IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO.~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES / NO.~~
(3) REVISED. ✓

DATE 31/7/2014 **SIGNATURE**

CASE NO: 5034/2013

DATE: 25/7/2014

IN THE MATTER BETWEEN

CHRISTO JOHAN PELSER N.O.	1ST APPLICANT
ANNEMARIE BASHIR N.O.	2ND APPLICANT
AND	
PHILIPPUS CHRISTOFFEL LESSING N.O. AND SORIA MARAIS N.O.	1ST RESPONDENTS
SANDRA ELIZABETH LOUBSER	2ND RESPONDENT
THE MASTER OF THE HIGH COURT, PRETORIA	3RD RESPONDENT
MC VAN DEN BERG ATTORNEYS	4TH RESPONDENT
VIOLET MAY VISAGIE	INTERVENING PARTY

JUDGMENT

PRINSLOO, J

[1] The decision of this dispute turns, to a large extent, on the provisions and the interpretation of section 19 of the Matrimonial Property Act no 88 of 1984 ("the Act").

[2] Before me Mr Mollentze appeared for the applicants and Ms Kyriazis appeared for the second respondent. There was no appearance for the other respondents.

Introduction and background

[3] The two applicants, and two more siblings, Jakobus Petrus Pelser and Veronica Stoltz, are the children of the late J E Pelser ("the deceased") who passed away in 2005. The widow is Maria Magdalena Pelser ("the widow") who has an interest in the matter. She is not the mother of the four siblings, but nothing turns on this.

[4] In his will, the deceased nominated one Keith Bruce Loubser ("Loubser") as the executor of his estate.

[5] In terms of the will, certain fixed properties were bequeathed by the deceased to the four children (siblings) subject to the lifelong usufruct of the widow.

[6] Before the fixed properties were transferred out of the deceased estate to the children, they were sold and the heirs (including the widow) agreed that the

proceeds would be invested, and the return on the investment would go to the widow in lieu of her usufruct.

[7] The investment was made and controlled by Loubser, in his capacity as the duly appointed executor.

[8] Loubser failed to perform his duties as executor in an honest and professional manner. He made erratic payments to the widow of moneys purporting to flow from the investment, and later ceased payments altogether. Despite repeated requests by the applicants, he was unable to give a proper account of the moneys which he was supposed to invest. On a general reading of the papers, it must be inferred, on the overwhelming probabilities, that Loubser, through fraud and dishonesty, misappropriated the whole investment which is lost to the heirs.

[9] On 13 April 2012, the Master of the High Court (third respondent) removed Loubser from his office as executor in terms of section 54(1)(b) of the Administration of Estates Act, no 66 of 1965. The Master instructed Loubser to return his letters of executorship and disallowed any remuneration which he may have been entitled to in terms of section 51(3)(b) of the aforesaid Act. Loubser did not file an opposing affidavit to this application, neither did he, at any stage, offer a proper explanation for his apparent dishonest conduct.

[10] On 4 October 2012 this court, on the application of the heirs, ordered Loubser to give a proper and detailed account of the investment of the proceeds of the sale of the properties, amounting to R1 070 000,00. He was also ordered to pay whatever was left of the investment into the trust account of the attorneys of the heirs. He was also ordered to pay the costs *de bonis propriis*.

He never complied with the order. At one stage Loubser indicated that he would apply for a rescission of the judgment contained in the order of 4 October 2012, but he never launched such an application.

[11] The heirs got wind of the fact that Loubser had sold his fixed property (Erf 1272 Valhalla). In an effort to protect their interests, and to salvage something of the lost investment, the heirs, on 11 December 2012, obtained the following relief from this court:

1. It was declared that Loubser was in contempt of the order of 4 October 2012.

2. Loubser's attorney (presently the fourth respondent, then the third respondent) who was handling the transfer of the property into the name of the purchaser, was restrained from paying out the proceeds of that sale and ordered to retain same in his trust account pending compliance by Loubser of the order of 4 October 2012, or rescission of that judgment, which, as I

have said, was never applied for. Loubser was also ordered to pay the costs of that application.

[12] The proceeds of the Valhalla property, amounting to R1 155 602,31, are still kept in trust by the fourth respondent who, quite correctly, invested the amount in an interest bearing account.

Loubser's divorce, his sequestration and the relief now sought

[13] Already on 14 June 2012, a final divorce order was granted in this court, dissolving the marriage between Loubser and the second respondent with whom he was married in community of property in 1985. The order provided for a division of the joint estate.

[14] Chronologically speaking, the following dates may be of significance: after Loubser was removed from his position as executor (*supra*) on 13 April 2012, the attorney of the applicants wrote a letter of demand to him on 18 April 2012 indicating that the applicants would be taking over the investment which he was supposed to have made and demanding payment of the invested moneys into the trust account of the applicants' attorney, pending the appointment of two of the heirs as executors (the present first and second applicants) which appointment took place on 29 April 2013.

On 14 June 2012 (the day of the divorce) Loubser's attorney wrote to the applicants' attorney declining on Loubser's behalf to surrender the investment and insisting that Loubser would continue controlling the investment pending the appointment of other executors.

On 28 January 2013, the present application was launched, in which the applicants claimed payment of the investment amount (R1 070 000,00) plus an amount of R41 298,00 from Loubser. The latter amount was appropriated from the estate by Loubser as executors fees to which he was not entitled under the circumstances.

[15] On 23 April 2013 Loubser was provisionally sequestrated at the instance of the intervening party, Ms Visagie, and on 20 August 2013 the present joint first respondent, Lessing N.O. and Soria Marais N.O., were appointed as co-trustees of the insolvent estate by the Master. On 27 September 2013 the estate of Loubser was finally sequestrated. By notice in terms of rule 15, the two trustees replaced Loubser, the original first respondent, as the joint first respondent.

[16] It is common cause that the Valhalla property which previously belonged to the joint estate of Loubser and the first respondent was only sold in November 2012, months after the divorce.

[17] As will be more fully described hereunder, the second respondent claims that she is entitled, as a co-owner of the Valhalla property, to 50% of the proceeds and that the claim of the applicants should only be directed at the 50% of Loubser. This inspired the applicants to add the following alternative prayer to the notice of motion, also based on the fact that a sequestration had taken place:

> "3.1 Dat dit verklaar word dat die verdeling van die boedel van Keith Bruce Loubser en Sandra Elizabeth Loubser nie finaal afgehandel is nie;
>
> 3.2 Dat dit verklaar word dat die volle opbrengs van die verkoop van die vaste eiendom te wete Erf 1272, Valhalla 'n bate in die boedel van Keith Bruce Loubser sal wees by sekwestrasie van sy boedel."

[18] For present purposes, the relief now sought by the applicants was extended and incorporated in a draft order handed up by Mr Mollentze. Freely translated, the relief now sought amounts to the following:

1. payment of the two amounts aforementioned, namely R1 070 000,00 and R41 298,00 plus costs of this application and costs flowing from the case 43975/2012 (the mandamus and the interdict) to be paid by the joint first respondents in their official capacity as trustees of the estate;

2. a declaratory order to the effect that the division of the joint estate has not yet been finalised;

3. a declaratory order to the effect that the full proceeds of the sale of the Valhalla property constitute an asset in the insolvent estate of Loubser;

4. an order authorising the fourth respondent to pay such full proceeds of the sale, presently held in trust, to the first respondent to be dealt with as an asset in the insolvent estate.

A claim in delict, the provisions of section 19 of the Matrimonial Property Act no 88 of 1984 ("the Act") and a brief synopsis of the arguments offered on behalf of the applicants and the second respondent

[19] It is common cause that Loubser, through negligence, fraud and/or dishonesty, misappropriated the investment which he was supposed to make on behalf of the deceased estate. In the process, he incurred delictual liability towards the estate. "Broadly speaking, a delict is an unlawful, blameworthy act or omission resulting in damage to another and in a right on the part of the injured party to compensation." – C R Snyman *Criminal Law* 4th ed p5.

[20] Section 19 ("section 19") of the Act reads as follows:

> "19. **Liability for delicts committed by spouses.** - When a spouse is liable for the payment of damages, including damages for non-patrimonial loss, by reason of a delict committed by him or when a contribution is recoverable from a spouse under the Apportionment of Damages Act, 1956 (Act no 34 of 1956), such damages or

> contribution and any costs awarded against him are recoverable from the separate property, if any, of that spouse, and only in so far as he has no separate property, from the joint estate: Provided that in so far as such damages, contribution or costs have been recovered from the joint estate, an adjustment shall, upon the division of the joint estate, be effected in favour of the other spouse or his estate, as the case may be."

[21] In terms of section 1 of the Act, "separate property" means property which does not form part of a joint estate. There is no evidence that Loubser had such "separate property" at any relevant time.

[22] The question for decision is whether the provisions of section 19 can still be applied after the divorce, namely whether the delictual damages caused to the deceased estate by Loubser can still be recovered from the "joint estate", which would include the second respondent's 50% share in the proceeds of the Valhalla property, or whether the claim for delictual damages only lies against the 50% share of those proceeds belonging to Loubser.

[23] The mandamus and interdict applications were only launched in October and December 2012, some four to six months after the June 2012 divorce, and this

application for recovery of the delictual damages was only launched in January 2013.

(i) The applicants' argument

[24] It was submitted on behalf of the applicants that the delict was committed by Loubser before he was removed from his office as executor on 13 April 2012 (before the divorce). The cause of action of the applicants therefore arose during the existence of the marriage. This would include the purported investment of the funds and the subsequent misappropriation thereof. This is not disputed by the second respondent.

[25] The applicants rely on the judgment in *Du Plessis v Pienaar N.O. and others* 2003 1 SA 671 (SCA). The appellant inherited certain movable and immovable property from her father. She was at that time married in community of property and the marriage, in fact, was still in existence when the case came before court. There was no question of a divorce. The property was bequeathed to the appellant subject to a stipulation that it was not to form part of the joint estate of the appellant and her husband, that it was not to be subject to the marital power of the appellant's husband, and that it was not to fall within "any possible insolvent estate" of the appellant's husband nor vest in a trustee of such estate. The appellant's husband carried on business as a money lender for the benefit of the joint estate. The business fell upon hard times and the joint estate was sequestrated. There was no question of delictual damages.

At 676C, the learned Judge of Appeal says the following:

> "When the estate is sequestrated for recovery of the joint debts of the spouses, both spouses become 'insolvent debtors' for purposes of the Insolvency Act with the consequence that the property of both of them (comprising their undivided interests in the joint estate as well as separately owned property) is available to meet the claims of creditors."

The appeal of the wife to protect her separately owned property therefore failed.

Evidently, the appellants submitted, during argument, that the Matrimonial Property Act ("the Act") has had the effect of creating a separate estate comprising all property that is excluded from the joint estate, and that that estate is protected against the incursions of joint creditors of the spouses – at 677C. In this regard the learned Judge of Appeal made the following remark, which appears to me to have been done *obiter*, at 677D-E:

> "There are indeed various provisions of the Act that give recognition to the separate property of spouses who are married in community of property (see sections 17, 18, 19 and the definition of 'separate property') but I do not think that implies the creation of a novel entity that is capable of incurring discrete debts, or that is protected from the normal consequences of the spouses' indebtedness."

[26] In my view, the judgment in *Du Plessis* is distinguishable from the present situation: there was no divorce, neither was there any question of delictual damages. As will be seen hereunder, there has always been a distinction between delictual debts in matters of this nature and "ordinary" or contractual debts. Indeed, section 19 deals exclusively with delictual debts and appears to represent an effort by the legislature to protect the "innocent" spouse where his or her consort had committed the delict. Of course, and regrettably, the legislature did not stipulate what should happen in the case of a divorce granted before payment of these delictual damages took place.

[27] On the strength of *Du Plessis*, it was argued on behalf of the applicants that the second respondent is also liable for the debt occasioned by the delict committed by Loubser.

It was argued that the remedy of the second respondent lies in the proviso of section 19, namely that she is entitled to "an adjustment" upon division of the joint estate to be effected in her favour as the innocent spouse. It was argued that, where Loubser's estate has been sequestrated, the second respondent would have to lodge a claim based on this "adjustment" which she is entitled to.

[28] It was argued on behalf of the applicants that the liability for Loubser's delict, which was incurred during the existence of the marriage, forms part of the liabilities of the joint estate so that the proceeds of the property cannot be divided before the liability has been met.

[29] It was argued by Mr Mollentze that, to hold otherwise, could lead to the absurd result that an errant spouse, faced with a possible claim for delictual damages, only has to arrange for a quick divorce from his wife in order to protect her half of the joint estate.

[30] It was argued that even if it were to be held that the second respondent was entitled to 50% of the proceeds of the Valhalla property, she would remain liable for the debt which occurred during the existence of the marriage.

[31] It was submitted that the proper approach would be to declare that the full proceeds of the sale of the Valhalla property should be paid over to the trustees of Loubser's insolvent estate to be applied towards a fair distribution amongst the creditors of that estate.

(ii) <u>The second respondent's arguments</u>

[32] She states in her opposing affidavit that she was married to Loubser in October 1985. This was almost 27 years before the divorce. The estate was divided upon

the divorce. The movables were divided and each party agreed to remain liable for his or her own personal debt. The common home was placed in the market and it was agreed that the proceeds would be equally divided after the "necessary costs" had been paid.

She argued that the applicants do not have a claim against the joint estate which no longer existed and their claim lies against the 50% share of Loubser.

[33] An argument was offered on behalf of the second respondent which was based on section 9 of the Constitution namely that "everyone is equal before the law and has the right to equal protection and benefit of the law". I, respectfully, do not propose dealing any further with this argument. It does not appear to me to offer a solution to this rather complicated question which has to be decided.

[34] The second respondent submitted that the "adjustment" offered in terms of the proviso to section 19 would not be applicable where the marriage had been dissolved. She argued that section 19 was no longer applicable to this case.

She recorded that she never had any knowledge of the alleged criminal activity perpetrated by Loubser when misappropriating the investment of the applicants. She pointed out, correctly, that no facts were placed before the court by the applicants to indicate that the misappropriated moneys were spent by Loubser on

improving the lives of the spouses or that the joint community benefited from such misappropriated funds during the course of the marriage. She conceded that the reasonable inference to be drawn is that Loubser indeed misappropriated the funds and disposed thereof so that the funds are no longer available. She also pointed out that no proof was submitted on behalf of the applicants to indicate that any of the misappropriated funds were used to pay the bond on the Valhalla property or that any benefit was derived, with reference to the property, from the alleged misappropriated funds.

[35] Ms Kyriazis submitted, in her written argument, that "where community of property is terminated by divorce, the order of divorce has the automatic effect of dividing the joint estate". With respect, this appears to be an inaccurate statement. It appears that the divorce order has the automatic effect of terminating the community of property, but the actual division can take place later – in *Ex parte Menzies et uxor* 1993 3 SA 799 (CPD) at 815A-C, the learned Judge says the following:

> "However, where community of property is dissolved by divorce (or, for that matter, by an order for division), the legal position is not governed by the law of succession, and the legal consequences are therefore different in principle from those occurring upon dissolution by death. The position is summarised in *Joubert (*ed) (*op cit* volume 16 para 119 at 138):
>
> 'When a court grants an order of divorce the community of property between the spouses comes to an end. No provision is made for an

executor to divide the estate and the matter is left in the hands of the spouses. They can divide the estate by agreement or they can appoint a liquidator to do so. If they cannot agree on a liquidator, the court can appoint one to this task.'"

The learned Judge also quotes a passage from H R Hahlo *The South African Law of Husband and Wife* 5th ed ("*Hahlo* 5") at 175:

"No problems arise where the marriage is dissolved by divorce; here, each spouse retains, subject to an order of forfeiture of benefits, his or her half-share in assets of the joint estate until division is effected." – at 815C-D

About this statement in *Hahlo* 5, the learned Judge says the following at 815E-G:

"Clearly the court could not order a continuation of community of property ('tied' co-ownership) where there was no longer a marriage. But does it necessarily follow that the division of the spouses' joint estate must be ordered or, if not ordered, that such is an automatic consequence of an order of divorce?

The implication of the above statement by *Hahlo* is that, upon the dissolution of the community by divorce, the ex-spouses become in effect free co-owners entitled to a division of the estate. Their shares become divisible. Given the circumstances of divorce, it can rarely arise in

practice that they would elect to continue in co-ownership in this new form, and thus possibly the rule has grown up that the granting of a divorce carried with it an automatic order for division. It is open to the divorcing spouses (see section 7(1) of the Divorce Act 70 of 1979) to arrive at a settlement in terms of which they could, for example, continue as co-owners of particular assets."

[36] Of course, in the present case, as I have indicated, the learned Judge, when granting the divorce, ordered a division of the joint estate.

Some legal pronouncements on the subject at hand

[37] I find it convenient to deal with remarks made by H R Hahlo *The South African Law of Husband and Wife* 4th ed ("*Hahlo* 4") from p233 onwards. *Hahlo* 4 was published in 1975, before the Act was promulgated. The Act came into effect on 1 November 1984. Where these particular parties were married in October 1985, their marriage is obviously governed, where applicable, by the provisions of the Act.

[38] In *Hahlo* 4, at p233, under the heading "delictual damages" the learned author deals with the so-called "community of debts" which is a corollary of community of assets (in a marriage in community of property). Under "delictual damages" the learned author says the following:

"It is a fundamental principle of the law of delict, as it is of criminal law, that no one should be held liable for the wrongs of another. As a general rule, therefore, each spouse is liable for his or her own delicts only and not for those of the other spouse ...

No problems arise where the marriage is out of community of property. The guilty spouse has to pay the damages out of his or her separate estate, while the innocent spouse incurs no liability, unless the guilty spouse was acting as his agent or servant.

It is where the spouses are married in community that problems arise. Here, too, delictual liability is, on principle, personal. ... However, there is only one estate, and this raises the question, controversial in modern law as it was in old law, whether a creditor who has recovered judgment for delictual damages against one of the spouses can claim satisfaction in full out of the joint estate."

The learned author then deals with some of the old authorities and then concludes as follows:

"Only two things are fairly certain. First, if delictual damages incurred by either spouse were paid during the marriage out of the joint estate, the innocent spouse (or his or her heirs) had a right of recourse against the

> guilty spouse (or his or her heirs) on dissolution of the marriage – all the Roman-Dutch authorities are agreed on this. (My note: see the authorities quoted in footnote 145.) Secondly, if payment of the damages had not been effected during marriage, the creditor, after dissolution of the marriage, had to seek satisfaction out of the separate estate of the guilty spouse." (My note: see all the authorities quoted in footnote 146.) (Emphasis added.)

After coming to this conclusion, the learned author then adds, perhaps somewhat cynically: "Beyond that, doubt and controversy reign."

[39] In concluding his discussion on claims for delictual damages against a joint estate, the learned author, in *Hahlo* 4, says the following: (at p237-238)

> "Without trying to anticipate the settlement of a question which has vexed judges and writers alike for centuries, my guess is that the final solution will be on the lines of *Erikson* and *Opperman*. Rabie AJA's statement in *De Wet N.O. v Jurgens* points in this direction. (My note: the cases are *Erikson Motors (Welkom) Ltd v Scholtz N.O.* 1960 4 SA 791 (O), *Opperman v Opperman* 1962 3 SA 40 (N) and *De Wet N.O. v Jurgens* 1970 3 SA 38 (AD) at 46, 47.) If so, the general rule will be that during the subsistence of the marriage the joint estate is liable in full for a delict committed by either spouse. *Boedelscheiding* as a possible remedy for the

protection of the innocent spouse, which has found wide support among modern writers, is unlikely to be accepted by the courts. And even the existence of a right of regress of the innocent spouse on dissolution of the marriage, which was recognised without a dissenting voice by the Roman-Dutch jurists, and is generally supported by modern writers, can no longer be taken for granted. The only rule which is fairly certain is that if a delictual liability incurred by one of the spouses has not been paid during the marriage out of the joint estate it will have to be borne after the dissolution of the marriage by the guilty spouse alone.

If this prognostication should come true, the unhappy result will be that an innocent wife, via her half-share in the community, may have to help pay for the damage caused by her husband's adultery, seduction or murder. However, it may well be that this is what our universal community, which implies community of debts as well as of assets, is all about. If so, spouses who marry each other in community of property take each other 'for better or worse' in every sense of the word." (Emphasis added.)

[40] In *Hahlo* 5, which saw the light in 1985, shortly after the promulgation of the Act, the learned author sticks to his earlier approach on the subject when he says the following on p184:

> "If damages for a delict committed by one of the spouses have been paid during the marriage out of the joint estate, an adjustment in favour of the other spouse or his estate takes place upon the division of the joint estate. A delictual liability which has not been paid during the marriage has to be paid after its dissolution out of the half-share of the guilty spouse." (Emphasis added.)

The learned author does not appear to offer any authority in support of this last proposition. The first proposition is based on the provisions of section 19.

The learned author repeats this statement when he deals with the "effect of divorce on the property of spouses who were married in community of property of the old order" at p376. This is, presumably, a reference to marriages contracted in community of property before the Act came into operation. On p377 the learned author says the following:

> "Delictual claims incurred by either spouse during the marriage which have not been paid during the marriage out of the joint estate fall after the dissolution of the marriage solely on the spouse who committed the delict, without a right of recourse against the other spouse. The same applies *mutatis mutandis* to claims for maintenance or arrear maintenance flowing from a duty of support owed by one spouse only to a third party, say, a

> former spouse or the child of a previous marriage, which during the marriage became burdens on the joint estate."

The only authority quoted by the learned author appears to be what he said himself, *supra*, on p184.

Under "the effect of divorce on the property of spouses who were married in community of property of the new order" the learned author also says on p382:

> "Unpaid debts arising from a delict committed by one of the spouses either before or during the marriage can only be exacted from the spouse who committed the delict; he has no right of recourse against the other spouse if he pays it. The same applies in respect of unpaid maintenance obligations personal to one of the spouses."

Again, the authorities referred to in the footnotes relate to the remarks made by the same author earlier in the work, *supra.*

[41] In *Nedbank Ltd v Van Zyl* 1990 2 SA 469 (AD) at 476-477 the learned Chief Justice deals with the subject but, at 477B-C refrained from expressing a view as to the precise nature of the post-nuptial liability of the spouses for community debts. However, that case related to contractual or "ordinary" debts and not delictual debts.

[42] I was not referred to, neither could I find, any authority which is not in harmony with the views expressed by *Hahlo*, who is a celebrated author on the subject. Moreover, the views of *Hahlo* are also based on those of the old Roman-Dutch authorities as explained when I referred to *Hahlo* 4 p233-234.

In addition, the approach of *Hahlo* is also in line with the fact that "it is a fundamental principle of the law of delict, as it is of criminal law, that no one should be held liable for the wrongs of another" (*Hahlo* 4, *supra*, at 233).

[43] In all the circumstances, I find no justification for deviating from the views expressed by such an eminent and respected authority.

[44] Where section 19 is silent on the question of delictual debts not paid during the existence of the marriage in community of property, it seems to me that the correct approach is that a delictual liability which has not been paid during the marriage in community of property has to be paid after its dissolution out of the half-share of the guilty spouse.

[45] As to the question whether or not the division of the joint estate has already taken place, the position seems to be the following: when the marriage was dissolved, the learned Judge ordered a division of the joint estate. It is convenient to revisit

the passage quoted from LAWSA vol 16 by the learned Judge in *Ex parte Menzies et uxor* at 815A-C:

> "When a court grants an order of divorce the community of property between the spouses comes to an end. No provision is made for an executor to divide the estate and the matter is left in the hands of the spouses. They can divide the estate by agreement or they can appoint a liquidator to do so. If they cannot agree on a liquidator, the court can appoint one to this task."

In this case, the undisputed evidence of the second respondent is that the movables were divided by agreement and it was also agreed that each party would stand in for his or her own debts (obviously this is not binding on third parties). It was agreed that the Valhalla property would be sold and the proceeds would be shared equally. The proceeds are kept in trust by the fourth respondent. Obviously, the proceeds represent the balance after payment of any bond obligations and other costs. Against this background, it seems that the spouses decided to divide the estate and did so.

[46] As to the position of other creditors of the joint estate, details of which are not part of the record, the position, in my view, could be as follows: other creditors who may have delictual claims (such as, perhaps, the intervening party) will have to look to Loubser's half-share of the proceeds of the sale of the Valhalla property.

This will have to be paid over to the trustees (first respondent) to be dealt with in terms of the relevant statutory provisions.

If there are other creditors of the former joint estate with claims arising from contracts the position would be, it seems, as described in *Hahlo* 5 under the heading "the effect of divorce on the property of spouses who were married in community of property of the new order" – *Hahlo* 5 at p382. The author deals with the provisions of section 17(5) of the Act and says the following:

> "Failing a forfeiture order, the joint estate is equally divided. Creditors with claims arising from contracts entered into by either spouse during the marriage may sue the ex-spouses jointly or the spouse who incurred the debt, section 17(5). If the contract was one for necessaries for the joint household they may sue the spouses jointly or either spouse, section 17(5). If the spouse sued by a creditor pays the debt in full he has a right of recourse *pro semisse* against his former consort. This does not apply to debts incurred for household necessaries (section 23(1) of the Act)."

Section 17(5) of the Act reads as follows:

> "Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessaries for the joint household, the spouses may be sued jointly or severally therefor."

Any creditors with contractual claims against the former joint estate, will therefore have to proceed in terms of section 17(5): if they sue the second respondent, she will have to pay, and exercise a recourse action, such as it may be, against Loubser's estate. If creditors elect to proceed against Loubser, in terms of section 17(5), they will have to prove a claim against his insolvent estate with the joint first respondent as trustees.

The order

[47] In all the circumstances, it seems that when I make an order, the following regime will have to apply:

1. a declarator that the estate has been divided;

2. a declarator that the second respondent is entitled to her half-share of the proceeds of the sale of the Valhalla property;

3. an order directing the fourth respondent to pay out the second respondent's half-share to her and Loubser's half share to the joint first respondents or trustees to be dealt with in terms of the relevant legislation governing the administration of the insolvent estate;

4. as to costs, I see no reason why the normal rule should not apply namely that the costs should follow the result. Consequently, the unsuccessful applicants should be ordered to pay the costs of the successful second respondent in their representative capacity;

5. a declarator as to what is due by the insolvent estate to the deceased estate of the late J E Pelser.

[48] I therefore make the following order:

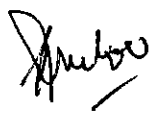
1. It is declared that the division of the joint estate has been finalised.

2. It is declared that the second respondent is entitled to payment of her half-share of the proceeds of the sale of the property known as Erf 1272 Valhalla.

3. The fourth respondent is authorised and ordered to pay the second respondent's half-share with interest, if any, as described in 2 above, and to pay the remaining half share to the first respondent, as trustees, with interest, if any.

4. The applicants, jointly and severally, in their representative capacities, are ordered to pay the costs of the second respondent.

5. It is declared that the claims for R1 070 000,00 (the lost investment) and R41 298,00 (misappropriated executor's fees by K B Loubser) and legal costs which the applicants may be able to tax including taxable costs relating to case no 43975/2012 are claims against the insolvent estate of K B Loubser in favour of the deceased estate of the late J E Pelser and the joint first respondents are directed to administer the said insolvent estate accordingly.



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

5034-2013

HEARD ON: 11 FEBRUARY 2014
FOR THE APPLICANTS: J H MOLLENTZE
INSTRUCTED BY: RUDI KOTZE ATTORNEYS
FOR THE 2ND RESPONDENT: G KYRIAZIS
INSTRUCTED BY: RUDOLPH BOTHA ATTORNEYS