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Legal update 18 of 2020: Case law on payment of life insurance policy where nominee is an unrehabilitated insolvent

Introduction

In October 2020, the Supreme Court of Appeal delivered a judgement in the *Wentzel vs Discovery*-case. It confirmed that except for the narrowly defined exceptions in section 23 of the Insolvency Act, an unrehabilitated insolvent who was married in community of property is 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 the liquidation and distribution account has been filed and approved. Instead, the proceeds of life insurance policy vests in the trustees of the insolvent joint estate. The case is discussed below, together with a brief discussion of the case of *Pieterse vs Shrosbee,* which Mr Wentzel relied on.

The case

Malcolm Wentzel vs Discovery Life Limited and Others: In Re Botha and Others NNO vs Wentzel (1001/19) [2020] ZASCA 121 (2 October 2020)

Facts:

The relevant dates and facts of this case can be summarised as follows:

- 25 August 2007: Mr Wentzel and his wife married in community of property.
- 1 January 2012: Mr and Ms Wentzel took out a joint life insurance policy with Discovery. This is a policy which covers both spouses' lives, with the surviving spouse being the beneficiary in the event of the death of the other spouse.
- 3 April 2012: Mr and Ms Wentzel's joint estate was sequestrated.
- 20 September 2012: The trustees of the sequestrated joint estate was appointed.
- 11 July 2014: The Master of the High Court accepted the first and final liquidation and distribution account (L&D) filed by the trustees.
- 16 April 2017: Mrs Wentzel passed away.
- 9 May 2017: Mr Wentzel claimed payment of the policy proceeds from Discovery.
- 5 September 2017: Following Discovery informing him that they were going to pay the proceeds to the trustees of the insolvent joint estate, Mr Wentzel sent a letter of demand to Discovery for payment of the policy proceeds.
- 8 December 2017: The trustees of the insolvent estate objected to Mr Wentzel's claim based on the fact that he was still an unrehabilitated insolvent.

The policy value was R5 240 345.56. The deficit in the insolvent joint estate was R3 480 986.88.

The matter was heard by the Gauteng Division of the High Court, Pretoria in May 2019, which had to decide whether the payment of a life insurance policy to a nominated beneficiary who was an unrehabilitated insolvent, would vest in the beneficiary or the trustees of the insolvent estate.

Mr Wentzel claimed that since the L&D had already been accepted, the administration of the insolvent estate had been finalised and that the policy proceeds were payable to him exclusively as the nominated beneficiary. The trustees claimed that since Mr Wentzel had not been rehabilitated at the time of the policy proceeds being payable, his estate remained vested in them. This entitled them to use it to settle claims of creditors of the insolvent estate.

The High Court held that the joint estate of parties married in community of property is dissolved by the death of one of the spouses. The property of each spouse then vests in that spouse. However, before a share in the joint estate can be distributed, the estate of the deceased spouse would have to be administered. The executor will first settle the liabilities of the joint estate before distributing the balance of the assets in the joint estate. From that balance, half of the estate will be allocated to the surviving spouse and the other half is then dealt with as set out in the will, or if there is no will, as stipulated in the Intestate Succession Act.

The Court confirmed 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.*

The status of the spouses in relation to their insolvency did not change as a result of the death of one of them. Mr Wentzel was still an unrehabilitated insolvent, and as such all assets acquired by or accruing to him during sequestration vested in the trustees of the insolvent estate, except those that fall under the exceptions listed in section 23 of the Insolvency Act. Pension, compensation for loss or damage as a result of defamation or personal injury and remuneration qualify as exceptions; the proceeds of a life insurance policy does not.

Mr Wentzel appealed the High Court judgement. The Supreme Court of Appeal (SCA) heard the case on 26 August 2020 and in the judgement delivered on 2 October 2020 confirmed that an unrehabilitated insolvent may not receive property that vests in him personally and keep it out of the reach of the trustees of the insolvent estate, even after the L&D has been filed and approved. The only exceptions were those listed in section 23 of the Insolvency Act. Once Mr Wentzel accepted the benefit under the life insurance policy, it became an asset in his hands. The SCA confirmed that the proceeds cannot belong to a separate estate of Mr Wentzel where such separate estate is not legally recognised. The proceeds of the life insurance policy therefore vests in the trustees of the insolvent estate.

Mr Wentzel relied on was *Pieterse v Shrosbee and Others; Shrosbee NO vs Love and Others 2005 (1) 309 SCA,* claiming that the proceeds of a life insurance policy are payable directly to the nominated beneficiary in terms of the contract between the life assured and the insurer, irrespective of whether that estate was solvent or insolvent, as was confirmed by the Court in that case. The Courts pointed out that in the *Pieterse*-case, the estate of the life insured only became insolvent <u>after</u> her death. The nominated beneficiary, who was married to the life insured out of community of property, was an unrehabilitated insolvent. On his acceptance of the policy benefits, it vested in the trustee of his insolvent estate and not in the trustee of the insolvent estate of the deceased life insured.

Acting Judge of Appeal VM Ponnan explained how a nomination should be dealt with as follows in paragraphs 8 and 9 of the *Pieterse*-case:

[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 stipulatio 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 stipulatio alteri*' (Ellison Kahn: 'Extension Clauses in Insurance Contracts' (1952) 69 SALJ 53 at 56). Thus the beneficiary, by adopting the benefit, becomes a party to the contract (see Total South Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A) at 625 D-G).*

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