THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1001/19

In the matter between:

MALCOLM WENTZEL	**APPELLANT**

and

DISCOVERY LIFE LIMITED	**FIRST RESPONDENT**
JOACHIM HENDRIK BOTHA NO	**SECOND RESPONDENT**
REINETTE STEYNBURG NO	**THIRD RESPONDENT**
ZOLILE ABEL DLAMINI NO	**FOURTH RESPONDENT**
THE MASTER OF THE HIGH COURT, PRETORIA	**FIFTH RESPONDENT**

In re:

Cross appeal

JOACHIM HENDRIK BOTHA NO	**FIRST CROSS-APPELLANT**
REINETTE STEYNBURG NO	**SECOND CROSS-APPELLANT**
ZOLILE ABEL DLAMINI NO	**THIRD CROSS-APPELLANT**

and

MALCOLM WENTZEL	**RESPONDENT**

Neutral Citation: *Malcolm Wentzel v Discovery Life Limited and Others: In Re Botha and Others NNO v Wentzel* (Case no 1001/19) [2020] ZASCA 121 (2 October 2020)

Coram: NAVSA, MBHA and MOLEMELA JJA and EKSTEEN and UNTERHALTER AJJA

Heard: 26 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 2 October 2020.

Summary: Insolvency Act 24 of 1936 – unrehabilitated insolvent – nominated beneficiary in life insurance policy – save for narrowly defined exceptions, unrehabilitated insolvent not permitted to receive property that vests in him personally and keep it out of the reach of the trustees of the insolvent estate, even after liquidation and distribution account filed and approved – proceeds of life insurance policy vests in the trustees.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Tlhapi J, sitting as court of first instance): judgment reported *sub nom Wentzel v Discovery Life Limited and Others* [2019] ZAGPPHC 164; 2019 (6) SA 472 (GP).

1 The appellant's appeal is dismissed.

2 The first to third cross-appellants' appeal is upheld.

3 The order of the Court a quo is set aside and replaced with the following order:

'(a) It is declared that the second, third and fourth respondents, in their respective capacities as the trustees of the insolvent estate of Malcolm Wentzel and Lizane Wentzel, Master's reference number T1179/12, are entitled to the proceeds of the Discovery Life Policy number 5130640002 payable by the first respondent, Discovery Life Limited, pursuant to the provisions of such life insurance policy.

(b) The first respondent is ordered to pay the proceeds of the policy referred to in (a) to the second, third and fourth respondents in their official capacity as trustees.

(c) The applicant, Malcolm Wentzel, is ordered to pay the costs of the application.'

3 The appellant is ordered to pay the costs of the appeal and the cross-appeal, such costs to include the costs occasioned by the employment of two counsel, where so employed.

JUDGMENT

Mbha JA (Navsa and Molemela JJA and Eksteen and Unterhalter AJJA concurring):

[1] What this court has to decide is whether an unrehabilitated insolvent, who is the nominated beneficiary in terms of a life insurance policy, is personally entitled (that is, to the exclusion of the trustees of the insolvent estate) to the proceeds of that life insurance policy if, on the date when such proceeds become payable, the insolvent has not yet been rehabilitated by an order of court, but the first and final liquidation and distribution account in respect of the insolvent estate has already been filed and accepted by the Master. If not, the question is whether the proceeds of the life insurance policy are an asset that vest in the trustees of the insolvent estate and are thus to be utilised by them for purposes of realisation and distribution. An application and a counter application for declarators in respect of these issues failed in the Gauteng Division of the High Court, Pretoria (Tlhapi J). The appeal and the counter appeal are brought with the leave of the court below. The factual matrix within which the issues arose is fairly straightforward and is set out in the paragraphs that follow.

[2] The appellant, Malcolm Wentzel, was married in community of property to Lizane Wentzel on 25 August 2007. On 1 January 2012, a contract of insurance was concluded with the first respondent, Discovery Life Limited (Discovery), in terms of which the life of Mrs Wentzel was insured. Mr Wentzel was appointed beneficiary of the proceeds payable upon her death. In terms of the same policy Mr Wentzel's life was also insured, though, in the event of his death, it was his wife who was appointed as the beneficiary. Approximately five and a half years later, on 16 April 2017, Mr Wentzel's wife passed away (the deceased).

[3] Prior to his wife's death, their joint estate was provisionally sequestrated by an order of court. The provisional order was confirmed on 3 April 2012. On 20 September 2012 the second, third and fourth respondents were appointed as trustees of the sequestrated joint estate (the trustees). The first and final liquidation and distribution account duly filed by the trustees was accepted by the fifth respondent, the Master of the High Court, Pretoria (the Master), on 11 July 2014.

[4] On 9 May 2017, shortly after his wife's passing, Mr Wentzel claimed payment of the proceeds of the insurance policy. Discovery informed him that these proceeds, amounting to R5 240 345.56 (the proceeds), would be paid over to the trustees of the insolvent joint estate. Mr Wentzel objected and, on 5 September 2017, claimed the proceeds in a letter of demand addressed to Discovery. On 8 December 2017 the trustees registered their objection to Mr Wentzel's claim, insisting that the proceeds be paid to them because neither Mr Wentzel nor the deceased had been rehabilitated by an order of court at the time when the proceeds became payable. As the appellant was still an unrehabilitated insolvent, the trustees insisted that payment could only be made to the insolvent estate. It is these mutually exclusive claims that gave rise to the application and counter application in the court a quo and the relief presently sought by the parties in this court. I pause to record that Discovery chose to abide the decision of the court and took no part in the proceedings in the court below and before us.

[5] The appellant contended, as he did in the court below, that as the nominated beneficiary in terms of the insurance policy, the proceeds were due and payable to him, exclusively, when he accepted the benefits under the policy on 9 May 2017. On the other hand, the trustees contended that the proceeds must be paid to them, in their capacity as trustees of the insolvent joint estate, as a result of the appellant's status as an unrehabilitated insolvent at the time when the proceeds became payable.

[6] The high court found that the proceeds, though payable to the appellant in terms of the policy, nevertheless represented an asset that had not been

exempted or excluded from the reach of the creditors of the insolvent joint estate by the laws of insolvency. Thlapi J thus held that the appellant was obliged to pay over the proceeds to the trustees for realisation and, ultimately, distribution to the creditors of the insolvent joint estate. However, she held further that the trustees were 'to notify the Master that a situation [had] arisen whereby a second liquidation and distribution account might be lodged' after they had engaged with the creditors on the proceeds that had since become available. She stated the following:

'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'.

The court a quo dismissed both the application and the counter application for appropriate declaratory relief.

[7] The basis on which Mr Wentzel claimed the proceeds may be summarised as follows:

7.1 On 3 April 2012, the joint estate between the appellant and the deceased (which came about as a consequence of their marriage in community of property on 25 August 2007) was sequestrated. The respondents' first and final liquidation and distribution account was confirmed on 11 July 2014, with the effect that the administration of the sequestrated joint estate was, for all intents and purposes, completed and finalised on that date.

7.2 The death of the appellant's wife on 16 April 2017 had the effect of finally dissolving the sequestrated joint estate *ex lege*.

7.3 Because of the *ex lege* dissolution of his marriage, the appellant was no longer disqualified from receiving and holding property in his own name, particularly the proceeds of the contract of insurance. Moreover, he accepted the benefits payable to him in his capacity as the nominated beneficiary of the proceeds in the event of the deceased's death. This acceptance, on 9 May 2017, happened after the administration of the sequestrated joint estate was finalised upon confirmation of the first and final liquidation and distribution account by the fifth respondent on 11 July 2014.

[8] On the other hand, the respondents submitted that the appellant was, at all relevant times, and in particular when the proceeds of the life insurance policy were accepted and became payable, an unrehabilitated insolvent. As such, all property acquired by him during his sequestration belongs to the estate, and the estate remains vested in the trustees until it re-vests in the appellant upon his rehabilitation.

[9] It is common cause that the appellant is an unrehabilitated insolvent. It bears mentioning that the appellant has in fact brought an application for his rehabilitation in the court a quo under a separate case number. The trustees have applied to intervene in this application in order to oppose the same. This application is still pending.

[10] The question which this court must determine can be formulated thus: can an unrehabilitated insolvent receive property that is to vest in him personally, and that is beyond the reach of his trustees, by virtue of the *ex lege* dissolution of his marriage in community of property, and therefore the dissolution of the joint estate? Put differently, can the death of Mr Wentzel's wife alter the ordinary consequences of insolvency and result in a modified application of the Insolvency Act 24 of 1936 (the Insolvency Act), to allow for an insolvent to receive and own property that is beyond the reach of the trustees of his insolvent estate?

[11] Section 20(1)(*a*) of the Insolvency Act provides expressly that the effect of the sequestration of the estate of an insolvent shall be 'to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him…'. Section 20(2), in turn, provides that for the purposes of subsection (1) the estate of an insolvent shall include:

'*(a)* all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment;

(b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three.'

In addition, parties married in community of property both become insolvent debtors when their joint estate is sequestrated.[1]

[12] It is necessary to consider the definitions section of the Insolvency Act. The phrase 'insolvent estate' is there defined as 'an estate under sequestration'. The word 'insolvent', when used as a noun, is defined as ‘a debtor whose estate is under sequestration and includes such a debtor before the sequestration of his estate, according to the context’.

[13] In *Du Plessis v Pienaar NO and Others*,[2] the appellant sought an order declaring that certain property, that was owned separately by her - received as an inheritance from her father with the stipulation that it not form part of the joint estate of the appellant and her husband - was excluded from the joint estate, did not form part of the insolvent estate and that the trustees were accordingly prohibited from selling such property for the benefit of creditors. The appellant sought to escape liability by contending that the debts that had given rise to the claims against the insolvent estate were debts that were incurred by the joint estate; and that they were on this basis only recoverable from the property of the joint estate – not from the property that was separately owned and thus fell outside the joint estate. Nugent JA rightly rejected this argument, holding that:

’… Debts are not incurred by a person's estate – the estate is merely the source from which the debt is recovered. The debt is incurred, however, by the person who is the debtor. Accordingly, the “joint estate” did not incur the debts that are now sought to be recovered and it is not the insolvent debtor. The insolvent debtors are both the appellant and her husband, for when spouses are married in community of property debts incurred by one spouse generally accrue to them both.'[3]

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[1] Section 21(1) of the Act provides that the effect of sequestration of the separate estate of one of two spouses who are not living apart shall be to vest in the Master, until a trustee has been appointed, all the property of the spouse whose estate has not been sequestrated.
[2] *Du Plessis v Pienaar NO and Others* 2003 (1) SA 671 (SCA).
[3] Ibid para 4.

[14] Thus, the appellant's argument that, because the death of his wife on 16 April 2017 had the effect of finally dissolving, *ex lege*, the sequestrated joint estate, he was no longer disqualified from receiving and holding property in his own name, in particular the proceeds of the policy, fails at the first hurdle. The debts he incurred personally, which led to the sequestration order on 3 April 2012, remain extant. Sight must also not be lost of the fact that in terms of the first and final liquidation account that was confirmed by the Master on 11 July 2014, there was (and still is) a deficit in the insolvent joint estate of R3 480 986 due to the creditors. In fact, this uncontroverted position of the insolvent joint estate unequivocally puts paid to the appellant's assertion that the Master's confirmation of the aforesaid liquidation and distribution account finalised the administration of the insolvent joint estate, with the effect that there were no longer any debts still payable to the creditors.

[15] The effects of s 20(2) of the Insolvency Act are clear. Upon the sequestration of a debtor's estate, all property belonging to the insolvent first vests in the Master and thereafter in the appointed trustee(s). Importantly, all property that the insolvent acquires, or which may accrue to him, during the currency of his insolvency also vests in the trustees.

[16] This general position is confirmed by the express wording of s 23(1) of the Insolvency Act, which provides that '[s]ubject to the provisions of this section and of section twenty-four, all property acquired by an insolvent shall belong to his estate'. The only exceptions are those cases specifically mentioned in s 23(7)-(9).[4]

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[4] Section 23 provides, in relevant part, that:
(7) The insolvent may for his own benefit recover any pension to which he may be entitled for services by him.
(8) The insolvent may for his own benefit recover any compensation for any loss or damage which he may have suffered, whether before or after the sequestration of his estate, by reason or any defamation or personal injury: Provided that he shall not, without the leave of the court, institute an action against the trustee of his estate on the ground of malicious prosecution or defamation.
(9) Subject to the provisions of subsection (5) the insolvent may recover for his benefit, the remuneration or reward for work done or for professional services rendered by or on his behalf after the sequestration of his estate.'
Subsection (5) entitles the trustee to 'any moneys received or to be received by the insolvent in the course of his profession, occupation or other employment which in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependent upon him'.

[17] Clearly, s 23 does not contain any provision excluding the proceeds of a life insurance policy, received by an insolvent, from the reach of trustees. If the legislature had wanted to exclude such proceeds from the general operation of the Insolvency Act, it would have clearly provided so. It follows, then, that the proceeds payable to the appellant in terms of the contract of insurance, acquired during the appellant's insolvency, must fall into his insolvent estate for the benefit of the creditors.

[18] In *Du Plessis* this court observed that one has to accept that debts are incurred by persons rather than by their estates, and that when a marriage is in community of property both spouses are generally liable for payment of the debts that are incurred by one of them and that it follows that a creditor may look to the estates of both the debtors for the recovery of the debt.[5] Nugent JA went on to state the following:

'[T]he remedies provided for by the Insolvency Act 24 of 1936 are available against both spouses for recovery of the debt that is due by both of them'.

[19] From the foregoing it is clear that, pursuant to the sequestration of their joint estate on 3 April 2012, Mr Wentzel and the deceased both became 'insolvent debtors' for purposes of the Insolvency Act. The effect is that all property acquired by the appellant as 'the insolvent' before the sequestration, as well as property that was acquired or which may have accrued to him during the sequestration, to wit, the proceeds of the contract of insurance payable to the appellant after the death of the deceased, vests in the trustees to be used to meet the claims of creditors.

[20] Mr Wentzel did not cease to be an insolvent. He maintains that status until his rehabilitation.

[21] The appellant's reliance on the decision in *Pieterse v Shrosbee and Others; Shrosbree NO v Love and Others*[6] is misplaced. The issue for

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[5] Para 5.

[6] *Pieterse v Shrosbee and Others; Shrosbree NO v Love and Others* 2005 (1) 309 SCA.

determination by this Court in *Pieterse* was whether, pursuant to the provisions of s 63 of the Long Term Insurance Act 52 of 1998, the trustee of an insolvent deceased's estate was entitled, in preference to the nominated beneficiaries, to the proceeds of certain insurance policies for distribution to the deceased's creditors.[7]

[22] This was a consolidated appeal of two cases. The facts in *Love* are entirely distinguishable from those in this case. In *Pieterse* the appellant, an unrehabilitated insolvent, had been married out of community of property to the deceased policy holder who had nominated him as beneficiary in a life insurance policy. When she died her estate was hopelessly insolvent and was subsequently sequestrated. *Pieterse* had accepted the benefits under the policy. However, the trustees in the insolvent estate claimed that they were entitled to the proceeds of the policy. This Court held that the proceeds accrue to the trustee of *Pieterse*'s insolvent estate. In doing so it merely gave effect to s 20(2) and 23 of the Insolvency Act. It is not authority for the argument advanced on behalf of Mr Wentzel. On the contrary it is against him.

[23] The fact is that upon Mr Wentzel's acceptance of the benefit, the proceeds became an asset in his hands as an insolvent debtor. And, as is demonstrated above, the proceeds cannot belong to a separate estate of the appellant where such separate estate is not legally recognised.

[24] Shortly before the hearing of this appeal, a new argument, additional and in the alternative, was raised on behalf of the Mr Wentzel. An attempt was made to base his exclusive entitlement to the proceeds of the contract of insurance on the provisions of s 23(8) of the Insolvency Act.

[25] Section 23(8) provides that:

'(8) The insolvent may for his own benefit recover any compensation for any loss or damage which he may have suffered, whether before or after the sequestration of his estate, by reason of any defamation or personal injury: Provided that he shall not,

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[7] Ibid para 2.

without the leave of the court, institute an action against the trustee of his estate on the ground of malicious prosecution or defamation.'

[26] The argument, as I understand it, is as follows: The contract of insurance in issue is a pure risk policy for the provision of an indemnity in the event of a future risk, to wit, the death of the Mr Wentzel's wife. The policy *in casu* became payable as a result of the death of the Mr Wentzel's wife and provides for indemnity for her death, inclusive of the loss of consortium suffered by the appellant. In the circumstances, so it was submitted, the proceeds of the pure risk insurance policy *in casu* fall squarely within the ambit of s 23(8) of the Insolvency Act and are payable to Mr Wentzel.

[27] In my view, considering the fact that reliance on s 23(8) was not even foreshadowed in the founding affidavit, the appellant is precluded from relying on the provision at this stage.

[28] In any event, even if the new argument were to be allowed, it is trite that a claim for the loss of consortium is a claim for damages. In *DE v RH*,[8] the Constitutional Court was called upon to consider whether in this day and age, in relation to the traditional field of claims of contumelia associated with loss of consortium, namely, adultery, liability should attach. It decided that question in the negative. If one were to assume that a claim for loss of consortium was notionally viable in other circumstances the obvious problem, before looking to indemnification, would be to identify a wrongdoer in relation to such a claim. Therein lies an insurmountable problem for Mr Wentzel.

[29] In the circumstances, the appellant's reliance on s 23(8) is unfounded. In the light of all of the foregoing, this appeal must fail. The respondents' cross-appeal accordingly stands to succeed.

[30] I make the following order:

1 The appellant's appeal is dismissed.

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[8] *DE v RH* [2015] ZACC 18; 2015 (5) SA 83 (CC).

2 The first to third cross-appellants' appeal is upheld.

3 The order of the Court a quo is set aside and replaced with the following order:

‘(a) It is declared that the second, third and fourth respondents, in their respective capacities as the trustees of the insolvent estate of Malcolm Wentzel and Lizane Wentzel, Master’s reference number T1179/12, are entitled to the proceeds of the Discovery Life Policy number 5130640002 payable by the first respondent, Discovery Life Limited, pursuant to the provisions of such life insurance policy.

(b) The first respondent is ordered to pay the proceeds of the policy referred to in (a) to the second, third and fourth respondents in their official capacity as trustees.

(c) The applicant, Malcolm Wentzel, is ordered to pay the costs of the application.’

3 The appellant is ordered to pay the costs of the appeal and the cross-appeal, such costs to include the costs occasioned by the employment of two counsel, where so employed.

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B H Mbha

Judge of Appeal

APPEARANCES:

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For 2nd, 3rd & 4th respondents:	Tintingers Inc, Pretoria
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For 5th respondent:	Master of the High Court, Pretoria
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