, it reaffirms the importance of notification to the creditors by an insolvent and the need for their joinder. The applicant in seeking a declaratory order in respect of the asset he seeks relief for, would therefore be required in terms of the authorities cited by Ms Lottering, to give notice to the creditors ("bewese en onbewese skuldeisers). Although Mr Heyns disagreed that such notice was required he made a concession that provisional relief could be granted by giving notice of the application to the creditors who had lodged and proved claims, so as to give them an opportunity to respond to the application.

[26] As I see it, the filing of a first and final liquidation and distribution does not necessarily mean that the trustees have completed their duties in the administration of the joint insolvent estate. The confirmation of the liquidation and distribution account only meant that after examination of the said account by the Master, it had lain for inspection without objection, and that the Master had confirmed that the trustees could pay to the creditors the dividend reflected in such account. Such confirmation has to be advertised.

[27] The trustees are therefore not barred from filing further accounts, with approval of the Master in respect of other assets which might later vest in them or acquired by the insolvent before the rehabilitation of the insolvent and their discharge from their duties as trustees. Even where there is re-vestment of assets in terms of a composition the trustees have to file an account reflecting such composition approved by the creditors.

The Proceeds of the Insurance Policy.

[28] Mr Heyns contends that in terms of the legal principles in *Pieterse v Shrosbree N.O. and Others, Shrosbree N.O. Love and Others* 2005 (1) SA 309 (SCA) as at paragraphs 8 to 12, the proceeds of the life insurance policy are payable in terms of the contract between the life assured (the deceased) and the first respondent directly to the nominated beneficiary irrespective of whether that estate was solvent or insolvent. *Naidoo v Discovery Life Limited and Others* (2002) /2017 ZASCA 88 (31 May 2018) at paragraph 9 confirmed that a risk-only policy containing a *stipulatio alteri* is not an asset in the estate of the policy holder and therefore is not an asset in the joint estate in a marriage in community of property.

[29] This is in opposition to the view of the trustees that the proceeds are payable to them and Ms Lottering contends that *Pieterse supra* was not applicable in this application in as far as section 63 of the Long Term Insurance Act 52 of 1988 was concerned because it ' does not purport to divert the proceeds of an insurance policy from a nominated beneficiary to the insolvent estate of the deceased policy holder."

[30] The distinguishing factor between the present application and *Pieterse supra* is that in the latter matter the estate of the deceased only became insolvent after death. In this application the principles in *Pieterse supra* are of assistance in as far as they shed light on the relationship established in a contract of life insurance between the proposer, the insurer and the beneficiary as stated in paragraph 9:

> "[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 the 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 *stipulatio alteri* (Ellison Kahn: Extension Clauses in Insurance Contracts (1952) 69 SALJ 53 and 56) Thus the beneficiary, by adopting the benefit, becomes a party to the contract (see Total South African (Pty) Ltd v Bekker N.O. 1992 (1) SA 617 (A) 625D-G)

[31] My understanding of the Act and of the relationship that is created as described above, is that it is only the appointed beneficiary who may demand and accept or refuse the benefit offered by the insurer and such call cannot be made by a trustee of his insolvent estate directly to such insurer. It is common cause that the applicant took the initiative without notifying interested parties to demand and accept such benefit. As I see it, such benefit when paid over to the insolvent by the insurer (and as the insurer is obliged to pay) now represents an asset in the hands of the insolvent which is not protected, in that it is not exempted or excluded by the laws of Insolvency from reach by the creditors of his insolvent estate. The trustee remains in control as envisaged in section 25 of the Act as stated in *Moodley N.O.supra.* Therefore, when the insurer makes payment, the applicant must hand over such payment to the trustee as administrator of his insolvent estate because he has acquired an asset. Alternatively, the trustee has a right to claim from the applicant because as stated before the proceeds are an asset acquired by the insolvent before his rehabilitation and before re-vestment as envisaged in the Act.

[32] The first respondent has in correspondence and as averred in the founding affidavit confirmed that the benefit has been claimed and accepted and that it abides the decision of the court. Therefore, the applicant who is not incapacitated from contracting as a result of his insolvent status, by claiming and accepting the benefit is still obliged to have this acquisition administered by the trustee as an unrehabilitated insolvent and in as far as it pertains to the creditors of his insolvent estate. The trustee remains answerable to the Master and creditors until discharged. The trustees claim does not arise in a *stipulatio alteri* but as a result of the laws of insolvency as explained above.

[33] It is my further view that the trustees having filed a first and final liquidation and distribution account, a formal process needs to be engaged to notify the Master that a situation has arisen whereby a second liquidation and distribution account might be lodged after a process has been commenced to engage the creditors. Both the main and the counter applications have to be dismissed to allow the trustees to engage such process because the applicant as an insolvent has not been rehabilitated and the trustees have not been discharged.

[34] In the result the following order is granted:

1. The main and counter application are dismissed.
2. Each party has to pay their own costs which include the costs of opposition.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**16 APRIL 2019**
JUDGMENT RESERVED ON	:	**16 APRIL 2019**
ATTORNEYS FOR THE APPLICANT	:	**DAY ATTORNEYS INC.**
ATTORNEYS FR THE RESPONDENTS	:	**TINTINGERS INC.**