

# **A critical analysis of problem areas in respect of assets of insolvent estates of individuals**

By

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## SUMMARY

The Law of Insolvency in South Africa is regulated by the provisions of the Insolvency Act 24 of 1936, with foundations in our common law, which has been influenced by different legal systems from Western Europe. But currently there is also other legislation affecting the insolvent debtor and the property in the insolvent estate. The courts too have had to formulate rules to govern aspects of insolvency law in South Africa. These variables created problem areas in insolvency law and in respect of the of the policies upon which the insolvency system hinges.

The predominant policy in South African insolvency is the collection of the maximum assets of the debtor for the advantage of creditors in insolvent estates. This strict creditor orientated approach created further problem areas in respect of assets in the insolvent estates of individual debtors. If advantage to creditors cannot be shown in an application for the sequestration of a debtor's estate, a court will refuse to grant that order. This strict policy overshadows policy concerns in respect of assets in insolvent estates, and regarding exemption law in respect of those assets. This has resulted in insolvency law reformers in South Africa missing the bigger picture, namely, that South Africa is a creditor driven developing society. It is conceivable that in the transformed South Africa, and in the present world economic chaos, there will be an escalation of sequestrations of the estates of individual debtors.

Bearing this in mind, a reformed insolvency law system must become more debtor friendly. A change in the philosophy is needed in favour of an exemption policy for insolvent estates. Exemption policy must be based on the interest of the debtor and his dependants, his dignity, creditor and third party interests, social welfare, and human rights imperatives within the South African constitutional framework. Exemption policy must be linked to the policy of a "fresh start" for the debtor.

The different policies in insolvency however create a conflict of interest among the different stakeholders, particularly regarding the assets in insolvent estates, thereby creating problem areas. In this thesis several problem areas are identified and critically analysed. The position of property included in, and excluded from, individuals' insolvent estates is investigated from a brief historical perspective, and in a brief comparative survey of the insolvency systems of the United Kingdom and the United States of America. Acute problem areas are critically analysed in detail, and the constitutional impact on property in insolvent estates is considered in a separate chapter.

The South African Law Reform Commission's review of South African insolvency law is critically analysed in a chapter of this thesis, concluding that the Commission's review is inadequate. This thesis concludes that there is a need to reform the insolvency system in South Africa and proposes a way forward in respect of property included in, and property excluded or exempt from insolvent estates.

This thesis states the law to the end of October 2008.

## NOTE

In this thesis reference is made to the South African Law Commission. The name of this Commission has now been changed to the South African Law Reform Commission. The thesis however consistently cites the former name because the work of the Commission that is described in the thesis was all conducted by the Commission as it was known then.

Certain citations in this thesis have consistently been cited in full for ease of reference for the reader.

## Key terms

Advantage to creditors; constitution; creditor; debtor; disposition of property; exempt and excluded property; inheritance; insolvent estate; insolvency policy; spouse of insolvent





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