What's yours is mine and what's mine is mine

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Insurance Law Newsflash

In *Naidoo v Discovery Life Limited & others* (202/20170) ZASCA 88 (31 May 2018) the Supreme Court of Appeal was faced with the main task of determining whether a risk-only policy with a beneficiary clause constitutes an asset in the joint-estate as envisaged by section 15(2)(c) of the Matrimonial Property Act,1984 (MPA).

This case deals with two areas of law, insurance and matrimonial law, and illustrates the interplay between the two.

The courts have previously decided on the issue of whether rights that arise by virtue of a life-insurance policy fell within the joint estate upon the death of the insured spouse. This issue was previously decided in *Danielz NO V De Wet & another* 2009 (6) SA 42 (C).

The concept of marriage in community of property is that spouses are in a "universal economic" partnership and all their assets and liabilities are combined in a joint estate in which they hold equal shares regardless of the value of their financial contributions. In addition, generally it makes no difference how the assets were acquired, or which spouse acquired the asset.

In this case, the appellant was married to the deceased in community of property.

In 2002, the deceased had made an application to the first respondent, Discovery Life Limited (Discovery), for a joint life assurance policy. The material terms of the policy included that the deceased was the owner of the policy; that he was also the principal life insured; that as the owner of the policy he could at any time direct Discovery in writing to change the nominated beneficiary and that he could also, at any time, revoke the appointment of a beneficiary.

The policy provided that the nominated beneficiary was not entitled to any benefits during the lifetime of the principal life. The deceased initially nominated the appellant as the beneficiary who would receive the proceeds under the policy. Later the deceased changed his beneficiary and elected to nominate his parents, brother and sister as the new beneficiaries.

The appellant's contention was that the rights and obligations under the policy vested in the joint estate, according to the appellant, these rights include the right to elect a beneficiary, to receive payment in terms of the policy and to revoke a nominate beneficiary.

The appellant therefore alleged that because these rights vested in the joint estate, the deceased could not simply nominate another beneficiary without her written consent as required by section 15(2)(c) of the MPA.

The Supreme Court of Appeal considered:

- Whether a risk-only life insurance policy amounts to an asset in the deceased estate and therefore in the joint estate. \
- If so, did the nomination of another beneficiary, without the written consent of the appellant as a spouse, amount to an alienation of an asset in the joint estate as contemplated by section 15(2)(c) of the MPA?

It is important to understand what a risk-only life insurance policy is. A risk-only life insurance policy falls under the category of long-term insurance, which is governed by the Insurance Act, 2017 and the Long-term Insurance Act, 1998.

The nature of such policies is that the insurer undertakes, in consideration of premiums received, to pay a sum to a person who is entitled to receive the money if the insured dies.

The essential elements of life insurance include an insurance contract that is embodied in a policy. The insurer undertakes toward the insured, in return for the payment of premiums, to pay the nominated beneficiary a determinable or determined benefit upon the happening of a life event that may include death and in whose life, functional liability or health the insured has an interest that is deemed in law to be worthy of protection.

In this matter the court *a quo* found that a risk-only life insurance policy is in fact an asset of a policyholder and that the nomination of a beneficiary amounted to an alienation of an asset in the joint estate as envisaged by section 15(2)(c) of the MPA.

On appeal in the SCA, the court found the following:

- It was held that the only rights the deceased had as the policyholder during his lifetime arose from the policy itself. These rights included the contractual right to nominate and change a beneficiary; to cede the policy as well as the right to terminate the policy. The policyholder would never have the right to claim an amount under the policy, therefore the policy could not be an asset in itself and, consequently, it could not be an asset in the joint estate.
- The court then looked at section 15(2)(c) of the MPA to determine in what transactions a spouse cannot engage without the prior consent of the other spouse in terms of the section.

The transactions requiring spousal consent should not be read in isolation and must be viewed holistically. One of the items listed are insurance policies, which must be interpreted consistently with the other assets listed, including mortgage bonds, investments and servitudes over immovable property. In this context the provision relates to insurance policies that have a current value, such as retirement annuities or endowment policies, which can be surrendered. This category of insurance policies must be differentiated from pure risk insurance policies like life, motor, fire, theft or household goods policies that have the purpose to indemnify an individual upon the happening of a future risk.

It is clear that the rights of a policyholder, which arise by virtue of a risk-only life insurance policy prior to the death of the insured, are not the kind of "insurance policies" envisaged by section 15(2)(c) of the MPA. The only right that the policyholder has, while he is still alive, is to nominate a beneficiary who will receive the proceeds under the policy. Therefore, the policy cannot be said to be an asset as contemplated by the provision.

The court further held that it follows that the right to elect a beneficiary or to change a nominated beneficiary who would receive proceeds in terms of a risk-only policy is simply an exercise of a contractual right and this would neither constitute a transfer of a right to an asset in the joint estate nor does it amount to an alienation of the policy.

In conclusion it was found that a risk-only life insurance policy taken out on the life of the policyholder is not an asset and is thus not an asset in the joint estate. Further, the right to nominate a beneficiary or to change a nominated beneficiary

does not amount to an alienation of a right to the asset in the joint estate.

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