

The Payout of a Life Insurance Policy into an Unrehabilitated Insolvent's Estate: *Malcolm Wentzel v Discovery Life Limited: In Re Botha v Wentzel* (1001/19) [2020] ZASCA 121 (2 October 2020)



Online ISSN
1727-3781

Z Mabe* and E Mbiriri**

P·E·R

Pioneer in peer-reviewed,
open access online law publications

Authors

Zingapi Mabe
Edith Mbiriri

Affiliation

University of South Africa

Email

mabez@unisa.ac.za
mbirie@unisa.ac.za

Date Submission

16 June 2021

Date Revised

3 April 2022

Date Accepted

3 April 2022

Date published

31 May 2022

Editor Prof A Gildenhuis

How to cite this article

Mabe Z and Mbiriri E "The Payout of a Life Insurance Policy into an Unrehabilitated Insolvent's Estate: *Malcolm Wentzel v Discovery Life Limited: In Re Botha v Wentzel* (1001/19) [2020] ZASCA 121 (2 October 2020)" *PER / PELJ* 2022(25) - DOI <http://dx.doi.org/10.17159/1727-3781/2022/v25i0a11486>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2022/v25i0a11486>

Abstract

One of the consequences of sequestration is the vesting of the property of an insolvent person in the trustee of the insolvent estate. However, not all the property of the insolvent person vests in the trustee as there are some exceptions. Under section 63 of the *Long-Term Insurance Act* 52 of 1998, life insurance policy benefits are excluded from forming part of the insolvent estate and thus do not vest in the trustee and are unavailable for the payments of the debts of the insolvent. The exclusion of these benefits diverts property from the insolvent estate and, consequently, the creditors who could benefit from the property. This note discusses *Malcolm Wentzel v Discovery Life Limited: In Re Botha v Wentzel* (1001/19) [2020] ZASCA 121 (2 October 2020) and considers whether a beneficiary of a life insurance policy payout is required to hand over such payment to the trustee of his insolvent estate. Further, it highlights the conflicting provisions between insolvency legislation and insurance legislation and examines the effects of section 63 on an insolvent estate where the insolvent was married in community of property.

Keywords

Sequestration; life insurance policy; insolvent; trustee; vesting; protection of policy benefits; *stipulatio alteri*; insolvent estate; community of property; insurer.

.....

1 Introduction

In *Wentzel v Discovery Life Limited*¹ the Court considered whether the trustees of an insolvent joint estate were entitled to claim the proceeds of a life insurance policy that had been paid to the surviving insolvent husband who had been married in community of property to his late wife. The surviving husband had taken out insurance on his wife's life and appointed himself² as the beneficiary of the proceeds of the policy in the event of her death.³ The same policy also insured his life and appointed his wife as the beneficiary in the event of his death.⁴ Thus, the spouses had taken out a life insurance policy on each other's lives.

The general legal position is that upon sequestration, all the assets of an insolvent vest in the trustee of the estate and form part of the insolvent estate.⁵ However, there are certain exceptions to this general rule.⁶ One of these relates to life and other insurance policy benefits as envisaged in section 63 of the *Long Term Insurance Act*.⁷ Section 63 provides for the exclusion of life and other insurance policy benefits from the insolvent estate.

The inclusion or exclusion of life and other insurance policy benefits from the insolvent estate has a huge effect on the property available to satisfy creditors' claims in an insolvent estate.⁸ If the proceeds of the insurance policy benefits are included in the insolvent estate, it would be an advantage to the creditors as more money would be available to pay off their claims.

* Zingapi Mabe. LLB LLM. Senior Lecturer, University of South Africa. E-mail: mabez@unisa.ac.za. ORCID iD: <https://orcid.org/0000-0002-4106-2385>. Google scholar ID: <https://scholar.google.com/citations?user=-HDhaUEAAAAJ&hl=en>.

** Edith Mbiriri. LLB LLM. Lecturer, University of South Africa. E-mail: mbirie@unisa.ac.za. ORCID iD: <https://orcid.org/0000-0002-2762-824X>

¹ *Wentzel v Discovery Life Limited* 2019 6 SA 472 (GP) (hereafter *Wentzel v Discovery Life*).

² For convenience, where relevant the male and/or female genders will be used interchangeably. No discrimination is implied or intended.

³ *Wentzel v Discovery Life* para 5.

⁴ *Wentzel v Discovery Life* para 5.

⁵ Section 20 of the *Insolvency Act* 24 of 1936 (hereafter the *Insolvency Act*); Bertelsmann *et al Mars The Law of Insolvency* para 9.2; Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* para 5.2.

⁶ Bertelsmann *et al Mars The Law of Insolvency* 214; Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 75.

⁷ 52 of 1998 (hereafter the *LTIA*) as amended by the *Financial Services Laws General Amendment Act* 45 of 2013 (hereafter the *FSLGAA*), which came into effect on 28 February 2014 and as amended by the *Insurance Act* 18 of 2017, which came into effect on 1 July 2018 (hereafter the *Insurance Act*).

⁸ Mabe 2015 *THRHR* 237.

However, if the proceeds are excluded from the insolvent estate, this would disadvantage the creditors as they would have lost out on money that would have increased the value of the insolvent estate for their benefit. As a result, the interplay between insurance law and the law of insolvency brings the challenge of balancing the interests of the estate's creditors with the interests of the insolvent debtor, those of his spouse, and third parties.⁹

This note discusses the Wentzel judgments.¹⁰ It considers whether a beneficiary of a life insurance policy payout is required to hand over such payment to the trustees of his insolvent estate.

2 In the High Court

2.1 *Facts of Wentzel v Discovery Life*

The applicant, Mr Wentzel (the insolvent), was an unrehabilitated insolvent. The first respondent was Discovery Life Limited. The second to the fourth respondents were the trustees of the insolvent estate, and the fifth respondent was the Master of the High Court.¹¹

The applicant and his wife (Lizane Wentzel) were married in community of property on 25 August 2007. On 1 January 2012, the applicant took out a life insurance policy from the first respondent.¹² This insurance policy was structured in such a way that both the applicant and his wife were the insured lives and each of them nominated the surviving spouse as the beneficiary of the insurable amount in the event of their death.¹³ The policy came into effect on 1 January 2012.¹⁴

On 20 February 2012 the joint estate of the applicant and his wife was provisionally sequestrated and the provisional order was made a final order of sequestration on 3 April 2012.¹⁵ As trustees of the insolvent estate, the second to fourth respondents filed a First and Final Liquidation and Distribution Account¹⁶ in the joint estate, dated 24 January 2014. The fifth

⁹ Mabe 2015 *THRHR* 238.

¹⁰ Which includes *Wentzel v Discovery Life*, that was heard by the Gauteng Division of the High Court (Johannesburg) and *Malcolm Wentzel v Discovery Life Limited: In Re Botha v Wentzel* (1001/19) [2020] ZASCA 121 (2 October 2020) (hereafter *Malcolm Wentzel v Discovery Life Limited*), which was the appeal in the Supreme Court of Appeal.

¹¹ *Wentzel v Discovery Life* para 6.

¹² *Wentzel v Discovery Life* para 5.

¹³ *Wentzel v Discovery Life* para 5.

¹⁴ *Wentzel v Discovery Life* para 5.

¹⁵ *Wentzel v Discovery Life* para 6.

¹⁶ Hereafter L&D Account.

respondent confirmed it on 11 July 2014.¹⁷

On 16 April 2017 Lizane Wentzel died,¹⁸ and on 9 May 2017 the applicant, as the nominated beneficiary to the insurance policy, claimed and accepted payment of the proceeds of the policy amounting to R5 240 345.56.¹⁹ The trustees insisted that the proceeds be paid to the insolvent estate because neither the applicant nor his late wife had been rehabilitated when the proceeds become payable.²⁰ The first respondent (Discovery Life Limited) therefore informed the applicant that the proceeds would be paid to the insolvent estate.

The applicant objected, indicating that the proceeds were payable to him because the L&D Account in the insolvent estate had been confirmed, and essentially, the administration of the insolvent estate had been finalised.²¹ Further, the present legal position in South African law did not support this demand by the trustees.²²

In May 2018 the applicant lodged two applications. The first application sought a declaratory order stating that the applicant is the owner and beneficiary of the life insurance policy in question, because of a contract that he entered into with the first respondent.²³ Further, the first respondent is ordered to pay the total proceeds of the policy to the applicant and not to the trustees of his insolvent estate.²⁴

In this application, which is the present case, the first respondent did not oppose the application but the trustees issued a counter application seeking a declaratory order that they as trustees of the unrehabilitated insolvent estate were entitled to the proceeds of the life policy.²⁵

In the second application, the applicant applied for rehabilitation. However, this application was withdrawn.²⁶

¹⁷ *Wentzel v Discovery Life* para 6.

¹⁸ *Wentzel v Discovery Life* para 6.

¹⁹ *Wentzel v Discovery Life* para 7.

²⁰ *Wentzel v Discovery Life* para 7.

²¹ *Wentzel v Discovery Life* para 8.

²² *Wentzel v Discovery Life* para 8.

²³ *Wentzel v Discovery Life* para 2.

²⁴ *Wentzel v Discovery Life* para 2.

²⁵ *Wentzel v Discovery Life* para 3.

²⁶ *Wentzel v Discovery Life* para 1.

2.1.1 *The trustees' contention*

The trustees said that three claims had been lodged and proved by creditors against the insolvent estate, and they were reflected in the L&D Account. Standard Bank of South Africa had two secured claims of R2 091 857.91 and R518 016.86, respectively, and Alert Staal (Pty) Ltd ("Alert Staal") had a concurrent claim of R2 958 043.08. After the realisation of the assets of the insolvent estate, a dividend had been distributed to the creditors in order of preference amounting to R2 161 038 99, leaving a deficiency of R3 480 986, 88.²⁷

The trustees argued that because the applicant and his wife (before death) had not been rehabilitated, the policy's proceeds were payable to the insolvent estate. Their view was that in terms of section 25 of the *Insolvency Act* the insolvent estate remained vested in the trustees until it reinvested in the insolvent after a composition or the rehabilitation of the insolvent. Further, any property which vested with the trustees immediately before rehabilitation remains vested in them after rehabilitation for the purposes of realisation and distribution. The trustees kept this viewpoint even though the marriage between the applicant and his late wife had been dissolved by death, which fact was communicated to the applicant and the first respondent.²⁸

They further argued that the applicant's declaratory application sought to alter the effects of the sequestration and that it would prejudice the creditors, who had proved claims, and which remained unpaid as far as the deficiency was concerned. The trustees raised a point *in limine* of non-joinder. They said that such creditors had a direct and substantial interest in the application and should have been joined. Therefore, the application should be dismissed on account of non-joinder or that the applicant should be directed to join such creditors.²⁹

The trustees based their counter application on the terms of section 25 of the *Insolvency Act* (read with sections 20, 23, and 24), that the applicant as an unrehabilitated insolvent remained as such even at the time when the proceeds of the policy became payable to him. They opposed the rehabilitation application on the basis that the applicant failed to make full and frank disclosure and that he stood to receive a substantial amount of

²⁷ *Wentzel v Discovery Life* para 9.

²⁸ *Wentzel v Discovery Life* para 10.

²⁹ *Wentzel v Discovery Life* para 11.

money from the first respondent.³⁰

2.1.2 *The applicant's reply*

In his reply, the applicant confirmed that he was an unrehabilitated insolvent and that both he and the trustees sought relief, declaring entitlement to the proceeds of the policy. As regards the rehabilitation application, he said it was agreed when the trustees intervened that the application would not proceed until his application and the trustees' counter application had been finalised.³¹

The applicant argued that the joint estate between him and his wife dissolved on her death on 16 April 2017. Consequently, the sequestrated and insolvent joint estate to which the trustees were appointed was dissolved *ex lege* on that same date, and the proceeds of the insurance policy became payable only on 9 May 2017.³²

As regards the deficiency of R3 480 986, 88 and Alert Staal's concurrent claim, he alleged that an agreement had been entered into with the liquidator of Zencron Site & Maintenance CC (in which the applicant was a member) in 2011 for the payment of R900 000.00, which he understood was to secure payment to this creditor. Therefore, he was of the view that, because the proceeds of the policy were not payable into the insolvent joint estate, the creditors of the estate did not have an interest in this current application. Consequently, he had no duty to notify any of his creditors of this application. For that reason, he argued that the point *in limine* on the non-joinder of the creditors had no merit especially because the trustees had not cited or joined the creditors in their counterclaim. He argued that the point *in limine* should be dismissed with costs.³³

2.1.3 *The trustees' reply*

Regarding the R900 000.00, the trustees alleged that Alert Staal was not a party to the agreement concluded in 2011. Thus, the R900 000.00 was not used to liquidate any debt in the applicant's insolvent estate.³⁴

³⁰ *Wentzel v Discovery Life* para 12.

³¹ *Wentzel v Discovery Life* para 13.

³² *Wentzel v Discovery Life* para 14.

³³ *Wentzel v Discovery Life* para 15.

³⁴ *Wentzel v Discovery Life* para 16.

2.2 *Issues before the Court*

The Court had to answer three questions. Firstly, what was the effect of the death of the applicants' wife on their sequestered estate? Secondly, did the applicant have a responsibility to notify the creditors of his insolvent estate about his application for declaratory relief? Lastly, whether the proceeds of the insurance policy vested in the trustees of the insolvent estate?

2.3 *Judgment*

2.3.1 *The effect of death on a sequestered insolvent estate*

Tlhapi J agreed with the applicant that the joint estate of parties married in community of property is dissolved by the death of one or both spouses, by divorce or by an order of division. It is further dissolved by a change in the matrimonial property system in terms of section 21 of the *Matrimonial Property Act*. He further agreed that in such an instance, the dominium of each of the spouse's property vested in that spouse on the dissolution of the joint estate.³⁵

However, he said that before a share in the joint estate could be distributed, the estate of the deceased had to be administered. The Master had to instruct the executor to call for the lodgement of claims against the estate and the liabilities of the joint estate must be paid before the balance of the assets is distributed. The surviving spouse's half share is allocated first before the deceased's half share. He indicated that where a beneficiary has been appointed, the proceeds of an insurance policy are paid to that beneficiary. Tlhapi J said that the proceeds are paid into the insolvent estate only when a beneficiary has not been appointed.³⁶

Concerning the applicant's contention that the trustees were vested only with the assets of the insolvent joint estate, which had been dissolved by death, Tlhapi J held that until the rehabilitation of the insolvent spouse's death did not change the applicant and his late wife's status. He held that a surviving spouse and a deceased insolvent estate could still acquire assets. His late wife's estate could still be reported as that of the late so and so, who had been a party to a marriage in community of property, which had been sequestered before her death. Tlhapi J agreed with the trustees that the acquisition of the proceeds of the policy made it difficult for the applicant

³⁵ *Wentzel v Discovery Life* para 17.

³⁶ *Wentzel v Discovery Life* para 18.

as an unrehabilitated insolvent in relation to his creditors and the trustees of his insolvent joint estate.³⁷

Tlhapi J referred to section 20(1)(a) of the *Insolvency Act*, that on sequestration an insolvent is divested of his estate, which vests in the Master until a trustee is appointed, whereafter it vests in the trustee. Read with section 20(1)(a), he said that section 20(2)(b) provides that the insolvent estate includes all movable or immovable property at the date of sequestration, including all property acquired or accrued to the insolvent during the sequestration, except as otherwise provided in sections 23, 79 and 82(6) of the *Insolvency Act*.³⁸ He added that this property remained vested in the trustees until it was re-vested in the insolvent by way of composition in terms of section 119 or until rehabilitation in terms of section 127 or 127A of the *Insolvency Act*. In this regard he referred to *Moodley v Milner*,³⁹ where James J held that:

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 the 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.

Tlhapi J restated the law that a *concursum creditorum* is created upon sequestration. The creditors' proved claims are administered by the trustee of the insolvent estate under the Master's supervision. Further, no creditor may thereafter enter into any transaction with the debtor that has the effect of prejudicing the body of creditors,⁴⁰ and the general body of creditors must understand that claims may not be paid in full but only a portion of their claims may be paid. As regards a deficiency and when more assets are found, he stated that those assets may be realised and distributed by the trustee, and that that also applied to the estate of the deceased. He stated that the general body of creditors understood that it is the trustee's responsibility to protect their interests in the insolvent estate and consider a

³⁷ *Wentzel v Discovery Life* para 19.

³⁸ *Wentzel v Discovery Life* para 20.

³⁹ *Moodley v Milner* 1965 1 SA 154 (D).

⁴⁰ *Walker v Syfret* 1911 AD 141 (hereafter *Walker v Syfret*).

provision in the *Act*. Further, they understood that they would always have an interest in the affairs and the assets of the insolvent before re-vestment as provided in the *Insolvency Act*.⁴¹

2.3.2 *Point in limine on non-joinder*

As regards the point *in limine*, Tlhapi J agreed with the trustee's argument that the insolvent's election to make two separate applications did not take away his responsibility to notify his creditors. He held that *Ex Parte Potgieter*,⁴² which the trustees cited in their heads of argument, reaffirmed the importance of the notification of the creditors by an insolvent and the need for their joinder. He held that in terms of the authorities cited by the trustees, the applicant was required to give notice to his creditors when making an application for declaratory relief. Further, although disagreeing, the applicant had conceded that provisional relief could be granted to give notice to creditors who had proved claims to allow them an opportunity to respond to the application.⁴³

Tlhapi J pointed out that the filing of the L&D account did not mean that the trustees had completed their duty of administering the joint insolvent estate. Instead, the confirmation of the L&D account meant that after its examination by the Master, it had lain for inspection without objection, and the Master had confirmed that the trustees could pay the creditors the dividends reflected in the account.⁴⁴

Tlhapi J therefore took the view that the trustees were not prevented from filing further accounts in respect of other assets which might later vest in them or be acquired by the insolvent before his rehabilitation and their discharge from their duties as trustees. Tlhapi J emphasised that even where there is re-vestment of assets in terms of a composition, the trustees must file an account reflecting such composition approved by the creditors.⁴⁵

2.3.3 *Proceeds of the insurance policy*

Regarding the question of whether the proceeds of the life insurance policy vest in the trustees of the joint insolvent estate, the applicant based his arguments on the legal principles set out in *Pieterse v Shrosbree, Shrosbree*

⁴¹ *Wentzel v Discovery Life* paras 22 and 23.

⁴² *Ex Parte Potgieter* 1967 2 SA 310 (T).

⁴³ *Wentzel v Discovery Life* para 25.

⁴⁴ *Wentzel v Discovery Life* para 26.

⁴⁵ *Wentzel v Discovery Life* para 27.

*Love*⁴⁶ and *Naidoo v Discovery Life Limited*.⁴⁷ In *Pieterse v Shrosbree, Shrosbree Love* it was held that the proceeds of the life insurance policy are payable in terms of the contract between the life assured (the deceased Mrs Pieterse) and the first respondent directly to the nominated beneficiary (Mr Pieterse) irrespective of whether that estate was solvent or insolvent.⁴⁸ *Naidoo v Discovery Life Limited* confirmed that a risk-only policy containing a *stipulatio alteri* is not an asset in the estate of the policyholder and therefore is not an asset in the joint estate in a marriage in community of property.⁴⁹

The applicant's argument is opposed to the trustee's view that the proceeds are payable to them.⁵⁰ They argued that *Pieterse v Shrosbree, Shrosbree Love* was not applicable in this application in as far as section 63 of the *LTIA* was concerned because it did not purport to divert the proceeds of an insurance policy from a nominated beneficiary to the insolvent estate of the deceased policyholder.⁵¹

Tihapi J distinguished this case from *Pieterse v Shrosbree, Shrosbree Love* because in the latter case the deceased estate became insolvent only after death.⁵² He said that *Pieterse v Shrosbree, Shrosbree Love* assisted this case only as regards the relationship formed in a contract of life insurance between the proposer, the insurer, and the beneficiary⁵³ as indicated below:

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)⁵⁴

⁴⁶ *Pieterse v Shrosbree, Shrosbree Love* 2005 1 SA 309 (SCA) (hereafter *Pieterse v Shrosbree, Shrosbree Love*).

⁴⁷ *Naidoo v Discovery Limited* (202/2017) [2018] ZASCA 88 (31 May 2018) (hereafter *Naidoo v Discovery Life Limited*). See *Wentzel v Discovery Life* para 28.

⁴⁸ *Pieterse v Shrosbree, Shrosbree Love* paras 8-12.

⁴⁹ *Naidoo v Discovery Life Limited* para 9.

⁵⁰ *Wentzel v Discovery Life* para 29.

⁵¹ *Wentzel v Discovery Life* para 29.

⁵² *Wentzel v Discovery Life* para 30.

⁵³ *Wentzel v Discovery Life* para 30.

⁵⁴ *Wentzel v Discovery Life* para 9.

Tlhapi J understood this to mean that only the appointed beneficiary may demand, accept or refuse the benefit from the insurer and the trustee of the insolvent estate cannot demand, accept or refuse the benefit directly from the insurer.⁵⁵ As the applicant accepted the benefit without notifying the interested parties, Tlhapi J said that when that benefit was paid to the insolvent by the insurer, it then became an asset in his hands which was then not protected from his creditors by exemption or the exclusionary provisions of the *Insolvency Act*.⁵⁶ Therefore, he stated that the trustee remained in control of those assets as per section 25 of the *Act* and that when the insurer makes the payment, the applicant is obliged to hand over such payment to the trustee.⁵⁷ This is because the trustee remains the administrator of his insolvent estate and because he has acquired an asset.⁵⁸ Otherwise, the trustee has a right to claim the proceeds of the insurance policy from the applicant because it is an asset acquired by the insolvent before his rehabilitation and before re-vestment as envisaged in the *Act*.⁵⁹ He further stated that the trustee's claim did not arise in a *stipulatio alteri* but as a result of the laws of insolvency.⁶⁰

Tlhapi J concluded that since the L&D account had been filed, the Master had to be informed that a situation had arisen that required a second L&D account to be lodged.⁶¹ Thus, both the main and the counter applications were dismissed to allow the trustees to engage the Master, as the insolvent applicant had not been rehabilitated and the trustees had not been discharged.⁶²

However, Mr Wentzel appealed the decision of the High Court.

3 In the Supreme Court of Appeal

The Supreme Court of Appeal had to answer three questions. The first was whether an unrehabilitated insolvent, who was the nominated beneficiary in a life insurance policy, was personally entitled to the proceeds of that policy if the first and final L&D account of his insolvent estate had already been filed and accepted by the Master?⁶³

⁵⁵ *Wentzel v Discovery Life* para 31.

⁵⁶ *Wentzel v Discovery Life* para 31.

⁵⁷ *Wentzel v Discovery Life* para 31.

⁵⁸ *Wentzel v Discovery Life* para 31.

⁵⁹ *Wentzel v Discovery Life* para 31.

⁶⁰ *Wentzel v Discovery Life* para 32.

⁶¹ *Wentzel v Discovery Life* para 33.

⁶² *Wentzel v Discovery Life* para 33.

⁶³ *Malcolm Wentzel v Discovery Life Limited* para 1.

Secondly, if not entitled, did the proceeds of the life insurance policy vest in the trustees of the insolvent estate and could thus be used for the purposes of realisation and distribution?⁶⁴

Lastly, did the dissolution of his marriage *ex lege* and consequently the dissolution of the joint estate entitle him to receive property that vested in him personally to the exclusion of his trustees?⁶⁵

As in the High Court, the Appellant maintained the same argument that, as the nominated beneficiary, in terms of the insurance policy he alone was entitled to the proceeds when he accepts the benefits under the policy.⁶⁶ The trustees, on the other hand, contended that since at the time the proceeds became payable the insolvent had been unrehabilitated, they were entitled to the proceeds in their capacity as the trustees.⁶⁷

3.1 Supreme Court of Appeal Judgment

The Court reiterated the provisions of sections 20(1)(a) and 20(2) of the *Insolvency Act*, which provide for the effects of sequestration on the assets of the insolvent and the property acquired during sequestration.⁶⁸ Mbha JA went on to refer to the definitions of "insolvent estate" and "insolvent" as explained in *Du Plessis v Pienaar*,⁶⁹ which held the following:

... 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.⁷⁰

The Court held that the debts incurred by the Appellant personally, which led to the sequestration order on 3 April 2012, still existed.⁷¹ Therefore, his argument that the death of his wife dissolved the joint estate *ex lege* freed him from the disqualification to receive and hold property in his name had to fail.⁷² This was because the confirmed L&D account still reflected a

⁶⁴ *Malcolm Wentzel v Discovery Life Limited* para 1.

⁶⁵ *Malcolm Wentzel v Discovery Life Limited* para 10.

⁶⁶ *Malcolm Wentzel v Discovery Life Limited* para 5.

⁶⁷ *Malcolm Wentzel v Discovery Life Limited* para 5.

⁶⁸ *Malcolm Wentzel v Discovery Life Limited* para 11 and 12.

⁶⁹ *Du Plessis v Pienaar* 2003 1 SA 671 (SCA) (hereafter *Du Plessis v Pienaar*).

⁷⁰ *Du Plessis v Pienaar* para 4; *Malcolm Wentzel v Discovery Life Limited* para 13.

⁷¹ *Malcolm Wentzel v Discovery Life Limited* para 15.

⁷² *Malcolm Wentzel v Discovery Life Limited* para 14.

deficit⁷³ and section 20(2) of the *Insolvency Act* was clear that all property that the insolvent acquired or which might accrue to him during the currency of his insolvency also vested in the trustees.⁷⁴

This, Mbha JA stated, was confirmed by section 23 of the *Insolvency Act*, that provides that all property acquired by an insolvent shall belong to his estate, with some specific exceptions in sections 23(7)-(9) of the Act.⁷⁵ Mbha JA pointed out that section 23 does not contain any provision excluding the proceeds of a life insurance policy received by an insolvent from the reach of trustees.⁷⁶ He said that if the legislature had wanted to exclude such proceeds from the general operation of the *Insolvency Act*, it would have provided so.⁷⁷ Thus, the Court concluded 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.⁷⁸

Mbha JA pointed out that pursuant to the sequestration of their joint estate, the Appellant and his deceased wife both became "insolvent debtors" for the purposes of the *Insolvency Act*. The effect was that all the property they acquired before the sequestration and property they acquired or which accrued to him during the sequestration vested in the trustee. This property included the proceeds of the insurance contract payable to him after the death of his wife. Accordingly, the Appellant remained insolvent and maintained that status until his rehabilitation.⁷⁹

The Court further held that the reliance on the case of *Pieterse v Shrosbree*, *Shrosbree v Love* was misplaced,⁸⁰ the reason being, that case concerned the question of whether the trustee of the insolvent deceased estate was under section 63 of the *LTIA* entitled, in preference to the nominated beneficiary, to the proceeds of an insurance policy to benefit the creditors of the deceased estate.⁸¹ It was held in that case, in which the parties were married out of community of property and in which Mr Pieterse was the nominated beneficiary, that because Mr Pieterse had accepted the benefits under the policy, the trustees of his insolvent estate were entitled to the

⁷³ *Malcolm Wentzel v Discovery Life Limited* para 14.

⁷⁴ *Malcolm Wentzel v Discovery Life Limited* para 15.

⁷⁵ *Malcolm Wentzel v Discovery Life Limited* para 16.

⁷⁶ *Malcolm Wentzel v Discovery Life Limited* para 17.

⁷⁷ *Malcolm Wentzel v Discovery Life Limited* para 17.

⁷⁸ *Malcolm Wentzel v Discovery Life Limited* para 17.

⁷⁹ *Malcolm Wentzel v Discovery Life Limited* paras 19 and 20.

⁸⁰ *Malcolm Wentzel v Discovery Life Limited* para 21.

⁸¹ *Malcolm Wentzel v Discovery Life Limited* para 21.

proceeds.⁸² Therefore, Mbha JA pointed out, the case was not authority for the argument advanced on behalf of the Appellant.⁸³ Instead it was against him because the Court in *Pieterse* merely gave effect to sections 20(2) and 23 of the *Insolvency Act*.⁸⁴

Thus, the Court concluded that upon the Appellant's acceptance of the insurance benefit, the proceeds became an asset in his insolvent estate, and they could not belong to a separate estate of the Appellant where such a separate estate was not legally recognised.⁸⁵

The Appellant then attempted to base his exclusive entitlement to the proceeds of the insurance policy on the provisions of section 23(8) of the *Insolvency Act*, a point which had not been raised in his founding affidavit. Section 23(8) provides for the insolvent to recover for his own benefit any compensation for any loss or damage which he may have suffered because of any defamation or personal injury.⁸⁶

The Appellant argued that the insurance proceeds fell under section 23(8) because the policy provided for indemnity for his wife's death, inclusive of the loss of consortium suffered by the Appellant.⁸⁷ Although this argument could not be allowed because it was not in the affidavit, the Court made a ruling on it. Mbha JA relied on the Constitutional Court case of *DE v RH*,⁸⁸ that when dealing with the traditional field of claims of contumelia associated with loss of consortium such as adultery, liability should not attach in this day and age. The Court held that the Appellant would have the insurmountable problem of identifying a wrongdoer concerning his claim if it were to be assumed that a claim for loss of consortium was notionally viable in other circumstances.⁸⁹ Thus, the appeal was unsuccessful and the Court declared that the proceeds should be paid over to the trustees.

4 Commentary

The main aim of a sequestration order in South African Insolvency law is the orderly and equitable distribution of the assets of the insolvent among

⁸² *Malcolm Wentzel v Discovery Life Limited* para 22.

⁸³ *Malcolm Wentzel v Discovery Life Limited* para 22.

⁸⁴ *Malcolm Wentzel v Discovery Life Limited* para 22.

⁸⁵ *Malcolm Wentzel v Discovery Life Limited* para 23.

⁸⁶ Section 23(8) of the *Insolvency Act*.

⁸⁷ *Malcolm Wentzel v Discovery Life Limited* para 26.

⁸⁸ *DE v RH* 2015 5 SA 83 (CC).

⁸⁹ *Malcolm Wentzel v Discovery Life Limited* para 28.

his creditors.⁹⁰ Thus, South African insolvency law is premised on the principle that the sequestration of a debtor's estate must be to the advantage of the creditors of the insolvent estate.⁹¹

To give effect to this purpose, all the assets of the debtor vest in the Master and later in the trustee, upon his appointment.⁹² When the parties are married in community of property there is one joint estate⁹³ and the assets of the joint estate vest in the trustee. When the parties are married out of community of property, there are two separate estates, that of the insolvent and that of the solvent spouse. To give effect to the aim of sequestration in South Africa, the *Insolvency Act* also vest the assets of the solvent spouse in the trustee of the insolvent estate to maximise the value of the insolvent estate.⁹⁴ Upon appointment, the trustee of the insolvent estate is tasked with the duty of collecting all the assets of the estate, selling them and using the proceeds to benefit the creditors.⁹⁵ Therefore, South African insolvency law is creditor-friendly and is not intended to benefit the debtors of the insolvent estate.

Therefore, in claiming the proceeds of the life insurance policy in the *Wentzel* case the trustees were giving effect to their duty to collect the maximum amount of assets to the benefit of the creditors. However, as indicated above, whenever the assets of the debtor include the proceeds of life insurance policies the *LTIA* comes into play and a balancing of interests must be achieved. The balancing of interests also raises the question of which legislation takes precedence, the *Insolvency Act*, which aims to benefit creditors, or the *LTIA*, which aims to regulate and control certain

⁹⁰ *Walker v Syfret*; Bertelsmann *et al Mars The Law of Insolvency* 3; Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 4.

⁹¹ Sections 6(1), 10(c) and 12(c) of the *Insolvency Act*; *Ex parte Mark Schmukler-Tshiko* [2012] ZAGPJHC 209 (26 October 2012) (hereinafter *Schmukler*) para 8; *Ex parte Pillay: Mayet v Pillay* 1955 2 SA 309 (N); Loubser 1997 *SA Merc LJ* 326; Mabe 2015 *THRHR* 238.

⁹² See ss 20(1)(a) of the *Insolvency Act*; Bertelsmann *et al Mars The Law of Insolvency* 181; Evans and Borraine 2005 *De Jure* 274; *Warricker v Liberty Life Association of Africa Ltd* 2004 3 SA 445 (SE) (hereafter *Warricker v Liberty Life*) para 9.

⁹³ Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 5; s 17(4) of the *Matrimonial Property Act* 88 of 1984.

⁹⁴ Section 21 of the *Insolvency Act*. See generally *Harksen v Lane* 1998 1 SA 300 (CC) for the purpose of s 21, to prevent collusion between spouses and to make sure that property that belongs to the insolvent estate, vests in the insolvent estate to maximise the value of the insolvent estate.

⁹⁵ Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 130; Evans and Borraine 2005 *De Jure* 268; Evans 2011 *PELJ* 39.

activities of the long-term insurer. This was the challenge faced by the Courts in the *Wentzel* case.

4.1 Section 63 of the LTIA and its application

The *LTIA* came into operation on 1 January 1999⁹⁶ and was amended by the *Financial Services Amendment Act*, which came into effect in February 2014⁹⁷ and 2018. Section 63 was further amended by the *Insurance Act*.⁹⁸ Before analysing the *Wentzel* case, it is necessary to first explain the application of section 63 of the *LTIA*.

The current section 63 of the *LTIA* provides:

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

⁹⁶ The *LTIA*.

⁹⁷ See fn 7 above. S 101 of the *FSLGAA*.

⁹⁸ Section 63 was amended by s 72 read with Schedule 1 of the *Insurance Act*. The amendment had the effect of consolidating policies under the application of s 63 to those provided by registered insurers. The amendment also had the effect of extending the application of s 63 to policies provided by licenced insurers.

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, step-child 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.

Therefore section 63 protects the proceeds of life and other insurance policy benefits that are payable to the insolvent policyholder from forming part of his insolvent estate.⁹⁹ It also protects the assets acquired exclusively from the proceeds of those policy benefits for five years from the date on which the policy benefit was provided.¹⁰⁰ The protection is applicable to life and other insurance policy benefits only where the insolvent or his spouse is the life insured and the policy has been in existence for at least three years.¹⁰¹ Section 63 does not mention the marital regime of the insolvent beneficiary.

However, the protection applies only where the insolvent is the beneficiary of the insurance policy and does not apply where the beneficiary is a third party.¹⁰² Therefore, in terms of section 63, where the owner of the policy nominated him or herself as a beneficiary, all the policy proceeds will be paid to him or her directly, to the exclusion of creditors.¹⁰³

Consequently, where an insurance policy benefit pays out to the insolvent while he is alive, section 63 states that the proceeds of that policy must be paid to the insolvent directly and should not fall into his insolvent estate.¹⁰⁴ Further, where the insurance policy benefit pays out upon the insolvent's

⁹⁹ Section 63(1)(b) of the *LTIA*. Also see Bertelsmann *et al Mars The Law of Insolvency* 215-216; Meskin *et al Insolvency Law* para 5.3.2.1.

¹⁰⁰ Section 63(2) of the *LTIA*; Bertelsmann *et al Mars The Law of Insolvency* 215.

¹⁰¹ Section 63(1)(b) of the *LTIA*. Bertelsmann *et al Mars The Law of Insolvency* 215-216; Meskin *et al Insolvency Law* para 5.3.2.1.

¹⁰² Section 63(1)(b) of the *LTIA*. Also see Bertelsmann *et al Mars The Law of Insolvency* 216-217; Evans *Critical Analysis of Problem Areas* 297.

¹⁰³ Bertelsmann *et al Mars The Law of Insolvency* 215; Mabe 2015 *THRHR* 240.

¹⁰⁴ Sections 63(1)(b)(i) of the *LTIA*.

death and he is survived by a spouse, child, or parent,¹⁰⁵ the insurance policy benefit will still not be available to pay his debts.¹⁰⁶ Thus, in terms of section 63 the proceeds of a life insurance policy benefit do not form part of the insolvent estate, irrespective of whether or not the deceased estate was sequestrated.¹⁰⁷

However, where the insolvent policyholder insured his life or the life of his spouse but the nominated beneficiary is a third party, meaning it is a person other than the insolvent policyholder,¹⁰⁸ it is regarded as a stipulation for the benefit of a third party.¹⁰⁹ In terms of this stipulation, during the lifetime of the insolvent policyholder he remains the owner¹¹⁰ of the policy and the nominated third party has no rights¹¹¹ to the policy until acceptance of the benefit.¹¹²

Since the trustee steps into the shoes of the insolvent after sequestration,¹¹³ the trustee acquires the right to remove the nominated beneficiary or to surrender the policy and receive the surrender value under the policy.¹¹⁴ The pay-out will then form part of the insolvent estate. However, if the trustee does not remove the third-party beneficiary, the proceeds of the policy will go to the nominated third party to the exclusion of the creditors of

¹⁰⁵ Sections 63(1)(b) of the *LTIA*.

¹⁰⁶ Sections 63(1)(b)(ii) of the *LTIA*. *Meskin et al Insolvency Law* para 5.3.2.1B.

¹⁰⁷ Pillay AJ in *Shrosbree v Van Rooyen* 2004 1 SA 226 (SE) 231 held that insolvency law is a debt-collecting mechanism and that ss 63(1)(b) is wide enough to cover all the possibilities explicitly listed in ss 63(1)(a). Therefore, it is submitted that even though ss 63(1)(b) does not explicitly provide that the benefit will not form part of the deceased insolvent estate, by virtue of the above case it is excluded by implication from the deceased's insolvent estate. Also see *Meskin et al Insolvency Law* para 5.3.2.1 B.

¹⁰⁸ That is the spouse, child, parent or any other third person. See *Bertelsmann et al Mars The Law of Insolvency* 217.

¹⁰⁹ *Bertelsmann et al Mars The Law of Insolvency* 217; *Evans and Boraine* 2005 *De Jure* 270; *Evans Critical Analysis of Problem Areas* 281; *Pieterse v Shrosbree*; *Shrosbree v Love* para 8; *Warricker v Liberty Life* para 10; *Mabe* 2015 *THRHR* para 2.1. In insurance law, these contracts are described as "third party contracts". Also see *Reinecke, Van Niekerk and Nienaber South African Insurance Law* 423.

¹¹⁰ As the owner of the property she had, subject to the terms of the policy, the full right to deal with it as she liked. See *Warricker v Liberty Life* para 10.

¹¹¹ It was emphasised in *PPS Insurance Co Ltd v Mkhabela* 2012 3 SA 292 (SCA) para 7 that prior to acceptance, a third party has no vested right but merely an expectation (*spes*) that could not survive his death. See *Reinecke, Van Niekerk and Nienaber South African Insurance Law* 433; *Pieterse v Shrosbree*; *Shrosbree v Love* para 8.

¹¹² *Wessels v De Jager* 2000 4 SA 924 (SCA); *Reinecke, Van Niekerk and Nienaber South African Insurance Law* 425-427.

¹¹³ *Evans and Boraine* 2005 *De Jure* 274; *Warricker v Liberty Life* para 9.

¹¹⁴ *Warricker v Liberty Life* para 13.

the insolvent estate upon acceptance of the benefit.¹¹⁵ Consequently, neither the insolvent debtor nor his dependants would have access to the protected portion of the policy because a third party could be anybody.¹¹⁶

Before the 2014 amendment, however, this was not the situation. In terms of the old section 63 only an amount of R50 000 accruing from life and other insurance policy benefits payable to the insolvent was protected from the insolvent estate.¹¹⁷ Thus, in terms of the old section 63 the creditors of the insolvent estate at least received any available amount over R50 000.¹¹⁸

4.2 The analysis

This analysis focusses on three issues. Firstly, whether section 63 of the *LTIA* applies to the *Wentzel* facts. Secondly, whether the dissolution of Mr Wentzel's marriage *ex lege* entitled him to receive property that vested in him personally to the exclusion of his trustees. Lastly, whether an unrehabilitated insolvent who was the nominated beneficiary in a life insurance policy is personally entitled to the proceeds of that policy if the first and final L&D account of his insolvent estate had already been filed and accepted by the Master?

Regarding the first issue, the definition of property in section 2 of the *Insolvency Act* would generally include insurance policies; however, the *Insolvency Act* and other statutes specifically exclude or exempt certain of the insolvent's property from passing to his trustee.¹¹⁹ In the case of insurance policies, the other statute is section 63 of the *LTIA*, which in certain circumstances and under certain limits exempts life insurance policies from the trustee's control.¹²⁰

¹¹⁵ *Warricker v Liberty Life* para 13; *Pieterse v Shrosbree*; *Shrsobree v Love* para 12. Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 428. See *Oshry v Feldman* 2010 6 SA 19 (SCA) para 45; *Pieterse v Shrosbree*; *Shrsobree v Love* para 10. See also Bertelsmann *et al Mars The Law of Insolvency* 196; Evans *Critical Analysis of Problem Areas* 297.

¹¹⁶ Though the nomination by the insured of a third party as a beneficiary under a life insurance policy is not a disposition as defined in s 2 of the *Insolvency Act*, it is submitted that the nomination of a third party could still be seen as a way of depriving the insolvent estate of the proceeds of insurance policy benefits. See Bertelsmann *et al Mars The Law of Insolvency* 251.

¹¹⁷ Bertelsmann *et al Mars The Law of Insolvency* 215-216; Meskin *et al Insolvency Law* para 5.3.2.1; Mabe 2015 *THRHR* 239.

¹¹⁸ Mabe 2015 *THRHR* 240.

¹¹⁹ Bertelsmann *et al Mars The Law of Insolvency* 212.

¹²⁰ Bertelsmann *et al Mars The Law of Insolvency* 214.

The facts in the *Wentzel* case are a typical example where section 63 of the *LTIA* applies because Mr Wentzel had taken out a life insurance policy on his wife's life and nominated himself as the beneficiary of the policy in the event of her death. The same policy also insured his life and nominated his wife as the beneficiary in the event of his death. The spouses had been married in community of property and both of them had been policyholders, nominated as beneficiaries. Thus, no third parties had been nominated as beneficiaries.

The policy had come into effect in January 2012 and had matured in April 2017 when the wife died. Thus, it had been in existence for at least three years. The joint estate had been sequestrated in April 2012, and on the death of the wife in 2017 the spouses had not been rehabilitated.

If all the requirements in section 63 have been met, as in the present case, the proceeds of a life insurance policy taken by a policyholder on the life of his wife appointing the policyholder as the beneficiary as per section 63(1)(b)(i) should not form part of his insolvent estate during his lifetime. Secondly, as per section 63(1)(b)(ii) the proceeds of the policy benefits should also not be made available for paying the wife's debts,¹²¹ since her deceased estate was also insolvent.

It is submitted that the complications in the *Wentzel* case arose because Mr Wentzel and his attorneys failed to allege that his entitlement to the proceeds of the life insurance policy benefits was based on the application of section 63 to his situation, as shown above. Instead, Mr Wentzel brought some inventive arguments based on section 23(8) of the *Insolvency Act*, which the Court could not accept. Secondly, both the Courts failed to analyse the circumstances under which section 63 applies and consequently could not realise that section 63 applied to the facts in this case.

Regarding the second issue concerning the effect of death on a sequestrated insolvent estate, Tlhapi J in the High Court was correct in saying that death did not change Mr Wentzel and his deceased wife's insolvency status. Mr Wentzel remained an unrehabilitated insolvent and the wife's estate became the deceased insolvent estate. Instead of basing his argument on death's changing their status, Mr Wentzel should have alleged that because his insolvency status had not changed upon his wife's death, section 63 applied and protected the proceeds of the insurance policy

¹²¹ Meskin *et al Insolvency Law* para 5.3.2.1B.

benefit from his trustees' hands. The fact that he remained an unrehabilitated insolvent was a benefit to him, not a disadvantage, because section 63 would keep the insurance policy benefit away from the trustees and his creditors.

Tlhapi J was also correct in stating that if Mr Wentzel acquired and kept the insurance policy proceeds for himself, this would make it difficult for the creditors of his insolvent estate. As indicated above, this is the dilemma brought about by applying two statutes, namely, the *Insolvency Act* and the *LTIA*, which have different purposes. The balancing of interests in favour of section 63 takes away money that could have been used to pay the creditors of the insolvent estate. However, the fact that there would be a difficulty for the creditors does not mean that section 63 should not be applied where the requirements for its application have been met. As indicated, insolvency law in South Africa allows certain assets to be exempted from the insolvent estate. Section 63 is one of the statutes that allows the exemption of life insurance policy benefits from the insolvent estate.

As regards section 20 of the *Act*, Tlhapi J was correct in stating that the insolvent estate includes all movable or immovable property at the date of sequestration, including all property acquired or accrued to the insolvent during the sequestration, except as otherwise provided in sections 23, 79 and 82(6). However, he ignored the fact that life insurance policy benefits are dealt with in terms of the *LTIA*, not in terms of the *Insolvency Act*. This is where the *Insolvency Act* and the *LTIA* conflict. He focussed only on the exclusions and exemptions in the *Insolvency Act*. He did not at all mention exemptions from other statutes, in this case, section 63 of the *LTIA*.¹²² The Courts are yet to make a ruling on the hierarchy of the two pieces of legislation to explain what happens in the event of a conflict between the two pieces of legislation, as in the present case.

In the Supreme Court, Mbha JA rightly confirmed Tlhapi J's finding that the dissolution of the joint estate did not end Mr Wentzel's insolvency as his insolvent estate still had a deficit and he remained insolvent until his rehabilitation.¹²³ However, like Tlhapi J he was incorrect in saying that section 20 vested the life insurance policy proceeds in the insolvent estate,¹²⁴ because where section 63 of the *LTIA* is applicable the assets are exempted from the insolvent estate.

¹²² See Evans 2011 *PELJ* para 2.

¹²³ *Malcolm Wentzel v Discovery Life Limited* paras 14-15.

¹²⁴ *Malcolm Wentzel v Discovery Life Limited* paras 15-16.

Mbha JA was also incorrect in stating that had the legislature wanted to exclude the proceeds of life insurance policy benefits from the general operation of the *Insolvency Act* it would have provided so in the *Act*.¹²⁵ If this were true, that would mean that other exempt assets which are not specifically exempted or excluded by the *Insolvency Act* but are exempted by other statutes would also, according to him, not be exempted because they are not specifically excluded and mentioned in section 23 of the *Act*. Such exemptions include friendly society money and assets in terms of section 48(1) of the *Friendly Societies Act*¹²⁶ and a share in accrual in terms of section 3(2) of the *Matrimonial Property Act*.¹²⁷ The exclusion of these types of assets is based on the policy that property that belongs to others cannot form part of an insolvent estate or are of a social security nature.¹²⁸

Regarding the third issue, which concerns the effect of filing the L&D account, Tlhapi J in the High Court rightly stated that the laying for inspection of the L&D account does not mean that the insolvent has been rehabilitated.¹²⁹ Therefore, confirmation of the account does not end the duties of the trustee to collect assets that are found after the L&D account and it does not end the insolvency of the estate. Only rehabilitation ends the insolvency. Thus, it is submitted that for as long as the insolvency exists, the insolvent can rely on section 63 to protect the proceeds of life insurance policies accruing to him.

Concerning the application of *Pieterse v Shrosbree*, *Shrosbree Love* to the facts in the *Wentzel* case, Tlhapi J was correct in distinguishing that case from the *Wentzel* case. In *Pieterse v Shrosbree*, *Shrosbree Love* the spouses were married out of community of property and the insolvency occurred after death. In the *Wentzel* case the spouses were married in community of property and insolvency occurred before death. However, it appears that Tlhapi was incorrect in stating that *Pieterse v Shrosbree*, *Shrosbree Love* assisted the present case as regards the application of a stipulation for the benefit of a third party.

The stipulation for the benefit of a third party was not applicable in the present case, because both the policyholders were the nominated

¹²⁵ *Malcolm Wentzel v Discovery Life Limited* para 17.

¹²⁶ *Friendly Societies Act* 25 of 1956.

¹²⁷ *Matrimonial Property Act* 88 of 1984. For more property that is excluded or exempted by legislation other than the *Insolvency Act*, see Evans 2011 *PELJ* para 2; Evans *Critical Analysis of Problem Areas* 300-310.

¹²⁸ Evans 2011 *PELJ* para 1, 2; Evans *Critical Analysis of Problem Areas* 300.

¹²⁹ Regarding the effect of the confirmation of the L&D account, see Bertelsmann *et al Mars The Law of Insolvency* 588.

beneficiaries. No third party had been nominated. The stipulation for the benefit of a third party applied in *Pieterse v Shrosbree, Shrosbree Love* because the nominated beneficiary was not the policyholder but the other spouse, who then became the third party. As indicated above, a third party is a person other than the policyholder.

Tlhapi J was therefore correct in stating that the trustee's claim did not arise in a *stipulatio alteri* but arose because of the laws of insolvency. However, although in terms of the laws of insolvency the trustee's claim was based on his duty to collect assets of the insolvent estate to benefit creditors, the proceeds of life insurance policy benefits are exempted by the *LTIA* from vesting in the insolvent estate. Therefore, the trustee never had control over them because they never vested in him (in ownership) and consequently he could not claim them because he had no legal right over them.

In the Supreme Court Mbha JA rightly distinguished *Pieterse v Shrosbree, Shrosbree v Love* from the facts of the *Wentzel* case and rightly indicated that the case was not authority for Mr Wentzel's argument because it applied sections 20(2) and 23 of the Act, which was to the disadvantage of Mr Wentzel.¹³⁰ However, just like Tlhapi J in the High Court, Mbha JA did not consider the application of section 63 to Mr Wentzel's situation. He focussed on the fact that Mr Wentzel accepted the benefit and because of that the proceeds became an asset in his insolvent estate and they could not belong to a separate estate of the Appellant where such a separate estate was not legally recognised.¹³¹

In this regard Mbha JA appears to be contradicting himself. This is because a beneficiary can accept a benefit only if the nomination was regarded as a stipulation for the benefit of a third party. As indicated above, that applies where the policyholder nominated a third party as a beneficiary. As already mentioned, a third party is a person other than the insolvent policyholder. This was the reason the Court distinguished the *Pieterse v Shrosbree, Shrosbree v Love* from the facts in the *Wentzel* case in the first place. In *Pieterse v Shrosbree, Shrosbree v Love*, Mrs Pieterse (the deceased) had owned an insurance policy in which she had been the life insured.¹³² She had paid the premiums herself but she had nominated Mr Pieterse as the beneficiary.¹³³ Thus, Mr Pieterse was a third party and a stipulation for the benefit of a third party applied to his situation. In the *Wentzel* case the

¹³⁰ *Malcolm Wentzel v Discovery Life Limited* paras 21-22.

¹³¹ *Malcolm Wentzel v Discovery Life Limited* para 23.

¹³² *Pieterse v Shrosbree, Shrosbree v Love* para 4.10.

¹³³ *Pieterse v Shrosbree, Shrosbree v Love* paras 4.11, 4.12.

applicant was the owner of an insurance policy where he had insured his wife's life but had nominated himself as the beneficiary in the event of her death, in which case section 63 applies and the proceeds of the policy should have been excluded from Mr Wentzel's insolvent estate and should have been paid directly to him to the exclusion of his creditors.

5 Conclusion

Although the *Insolvency Act* has been amended many times, many provisions in other legislation deal with aspects concerning insolvent debtors that are not directly mentioned in the *Insolvency Act*. This then results in having to cross-reference to other legislation when dealing with those aspects. An example of such aspects is life insurance policies, which are not specifically exempted by section 23 or other provisions of the Act.

The *Wentzel* case represents the dilemma faced by the Courts when legislation, in this case the *Insolvency Act*, does not specifically deal with an aspect that has hugely detrimental effects to achieve the purpose of sequestration, to benefit creditors. Favouring the aim of the sequestration process, which is creditor friendly, the Courts in the *Wentzel* case found that the trustees of the insolvent estate were entitled to the proceeds of the life insurance benefit.

This could be blamed on the fact that the Appellant failed to base his entitlement to the insurance benefit on section 63 but instead brought "imaginative arguments" which the Court could not accept. Further, the Courts failed to analyse the circumstances under which section 63 applies and consequently could not realise that section 63 applied to the *Wentzel* situation. As a result, the Courts in the *Wentzel* case did not even attempt to balance the interests of the creditors with those of the debtor by considering the application of section 63.

Unless the *Insolvency Act* is amended to deal with all aspects concerning insolvent debtors, the Courts will continue to be in the dilemma of having to refer to other legislation which does not share the same aims as the Act in aspects concerning the insolvent estate. As shown in the *Wentzel* case, some Courts do not make cross-references to other applicable legislation when adjudicating cases relating to the administration of an insolvent estate.

The Court's failure to apply section 63 in the *Wentzel* case says indirectly that the *Insolvency Act* takes precedence over the *LTIA*.

Bibliography

Literature

Bertelsmann *et al Mars The Law of Insolvency*

Bertelsman E *et al Mars The Law of Insolvency in South Africa* 10th ed (Juta Cape Town 2019)

Evans and Boraine 2005 *De Jure*

Evans R and Boraine A "Considerations Regarding a Policy for the Treatment of Certain Beneficiaries of Life Insurance Policies in the Law of Insolvency" 2005 *De Jure* 266-294

Evans *Critical Analysis of Problem Areas*

Evans RG *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (LLD-thesis University of Pretoria 2008)

Evans 2011 *PELJ*

Evans RG "Legislative Exclusions or Exemptions of Property from the Insolvent Estate" 2011 *PELJ* 39-56

Loubser 1997 *SA Merc LJ*

Loubser A "Ensuring Advantage to Everyone in a Modern South African Insolvency Law" 1997 *SA Merc LJ* 325-333

Mabe 2015 *THRHR*

Mabe Z "Life and Other Insurance Policy Benefits and the Property of an Insolvent Person" 2015 *THRHR* 237-247

Meskin *et al Insolvency Law*

Meskin PM *et al Insolvency Law and its Operation in Winding-up* (LexisNexis Butterworths Durban 1990- (June 2015 update))

Reinecke, Van Niekerk and Nienaber *South African Insurance Law*

Reinecke MFB, Van Niekerk JP and Nienaber PM *South African Insurance Law* (LexisNexis Butterworths Durban 2013)

Sharrock, Van der Linde and Smith *Hockly's Insolvency Law*

Sharrock J, Van der Linde K and Smith A *Hockly's Insolvency Law* 9th ed (Juta Cape Town 2012)

Case law

DE v RH 2015 5 SA 83 (CC)

Du Plessis v Pienaar 2003 1 SA 671 (SCA)

Ex parte Mark Schmukler-Tshiko [2012] ZAGPJHC 209 (26 October 2012)

Ex parte Pillay: Mayet v Pillay 1955 2 SA 309 (N)

Ex Parte Potgieter 1967 2 SA 310 (T)

Harksen v Lane 1998 1 SA 300 (CC)

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

Moodley v Milner 1965 1 SA 154 (D)

Naidoo v Discovery Limited (202/2017) [2018] ZASCA 88 (31 May 2018)

Oshry v Feldman 2010 6 SA 19 (SCA)

Pieterse v Shroobree, Shroobree Love 2005 1 SA 309 (SCA)

PPS Insurance Co Ltd v Mkhabela 2012 3 SA 292 (SCA)

Shroobree v Van Rooyen 2004 1 SA 226 (SE)

Walker v Syfret 1911 AD 141

Warricker v Liberty Life Association of Africa Ltd 2004 3 SA 445 (SE)

Wentzel v Discovery Life Limited 2019 6 SA 472 (GP)

Wessels v De Jager 2000 4 SA 924 (SCA)

Legislation

Friendly Societies Act 25 of 1956

Financial Services Laws General Amendment Act 45 of 2013

Insolvency Act 24 of 1936

Insurance Act 18 of 2017

Long Term Insurance Act 52 of 1998

Matrimonial Property Act 88 of 1984

List of Abbreviations

FSLGAA	Financial Services Laws General Amendment Act 45 of 2013
L&D Account	Liquidation and Distribution Account
LTIA	Long Term Insurance Act 52 of 1998
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg