

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG



(1) Reportable: Yes
(2) Of interest to other Judges:
Yes
(3) Revised: No

Date: 27/07/2022

A Maier-Frawley

CASE NO: 2020/13195

In the matter between:

LILIANNE DE MAGALHAES

Applicant

and

SEAN CHRISTENSEN N.O

First Respondent

JABULANI KHUMALO N.O

Second Respondent

J U D G M E N T

MAIER-FRAWLEY J:

Introduction

1. In the main application, the applicant seeks an order directing the respondents to release her bank accounts pursuant to section 21 of the Insolvency Act 24 of 1936 (*'the Act'*), *alternatively*, to release the attachment of her bank accounts, including but not limited to the proceeds of a policy benefit held in her bank account in terms of s 21, insofar as such policy benefit is excluded from attachment pursuant to section 63(1)(a) of the Long Term Insurance Act, 52 of 1998 (*'the LTI Act'*), *further alternatively*, insofar as

it is found that she is not the owner of the funds, an order directing that the monies constitute policy benefit[s] which are excluded from attachment in terms of section 63(1)(a) of the LTI Act.

2. The applicant is the wife of Mr AMF De Magalhaes (*'the insolvent'*) whose estate was placed under final sequestration by order of court on 15 August 2019.
3. The first and second respondents are the duly appointed provisional trustees of the insolvent estate. The respondents launched a counter-application wherein they seek an extension of their powers in terms of s 18(3) of the Act in order to oppose the main application. The counter-application is not opposed.
4. The applicant's case is that monies contained in her bank accounts constitute her own property which she acquired during her marriage to the insolvent. In para 7 of the founding affidavit, the applicant avers that the relief sought by her is premised on obtaining:
 - 4.1. the release of her personal bank accounts from attachment on the basis that the monies contained therein are her property which she acquired during her marriage to the insolvent, in accordance with the provisions of Section 21 of the Act;
 - 4.2. *alternatively*, an order directing the respondents to release and pay over all monies withdrawn [by the respondents] from her bank accounts on the basis that the monies so withdrawn constitute the applicant's property which she acquired during her marriage to the insolvent, in accordance with the provisions of s 21 of the Act;
 - 4.3. *further alternatively*, in the event that it is found that she did not acquire ownership of the monies, an order directing that the monies

constitute policy benefits which are excluded from attachment pursuant to the provisions of s 63(1)(a) of the LTI Act.

5. The respondents oppose the main application on the basis that the applicant has failed to demonstrate that the funds in her bank accounts were acquired by her by a title valid as against the creditors of the insolvent, as required by s 21(2)(c) of the Act, and further, that s 63 of the LTI Act does not find application on the facts of the matter since any policy benefits paid to the applicant were wholly depleted by the time of their attachment by the respondents.
6. The main issues arising for determination are:
 - 6.1. Whether the applicant has demonstrated that she holds valid title to the funds contained in her bank accounts; and
 - 6.2. Whether the funds in the applicant's bank account (FNB maximiser account) constitute policy benefits which are exempted from attachment in terms of s 63(1)(a) of the LTI Act.

Background matrix

7. The applicant and the insolvent were married to one another out of community of property on 11 January 1992. Their marriage still subsists and by all accounts they have remained living together.
8. The applicant was at all relevant times the holder of three bank accounts: a cheque account held at First National bank, a maximiser account held at First National bank and a credit card account held at Standard Bank.
9. During September 2004, the insolvent procured life and disability cover for himself (as principal/first life assured) and the applicant (as second life assured) from Liberty Life (hereinafter referred to as either '*Liberty Life*' or '*the insurer*') in terms of a Lifestyle Protector policy wherein the insolvent is

listed as both the policy holder, owner and a beneficiary of the policy benefits pertaining to the second life assured.

10. On 25 January 2019 Liberty Life paid an amount of R2,160 000.00 into the insolvent's bank account, being in respect of a disability claim submitted to the insurer under the disability portion of the policy pertaining to the second life assured. It is not in contention that the claim was submitted on account of the applicant having been diagnosed with cancer and so having suffered a 'disability' as defined in the policy. The amount paid by Liberty accords with the amount of the disability benefit stipulated in the policy for loss of income protection in respect of the second life assured under the policy, namely, the applicant.
11. On 28 January 2019, the insolvent paid an amount of R2,135 000.00 into the applicant's maximiser account held at First National Bank ('the FNB maximiser account'). Before this payment was received, the FNB maximiser account had a zero balance.
12. On 17 May 2019, an amount of R2,740 000.00 was paid from the applicant's FNB cheque account into the FNB maximiser account. This amount comprised a portion of the proceeds obtained by the applicant from the sale of an immovable property situate in Simons Town, which she alleges was owned by her.
13. On 3 July 2019 the insolvent's estate was placed under provisional sequestration by order of court, which order was made final on 15 August 2019.
14. On 2 August 2019 the respondents were appointed as the provisional trustees of the sequestrated estate.

15. Following their appointment, on or about 19 August 2019, the respondents attached the applicant's FNB maximiser account under the provisions of s 21(1) of the Act, pursuant to a notice addressed to the applicant, dated 14 October 2019, in which they informed her of their intention to realise the funds in the FNB maximiser account for the benefit of the creditors of the sequestrated estate, as envisaged in s 21(3) of the Act.¹
16. At the time of the attachment, the FNB maximiser account reflected a credit balance of R1,830 901.52. The balance in the FNB cheque account was R3176.79 whilst the Standard bank credit card account reflected a zero balance.
17. On 26 September 2019 the applicant's attorneys requested written reasons from the respondents as to why the funds in the FNB maximiser account were being withheld. On 27 September 2019 the first respondent replied stating that the trustees were of the view that the funds in the FNB maximiser account 'represent the balance of funds from a disposition made' by the insolvent of the amount of R2,135 000.00 to the applicant on 28 January 2019, and that they would proceed with their intentions to retain the funds for the benefit of the insolvent's creditors. The applicant was invited to apply for the release of the property in terms of s 21 of the Act.
18. The applicant thereafter launched an urgent application for the release of the property, which application was subsequently withdrawn by her on 21 April 2020 for reasons that are not pertinent to these proceedings. Sometime thereafter, the respondents withdrew funds from the FNB maximiser account, thereafter causing such funds to be deposited into the bank account of the sequestrated estate.²

¹ The notice is contained in Annexure 'AA40' to the answering affidavit at 04-244.

² According to the applicant, an amount of R1,741 896.56 was initially held in the trust account of the respondents. It is not clear from the papers whether this amount that was the amount withdrawn by from the FNB maximiser account and thereafter deposited in the bank account of the sequestrated estate, or whether the full balance of R1,830 901.52 was withdrawn, however, nothing really turns on

19. The present application was launched in June 2020.

Discussion

20. It is trite that upon sequestration of an insolvent's estate, which brings about a *concursum creditorum*, all of the insolvent's property vests in the Master of the High Court until a trustee is appointed, and upon appointment, in the trustee.

21. Section 21 of the Act creates an additional effect of such sequestration upon the estate of the solvent spouse who is not living apart from the insolvent, by providing that all the property (or proceeds thereof) belonging to the solvent spouse will vest in the Master or trustee in the same way as the estate of the insolvent spouse. Section 21(1) states:

"The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section." (emphasis added).

22. Section 21(2) of the Act defines various categories of property of the solvent spouse which the trustees of the insolvent spouse are obliged to release if the solvent spouse proves his or her entitlement thereto. In her founding affidavit, the applicant relies on s 21(2)(c) for the release of her personal bank account (being the FNB maximiser account) from attachment, including the release of the funds withdrawn therefrom the respondents. In terms of s 21(2)(c) of the Act:

this.

“(2) The trustee shall release any property of the solvent spouse which is proved

(c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent;”

23. Section 2 of the Act *inter alia* defines *property* as ‘movable or immovable property, wherever situated within the Republic’ of South Africa. *Movable Property* includes money in the sense of cash, as well as the right of action which one has against one’s banker to claim payment of the amount standing to the credit of one’s account³

24. In *Davies*,⁴ Molahlehi J summarised the nature of the onus upon a solvent spouse to prove his/her entitlement to the release of his/her property, as follows:

“ [21] The onus in proceedings of this nature, as stated in *Beddy No v Van der Westhuizen*, is for the solvent spouse to show that the true transaction that resulted in the acquisition of the property in question was valid and conferred a valid title on him or her. In other words, the solvent spouse in seeking to have an estate released from the insolvency proceedings has to demonstrate the true validity of her title and its validity against creditors of the insolvent. Put in another way the solvent spouse has to show that the transaction(s) under which she acquired the property was not simulated, or designed to defeat the rights of creditors.

[22] Once the solvent spouse has discharged the onus of showing that the property in question was not acquired by improper methods intended to prejudice the creditors, the trustee is obliged to release such property from the insolvency proceedings. The property would, in other words, have been acquired by the solvent spouse through her or his resources during the marriage and such acquisition would have vested on his/her a valid title against the creditors of the insolvent spouses.” (footnotes omitted) (emphasis added)

³ See: Meskin’s Law of Insolvency at par 5.1 and the authority cited therein.

⁴ *Davies v Van den Heever NO* (16865/17) [2019] ZAGPJHC 59 (1 March 2019) at paras 21 & 22.

25. In seeking to discharge the onus, the solvent spouse cannot simply point to an ostensible transaction and call upon the trustee to demonstrate that it was not a true transaction or came about from collusive dealings between the insolvent and the solvent spouse.⁵

26. In *Kilburn v Estate Kilburn*⁶ Wessels ACJ held as follows:

“Now the Insolvency Act provides that when one spouse becomes insolvent, the estates of both spouses vest in the Master, and then in the trustee when appointed, but there is a proviso that the trustee must release such property of the solvent spouse as is shown to have been acquired during the marriage with the insolvent by a title valid as against the creditors of the insolvent spouse. In other words if property has been acquired by the spouse who is not insolvent by means of her own money or from a source other than her husband, then she holds it by title valid as against the creditors of her insolvent husband. But if she obtains it from him during marriage as a donation, or if the insolvent gives money to his wife to buy property and have it registered in her name, or if she buys property with money provided by the husband ostensibly for herself but in reality for her husband’s estate or even for the benefit of both the spouses, then it is his property and forms part of his estate; and the property, though registered in her name, is not acquired by the non-insolvent spouse by a title valid as against the creditors of the insolvent.”
(emphasis added)

27. According to the respondents, they attached only the FNB maximiser account from which they withdrew funds, which funds so withdrawn were subsequently deposited into an account that had been opened for the sequestrated estate. It is not in dispute that the bulk of the money in the FNB maximiser account came from two substantial payments, namely, (i) a payment of R2.135 million made by the insolvent to the applicant on 28 January 2019, and (ii) a payment of R2.740 million, being the proceeds of the sale by her of an immovable property in Simons Town, which amount was

⁵ *Beddy N.O v Van der Westehuizen* 1999 (3) SA 913 (SCA) at 917D - F

⁶ 1931 AD 501 at 507 to 508

subsequently transferred from the applicant's cheque account into the FNB maximiser account on 17 May 2019.

28. The applicant conceded in her heads of argument that she bears the onus of proving a valid title to the property for purposes of demonstrating why it should be released to her. During oral argument presented at the hearing of the matter, however, the applicant sought to argue that in so far as s 21(1) vests the property of the solvent spouse in the master or trustee of the insolvent spouse, the section is unconstitutional in that it amounts to the arbitrary deprivation of property in conflict with the provisions of s 25(1) of the Constitution⁷ and that the respondents ought to bear the onus of making out a case for why the property belongs to the insolvent estate. Apart from the fact that s 21(1) has been held by the Constitutional court *not* to be unconstitutional *and* that sound reasons exist for placing the onus upon a solvent spouse to prove his/her ownership of the property he/she seeks be released,⁸ it is not permissible to raise a constitutional point which has not

⁷ Constitution of the Republic of South Africa, 1996. In terms of s25(1), no-one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property.

⁸ See: *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997) at paras 35-37 and 59-60, where, *inter alia*, the following was said:

“The purpose and effect [of s 21(1)] is clearly not to divest, save temporarily, the solvent spouse of the ownership of property that is in fact his or hers. The purpose is to ensure that the insolvent estate is not deprived of property to which it is entitled.²⁸ The fact that the onus of establishing his or her ownership of the property is placed upon the solvent spouse should not in any way be confused with the purpose of the provision. In any vindicatory action the claimant has to establish ownership. The onus of proof had to be placed on either the Master or the trustee or on the solvent spouse. Having regard to which of those parties has access to the relevant facts, the onus was understandably and justifiably placed on the solvent spouse.

Again, on the assumption that the effect of section 21 is to “transfer” ownership of the property of the solvent spouse to the Master or the trustee, the section does not contemplate or intend that such transfer should be permanent or for any purpose other than to enable the Master or the trustee to establish whether any such property is in fact that of the insolvent estate. Again, there is no intention to divest the solvent spouse permanently of what is rightfully hers or his or to prejudice the solvent spouse in relation to her or his property. Hence the provisions enabling the solvent spouse to seek the assistance of the court in order to obtain the release of that which is his or hers and to seek the protection of the court in the event of the trustee wishing to sell such property prior to its release.” (footnotes excluded)

been canvassed on the pleadings for the first time in argument, as transpired in the present case.⁹

29. The applicant seeks final relief in these proceedings. It is trite that final relief may only be granted if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavits, justify the granting of such relief. This means that the court is to accept the *facts* alleged by the respondents unless they constitute bald or uncreditworthy denials or are palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers.¹⁰
30. That being said, the probabilities are inevitably considered for purposes of determining whether allegations made in affidavits are implausible, untenable, far-fetched or uncreditworthy.
31. The question then arises as to whether the applicant has discharged the onus of proving that the property (being the funds which she received from the insolvent pursuant to a disability benefit pay-out by Liberty Life and the sale of the Simons Town property) was acquired by her during the marriage with the insolvent by a title valid as against creditors of the insolvent. Although certain other funds were deposited into the FNB maximiser account by way of inter-account transfers effected by the applicant in respect of unrelated transactions, which the respondents accept do not amount to the acquisition of property as envisaged in s 21 of the Act, the main controversy pertains to the R2.160 million disability benefit paid out by Liberty Life to the insolvent,

⁹ In *Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others* [2017] ZACC 45, para [50], the Constitutional court endorsed the cautionary remarks expressed by Jaffha J in *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (Garvas) at para 114, where he emphasised the need for accuracy in the pleadings, stating as follows: " *Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.*"

¹⁰ See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-G. See too: *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D-E.

of which R2.135 million was thereafter paid by the insolvent to the applicant, and the R2.7 million received by the applicant pursuant to the sale of the Simons Town property. I deal with these in turn.

Disability pay-out from the Liberty Life policy

32. The papers evidence that the insurer both accepted and honoured a claim ostensibly found by it to have been validly made apropos a capital disability¹¹ suffered by the applicant as the second life assured under the policy. The applicant was the party who was diagnosed with cancer and who accordingly suffered the disability. Liberty Life paid out the accelerated benefit in an amount of R2,160000.00 into the bank account of the insolvent on 25 January 2019, of which an amount of R2,135 000.00 was thereafter paid on 28 January 2019 by the insolvent into the applicant's FNB maximiser account. This occurred some eight months prior to the sequestration of the insolvent's estate.
33. Although the applicant alleges that the amount was received as a result of a claim made by her under the policy, the claim documents themselves were not provided by her in her affidavits.¹² In support of her assertion that she holds valid title to the payment, the applicant alleges that the amount was paid by the insurer into the insolvent's account only because he was listed as

¹¹ 'Capital Disability' is defined in the policy as: "... an accelerated benefit. A state of disability exists if, as a result of injury, disease, or surgical operation the principal or second life assured is and has been for a period of 3 consecutive calendar months, total and permanently incapable of earning an income from his/her own occupation, a reasonable occupation or any other occupation they could reasonably pursue, taking into account their knowledge, training, working experience and ability."

¹² The applicant failed to provide proof that she submitted the claim qua owner via cession entitling her to receive payment as envisaged in clause 5 of the policy terms and conditions. In the absence of a cession, had the contract been for the benefit of the applicant, she would have been entitled (not the insolvent) on acceptance of the benefit to exercise the contractual rights provided in the policy and would have been the party to submit the claim and receive the funds. Yet the applicant provided no proof that she had submitted the claim. Her assertion, namely that her failure to attach the claim documents should be seen in the light of the absence of any evidence by the respondents to contradict her evidence (i.e., that she had submitted the claim) is insufficient for purposes of discharging the onus that rests upon her. As explained in *Beddy NO* (cited in fn 5 above): "s 21 (2) expressly places the onus on the solvent spouse, and I do not think that that onus is discharged simply by pointing to the ostensible transaction (in this case the sale) and saying to the trustee 'It is now your turn to do your worst with it' ". The onus remained on the solvent spouse to prove that the true transaction conferred a valid title upon her.

the beneficiary under the policy, however, the payment was in effect for the applicant or intended to be made to her and thus properly belonged to her, because it was a policy benefit to which she was entitled following her disability claim. The applicant's argument overlooks the fact that the insolvent is the policy holder, owner and beneficiary of the disability portion of the second life assured under the policy and in terms of the express wording of the contract, it is the insolvent who, in the absence of any cession, obtains payment of benefit proceeds on the happening of the applicant's death or in the event of her suffering a disability.

34. I therefore agree with the respondents that it is not insignificant that the insolvent was the recipient of these funds from Liberty Life (rather than the applicant) because the benefit accrued to the insolvent as owner of the policy in terms of the express wording of the policy, which states that '*except in the event of the death of the Life Assured all benefits due will be paid to the owner. ... subject to any cession, the Owner may exercise all rights under this contract without the consent of any Beneficiary...*'¹³
35. There is no allegation in the papers that the insolvent ceded his rights under the contract to the applicant. Absent a cession, all benefits under the policy accrued to the owner (i.e., the insolvent) and the disability benefit was thus rightfully paid by the insurer to the insolvent. The applicant's case was *not* that the policy constituted a contract for the benefit of a third party (i.e., the applicant).¹⁴ There is a difference between an insurance contract in favour of

¹³ See Clause 5 of the general terms and conditions governing the policy at p 04-62 of the papers. Clause 5 also stipulates that where a cession has been recorded, any benefits will be paid to the cessionary, or in the case of an absolute cession, to any beneficiary nominated by the cessionary as owner.

¹⁴ The test on whether a contract is made for the benefit of a third party is whether that third party, by consent (acceptance of the contract) can become a party to that contract with one of the other two contracting parties. See *Pieterse v Shrosbree NO and Others, Shrosbree v Love and Others* [2006] 3 All SA 343 (SCA), paras 8 -10. See also Reinecke et al, *General Principles of Insurance law*, 2007, paras 406-407.

a third party and one that is for the benefit of the insured.¹⁵ A contract for the benefit of the insured is one where the insured (insolvent in this case) is the policy holder and owner in circumstances where a sum of money is paid out to the insured so that the insured has access to funds when a certain event (i.e., a disability) occurs.¹⁶ The contract *in casu* provides for payment to the insured (the insolvent) in the event that the second life assured suffers a capital disability. In such circumstances, the payment of R2.160 million by the insurer to the insolvent validly formed part of his estate and did not belong to the applicant. The ineluctable consequence is that the applicant has failed to demonstrate that she acquired ownership of the funds on the basis that the policy benefits accrued to her in terms of the relevant policy or were deposited into the bank account of the insolvent in error.

36. However, this is not the end of the inquiry. An alternative claim is pursued in the event that this court finds that the applicant did not acquire ownership of the funds deposited by the insolvent into her maximiser account. In such event, she seeks an order directing that the monies constitute policy benefits which are excluded from attachment pursuant to the provisions of s 63(1)(a) of the LTI Act.¹⁷

¹⁵ See: *Pieterse v Shrosbree NO and Others, Shrosbree v Love and Others* [2006] 3 All SA 343 (SCA), paras 8 -10

¹⁶ For example, in *Wallach's Trustee v Wallach* 1914 AD 202 it was held that a life insurance contract which provided for payment to the insured's 'executors, administrators and assigns' was in law a contract for the benefit of the insured and not his wife and children although the insured intended to provide for them by taking out the insurance

¹⁷ Section 63 of the LTI Act reads as follows:

“Protection of policy benefits under certain long-term policies. –

- (1) Subject to subsections (2) and (3), the **policy benefits provided or to be provided** to a person under one or more assistance, life, disability or health policies 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 –
- (a) 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
 - (b) upon his or her death, if he or she is survived by a spouse, child, stepchild or parent, or be available for the purpose of the payment of his or her debts.
- (2) The protection contemplated in subsection (1) shall apply to –
- (a) assets acquired solely with the policy benefits, for a period of five years from the date on which the policy benefits were provided; and
 - (b) policy benefits and assets so acquired (if any) to an aggregate amount of R50 000 or another amount prescribed by the Minister.

37. I pause to mention that the respondents aver that any funds emanating from the Liberty Life policy were depleted in their entirety prior to the attachment by the respondents in August 2019 of monies that remained in the FNB maximiser account. The respondents demonstrate this by reference to various transactions that were effected over several months in the bank accounts of the applicant. The specific allegations were not seriously disputed by the applicant in her replying affidavit, although an argument was presented on her behalf at the hearing of the matter to the effect that any funds comprising policy benefits, which were protected by virtue of s 63 of the LTI Act, became the property of the applicant by operation of the principle of *commixtio* when they became mingled together with other monies in the account, so that it cannot be said that the funds remaining in the account were not the policy benefits or that the funds comprising policy benefits were therefore depleted prior to attachment of the FNB maximiser account. As the parties differ on the whether or not s 63 of the LTI Act finds application on the facts of this matter, it is necessary to consider the section.

Section 63 of the LTI Act

38. I am not persuaded that the cases relied on by the respondents relating to the payment of pension benefits assist them in this matter.¹⁸ The respondents argue that payment of disability benefits are analogous to and should be treated the same way as the payment of pension benefits. It is

-
- (3) Policy benefits are only protected as provided in –
- (a) subsection (1)(b), if they devolve upon the spouse, child, stepchild 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." [emphasis added]

¹⁸ See *M and Another v Murray and Others* [2020] ZASCA 86, paras 15-17; (*'Murray'*). The case dealt with the issue of whether a pension *benefit* paid out to an insolvent member/beneficiary before his estate was sequestrated enjoyed the protection provided in s 37B of the Pensions Fund Act 24 of 1956, which protects the pension of an insolvent subject to certain exceptions. 'Benefit' as defined in s 1 of that Act was construed by the court as a benefit only to the extent that it had not been paid out to the member/beneficiary, and reference to pension benefit *payable* (as opposed to *paid*) was held to envisage a sum to which a member of a pension fund or a beneficiary is entitled to receive, but has not yet received.

trite that a pension benefit is protected from attachment by the insolvent member's trustees whilst it is in the hands of the pension fund and it remains a benefit to the extent that it has not yet been paid to a member of a pension fund. Once the benefit is paid to the member or beneficiary, it ceases to be a benefit and thus forms part of the insolvent's assets. As the court in *Murray* held, once the benefit has been paid out, the member or beneficiary can hardly complain if creditors lay their hands on the money to satisfy outstanding debts. Such a construction found support in cases where similarly worded statutory provisions had received consideration.¹⁹

39. Section 63 of the LTI Act does not contain a reference to pension or pension benefits payable to a person in the specified types of policies to which it applies. As pointed out in *Pieterse*,²⁰ 'Section 63 refers to assistance, life, disability or health policies. Those are defined in s 1 of the LTIA. The protection afforded by s 63 of the LTIA applies to 'the policy benefits' provided or to be provided to a person under one or more of the specified types of policies or the assets acquired exclusively with those policy benefits. The policy benefits which are protected are those payable to the protected person in terms of a protected policy which has been in force for at least three years. The assets which are protected are those which have been acquired solely or exclusively with the benefits of the relevant policy. The protection in relation to such assets operates for a period of five years after the date upon which the relevant policy benefits were provided. The protection is limited to an aggregate amount of R50 000,00 or such other amount as may be prescribed by the Minister.' (emphasis added)
40. The section refers to policy benefits 'provided' or 'to be provided' to a 'person' (i.e., the insolvent) under *inter alia* a life or disability policy in which that person or the spouse of that person is the life insured. In terms of the section, the benefits provided (or to be provided) shall, other than for a debt secured by the policy, during the person's lifetime not be liable to be attached or subjected to execution under a judgment of a court or form part

¹⁹ See, for example, *Jones & Co v Coventry* 1909 2 KB 1029; *Gibson v Howard* 1918 TPD 185; *Foit v FirstRand Bank Bpk* 2002 (5) SA 148 T

²⁰ *Pieterse*, (cited in fn 15 above) at par 11.

of his or her insolvent estate. The word '*provided*' is defined in the Cambridge English dictionary as '*to give someone something they need*'.²¹ The Merriam Webster dictionary defines '*provide*' as '*to supply or make available something needed or wanted*'.²² There appears to be no dispute between the parties that the word '*provided*,' having regard to its ordinary meaning and contextually applied, connotes the encashment of the policy benefit so that the proceeds remain protected from attachment.

41. As the policy benefits were payable to the insolvent, he is the protected person under s 63 of the LTI Act. The benefits concerned the disability and health of the insolvent's spouse (applicant). That was the risk insured against and which eventuated. Hence, in my view, the disability benefits, after encashment, were protected and thus did not form part of the insolvent's estate.
42. The question which arises is whether the characteristics of the benefits changed when the insolvent transferred them to the applicant. The transfer to the applicant was done ostensibly with the intention to provide the applicant with the benefits of the policy, given that it was she who had sustained the disability. Similarly, they were received as the benefits of the risk insured against to enable the applicant to fund expenses which the insolvent and the applicant anticipated would eventuate and which the insolvent had taken cover for. The insolvent could well have retained the funds and paid them out piecemeal from time to time, in which event they would have remained protected. Ostensibly a lump sum was paid to the applicant to enable her, as the bill-payer, to pay their bills, presumably as a matter of convenience. Does that position change because of the transaction which occurred in the circumstances described? I think not. There could as well have been a deposit into any account of the insolvent with his spouse

²¹ See: <https://dictionary.cambridge.org/dictionary/english/provided> .

²² See: <https://www.merriam-webster.com/dictionary/provide>

having signing powers on the account in order to deal with the funds. Such funds would have been protected. The effect of having control over funds in such a scenario is essentially the same as in a scenario where the funds are transferred into the spouse's bank account.

43. Applying mandated principles of interpretation,²³ In my view, the section must be read to mean that if the insolvent is protected, and hands over funds which are protected in his hands, to a person (spouse) whose disability is the reason that they are protected, the character of the funds remains unchanged - the funds remain protected as if there were no transfer to that person (spouse). A purposive business-like interpretation of the section is that the protection survives an insolvent-to-spousal transfer.
44. Seen from a different perspective and through the prism of s 21 of the Act, when it provided the protection afforded by s 63 of the LTI Act, the legislature did not deem it necessary to repeat that the benefits would not be attachable in the circumstances provided for in s21 of the Act. If the benefits were protected in the hands of the insolvent under s 63 of the LTI Act, it was presumably assumed that they would be protected under s 21 of the Act, which provides that the effect of the sequestration of the separate estate of one of two spouses who are not living apart shall be to vest in the trustee, once appointed, all the property of the spouse whose estate has not been sequestrated as if it were ***the property of the sequestrated estate***, and to empower the trustee to deal with such property accordingly, subject to the further provisions of the section.
45. Protected benefits released to the spouse of the protected person are not attachable under s 21 of the Act for the simple reason that by virtue of s 63 of the LTI Act, the benefit was protected from attachment and thus did not

²³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par 18; *Pride Milling Company (Pty) Ltd v Bekker NO and Another* 2022 (2) SA 410 (SCA)

ever form part of the property of the sequestrated estate in the hands of the insolvent. In the hands of his spouse, it cannot by a fiction suddenly become property of the sequestrated estate. The insolvent's creditors have no claim against the insolvent estate for payment of any of the protected benefits. Yet *in casu*, an excluded asset was seized by the insolvent's trustees in circumstances where no creditor had a claim against it either in the insolvent's hands or in the solvent spouse's hands. The situation *in casu* is completely different from what the section seeks to prevent, namely, transfers designed to prejudice the insolvent's estate creditors. The purpose of the section is explicit – it is to recover assets that properly belong to the insolvent estate, whereas protected benefits are expressly excluded by statute from forming part of an insolvent estate where the requirements in s 63 of the LTI Act are met, which requirements were, on the facts of this matter, indeed met.

46. On a purposive interpretation of the protection offered in s 63 of the LTI Act, when read with the purpose the legislature sought to achieve in s 21 of the Act, the disability benefits paid to the applicant were legally and factually protected from attachment. That being said, what then is the position if the protected funds had been spent by the time the FNB maximiser account was attached? The applicant submits that funds paid by the insolvent to the applicant became mixed with other monies in the FNB maximiser account by application of the principle of *commixtio*²⁴ and it therefore cannot be said that funds comprising protected benefits were *not* the funds remaining in the account at the time of attachment. It was further submitted that the monies from Liberty Life were paid out with the purpose to sustain the

²⁴ *Commixtio* occurs when things of more or less equal value belonging to different owners are mingled or mixed so as not to be readily separable. In the case of mixing of money, the effect of *commixtio* is that ownership vests in the possessor. See: CG van der Merwe, 'The Law of South Africa' (LAWSA), 'Things, Volume 27 (second edition), 2014. See too: Wille's Principles of South African Law, 9th ed, at p508.

The applicant therefore contends that once money was deposited into her account it became unidentifiable as a result of *commixtio* and any right to it vests with the possessor (i.e., the applicant).

applicant and the insolvent, and that 'logic dictates that the monies that remain in the account are there with the purpose to sustain the applicant and the insolvent'.

47. On the unrefuted facts, however, at the time that the funds comprising policy benefits (R2.135 million) were paid by the insolvent into the FNB maximiser account, such account had a zero balance. There was thus no mingling of funds, as contended by the applicant. On 12 February 2019 the applicant paid an amount of R 1,357 800 from the FNB maximiser account with regard to a deposit that was due in respect of an immovable property she had purchased on auction, thus using the funds received from the insolvent in respect of the deposit. The sale fell through, as a result of which the deposit so paid, was forfeited. By 16 May 2019 (the day before the sale proceeds in respect of the sale of the Simons Town property were deposited into the account), the FNB maximiser account had a credit balance of R344,169.97. Thus, at least R1.005 million had by then been depleted from the policy benefits received by her. After transfer of the sum of R2.7 million from the applicant's cheque account into her maximiser account on 17 May 2019, the account had a credit balance of R3,084 169.97. Between 17 May 2019 and 27 July 2019 the applicant transferred or paid out an amount of R1,253 268.45 from the FNB maximiser account. These facts tend to support the conclusion that any protected funds that had remained in the account were likely depleted by the time that the FNB maximiser account was attached. Even had funds comprising disability benefits (i.e., R344,169.97) remained in the account at that juncture, by operation of *commixtio*, such benefits would have become co-mingled with other monies in the account so that it cannot either be established that they were *not* the funds that were transferred or paid out of the account during the relevant period before attachment.

48. I turn now to consider whether the applicant has established a valid title to funds acquired by her pursuant to the sale of the Simons Town property, which funds were transferred from her cheque account into her maximiser account on 17 May 2019.

R2.7 million proceeds from sale of Simons Town property

49. The applicant avers that she purchased the Simons Town property in approximately 2001 with her own monies, however, since the sale took place some 18 years ago, she no longer has proof of the fact that she purchased same by utilising her own financial resources. In support of her ownership of the property, the applicant put up a deed of transfer, dated 15 August 2001²⁵ which reflects that she purchased the property on 17 April 2001 from Moneyline 489 (Pty) Ltd for the sum of R179,500.00. A further deed of transfer²⁶ provided by the applicant reflects that she sold the property for the sum of R4.3 million to Mr and Mrs Van Rensburg on 27 January 2019. The said property was transferred into the purchasers' names during May 2019. An amount of R2.7 million was thereafter transferred from the applicant's FNB cheque account into the FNB maximiser account on 17 May 2019.
50. The respondents contend that the applicant has put up insufficient evidence to prove her ownership of the property sold by her. They contend that the insolvent is in fact the true or beneficial owner of this property and that the insolvent estate is therefore entitled to the equivalent value of the proceeds of the sale (i.e., R2.740 million) in the FNB maximiser account. Since the amount standing to the credit of the FNB maximiser account at the time of attachment was less than the proceeds received from the sale of the property, they reason that the entire balance standing to the credit of the FNB maximiser account falls within the insolvent estate.

²⁵ Annexure LM14 to the founding affidavit)

²⁶ Annexure LM13 to the founding affidavit.

51. In this regard, the respondents aver that since the applicant was a salaried employee for only two years prior to her acquisition of the property, 'it is hard to fathom' how she could have utilised her own funds to purchase same. The respondents provided documentary evidence to show that a mortgage bond was registered over the property in 2004 in the amount of R1,365 000.00.²⁷ By September 2014, a balance of R1.287 million was outstanding on the loan. They further ascertained that the applicant had not received a salary in 2014 and had filed zero tax returns in 2017. Moreover, as evidenced by the insolvent's bank statements, the insolvent had paid the bond instalments in respect of the Simons Town property for several months during 2013, 2014 and 2018. The respondents also referred to certain correspondence between the insolvent and service providers/contractors in connection with maintenance work and/or renovations that were effected at the property. These facts were relied on to reach somewhat staggering conclusions that: (i) the property was acquired by the insolvent or was considered to be the property of the respondent and (ii) the property was managed as if it was the property of the insolvent and (iii) that the said property was 'shielded' from creditors in the insolvent's estate through registration in the applicant's name.
52. The conclusions sought to be drawn by the respondents are not factually sustainable and are at best, largely speculative. Firstly, the explanation tendered by the applicant that she no longer has proof of payment by her of the purchase price from her own resources, given that this occurred some 18 years ago, is in my view perfectly reasonable. Eighteen years ago, the sequestration of the insolvent's estate could hardly have been in the contemplation of the applicant and the insolvent. Secondly, one cannot reason that because the insolvent contributed during some months over a

²⁷ See annexure 'AA 13' to the founding affidavit.

three year period to the repayment of the bond, that the property was therefore paid for by him or belongs to him. The applicant explained that during a period of illness suffered by her, the respondent contributed towards payment of the monthly bond instalments, as one would ordinarily expect to occur, given the insolvent's common law duty of support towards his wife. The mere fact that the insolvent contributed towards the repayment of the bond liability did not and could not confer upon him a real right of ownership in the property. Thirdly, the applicant would likely not have obtained registration of transfer the property into her name unless the purchase price had been paid or its payment secured. There is no mention in the papers that the applicant sought or obtained a loan in order to fund the purchase price. Rather, a bond was only registered against the property some three years after the property was purchased for purposes of securing a loan obtained from the bank.

53. There is no reason for me to disbelieve the applicant's evidence, namely, that she paid for the property purchased by her some eighteen years ago with her own funds. The respondents ultimately have no knowledge of whether or not the applicant paid for the property in 2001 with her own funds, in circumstances where her unrefuted version is that she had other movable and immovable assets and even other sources of income (aside from her salaried employment at the time) with which to fund the purchase price of the property. This evidence cannot be refuted, precisely because the respondents have no knowledge about what took place some 18 years ago. At best, they have resorted to speculating²⁸ or supposing about what the

²⁸ As Lord Wright observed in *Caswell v Powell Duffryn Associated Collieries Ltd* 1939 (3) All ER 722 at 733: '*Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish...But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.*'

See too: *Buildcure CC v Brews and Others* 2017 (6) SA 562 (GJ), at para [27], where the court quoted with approval from the judgment of Landman JA in *South African Transport and Allied Workers Union v Tokiso Dispute Settlement & Others* [2015] 8 BLLR 818 (LAC) where the learned judge pointed out

applicant might or might not have been able to pay or did or did not pay. Since the respondents did not avail themselves of the right to test the veracity of the applicant's allegations through cross-examination, by seeking the referral of this issue to oral evidence, I see no basis to reject the applicant's evidence as uncreditworthy or false on paper.

54. In so far as the respondents argue that although land registration generally proves ownership, it is not necessarily conclusive thereof,²⁹ none of the exceptions elucidated in the *Cape Explosives* case are applicable *in casu*.
55. The upshot of the foregoing is that the applicant has in my view established, through her own testimony, supported by the documentary evidence put up to substantiate her title over the property, that she holds a valid title to those proceeds from the sale of her property which were retained in the FNB maximiser account at the time of its attachment. Ultimately, whether or not the remaining protected policy benefits became mixed with the sale funds or whether only sale proceeds remained in the account at the time of attachment matters little in the light of the conclusions to which I have arrived earlier in the judgment.

in para 13 that

"The court *a quo* overlooked the fact that the deponent to Putco's answering affidavit was making an assumption. It was incumbent on the court *a quo* to interrogate the assumption and to determine whether the assumption was such that it could be elevated to a fact. L Steynberg "*Fair*" *Mathematics in Assessing Delictual Damages* 2011 (14) 2 PER/PELJ relying on Keynes *Treatise on Probability* points out that:

'Probabilities are not surrendered to human imagination, which means that a supposition or assumption is not probable merely because someone thinks so. The facts that establish the knowledge upon which the probability is based should be determined objectively and independently of human opinion.' [emphasis added]

²⁹ See for example *Gugu and another v Zongwana and others* 2014 (1) all SA 203 (ECM) para 19 citing *Cape Explosive Works Ltd v Denel Pty Ltd* 2001 (3) SA 569 (SCA) at 579F, where the Supreme Court of Appeal stated the following: 'We have a negative system of registration where the deeds registry does not necessarily reflect the true state of affairs. There are a number of exceptions to the rule that the acquisition of a real right of ownership in immovable property must be by registration. Besides prescription, an example of acquisition of ownership not requiring an act of registration is by marriage in community of property. Nor does the fact that the land in question is registered in the name of the board militate against this conclusion, for registration is not necessarily conclusive on the question of ownership of land. It is not so, for example, in the case of marriage in community of property, or of partnership, or of bequests by will.'(footnotes excluded)

56. Accordingly, the funds attached and withdrawn by the respondents are to be released back to the applicant and the FNB maximiser account itself released from attachment. Although there was some debate at the hearing of the matter as whether or not the relief sought in the notice of motion allows for repayment of funds withdrawn by the respondents from the FNB maximiser account, when regard is had to the case pleaded by the applicant (referred to in paragraph 4 above) the respondents could not have been under any misapprehension about the relief sought by the applicant, which was ultimately designed to release the attachment of the FNB maximiser account and the funds retained therein or withdrawn therefrom, from insolvency proceedings pertaining to the insolvent, albeit that the relief set out in the notice of motion was somewhat ineptly articulated. In my view, para 2 of the notice of motion is in any event broad enough to cater for the order I intend to make.
57. It is not in contention that a proper case was made out for the relief sought in the counter-application, and as such, it should succeed.
58. The general rule is that costs follow the result in the main application. I see no reason to depart therefrom.
59. Accordingly the following order is granted:

ORDER:

1. As regards the main application:
 - 1.1 The respondents are ordered to release the property (comprising the applicant's FNB maximiser account and its contents, including any funds withdrawn therefrom by the respondents) from the

insolvency proceedings instituted against the insolvent, in terms of section 21(4) of the [Insolvency Act 24 of 1936](#).

1.2 The respondents are ordered to pay the costs of these proceedings.

2. As regards the counter-application:

2.1 The powers of the first and second respondents, as the joint provisional trustees of the insolvent estate of AMF De Magalhaes ('the insolvent estate') are extended in terms of section 18(3) of the Insolvency Act, 24 of 1936 in order to allow the joint trustees to:

2.1.1 Defend the main application in the name and on behalf of the creditors of the insolvent estate; and

2.1.2 Engage the services of Attorneys and Counsel, to agree to such fees, charges and costing and to make payment of those costs in the normal course of litigation, which costs shall be regarded as costs in the administration of the insolvent estate.

2.2 The affidavit of Sean Christensen N.O. dated 23 July 2020, together with all supporting documents annexed thereto is to stand as the first and second respondents' answering affidavit in the main application.

2.3 The costs of the counter-application shall be costs in the sequestration proceedings pertaining to the insolvent estate.

**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 11 May 2022
Judgment delivered 27 July 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 27 July 2022.

APPEARANCES:

Counsel for Applicant (main application/
Respondent in counter-application)
Attorneys for Applicant:

Adv F. Slabbert

Ewart Attorneys

Counsel for 1st & 2nd Respondents
Attorneys for 1st & 2nd respondents

Adv A. Vorster
Cox Yeats Attorneys