CASE NO. 541/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

A R Fairleigh NO — Appellant

and

M Whitehead — First Respondent

The Master of the Supreme Court — Second Respondent

Before: Hefer ADCJ, Smalberger, Olivier, Schutz JJA and Mthiyane AJA

Heard: 1 September 2000

Delivered: 29 September 2000

Interpretation and operation of the since-invalidated ss 44(1) and (2) of the Insurance Act 27 of 1943, which dealt with insurance policies effected or ceded in favour of a wife.

W P SCHUTZ

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J U D G M E N T

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SCHUTZ JA:

[1] The issue in this appeal is whether the deeming provision contained in s 44 (2) of the Insurance Act 27 of 1943 ("the Act") came into operation in respect of certain life policies before 27 April 1994 (when the interim Constitution came into force). If it did, then the proceeds of those policies (save for an exempted sum of R30 000) fell into the estate of the deceased, Mr Geoffrey Dale Whitehead ("the deceased"), who died at Durban on 10 March 1994 (that is before the interim Constitution became law). If the deeming provision did not operate, then the proceeds of the policies will remain with his widow, Mrs Margaret Whitehead

("Mrs Whitehead") in whose favour they were taken out by the deceased, more than two years before his death. The Whiteheads were married out of community of property in 1960. She is the respondent on appeal, having successfully opposed an application for payment of the proceeds of the policies, brought by the deceased's executor, Mr Alan Robert Fairleigh ("the executor") before Alexander J in the Durban and Coast High Court. Leave to appeal was granted by the court *a quo.*

[2] The significance of the interim Constitution lies in the decision of the Constitutional Court in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) in holding that subsections 44 (1) and (2) were invalid for being contrary to the equality clause (s 8). The declaration of invalidity was to have effect from 27 April 1994. For the executor the decision meant that, whereas before 27 April he would have been entitled to rely on the appropriate deeming clause contained in ss 44 (1) or (2), thereafter he had to show that one of those clauses had already vested a right in him

by that date.

[3] The relevant parts of s 44 read:

> "44(1) *If the estate of* a man who has ceded or effected a life policy . . . *has been sequestrated* as insolvent, *the policy* [or its proceeds] *shall be deemed to belong to that estate*: Provided that, if the transaction in question was entered into in good faith and was completed not less than two years before the sequestration -
>
> (a) by means or in pursuance of a duly registered antenuptial contract, the preceding provisions of this sub-section shall not apply . . .;
>
> (b) otherwise than by means or in pursuance of a duly registered antenuptial contract, *only so much* of the total value of all such policies [or their proceeds] as exceeds *thirty thousand rands shall be deemed to belong to the said estate*.
>
> (2) *If the estate* of a man who has ceded or effected a life policy as aforesaid, *has not been sequestrated*, *the policy* [or its proceeds] shall, *as against any creditor of that man, be deemed to be the property of the said man* -
>
> (a) *in so far* as its value, together with the value of all other life policies ceded or effected as aforesaid [and their proceeds] *exceeds* the sum of *thirty thousand rands*, if a period of two years or longer has elapsed since the date upon which the said man ceded or effected the policy; or
>
> (b) *entirely*, if a period of less than two years has elapsed between the date upon which the policy was ceded or effected, as

aforesaid, *and the date upon which the creditor concerned causes the property in question to be attached in execution of a judgment or order of a court of law*.

(3) When a woman, who is married in community of property, *owns a life policy* . . . which falls outside that community . . ., but which may lawfully be wholly or partly attached in execution of a judgment given against her husband, that policy, . . . shall not be so attached by any creditor of her husband, unless the assets which they own jointly are insufficient to satisfy the creditor's claim, and if the policy . . . is used in payment of any such claim, the woman shall be entitled to a refund . . . out of any policy or money *belonging to her husband* which is withheld from his creditors or the trustee of his insolvent estate in terms of section *thirty-nine.*"

(Emphasis supplied.)

[4] The executor was appointed on 21 November 1994. On 28 August 1995 he made demand on Mrs Whitehead to pay over the proceeds of the policies (save for R30 000 to which she was in any event entitled.) On 16 November 1995 he gave notice to the creditors of the estate in terms of s 34(1) of the Administration of Estates Act 66 of 1965 ("the Estates Act") that unless otherwise instructed he intended to administer the estate as if he were a trustee in insolvency. The creditors

were content that he should do so. Accordingly a "deemed state of sequestration" came into operation in December 1995. At no stage has the estate been sequestrated by the court.

[5] Section 44 dealt with two situations in which insurance benefits conferred on a wife by her husband could be utilized for the benefit of his creditors, either to the full extent of the benefit or to so much of it as exceeded R30 000. The first situation was where the husband's estate "has been sequestrated" (s 44 (1)). The second was where his estate "has not been sequestrated" (s 44 (2)). Assuming for the sake of argument that the executor's notification operated as a sequestration for the purposes of s 44, the executor cannot rely upon it now, because the notification took effect long after the section ceased to be law (December 1995 as against April 1994). That does not mean, however, that a s 44 (1) *situation* did not come into existence, even if too late for the executor's purposes. As the deceased's estate was in fact insolvent, it was only a matter of time before it would be sequestrated

(in the technical sense) or administered as insolvent under s 34 of the Estates Act. So far I have assumed that a s 34(1) notification satisfies the "has been sequestrated" pre-condition for the operation of s 44 (1). In *Hugo NO v Lipkie* 1961 (3) SA 66 (O) it was held that the predecessor of s 34(1) (s 48 (3) (b) of the Administration of Estates Act 24 of 1913) did not satisfy the requirement. The main reason for so holding was that the former section did not fix a time when the process of realisation and distribution would begin (at 70 G-H). The current section does provide for a fixed time, so that this problem in interpretation has fallen away. Moreover, since *Hugo's* case, this court has held that the procedures under the old Estates Act had an effect similar to a sequestration order, even though there was no order of court: *Ward v Barrett NO and Another NO* 1963 (2) SA 546 (A) at 552 B-H. See also Gordon & Getz on *The SA Law of Insurance* 4 ed 349 - 350. I do not think that there is any reason to treat s 44 as being narrowly focussed upon forms of procedure. It is concerned rather with distinguishing between the

situation where an estate is being administered as insolvent and the situation where it is treated as solvent. Accordingly I conclude that s 44 (1) would have applied in this case had the subsection not been declared invalid. The executor has not based his appeal on s 44(1).

[6] But the conclusion that I have reached concerning s 44(1) leaves unanswered the further question, whether s 44 (2) may have operated so as to vest the policies in the deceased before his death on 10 March 1994, so that they passed to his deceased estate before the coming into operation of the interim Constitution on 27 April 1994, which, as the Constitutional Court later declared, had the effect of repealing s 44 because of its inconsistency with the equality clause.

[7] Two opposed interpretations of s 44 (2) have been put forward. For the executor, emphasis is placed on the words in s 44 (2) ". . . the policy . . . shall . . . be deemed to be the property of the said man [the husband] . . . ." The effect of these words, so it is argued, is that from the moment that a husband benefits his

wife with a policy, the policy is deemed to be the property of the husband. The provisions of subsections (a) and (b) of s 44 (2) are not pre-conditions to such deeming, but serve merely to determine how much of the policy falls into the husband's estate. This situation continues to prevail until such time as the husband may be sequestrated, in which case the policy falls into his insolvent estate under s 44 (1). I do not agree with this argument. My reasons will be set out later.

[8] The contrary argument is that the deeming provision does not operate from the time that the wife is benefitted, but only if and when a creditor attaches the policy in execution, in order to obtain payment of a judgment debt owed him by the husband. The subsection is intended to give speedy relief to a creditor who would rather not follow the longer and more expensive route of sequestration.

[9] My reasons for accepting the latter argument, advanced on behalf of Mrs Whitehead, are these:

First, the words used in the section . Section 44 (2) does not read "shall be

deemed to be the property of the said man." It reads "shall, as against any creditor of that man, be deemed to be the property of the said man". By contrast with the *concursus*-orientated wording of s 44 (1) "shall be deemed to belong to that estate", there is a specific deeming conceived in favour of a particular creditor. Further, it is implicit that a particular creditor at a particular time is envisaged. This is so because without a fixed time the periods of more than or less than two years could not be established on the calendar. The executor's argument, on the other hand, might involve conclusions which it is difficult to suppose were intended. If the deeming operated when the wife was first benefitted, but the husband then had no creditors, one would have to conclude that the expression "as against any creditor" was redundant. Or if one has to wait for the deeming to operate only when a creditor is acquired, is the deeming undone when the husband again becomes creditor-free? And so on.

[10] Secondly, if the husband is deemed to be owner from the outset, what rights

could the wife have? None, one must suppose, except some ultimate reversionary right. Yet the section itself envisages that she might convert the policy into other assets. Thus, no doubt, she might surrender the policy. Is she to be denied the right to pledge her policy with a bank in order to obtain an overdraft? How can such actions be squared with the policy "belonging" to the husband? That it is she who owns the policy until its attachment by the husband's creditor is confirmed by the express words of s 44 (3), in its opening lines, "when a woman who is married in community of property . . . owns a life policy . . ." The purpose of this subsection is to bring about that, where there are joint assets, the burden of execution should as far as possible fall upon them, and not upon the policy "owned" by the wife outside the community. See also the reference to "the policy . . . belonging to her husband" towards the end of the subsection. A practical interpretation of s 44 (2) leads to the conclusion, in my opinion, that the wife and not the husband owns a policy made over by him to her, until such time as a

creditor attaches it in payment of his judgment debt. To interpret s 44 (2) as enjoining an anticipatory nullification as a step precursory to an event that in all probability will never occur (attachment by a creditor), might seriously hamper the wife whilst not conferring upon creditors any benefits beyond those obtained by attachment.

[11] Thirdly, the calculation of the period of less than two years provided for in s 44 (2) (b) depends necessarily upon there being an attachment by a creditor. Thus if no creditor chooses to attach, this part of s 44 (2) cannot operate. As the amount deemed to belong to the husband is dependent upon whether a period of more than or less than two years has run, it would mean that subsection 44 (2) is substantially inoperable, unless an attachment is postulated.

[12] Fourthly, the argument for the executor must involve that at the time that the wife is benefitted the amount of the benefit is unknown, because it cannot be known at that stage whether the wife will receive the benefit of the R30 000, which may be

allowed to her. Or is it to be concluded that initially the full amount of the policy falls into the husband's estate, but after two years R30 000 disappears out of it to find its way into the wife's estate? An unlikely intention, it seems to me.

[13] Finally, I think there is substance in the remark of Hartzenberg J in *Kitshoff NO v Brink and Andere* 1997 (4) SA 117 (T) at 126 F - H that the very fact that there is a deeming (the Afrikaans text of s 44 (2) reads "word die polis . . . beskou as die eiendom van daardie man") indicates that the policy is not in fact owned by the husband. The deeming provision, it seems to me, is designed to create the fiction that the husband never made over the policy to the wife, so that his creditor may attach it, rather than to vest ownership in the husband against all comers and at all times, as the executor contends happened.

[14] My conclusion is that s 44 (2) cannot operate unless a creditor makes an attachment. No attachment was effected before 27 April 1994. Therefore nothing vested in the executor before the law upon which his case was based was

consigned to history.

[15] The appeal is dismissed with costs.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
HEFER ADCJ
SMALBERGER JA
MTHIYANE AJA

**OLIVIER JA**

**[1]** It happens from time to time that the insolvency of the estate of a person manifests itself onlyafter his death. Those interested in the winding up of the estate can then proceed in one of three ways: a creditor may apply to court for the compulsory sequestration of the estate; the executor may surrender the estate to the court as insolvent, thereby achieving its sequestration; and thirdly the executor may follow the "informal" route of s 34 of the Administration of Estates Act 66 of 1965 ("the 1965 Estates Act"). This section creates the machinery whereby the executor can give notice to creditors that the estate is insolvent. Unless a majority in number and value of all the creditors instruct him in writing within a period (not less than fourteen days) specified in the notice, to surrender the estate under the Insolvency Act 24 of 1936 ("the Insolvency Act"), the executor must proceed to realize the assets in the estate and to distribute the proceeds in the order of preference prescribed under the Insolvency Act in the case of a sequestrated estate.

**[2]** In the ordinary course the question, whether the end result of the informal route described above amounts to a "sequestration", would seem to be a nice but wholly academic one. But sometimes it assumes great practical importance. This is such a case.

**[3]** Mr Geoffrey Dale Whitehead and Mrs Margaret Whitehead were married to each other out of community of property on 12 November 1960. The marriage was terminated when Mr Whitehead died on 10 March 1994. I will refer to him as the deceased and to his widow as the first respondent.

**[4]** While married, the deceased, during the period 1980 - 1991, effected various life policies on his own life and nominated the first respondent as the beneficiary in each. After the death of the deceased, the insurance companies concerned paid the proceeds of the policies to the first respondent as follows:

1 Old Mutual Policy No 7065929: R45 670,00 paid on 7

April 1994;

2 Federated Life Insurance Company Limited, Policy VA202437: R59 836,00 paid on 21 April 1994;

3 Standard General Insurance Company Limited Policy No 846624: R565 173,05 paid on 25 April 1994.

**[5]** On 21 November 1994 the appellant was appointed executor of the estate of the deceased, after the resignation of a previous executor. As the estate was unable to meet the claims of its creditors, the appellant, on 16 November 1995, gave notice to the creditors in terms of s 34 (4) of the 1965 Estates Act of such insolvency. The appellant was not instructed by creditors to surrender the estate. No other creditor applied for its compulsory sequestration. The appellant pursued the informal route described above. The deemed date of sequestration, according to s 34 (1) of the 1965 Estates Act, occurred in December 1995.

**[6]** The estate being unable to pay the claims of its creditors, the appellant now turned his attention to the various sums of money paid by the insurance companies to the first respondent. He decided to claim them for the benefit of the estate. He based his claim on the provisions of s 44 (1) and (2) of the Insurance Act 27 of 1943 ("the Insurance Act") which, at all times relevant hereto, read as follows:

"(1) If the estate of a man who has ceded or effected a life policy in terms of s forty two or forty three **has been sequestrated** as insolvent, the policy or any money which has been paid or has become due thereunder or any other asset into which any such money was converted shall be deemed to belong to that estate: Provided that, if the transaction in question was entered into in good faith and was completed not less than two years before the sequestration -

(a) by means or in pursuance of a duly registered antenuptial contract, the preceding provisions of this subsection shall not apply in connection with the policy, money or other asset in question;

(b) otherwise than by means or in pursuance of a duly registered antenuptial contract, only so much of the total value of all such policies, money and other assets as exceeds thirty thousand rand shall be deemed to belong to the said estate.

(2) If the estate of a man who has ceded or effected a life policy as aforesaid, **has not been sequestrated**, the policy or any money which has been paid or has become due thereunder or any other asset into which any such money was converted shall, as against any creditor of that man, be deemed to be the property of the said man -

(a) in so far as its value, together with the value of all other life policies ceded or effected as aforesaid and all moneys which have been paid or have become due under any such policy and the value of all other assets into which any such money was converted, exceeds the sum of thirty thousand rand, if a period of two years or longer has elapsed since the date upon which the said man ceded or effected the policy; or

(b) entirely, if a period of less than two years has elapsed between the date upon which the policy was ceded or effected, as aforesaid, and the date upon which the creditor concerned causes the property in question to be attached in execution of a judgment or order of a court of law." (My emphasis)

**[7]** In March 1997 the appellant launched the application now under

consideration in the Durban and Coast Local Division of the High Court against the first respondent, claiming payment of the said amounts. She opposed the application. The Master of the Supreme Court was cited as second respondent. He abides the decision of the court.

**[8]** The application was dismissed and an appropriate costs order made by Alexander J on 3 March 1998. The learned judge subsequently granted the appellant leave to appeal to this Court.

**[9]** Because of the differing legal results that emanate from the respective applications of ss 44 (1) and (2) of the Insurance Act I must, therefore, turn to the vexed question whether the end result of the steps taken by an executor of a deceased estate in terms of s 34 of the 1965 Estates Act, amounts to a "sequestration", at least for the purposes of ss 44 (1) and (2) of the Insurance Act.

**[10]** In endeavouring to find an answer to this problem, one must distinguish between the provisions of the previous Administration of Estates Act 24 of 1913

("the 1913 Estates Act") and the present 1965 Estates Act, relating to the "informal" procedure whereby an executor deals with an insolvent deceased estate.

**[11]** The relevant provision of the 1913 Estates Act was s 48 (3) (b). It read:

> "If the Master be not satisfied as aforesaid as to the value of the assets the executor shall immediately report, in writing, the position of the estate to the creditors, informing them that unless a majority in number and value of all the creditors instruct him in writing to surrender the estate, he will proceed to realise the estate and will distribute the same as if he were a trustee distributing an insolvent estate. Unless creditors to the number and value aforesaid instruct the executor within a reasonable time to surrender the estate he shall proceed so to realise and distribute the same, but nothing in this section contained shall prevent a creditor from applying to the Court for the sequestration of the estate as insolvent, and the Court may order the sequestration of the estate if satisfied that the sequestration will be for the benefit of the creditors generally."

The section did not state what the legal effect of the procedure was, except that the executor must realise the estate and will distribute the same "... as if he were a trustee distributing an insolvent estate".

**[12]** Two cases were decided in respect of the legal effects of this "informal distribution" under the 1913 Estates Act: ***Hugo N O v Lipkie*** 1961 (3) SA 66 (O),

decided by Potgieter J; and ***Ward v Barrett, N O and Another, N O*** 1963 (2) SA 546 (A), a judgment of this Court delivered by Steyn CJ.

**[13]** The very question now under discussion arose in ***Hugo N O v Lipkie***, *supra*, where it was held that the informal procedure described above was not a sequestration for the purposes of ss 44 (1) and (2) of the Insurance Act. Potgieter J stated at 70 E - H

> "But it seems also clear from the very wording of sec. 44 (1) of the Insurance Act, that the Legislature could never have had a realisation and distribution in terms of sec. 48 (3) of the Administration of Estates Act in mind when the words 'has been sequestrated as insolvent' were used. The words clearly seem to suggest that sequestration is a condition precedent to the policy belonging to the estate - in other words something must first happen before the policy is deemed to belong to the estate. If realisation and distribution in terms of sec. 48 (3) are also included in the words 'sequestrated', at what point of time in the process of realisation and distribution 'has the estate been sequestrated'? To my mind the Legislature must have had in mind a fixed point of time after which the policy becomes 'deemed to belong to that estate' and if that is so the only reasonable interpretation to be placed on the words is that the policy is deemed to belong to the estate only after it has been sequestrated by the Court."

**[14]** In ***Ward***, the executrix had by letter, dated 9 June 1960, reported that the

estate was in fact insolvent. She advised the creditors that unless instructed by them to surrender the estate formally as insolvent in terms of the Insolvency Act before 23 June 1960, she would proceed to realise and distribute it as if she were a trustee distributing an insolvent estate. She was not instructed by the creditors to surrender the estate and followed the informal route of the Estates Act. On 22 September 1960 the executrix caused a bond to be registered over an asset in the deceased's estate in favour of the appellant. Later, she refused to recognise the validity of the bond in the liquidation and distribution account. The appellant unsuccessfully sought the assistance of the Master. She then applied for an order requiring the account to be amended by recognising her preference under the bond. The application was dismissed and the matter came before this Court.

**[15]** The Court dismissed the appeal. In so doing he held that although the position brought about by the application of the provisions of s 48 (3) (b) of the 1913 Estates Act, *i.e.* the informal procedure, was not in all respects equivalent to that created by a sequestration order under the Insolvency Act, it did have the

effect of initiating a *concursus creditorum*. Even in the absence of an order of court, the expiry of the date set for instructions by the creditors " ...was apparently intended by the Legislature to have a similar effect." As from that date (*i.e.* the expiry of the date set for instructions by the creditors) there was a *concursus creditorum*. In the result the executrix was not entitled to deal with an asset of the estate in such a way that one creditor received a preference above others (see p 552 B - H *in fine*).

**[16]** There are important features in the ***Ward*** case which should be kept in mind. The first is that the Court was not required to interpret the word "sequestrated". The second is that it in fact disavowed a full identification of the effect of the informal procedure under s 48 (3) (b) of the 1913 Estates Act with sequestration, notwithstanding the words in that section that the executor, in such a case, "will proceed to realise the estate and will distribute the same as if he were a trustee distributing an insolvent estate."

The third noteworthy feature is that no reference was made to ***Hugo***

***N O v Lipkie**, supra*, either in the heads of argument of counsel for the parties, or in the judgment itself.

**[17]** The 1913 Estates Act was repealed in by the 1965 Estates Act. The relevant provisions are now contained in s 34 the terms of which I have set out above. Of particular importance is the new s 34 (5), which now provides that in so far as a date of **sequestration** is relevant for the purposes of the distribution of an estate under that section such date shall be deemed to be the day immediately following the date on which the period specified in the relevant notice has expired.

**[18]** The genesis of this new section was obviously the question posed by Potgieter J in ***Hugo N O v Lipkie***, supra, *viz*: If realisation and distribution in terms of s 48 (3) of the 1913 Estate Act are also included in the word 'sequestrated', at what point of time in the process of realisation and distribution has the estate been sequestrated?

Section 34 (5) of the Estates Act now answers that question, and in doing

so it has removed the main *ratio* of the judgment of Potgieter J on this point; for it seems implausible that the legislature intended that the conclusion reached in ***Hugo N O v Lipkie****, supra,* would remain valid. To my mind, s 34 (5) gives a clear indication that the end result of the s 34 procedure is a sequestration of the estate at the moment mentioned therein. The change in wording between the 1913 and the 1965 Estates Acts on this aspect is too clear to negate, especially when seen as a response to the two decisions mentioned above.

**[19]** The first decision on the point now under consideration under the 1965 Estates Act was that of Van den Heever J in ***Miller N O v Smit*** 1986 (1) SA 320 (C).

In that case the informal route of s 34 of the 1965 Estates Act was **not** followed, but this was not a central issue in the case. What was said by Van den Heever J in respect of the interpretation of the word "sequestrated" in ss 44 (1) and (2) of the Insurance Act, must thus be regarded as *obiter.* Nevertheless the learned judge assumed that the informal route **might** have been followed. She

stated at 326 H - I:

> "According to *Ward v Barrett NO and Another NO* 1963 (2) SA 546 (A), a *concursus creditorum* would be initiated by the s 34 procedure which again in the view of many of the writers, brings s 44 (1) of the Insurance Act into operation."

The learned judge did not decide the point at all, stating expressly that s 44 (2) applied in that case - thereby accepting that there had **not** been a sequestration. The difference in the wording of the 1913 and the 1965 Estates Act was not mentioned.

This case, therefore, despite favouring the synonymity of sequestration and the informal process of s 34 of the 1965 Estates Act, can not really be regarded as authority one way or the other on the question before us.

**[20]** In the Constitutional Court case of ***Brink v Kitshoff N O*** 1996 (4) SA 197 (CC), ss 44 (1) and (2) of the Insurance Act were challenged on the basis that they discriminate unfairly against women, thereby violating s 8 of the Constitution of the Republic of South Africa Act 200 of 1993. The question of the meaning to

be given to the word “sequestrated” in ss 44 (1) and (2) of the Insurance Act was raised, but the Court, quite properly in my view, held that it had **no** jurisdiction to decide either on the question when an estate becomes entitled to the proceeds of a life insurance policy in terms of s 44 of the said Act or the question when a *concursus creditorim* is deemed to have been initiated (see par [28] of the judgment of O’Regan J). This latter question was, in terms of par 3 of the order of the Constitutional Court, referred back to the court *a quo*.

**[21]** The matter, so referred back by the Constitutional Court, came before Hartzenberg J (*sub nom* ***Kitshoff N O v Brink and Andere*** 1997 (4) SA 117 (T) ). The facts in that case were, for all intents and purposes, similar to those in the present case (see p 122 C - 123 G for a summary of the facts). In respect of the question whether a “sequestration” had taken place, Hartzenberg J solved the problem in this way: the Constitutional Court had declared invalid the deeming provisions of ss 44 (1) and (2) of the Insurance Act with effect from 27 April 1994; the estate was not sequestrated on or before that date; further, no

*concursus creditorum* had been effected in terms of s 34 of the 1965 Estates Act, because such a *concursus* would only come into existence after the expiry of the notification to creditors in terms of s 34 - this follows from the decision in ***Ward v Barrett N O and Another N O****, supra,* and because s 34 (5) of the 1965 Estates Act now specifically lays down that the day after the date of expiry of the said notification is deemed to be the date of sequestration. In the result, no sequestration or *concursus creditorum* had taken place before 27 April 1994, and, for the purposes of ss 44 (1) and (2) of the Insurance Act, there had not been a "sequestration". The learned judge then proceeded to deal with the matter in terms of s 44 (2).

**[22]** From what I have said before, in paragraphs [21], [22] and [23], it will be clear that I believe that the correct interpretation of the word "sequestrated" in s 44 (1) of the Insurance Act includes the conclusion of the informal procedure followed by the executor of an insolvent deceased estate in terms of s 34 of the 1965 Estates Act. It follows from this that Hartzenberg J was wrong, on this

aspect, in the case just discussed in holding that there had **not** been a sequestration. He did not analyse the difference between the 1913 and the 1965 Estates Acts.

**[23]** As also indicated above, I am of the view that the sequestration in terms of ss 44 (1) of the Insurance Act need not take place before the man's death. It can occur long after his death and while his estate is being administered by the executor: whether because of compulsory sequestration by a creditor; or because of voluntary surrender by the executor; or because of conclusion of the informal process in terms of s 34 of the 1965 Estates Act.

It is, therefore, wrong to say that because the sequestration in the present case occurred after 27 April 1994 (the relevance of which I will discuss just now) that there had **not** been a sequestration. It is a *non sequitur*. Such a conclusion would also fly in the face of the plain meaning of s 44 (1) of the Insurance Act. There was a sequestration, no matter when it occurred.

**[24]** Based solely on these facts and on this reasoning, I would have

concluded that s 44 (1) of the Insurance Act governs the present case, with resultant success for the appellant. S 44 (2) of the Insurance Act clearly does not come into the picture, there having been a sequestration.

**[25]** But what is the effect of the judgment of the Constitutional Court in ***Brink v Kitshoff N O*** 1996 (4) SA 197 (CC)? In that case, the challenge to the constitutional validity of s 44 (1) and (2) of the Insurance Act was successful. A declaration to that effect was called for. As always, the effect of the retrospectivity of such an order required careful consideration. The Constitutional Court, per O'Regan J, specifically limited the declaration of the invalidity of the deeming provisions of ss 44 (1) and (2) of the Insurance Act to 27 April 1994, *i.e.* the date of commencement of the 1993 Constitution. The following order was made at (221 G - I):

> "1 It is declared that ss (1) and (2) of s 44 of the Insurance Act 27 of 1943 are invalid.
>
> 2 In terms of s 98 (6) (a) of the Constitution it is ordered that the declaration of invalidity made in para 1 shall invalidate the deeming provisions of ss 44 (1) and (2) of the Insurance Act with effect from

27 April 1994, except to the extent that the operation of such deeming provisions has resulted, before the date of this order, in the payment of any money or the delivery of any asset which, but for such provisions, would not otherwise have formed part of the estate, to any creditor of the man or any beneficiary of his estate.

3 The matter of *Brink v Kitshoff N O* is remitted to the Transvaal Provincial division to be dealt with in terms of this judgment."

**[26]** The crucial order is that made in par 2. The exception mentioned in par 2 of the order is not relevant to the present matter, as no money has been paid or asset delivered to any creditor or beneficiary. The question is: what is the effect of the declaration of invalidity of the deeming provision of s 44 (1) of the Insurance Act as from 27 April 1994, in the context of the case before us?

**[27]** In my view the correct answer to this enquiry depends on whether the appellant, as executor, had acquired a vested right to claim the proceeds of the policies as property of the estate before or after 27 April 1994. If such vesting took place before 27 April 1994, his claim is not affected by the judgment; *aliter* if it vested after that date.

**[28]** It is clear that the appellant's claim under s 44 (1) of the Insurance Act could only have vested (a) after he had been appointed as executor of the deceased estate and (b) after the sequestration had occurred in terms of s 34 of the 1965 Estates Act. Both these events took place long after 27 April 1994. When the appellant's rights would have vested in the ordinary course of events, s 44 (1) of the Insurance Act was a dead letter. He could not claim under it.

**[29]** Nor can the appellant succeed under s 44 (2) of the Insurance Act. By virtue of the fact that the estate of the deceased **had been sequestrated**, he would in any event not have succeeded under s 44 (2) of that Act. But the point is academic, for - together with ss (1) - ss (2) has been rendered invalid by the order made in ***Brink v Kitshoff N O***. The claim must fail.

**[30]** In the result, I would dismiss the appeal with costs.

**P J J OLIVIER JA**