

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

By

Roger Graham Evans

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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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A CRITICAL ANALYSIS OF PROBLEM AREAS IN RESPECT OF ASSETS OF INSOLVENT ESTATES OF INDIVIDUALS

PART I: INTRODUCTION

Chapter I: General Introduction

Avarice, meanness, stinginess were the worst of all crimes for us ... We ourselves were never mean. We bought drinks liberally round the house, on tick ... It is easy not to be mean when there is nothing in the kitty to be mean with. The more that is in the kitty, the more difficult it is, apparently, not to be mean.¹

In any insolvency law regime in the world the fundamental question that is to be addressed is essentially “what is in the kitty?” The question is: are there any assets – is there property of value – in the estate of the insolvent debtor that can be shared by his² creditors. What is apparently not uncommon in sniffing out this property is meanness; towards the debtor and among creditors *inter se*. There is usually just not enough to go around. This in itself is a problem, but what to do with such property if found and how to share it invariably creates considerable problems in respect of assets in the insolvent estates of individuals. An efficient insolvency law system is intended to address such concerns and to alleviate, or at least reduce, them.³ But as will be shown in this thesis, this is not a simple exercise. Fletcher⁴ put it this way:

In view of the complexities which can exist in relation to the holding and use of property, [after vesting in the insolvent estate] intricate and particularised provisions are necessary to ensure that this simple-sounding objective may be realised in practice.

In respect of one of these problem areas peculiar to South African law, concerning the vesting of a spouse’s interest in property in an insolvent community estate, Connor CJ, in a case of 1885, stated that:⁵

¹Nicholson V *Among the Bohemians – Experiments in living 1900-1939* (2003) at 17.

²For purposes of convenience this thesis will generally use the male gender. It is not intended to discriminate in any way by using this method of reference. The words insolvency and trustee, and bankruptcy and liquidation respectively carry essentially the same meaning and are used interchangeably in this thesis, unless otherwise stated.

³See United Nations Commission on International Trade Law *Legislative guide on insolvency law* (2005) at 10 (hereafter UNCITRALGuide).

⁴Fletcher IF *The law of insolvency* (3rd edition) (2002) at 195.

⁵*In re William Dyne’s Estate* 1885 NLR 43 at 46 and 47.

It may not, at first, be easy to see how, in our law, a wife's interest in the community of goods occasioned by her marriage, becomes vested in the trustee of her husband's insolvency ... The case has occasioned me not a little difficulty, but, on the whole, it seems to me that we may look upon the sum, now in question, in this light ...

The law of insolvency in South Africa is regulated primarily by the provisions of the Insolvency Act 24 of 1936,⁶ but its foundations can be found in common law, which has been influenced by various different legal systems from Western Europe.⁷ In the context of insolvency, however, South African common law roots are embedded primarily in the insolvency law that applied in the Netherlands in the fifteenth to the sixteenth centuries. The Dutch jurists, in turn, relied heavily, and almost fanatically, on Roman law as a foundation for the development of their insolvency laws.⁸ Through an Ordinance of Amsterdam of 1777 the Dutch law, with its many traces of Roman law, found its way to South Africa when it was annexed by the Dutch.⁹ With the advent of British colonial rule, English law was also introduced to South Africa and had a substantial influence on insolvency law. But today, apart from the Act and the common law, there is a multitude of legislation that also, in one way or another, has an effect on the insolvent debtor and the property in the insolvent estate.¹⁰ In other instances, particularly where the above sources are lacking, the courts have had to assist with the interpretation of aspects of insolvency law in South Africa.¹¹

The South African Insolvency Act provides for two methods of sequestration of a debtor's estate. First, the debtor himself can apply for the sequestration of his own estate by means of the voluntary surrender of his estate. Second, one or more

⁶Hereafter referred to as the "Act" or the "Insolvency Act".

⁷See part II below.

⁸See Gane P *The selective Voet being the commentary on the Pandects* [Paris Edition of 1829] by Johannes Voet and the Supplement to that work by Johannes van der Linden, translated with explanatory notes and notes of all South African reported cases by Percival Gane vol 1 (1957) at 362-363 (hereafter Gane). In this respect Jackson points out that insolvency law has an ancient written history, but that what preceded the written record was probably passed on orally. But, he says, as a debt collecting device the first foundations were probably established "when the first item of trade was exchanged between two thinking humans" – see Jackson TH *The logic and limits of bankruptcy law* (1986) at 7 (hereafter Jackson).

⁹See ch 3 on Roman Dutch Law.

¹⁰See, eg, the Friendly Societies Act 25 of 1956; Income Tax Act 58 of 1962; Estate Agents Act 112 of 1976; General Pensions Act 29 of 1979; Matrimonial Property Act 88 of 1984; Long-term Insurance Act 52 of 1998 and the Civil Union Act 17 of 2006, to mention only a few.

¹¹See, eg, *Badenhorst v Bekker NO en Andere* 1994 (2) SA 155 (N); *Beddy NO v Van der Westhuizen* 1999 (3) SA 913 (SCA); *Wessels NO v De Jager en 'n ander NNO* 2000 (4) SA 924 (SCA), to mention only a few.

creditors can apply for the compulsory sequestration of a debtor's estate.¹² These procedures that were developed over many hundreds of years and were found in both Roman and Roman-Dutch law in different forms, existed first for the relief of creditors, and to a much lesser extent to reduce the misery of the debtor who had fallen on difficult financial times. The prevailing policy was always that of debt collection for the benefit of the creditors. Still today, a golden thread that runs through the entire insolvency proceeding in South Africa, from beginning to end, is the requirement of "advantage to creditors" in insolvency.¹³ 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. It can therefore be said without hesitation that insolvency law in South Africa today continues to hinge on the policy of advantage to creditors, usually overshadowing any other policy that should be considered and developed in this law; particularly in respect of assets in insolvent estates and exemption law in respect of these assets. This has resulted in insolvency law reformers in South Africa missing the bigger picture. In subjects of such complexity, however, it is perhaps easy to miss the bigger picture in the absence of scrupulous analysis thereof. So, for example, as with developments in modern art, developments in modern law may be complex and the picture obscure. In this respect the English artist Vanessa Bell wrote the following in a letter to her brother-in-law, Leonard Woolf, in 1913:¹⁴

It cannot be the object of a great artist to tell you facts at the cost of telling you what he feels about them ... I often look at a picture – for instance I did at the Picasso trees by the side of a lake – without seeing in the least what the things are. I saw trees, but never dreamt of a lake or lakes although I saw certain colours and planes behind the trees. I got quite a strong emotion from the forms and colours, but it wasn't changed when weeks afterwards it was pointed out to me by chance that the blue was a lake ...

The bigger picture in South African insolvency law, and probably in insolvency law universally, is the fact that mankind has now been captured by a credit hunger that will

¹²See ss 3 and 9 of the Act.

¹³See Smith CH *The law of insolvency* (3rd ed) (1988) at 9, 28 and 61 and further (hereafter Smith *Insolvency law*); Bertelsmann E, Evans RG, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L and Steyn L Mars *The law of insolvency in South Africa* (ed Nagel C) (2008) at 1 and 76 (hereafter Mars (2008)). See also *Amod v Khan* 1947 (2) SA 432 (N); *Meskin & Co v Friedman* 1948 (2) SA 555 (W).

¹⁴Spalding F *Vanessa Bell* (1994) at 126.

probably never be escaped from. Inextricably linked to this, it is submitted, is a powerful global marketing force which, in turn, is inextricably linked to a media industry that is effective and aggressive. It cannot be escaped from with its electronically aimed barrels at households the world over. Any traveller will know that even in the most remote, and the poorest countries in the world, from Lallibella in Ethiopia, to Jaipur in India, television receptors grow like surrealistic skeletal forests and dish-like alien faces above the rooftops of shacks and houses, filtering consumerism into the minds of the inhabitants of those dwellings. And to consume the objects of those advertisements, credit, invariably, is required, and just too readily available. The average person in the developed and the developing world is not unlike a guilty transgressor of a law, but who is allowed out of incarceration with an electronic microchip or band in him or on him for constant monitoring. Credit usage is the new debtor's prison, the only difference being that the prison bars are invisible. The monitor, however, is the debtor's sense of responsibility, the debtor and creditor's greed and society. It is submitted that the vast majority of adults in the world are dependent on credit for their daily survival.¹⁵ It is also predicted in this thesis that the latter observation will prove correct in the present credit melt-down in the United States, Europe and elsewhere. Multitudes of ordinary people are being retrenched by multinational companies and this is probably going to result in a considerable escalation in bankruptcy proceedings world-wide. Just as world governments must now rescue banks, the largest credit grantors, and look upon them in sympathy, so insolvency legislation, and particularly exemption policy, may have to view debtors with more sympathy. These are important facts, real events, that are being documented in the media daily. It is submitted that these facts, all being little snippets or vast planes of the bigger credit painted picture, must be well observed and analysed in creating future insolvency law reform in South Africa. The blue lake in the picture must not be missed for the trees.

Although there are the two different methods of obtaining an order for the sequestration of a debtor's estate in South African law, the legal procedure that

¹⁵"Of all the Shakespearian injunctions 'neither a borrower nor a lender be' is no doubt the least observed, but the most quoted. The truth of the matter is that the granting and the taking up of credit is one of the cornerstones of modern commercial activity" – Scholtz JW, Otto JM, Van Zyl E, van Heerden CM and Campbell N *Guide to the National Credit Act* (2008).

must be followed after a court has handed down an order of sequestration is the same for both voluntary and compulsory sequestration. From this point onwards, the collection, protection, control and distribution of the property that comprises the insolvent estate are of cardinal importance.

Sequestration is a method of collective debt collection by a group of creditors to the advantage of those creditors,¹⁶ as opposed to individual debt collection methods, in terms of which individual creditors take individual steps against a debtor to recover their debts individually to their individual advantage.¹⁷ By the time this collective debt collection procedure through the courts has been reached, the question of the rights of individual creditors towards the debtor and/or his property essentially falls away, and the rights and interests of the creditors as a group take precedence in this collective debt collection procedure. So, where “advantage to creditors” is considered the golden thread in the sequestration proceedings, “assets comprising the sequestrated estate” are inextricably linked to this advantage. Without the assets, there can be no advantage and the sequestration application would not be entertained by the courts in the first place. The presence or absence of advantage to creditors is entirely dependent on the policies and principles that govern the inclusion or exclusion of property in the insolvent estate. The assets of the debtor, and later of the insolvent estate, are the origin of any advantage to creditors, and in this sense may be described as the golden needle that guides the thread on its journey. Perhaps it is more important than the thread. Without the needle, there can be no garment and the thread is useless.

¹⁶In this respect it has been said the “The overriding intention of the legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be a free man, able to earn his livelihood, and having the ordinary inducements to industry” – see *Re Gaskell* [1904] 2 KB 478 at 482. Millman D *Personal insolvency law, regulation and policy* (2005) at 19 (hereafter Millman) says that at one level one may look at bankruptcy as a complex game created to allow players who participated in a credit transaction to snatch or retain assets.

¹⁷“Insolvency proceedings are inherently of a collective nature; their prime beneficiary is the general body of the insolvent’s creditors, each of whom is affected, though clearly by no means necessarily to the same extent, by the common disaster. If each such creditor is denied by law the right to pursue separate remedies against the insolvent and is obliged to rely on the outcome of collective proceedings, then his interest in those proceedings ought to be, so far as consistent with the claims of his fellow creditors, as fair and reasonable as circumstances will permit, to compensate him for the loss of his individual rights.” Cork K *Report of the Review Committee Insolvency Law and Practice* Chairman Sir Kenneth Cork GBE Cmnd 8558 (1982) at page 61 (hereafter the *Cork Report*).

As Jackson¹⁸ says:

The determination of liabilities is only half of what the basic bankruptcy process needs to concern itself with. The assets of the debtor as well as its liabilities must be fixed in order to determine the estate of a debtor available for distribution to particular claimants ... In deciding what counts as an asset, we can start by answering a simple question: is the estate more valuable with the item under consideration than without it.

On the face of it, determining an estate is fairly simple. In common law all the debtor's assets comprise an estate.¹⁹ Section 20 of the Insolvency Act identifies the content of the insolvent estate. Section 2 of the Act defines "property". But dig deeper, and it will be apparent that the determination of the insolvent estate is riddled with complexity and uncertainty. There are many problem areas. Situations not foreseen by legislators, poorly drafted legislation, overlapping legal fields and concomitant legislation, conflicting or complex case law, and importantly, an absence of clear or consistent policy in respect of the collection and identification of estate assets may be some of the reasons for this dilemma. Furthermore, property that ostensibly belongs to the estate may, in fact, be excluded from it in favour of the debtor or a third party. The debtor's marital status may affect the status of the assets of the insolvent estate. So, the possible variables are many and complex. Some problems in respect of assets in insolvent estates are more acute than others. Whether the debtor is a natural or a juristic person also affects the assets of the estate. The natural individual, unlike the insolvent juristic person, survives insolvency, can generate income and may keep some of his assets in order to use them to assist in his rehabilitation.²⁰ For example, the debtor's ability to work, thereby producing a future source of income is arguably the debtor's most valuable asset, but it is generally excluded from the insolvent estate.²¹

¹⁸Jackson at 89.

¹⁹See *Gibson v Howard* 1918 TPD 185 at 186 and *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 818.

²⁰The Insolvency Act generally applies, with necessary contextual changes, to juristic persons which become insolvent. However, whereas the estates of natural persons are sequestrated, the estates of juristic persons are liquidated in South Africa. Despite the Insolvency Act applying also, with necessary contextual changes, to the liquidation of juristic persons, there are numerous differences in the requirements and procedures to be followed for the liquidation of juristic persons. Eg, juristic persons need not show advantage to creditors in a liquidation application, nor do their assets pass to the liquidator in ownership, as in the case of the sequestration of the estates of natural individuals. This thesis however, investigates only the position relating to the sequestration of the estates of natural persons, so no further reference will be made to the liquidation of juristic persons. For further reading on this subject see generally Meskin PM *Insolvency law and its operation in winding-up* (1990). For suggested law reform in this field, see Burdette DA *A framework for corporate insolvency law reform in South Africa* LLD thesis University of Pretoria (2002).

²¹See Jackson at 90 and ss 23(5) and (9) of the Act.

This thesis proposes to identify and analyse some of the more pressing problems regarding assets in insolvent estate of natural persons in South Africa.²² Problems encountered in identifying assets of the insolvent estate, in deciding whether they belong to the debtor's estate for the creditors' benefit, or whether they are excluded or exempt from it for the benefit of the insolvent debtor are the primary issues to be examined. But in doing so, the position of the debtor and the creditor, and often other stakeholders, must often also be considered as the need arises in this thesis.

To achieve the goal of effective collective debt collection for the creditors as a group, insolvency legislation must provide for the most effective means by which to identify and collect as much property of the insolvent estate as possible, and to administer and distribute that property or the proceeds thereof to the creditors, in accordance with the provisions of the relevant legislation. Whether or not property is included in, or excluded from, an insolvent estate, is determined primarily by three sections of the Insolvency Act namely sections 20, 21 and 23. To a lesser extent the common law, various other sections of the Act, and legislation in other fields of law, such as insurance and taxation legislation, may also determine the status of assets in insolvency. Where the legislation fails to be of any assistance in determining the status of property in insolvency, it is usually left to the courts to resolve the problem.²³

From the earliest stages of legal development in this field of law the idea of the collection by a creditor of a debtor's property in order to satisfy debts was identified. Together with this, one identifies a policy, based on, among other things, motives of humanity; of allowing a debtor to keep some trifling items of his estate to maintain the basic subsistence and welfare of the debtor and his dependants. This has become known as "property that is excluded or exempt from the insolvent estate", depending on the nature of that property. Initially, debtors were in reality at the mercy of their creditors. Although policy regarding the welfare of the debtor and his dependants had

²²Some meanings of the term "analyse" include the following, "examine the detailed constitution of; find or show the essence or structure of ..." *The concise Oxford English dictionary*.

²³See, eg, *Badenhorst v Bekker No en Andere* 1994 (2)SA 155 (N); *Wessels NO v De Jager en 'n Ander NNO* 2000 (4) SA 924 (SCA); *Shrosbree and Others NNO v Van Rooyen NO and Others* 2004 (1) SA 223 SECLD and *Love and Another v Santam Life Insurance Ltd and Another* 2004 (3) SA 445 (SE) to mention only a few.

already been formulated in Roman law, little attention was, in fact, paid to such policy.

In respect of this policy in Roman law Burton says:²⁴

The oppressions indeed of the rich over their miserable debtors, their rigid execution of the laws, to the extent at least of reducing the debtor to a harsh and almost hopeless servitude, were such as to be a continual cause of rebellion and secession, and such as to split the two great classes of the Roman republic as into two cities, each having an interest divided from the other; “the one”, as it was expressed by one of their consuls, on the occasion of one of those popular secessions, “full of riches and pride, the other of misery and rebellion”.

The public indignation was indeed more than once excited by some signal violation of the first principles of humanity in the persons of the nexi, or debtors reduced to servitude, and occasioned as in the case of Papirius, a modification or repeal of the severe laws against them.

As stated, this thesis will critically consider certain problem areas in respect of certain assets of insolvent estates of individuals. At the outset it will be assumed that it is the policy of most insolvency law systems, and particularly the South African system, to collect the maximum amount of property belonging to an insolvent estate, for the benefit of the creditors of such estate as a collective body.²⁵ In this respect, Jackson states that currently one is not debating whether insolvency law is needed in society, “but rather what society seeks to achieve with its insolvency law as a debt collecting mechanism”.²⁶ By posing this question, Jackson is actually saying that the insolvency laws in a society must be based on some sort of policy. In South African insolvency law, however, policy considerations in respect of assets of insolvent estates have not always been consistent, nor have they recognised changes in society. Inconsistency relating to particular problem areas concerning certain assets in insolvent estates has resulted in legal uncertainty, a great deal of litigation and much academic debate.

An obstacle in the way of putting into practice a policy on the collection of the maximum assets for the estate, and therefore the maximum advantage to creditors, is the fact that some assets that belong to an insolvent debtor are considered excluded or exempt from his insolvent estate and may therefore not be utilised to the advantage of creditors. This “exemption law” policy is arguably, in a sense, in conflict

²⁴Burton WW *Observations on the insolvent law of the Colony* (1829) at 1-2.

²⁵See *Amod v Khan* 1947 (2) SA 432 (N); *Meskin & Co v Friedman* 1948 (2) SA 555 (W).

²⁶Jackson at 7.

with the policy on advantage to creditors. In deciding whether assets should be excluded or exempt from an insolvent estate, other policy considerations, such as the rights of third parties, socio-economic factors, the dignity of the debtor and the position of the family, the young or the elderly, to mention only a few, come into conflict with those policy considerations of the inclusion of assets in insolvent estates. Here one is essentially faced with the problem of balancing the interests of all the parties who may be touched by the sequestration of an insolvent estate and policy formulation must take account of this.²⁷ In this respect, Keay, in considering the rationales for the institution of bankruptcy in society, says the following:²⁸

These rationales clearly suggest that the existence of bankruptcy is tied up with an attempt to arrive at a balance, that is the law is seeking to ensure that there is a balance between the interests of those who, for the want of a better word, are 'stakeholders' in a person's insolvency. The stakeholders are the debtor, the debtor's creditors, and society in general, and bankruptcy involves these three parties in a compact. These stakeholders, together with the debtor's family which also can be seen as a stakeholder, have conflicting interests which produce tension, and it is the task of the law to reconcile these interests.

Also to be taken into account in this respect, it is submitted, particularly in South Africa, are the changing norms of society. It has also been observed that an efficient insolvency law mechanism must strike a balance between the interests of all the stakeholders, taking into account also the interests of the relevant social, political and

²⁷In 1999 the South African Law Commission published its second draft Insolvency Bill and Explanatory Memorandum (Discussion Paper 86 vol 1 Project 63 *Review of the law of insolvency* and vol 2 Draft Insolvency Bill – (hereinafter referred to as Discussion Paper 86 and/or the draft Bill). This Explanatory Memorandum and draft Bill were, however, officially published in 2000. The previous draft Bill was published for comment in 1996 as the *Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum Working Paper 66, Project 63 (1996)*, hereinafter referred to as the 1996 draft Bill). In Discussion Paper 86 (at 3) the South African Law Commission considers the major stakeholders in the insolvency arena to be the commercial community in general and creditors in particular, insolvent debtors, insolvency practitioners and the government. They state that conflicting interests impede the task of striking a fair balance between the different interests of these parties. A basis for the Law Commission's latest review of insolvency law (*ie* Discussion Paper 86 at 3) was the need for effective, speedy and fair procedures being important requirements of these stakeholders. On this point Millman at 2 says "If one can view bankruptcy law as a *product* which the state offers to its citizens ... the fundamental question to be asked is whether it provides the optimum balance between promoting justice between the various stakeholders and achieving the goal of economic efficiency". He proceeds to say that the chosen bankruptcy regime must take into account the changing norms and formative perceptions of society. Today, eg credit is simply accepted as an integral part of a modern capitalist society, and this results in the recognition that bankruptcy is a consequence of "dysfunctional credit-taking and an acceptable mode of discharging debts" (Millman at 2). But this gentler view, which has a significant influence on policy reform, developed over a long period of time, the idea being that debtors should be helped rather than punished (Millman at 2). In respect of the Draft Bill of the South African Law Commission, see Boraine A and Van der Linde K "The draft Insolvency Bill – an exploration" (part 1) (1998) *TSAR* at 621 and (part 2) 1999) *TSAR* at 38.

²⁸Keay A "Balancing interests in bankruptcy law" (2001) *Comm L World Rev* 206 at 208.

other policy considerations that impact on the economic and legal goals of insolvency proceedings.²⁹ In fact, it will be shown along the entire thread of this thesis, that from the earliest stages of the development of the idea of debt collection, the changing circumstances and particularly the norms of society have affected the position of all the stakeholders in the debt collection circus. Also to be taken into account in this respect, particularly in South Africa, are the changing norms of society.

Apparently the South African Law Commission had this in mind when considering the possible reform of the law of insolvency in South Africa.³⁰ However, in respect of the assets of insolvent estates, and more specifically the exclusion or exemption of certain assets, the commission does not appear to have formulated any consistent policy in what can perhaps be described as a complex high-wire trapeze act. Recent legislation and court decisions have also failed to move in the direction of supporting a meaningful policy in respect of such assets.³¹

From the earliest development of insolvency law the question of the exclusion or exemption of a debtor's property from his insolvent estate has apparently always constituted a "problem area", either because of the irresponsible behaviour of debtors, the greed of creditors, socio-economic considerations that differ from time to time and from one geographical area to the next, public interest as determined by governments of the day, and more recently, human rights imperatives. Of course, these facts or events directly or indirectly influenced policy in respect of insolvency law and they continue to do so.³² The formulation of policy in this field, as in most legal spheres, is therefore dynamic. It requires careful consideration and in a country such as South Africa constant monitoring and possible reformulation as the need arises. South Africa is currently experiencing a transformation that has been compared by its former President to the Renaissance period in history. In respect of a Renaissance, commentators tend to concentrate mostly on renewal and a movement out of

²⁹UNCITRAL Guide at 9.

³⁰See Discussion Paper 86 at 3.

³¹This is comprehensively discussed in several chapters in this thesis.

³²For an interesting and colourful illustration of the pendulum-like development and tussle between the varying interests of bankruptcy role players in the United Kingdom over the centuries, see Millman at 5 and further.

darkness into light. But it must be remembered that “Renaissance” means “rebirth” and any birth is accompanied by pain. In this respect, Nicholl,³³ in his biography of Leonardo da Vinci, said the following:

We think of the Renaissance as a time of great intellectual optimism: a ‘new dawn’ of reason, a shaking-off of superstition, a broadening of horizons. Viewed from the vantage-point of the late nineteenth century, which is when this rather triumphalist reading took definitive shape, it was all of these things. But what was it like while it was happening? The old beliefs are crumbling; it is a time of rapid transition, of venal political strife, of economic boom and bust, of outlandish reports from hitherto unknown corners of the world. The experience of the Renaissance – not yet defined by that word, not yet accounted a ‘rebirth’ – is perhaps one of disruption as much as optimism. The palpable excitement of the period is laced with danger. All the rule-books are being rewritten. If everything is possible, nothing is certain: there is a kind of philosophical vertigo implicit in this.

The present experience of transformation in South Africa is not unlike that period, although the reference to a Renaissance may be stretching the point a bit too far. Therefore, one would think, in any transformation one must also consider the reality of every moment of that transformation. Transformation, whether good or bad, usually lasts for a considerable period and the accompanying changes are probably not accepted by everyone. For these reasons it is crucially important to use the opportunity of change, which cannot be evaded, to formulate policy that will serve all stakeholders, but that simultaneously may be considered progressive and fitting in a civilised society.³⁴

In considering problem areas in respect of certain assets in the insolvent estates of individuals in this thesis the policy behind the present insolvency legislation will also be considered, and where a new formulation of legislation is proposed, the relevant policy that ought to underpin such legislation will also be suggested or considered. This thesis will, however, not consider all assets that may be included or excluded from individuals’ insolvent estates. It concentrates primarily on specific problem areas and the policy, or absence thereof, in respect of these areas. Other areas of insolvency law that may appear to overlap the subject of assets of an insolvent estate, such as impeachable dispositions and uncompleted contracts, will also not be considered in this thesis. These aspects of insolvency law overlap the context of

³³Nicholl C *Leonardo da Vinci: The flights of the mind* (2004) at 3.

³⁴See ch 13 where the meaning of “civilised” is considered.

assets in the sense that a consequence of impeachable dispositions and uncompleted contracts is that it could result in hitherto unidentified property being retrieved for the benefit of the creditors of the insolvent estate during the process of the administration of the estate. Furthermore, this thesis will not examine the question of assets in the context of the different classes of creditors. For example, from the point of view of concurrent creditors, it may be argued, that just what an asset is, can be determined only after the preferent interests of the preferent claimants concerned is known. Therefore, this thesis is concerned, generally, with certain assets that theoretically are initially at the disposal of all creditors at the commencement of the insolvency proceedings and certain assets accruing during sequestration, as regulated by legislation, the common law and case law.

To achieve its objective, this thesis is structured in five parts. Part I is the general introduction and part II is an historical survey of the South African system, with roots in Roman law and Roman-Dutch law of insolvency law relating to assets. Part III is a comparative survey which considers the insolvency systems in the context of assets in the United Kingdom and the United States of America. Part IV deals with the existing South African insolvency law in respect of problem areas in respect of assets in insolvent estates and with proposed law reform, and Part V is a general conclusion. The historical part serves only as a road map to the present. It does not pretend to be a comprehensive historical study of insolvency law. The intention is to do a brief reconnaissance into the early foundations of insolvency law, of the manner in which assets in insolvent estates were dealt with in early insolvency procedure and a search for the policy upon which this procedure hinged. It will be shown that with the development of civilisations and increased commercial activities of all individuals in societies, the position of bankrupts slowly improved, often depending on the economic expedience, or lack thereof, in a particular region or country. Consequently, the position of the bankrupt and his property has always been linked to existing politics which, in turn, usually determined socio-economic policies peculiar to a particular place at a particular time.³⁵

³⁵See part II below.

In part III, the comparative section, the treatment of certain assets in the insolvent estate of individuals in the United Kingdom and the United States of America is considered. These two countries have been chosen for this study for three broad reasons. First, English law can at least to some extent be considered the foundation of insolvency law of both South Africa and the United States of America. Second, while the South African law developed in later years in very much the same direction as English law, the American law developed completely new concepts, mostly driven by the liberal philosophy of the “fresh start” for the destitute debtor. Thirdly, during the twentieth century and the beginning of the twenty-first century, both the English and the American insolvency legislation experienced considerable legislative reform. Much of this reform is inextricably linked to socio-economic changes and rights of humanity experienced in those periods. However, in respect of assets in insolvent estates, South African insolvency law, although completely functional, has really stagnated since the early twentieth century. For this reason and for reasons of transformation in South Africa, the reform of the South African law of insolvency, particularly in respect of certain problem areas regarding the assets of insolvent estates, is required. Whether the reform of the entire body of legislation that encompasses the Insolvency Act 24 of 1936 is required, is debatable, but this debate will not be considered any further in this work. Suffice to say that the lessons that have been learnt through the reform process in the law in England and America, and the policy driving that reform, can be of considerable value in an attempt to reform South African law.

Jackson correctly states that accepted wisdom has already acknowledged that collectivised debt collection through a bankruptcy system is, in principle, beneficial.³⁶ In South Africa policy in respect of insolvency as a debt collection device has traditionally centred around the idea that the collective mechanism is available only if a debtor has sufficient assets to finance the debt collection and, consequently, only if it is to the advantage of the creditors as a group. Any policy that favours the debtor in respect of his access to a part of his insolvent estate to assist him in achieving a meaningful fresh start is essentially lacking. But case law and commentators have shown (albeit sometimes indirectly) that the South African system is flawed as a result of these

³⁶Jackson at 7.

policies upon which it hinges.³⁷ A certain sector of debtors, having too few assets, cannot access the system if they are “too poor” to enter it.³⁸ The crux of the functionality of a system ultimately centers around the question of the utilisation of the debtor’s assets, or the failure to utilise them, at the moment when the debtor has fallen into economic distress. Jackson says that insolvency is a response to credit.³⁹ In a developing country such as South Africa one should perhaps go further and say that actual bankruptcy, in many cases, is a response consequent upon attempts at basic survival, in a world lacking a life-buoy in the form of a debt collection system, based on carefully considered current progressive policies.⁴⁰

Jackson further states that the essence of credit economies is people – called “debtors” – borrowing money.⁴¹ Millman says that the state must guard against the institution of credit, the lifeblood of the economy, from being abused.⁴² But in South Africa, without any credible social security system in place, borrowing is even more crucial for the survival of certain sectors of society. The further irony is that credit is essentially based on the idea that it will be redeemed out of future income. With a high unemployment rate in South Africa, this means that credit may be beyond the reach of many, or alternatively, that the credit received will not be serviced at some

³⁷*Van Rooyen v Van Rooyen (Automutual Investments (EC) (Pty) Ltd, Intervening Creditor* [2002] 2 All SA 485 (SE); Evans RG and Haskins ML “Friendly sequestrations and the advantage of creditors” (1990) *SA MercLJ* at 246; Boraine A and Roestoff M “Vriendskaplike sekwestrasies – ’n produk van verouderde beginsels? (part1) (1993) *De Jure* 229 and (part 2) (1994) *De Jure* at 31; Smith A “‘Cast a cold eye’: Some unfriendly views on friendly sequestration” (1997) *JBL* at 50; Smith AD “Caution without bias: The court’s treatment of opposition to a friendly sequestration” (1998) *JBL* at 157; Evans RG “Friendly sequestrations, the abuse of the process of the court, and possible solutions for overburdened debtors” (2001) *SA Merc LJ* at 485; Evans RG “The abuse of the process of the court in friendly sequestration proceedings” (2002) *International Insolvency Review* at 13; Evans RG “Unfriendly consequences of a friendly sequestration” (2003) *SA Merc LJ* at 437.

³⁸Creditors of such debtors must then rely on remedies outside the realms of insolvency law, usually satisfying their claims on a first-come-first-serve basis, which can be described as a species of “grab law” – see Jackson at 9. This behaviour is ultimately detrimental to debtors, creditors and society in general. See also *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), where debtors who could not access a formal debt collection process lost their dwellings when failing to satisfy a most trifling debt.

³⁹Jackson at 7.

⁴⁰See, eg, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); *Standard Bank of SA Ltd v Snyders* 2005 (5) SA 610 (C); *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA); and *ABSA Bank Ltd v Ntsane* 2007 (3) SA 554 (T).

⁴¹Jackson at 7. For further comment on the subject of credit in the context of insolvency, see also Millman at 9, 18 and 20.

⁴²Millman at 20.

point in the future and effective debt collection legislation should then be in place to remedy the problem.⁴³ But in putting this in place, a more progressive policy must be embarked on so as to better balance the interests of particularly the creditors *and* the debtors. South African insolvency law, having its roots and further development in a developed world, has always borrowed from a system that was more developed than its own, and then stagnated in its policy development, particularly regarding assets of the estate and exemption law. It further failed to recognise modern developments in the foreign systems from which it transplanted its own legislation and the policies underpinning that legislation. Not only must South Africa learn from policy changes in foreign developments in future law reform, it must also reconsider policy that will work in its own unique environment. At the heart of these changes is the property of debtors, how that property is come by and what its status should be when debtors have fallen into financial decay.

The South African Law Commission embarked on an effort to reform insolvency law in the 1980s and has already produced two draft Bills for a suggested new insolvency law regime for the Republic of South Africa. Part IV of this thesis therefore examines the present provisions in insolvency law that can be regarded as problem areas in respect of the assets of insolvent estates of individuals, and the policies behind these provisions. These assets will be looked at together with the reforms suggested by the Law Commission and, where relevant, the comparative material referred to above will be considered in the suggested formulation of further ideas and policies. In South Africa further problems relating to assets in insolvent estates and the policies underpinning issues relating to such assets were identified on occasions when certain legislative provisions relating to the law of insolvency were scrutinised by the constitutional court.⁴⁴ In some cases constitutional scrutiny has resulted in the repeal or amendment of legislation⁴⁵

⁴³An attempt to regulate the credit industry in South Africa more effectively is seen by the introduction of the National Credit Act 34 of 2005; see also Scholtz JW, Otto JM, Van Zyl E, van Heerden CM and Campbell N *Guide to the National Credit Act* (2008).

⁴⁴Provisions of the Insolvency Act 24 of 1936 have been challenged both under the interim constitution (Constitution of the Republic of South Africa Act 200 of 1993 – hereafter the interim Constitution) and under the final constitution (Constitution of the Republic of South Africa Act 108 of 1996 – hereafter the Constitution).

⁴⁵See, eg, *Brink v Kitshoff* NO 1996 (4) SA 197 (CC) and s 63 of the Long-term Insurance Act 52 of 1998.

relating to issues of insolvency, particularly assets in insolvent estates. This constitutional scrutiny was also directly responsible for a re-assessment of asset related issues in the current draft insolvency legislation.⁴⁶ It would appear that the present Insolvency Act remains vulnerable to constitutional attack, particularly in respect of some of the Act's provisions regarding assets in insolvent estates. These constitutional imperatives will also be dealt with in Part IV of this thesis.

Part V contains a general conclusion and proposals for a way forward in respect of the present problem areas concerning property in the insolvent estates of individuals. Taking into account suggestions of the Law Commission's draft Bill, part V also includes a summary of some of the pitfalls in South African law and the problems found in the suggestions of the Law Commission. My proposals in this thesis regarding the manner in which the certain assets should be dealt with in future legislation suggest a change in the philosophy of South African insolvency law, from a strict creditor orientated approach, to a more liberal debtor friendly approach. In view of the fact that South Africa has become a radically transformed society encapsulated within a liberal constitutional framework, it is submitted that reform in this direction is timely. It is further submitted that these suggested proposals will add clarity to this field of law, thereby eradicating many of the problem areas in respect of assets in the estates of insolvent individuals in South Africa.

⁴⁶See, eg, the conflicting ideas in the various draft legislation in respect of the property of a solvent spouse, prior to, and after the Constitutional Court decision in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) as discussed in chs 10, 11 and 12 below.

PART II: HISTORICAL SURVEY

Chapter 2: Roman Law

2.1 Introduction

In this chapter the development of legal redress in the Roman Law of civil procedure is considered, bearing in mind that South Africa's modern insolvency laws have their roots in Roman Law.¹ The objective is to investigate the manner in which assets of debtors in Roman Law may have been affected by the relevant legal process that was followed when enforcing individual rights and how the property of debtors was dealt with in such process. This leads to the further question whether these Roman Law roots of the modern system of insolvency law were sufficiently developed to distinguish between different types of property that may have been the subject of a disputed right and whether the concept of excluded or exempt property was known in respect of debts owed by one person to another.

The earliest documented evidence of Roman civilisation and Roman law appears to date from approximately 450 BC.² The development of Roman law then occurred over hundreds of years that were categorised as different periods, namely the period of the Kings (753 – 509 BC), the Republican period (509 – 27 BC), the Principate (27 BC – AD 284), the Dominate (AD 284 – 527) and the period of Justinian (AD 527 – 565). The second century AD and the first half of the third century were considered the classical period in the development of Roman law, while the post-classical period stretched from this period until Justinian's rule in 527.³

Initially, the procedure by which rights or obligations were enforced was of primary importance and this led to difficulties in the classification of ancient bodies of law.⁴ In this

¹Wenger L *Institutes of the Roman law of civil procedure* (translated OH Fisk 1955) (1940) at 8 (hereafter Wenger *Institutes*); Countryman V "Bankruptcy and the individual debtor – a modest proposal to return to the seventeenth century" (1983) *Catholic University Law Review* at 809; Dalhuisen JH *Dalhuisen on international insolvency and bankruptcy* vol 1 (1986) at 1-1 (hereafter Dalhuisen *International insolvency*). In this chapter the following abbreviations will be used in various parts of the text: C is the Code of Justinian, D is Digest or Pandects and J is for Institutes of Justinian.

²Van Zyl DH *Geskiedenis en beginsels van die Romeinse privaatreë* (1977) at 1 (hereafter Van Zyl DH *Geskiedenis en beginsels*).

³Van Zyl DH *Geskiedenis en beginsels* at 2-7.

⁴Hunter *Introduction to Roman law* (1885) at 122 (hereafter Hunter).

respect, Hunter refers to one of the oldest bodies of Hindu law as set out by Narada,⁵ who assumed that men do quarrel, and he explains how their quarrels were adjudicated upon and settled without bloodshed or violence. Hunter states that Narada's emphasis is not on a law or a right or a sanction or between persons and things, but a court of justice. The important point is that there was no alternative to private reprisals. Narada commences by describing the court and its procedure. He then proceeds to describe law by the subject matter of the quarrel, according to the relations between human beings. He considers debt, among other things, as a matter about which men did quarrel, but the rights and liabilities (as they are now called) to which debt gave rise were regarded simply as guides for determining the court's judgment.⁶ Roman jurists later attempted a logical classification of the law, with Gaius and Justinian identifying three branches of the law, namely persons, things and actions.⁷ The interesting feature at this point is that actions, which closely correspond with the law of procedure come last, while in the Twelve Tables, as in Narada, they stood first.⁸ Thus by the time of the classical jurists substantive law had taken precedence over adjective law. Gaius already recognised that procedure was only a means to an end, so that the primary object to consider in a legal treatise was the vindication of rights and the enforcement of duties, and not the form of action.⁹ But Hunter says that although Gaius's arrangement is an arrangement of rights and duties, it was open to objections, which Gaius could not have avoided because although right and duty formed the crux of the classification, this fact was "too much obscured to be readily appreciated even by the jurists themselves".¹⁰ Hunter says that from one point of view the explanation for this may lie in the defects of their technical language, because they knew the idea of *obligatio* as an equivalent of legal duty, but they were not familiar with the corresponding idea of legal right. Initially, the legal remedy is thus the only conception of importance.¹¹ At first the word *jus* was the nearest equivalent to the conception of a right, but this was confined to an insignificant class of rights of property and did not refer to ownership.¹²

⁵Narada, translated by Dr Jolly, at 6 as cited by Hunter at 122 note 1.

⁶Hunter at 123.

⁷Hunter at 123.

⁸Hunter at 124.

⁹Hunter at 124.

¹⁰Hunter at 124.

¹¹Hunter 125.

¹²Hunter 125.

It would therefore appear that this difficulty in classifying the law had a very real effect on the idea of insolvency law, and more specifically, the concept of an insolvent estate and assets belonging to, or excluded from, that estate. At first it was all about the procedure that was followed in dealing with the debtor, with the emphasis on the person of the debtor that would be punished.

2.2 Legal redress in the Roman law of civil procedure

2.2.1 The emergence of insolvency laws

The judicial procedures used by Romans to enforce their rights has a long history. In respect of the primary assertion of rights three stages of legal redress developed, namely, the procedure *legis actiones*, the *formula* procedure and the *cognitio* procedure.¹³ These procedures will be discussed in more detail below.¹⁴

Initially, in a tribal community with little economic activity, there was no need for insolvency laws other than incidental sanctions against the person of the debtor who defaulted. Where the right of one party may have been infringed by another, redress was obtained by measures of self-help.¹⁵ However, it became obvious that this “might is right” attitude would result in grave injustice.¹⁶ As groups of people came to recognise various rights generally they also realised the efficacy of referring their disputes to a special arbiter, which role was later, as the idea of the state developed, performed by some chieftain, lord, king or ruler, and eventually by a special magistrate.¹⁷ The emergence of insolvency laws, that developed alongside the gradual development of a more advanced economy,¹⁸ was achieved in Rome shortly before the period of the Emperor Augustus (63 BC – AD 14).¹⁹

¹³Jolowicz HF and Nicholas B *Historical introduction to the study of Roman law* (1972) at 175 (hereafter Jolowicz and Nicholas); Thomas JAC *Textbook of Roman* (1976) at 71 (hereafter Thomas *Textbook*); Van Zyl DH *History and principles of Roman private law* (1983) at 368 (hereafter Van Zyl *History and principles*).

¹⁴See para 2.3 and further below.

¹⁵Burdick WL *The principles of Roman law and their relation to modern law* (1938) at 626 (hereafter Burdick *Principles*).

¹⁶Van Warmelo P *An introduction to the principles of Roman civil law* (1976) at 271 (hereafter Van Warmelo *Introduction*).

¹⁷Burdick *Principles* at 626.

¹⁸Burdick *Principles* at 626; Van Warmelo P *Die oorsprong en betekenis van die Romeinse reg* (1978) at 229 (hereafter Van Warmelo *Oorsprong*).

¹⁹Kaser M *Roman private law* (1965) translated by R Dannenbring at 330 (hereafter Kaser *Roman private law*); Dalhuisen *International insolvency* at 1 - 2.

The more advanced economic activities and contractual arrangements which had developed by then required more advanced insolvency rules.

Proceedings consequently developed towards the idea of the creditor's satisfaction of his rights out of a debtor's estate under a uniform set of laws. Private remedies against the person of the debtor were abolished.²⁰ Although imprisonment for debt continued to exist, actual insolvency proceedings increasingly prevailed.²¹ The first procedure that provided recourse to a debtor's estate was *venditio bonorum*. This procedure applied to both solvent and insolvent debtors whereby all the debtor's assets were sold to one buyer as there was no auction. That buyer became the legal successor of the debtor who would pay the creditors a percentage of the debts as part of a speculation.²² Because of the cumbersome nature of the *venditio bonorum*, a less severe procedure, the *cessio bonorum*, developed. This was the assignment for the benefit of creditors, but was available in only limited circumstances. By post-classical times *venditio bonorum* was replaced with individual remedies (*pignus in causa iudicati captum*) for solvent debtors and for insolvent debtors, by *missio in bona* followed by the *distractio in bonorum*, which was a liquidation procedure.²³ This procedure could be initiated only by a plurality of creditors.

2.3 Procedures of execution

2.3.1 General

For the purpose of this thesis, relating as it does specifically to certain assets of the insolvent estate as it is known today, this investigation of the Roman law system lies primarily in the objects of execution that were of interest to the Roman creditor, namely the person and the property of the debtor. It is appropriate to consider the distinction that was made between the person of the debtor and the property of the debtor as objects of execution and the extent to which the development in Roman law influenced modern-day insolvency law.

²⁰Dalhuisen *International insolvency* 1-2.

²¹Dalhuisen *International insolvency* 1-2.

²²Dalhuisen *International insolvency* 1-2.

²³Dalhuisen *International insolvency* 1-2.

In discussing the material right to execution, namely the person and property (the objects) that a creditor could seize to satisfy his claim, the different formal proceedings in execution that developed in Roman Law must also be described. In other words, the formalities regarding the manner in which the debtor was compelled with state and private force to satisfy the creditor must also be considered when looking at the objects of execution in Roman law.

2.3.2 Proceedings in execution

The Roman law of procedure is generally distinguished by three stages of development, namely the period of the *legis actiones* procedure, the period of the *formula* procedure and the *cognitio* procedure.²⁴ These three proceedings will now be discussed.

2.3.2.1 Legis actiones

The *legis actiones* is considered the earliest form of Roman legal procedure that evolved at least during the period of the kings.²⁵ Roman law scholars differ in opinion regarding the details of these procedures. This is because of the paucity of definite information on the subject. However, these procedures preceded the Twelve Tables and what is known of them comes from fragments of the Twelve Tables and from an incomplete account of them given by Gaius.²⁶

These proceedings were characterised by the enunciation of prescribed formal words and formal ritual acts.²⁷ Gaius listed five *legis actiones*,²⁸ of which three were applied for the solution of a dispute (litigation), and only the *legis actio per manus iniectioem* and the *legis actio per pignoris capionem* were used for the

²⁴Van Zyl *History and principles* at 364; Bauer *The Bankrupt's estate: A study of individual and collective rights of creditors under Roman and early English bankruptcy laws* (Master's Thesis (1980) Southern Methodist University School of Law) at 3 (hereafter *Bauer Thesis*).

²⁵Van Warmelo *Introduction* at 272.

²⁶See generally De Zulueta F *The institutes of Gaius Part II Commentary* (1953) at 244 - 245 (hereafter De Zulueta).

²⁷Van Warmelo *Introduction* at 272.

²⁸These were *legis actiones sacramentum, iudicis arbitrive postulatio, condictio, manus iniectio* and *pignoris capio* – see Thomas *Textbook* at 73.

execution of judgments.²⁹ Consequently, only these two *legis actiones* will be considered as methods by which a creditor's claim, which at this stage would already have been shown to exist, could be satisfied.

2.3.2.1.1 *Legis actio per manus iniectioem*

This may have been the oldest form of redress, being the seizure of a person against whom one had a claim.³⁰ Gaius identified three forms of *manus iniectio*, namely *manus iniectio iudicati*, *manus iniectio pro iudicati* and *manus iniectio pura*.³¹

(i) Manus iniectio iudicati

This form of execution was characterised by the fact that it was directed not at the estate of the debtor, but at his person. *Manus iniectio* could be utilised 30 days after the debtor had been condemned or admitted the right of his creditor, or, if without judgment, his liability was incontestable.³² The debtor was brought before the *praetor* and the creditor would put his hand on the debtor and utter specific words.³³ The debtor could not defend himself. He could only free himself from the creditor through the intervention of a third person, a *vindex*, who would dispute the creditor's right of seizure.³⁴ The *vindex* took the debtor's place and his intervention resulted in the release of the debtor.³⁵ But if he was unsuccessful, he was liable for double the original amount.³⁶ As a ground of defence, the *vindex* could not question the merits of the preceding decision.³⁷ He was limited to disputing the actual judgment, for example, by showing that the judgment had been honoured, that there had been no judgment, that the judge had been bribed or that the debtor and creditor had settled the dispute.³⁸

²⁹Kaser *Roman private law* at 335; Thomas *Textbook* at 73; Van Warmelo *Introduction* at 273; Van Zyl *History and principles* at 369.

³⁰Thomas *Textbook* at 78.

³¹G.IV. 21-25.

³²Twelve Tables 3.1; Hunter *Roman law* (1885) at 1034.

³³Eg: "*Quando tu mihi iudicatus (vel damnatus) es decem milia, quando non solvisti, ob eam rem ego tibi decem milia iudicati manum inieci*" (Since you were adjudged (or condemned) to me in a sum of ten thousand and since you have not paid, on that account I lay hands on you for the judgment of ten thousand) see Thomas *Textbook* at 78.

³⁴Kaser *Roman private law* at 338.

³⁵G.IV.21.

³⁶Kaser *Roman private law* at 338.

³⁷Thomas *Textbook* at 79.

³⁸Kaser *Roman private law* at 338; Thomas *Textbook* at 79.

In the absence of a *vindex*, the magistrate “addicted” (*addictio*) the debtor or, if the *vindex* was unsuccessful, the *vindex*, to the creditor, who could take him to a private prison and keep him for 60 days.³⁹ The Twelve Tables provided that the debtor could be held in bonds for 60 days.⁴⁰ During this time the creditor produced his prisoner on three successive market days and publicly declared the amount of the debt, probably hoping that someone might settle the debt and release the debtor. Failing this, the debtor could either be put to death, or he could be sold into foreign slavery.⁴¹ Where there was more than one creditor who had secured *manus iniectio*, they were permitted to cut the debtor to pieces, each taking his rightful share. It is, however, probable that this practice was never followed. Burdick finds it more probable that the debtor was sold as a slave and that the proceeds of the sale were divided among the creditors.⁴² De Zulueta thought it probable that initially the debtor was entirely at the mercy of the creditor, but that later on the public interest and the creditor’s own interest rendered this extreme penalty obsolete in practice.⁴³ Be that as it may, this severe method of execution shows that at this point the law concerning debt was regarded as part of the law of delict in that a creditor suffered a wrong if he was not paid by the debtor.⁴⁴ Later, however, it developed into the procedure to enforce, primarily, execution of judgment against a debtor.⁴⁵

The position of the debtor, however, improved when a *lex poetilia*⁴⁶ abolished the fettering, imprisonment and putting to death of the debtor, and *manus iniectio* became a way in which the debtor had to work off his debt as a debt slave of his

³⁹Thomas *Textbook* 79; Van Zyl *History and principles* at 370.

⁴⁰Table III.

⁴¹Burdick *Principles* at 632; Kaser *Roman private law* at 338; Thomas *Textbook* at 79; Van Zyl *History and principles* at 370.

⁴²Burdick *Principles* at 633-634; Van Warmelo *Oorsprong* at 251; Countryman (1983) *Catholic University Law Review* 809 at 810 and notes 4 and 5 at 810, however, cites Radin when saying, “There were also ‘abundant traces in Rome, as in Europe until recent times, of an ancient custom of seizing the corpse of a defaulting debtor as a means of enforcing payment from his heirs’— which may explain why there are still statutes on the books of some of our states specifically forbidding that practice”.

⁴³De Zulueta at 245.

⁴⁴Jolowicz and Nicholas at 189; Van Warmelo *Oorsprong* at 249.

⁴⁵Van Warmelo *Oorsprong* at 249.

⁴⁶Of approximately 325-326 BC. Hunter in *Roman law* at 1035 comments that it is certain that during the later Republic a debtor could not be taken as a slave to satisfy a judgment debt. Public imprisonment of the debtor took the place of his slavery; C.7, 72, 7.

creditor.⁴⁷ It probably also authorised detention of the debtor beyond the 60 days allowed by the Twelve Tables precisely to provide for the creditor to use the labour of the debtor to work off his debt, because if the creditor were obliged to free the debtor, he would have lost any effective means of execution.⁴⁸

(ii) *Manus iniectio pro iudicato*

This was the *manus iniectio iudicati* procedure extended to cases where there may have been no litigation in circumstances where a judgment may have been given. The scope of the *manus iniectio* as a punitive measure against certain conduct was extended by various *leges*. For example, the *lex pubilia*⁴⁹ provided the *manus iniectio* to a *sponsor*, guarantor, who paid a debt against the principal debtor, if the latter had not reimbursed him within 6 months.⁵⁰

(iii) *Manus iniectio pura*

This process was a substitute for, rather than a form of *manus iniectio*. It was introduced by legislation after the *lex poetilia* had stripped the true *manus iniectio* of its severity.⁵¹ Here the defendant could defend himself without the need for a *vindex*, but failing in his defence, he was liable in double the amount. An example of this *manus iniectio* is the liability of usurers for taking excessive interest under the *lex Marcia*.⁵²

Thomas states that a *lex Vallia*⁵³ made all *manus iniectio pura*, “except that in consequence of a judgment or under the *leges pubilia* and *furia de sponsu*”.⁵⁴ As a consequence, cases that were previously redressed by personal seizure were now replaced with actions in which the unsuccessful defendant would be liable for double damages. This discouraged baseless defences. However, where the *lex*

⁴⁷Kaser *Roman private law* at 338; Thomas *Textbook* at 79. Constantine (AD 320) abolished imprisonment for debt, unless the debtor was stubborn – Hunter *Roman law* at 1036.

⁴⁸Jolowicz and Nicholas at 190.

⁴⁹Approximately 200 BC.

⁵⁰Thomas *Textbook* at 79; Van Warmelo *Oorsprong* at 252.

⁵¹Thomas *Textbook* at 80; Van Warmelo *Oorsprong* at 252.

⁵²Approximately 104 BC.; Thomas *Textbook* at 80; Van Warmelo *Oorsprong* at 253.

⁵³Possibly of approximately 170 BC.

⁵⁴Thomas *Textbook* at 80.

vallia did not apply, personal seizure was retained and personal execution continued in Roman law long after the passing of the *leges actiones*.⁵⁵

2.3.2.1.2 *Legis actio per pignoris capionem*

This *legis actio*, the last to be mentioned by Gaius,⁵⁶ was also a procedure for execution. This *legis actio* differed from the *manus iniectio* in that it was aimed at execution of the property of the debtor and not against his person.⁵⁷ It entailed the seizure of a debtor's property to persuade him to comply with his obligation. The seizure was accompanied by the uttering of *certa verba*, a solemn form of words.⁵⁸ This did not, however, have to occur in the presence of a magistrate or the other party. This "taking of a pledge"⁵⁹ allowed the creditor only to retain it, returning it when the debtor paid his debt. The creditor could not sell it. Some authors think that the "pledge property" could be destroyed if the debtor remained impenitent,⁶⁰ while others think that the holder of the pledge could become owner thereof after the passing of a period of time.⁶¹ *Pignoris capio* could be utilised in a limited number of cases, partly by custom and partly by law.⁶² It was authorised by custom where a soldier used it against his paymaster in respect of his wages, and by a cavalryman against the person who was liable for the purchase price of his horse and its fodder. *Pignoris capio* appears to have been primarily a state privilege, allowed to individuals only when it was recognised that their claims were of peculiar public or religious importance.⁶³ So, for example, it was also available to tax collectors who could take this pledge to ensure payment of taxes by the taxpayer.⁶⁴

This was therefore an early procedure of execution in respect of the property, in the sense that it was not the person of the debtor that was "attached", thus a

⁵⁵Thomas *Textbook* at 80.

⁵⁶Gaius Inst 4.26-29.

⁵⁷Van Warmelo *Oorsprong* at 253.

⁵⁸Jolowicz and Nicholas at 190; Thomas *Textbook* at 80.

⁵⁹Jolowicz and Nicholas at 190.

⁶⁰Jolowicz and Nicholas at 190.

⁶¹Van Warmelo *Oorsprong* at 254.

⁶²That is, by the Twelve Tables; see Jolowicz and Nicholas at 190 and Thomas *Textbook* at 80.

⁶³Jolowicz and Nicholas at 190.

⁶⁴Tax collectors were authorised by the state, against payment to the state, to collect taxes for themselves.

development in the direction of the attachment of the debtor's assets as a means of satisfying the claims of creditors. But it was available to limited classes of creditors and always in respect of state or religious interests. Further, as mentioned above, personal execution remained a possibility in Roman law long after the passing of the *leges actiones*.

2.3.2.2 The formulary process

2.3.2.2.1 General

After a long period of survival of the *leges actiones*, changes in society and commerce slowly resulted in the establishment of a new system of procedure, the *formula* system.⁶⁵ In the execution of judgments it was still possible under the *formula* procedure to act against the person of the debtor,⁶⁶ but this system developed an alternative means of execution against the debtor's property.⁶⁷ This procedure is named after the *formula*, a written exposition of the dispute between the litigants which differed from the almost ritual formal words required by the *leges actiones*.⁶⁸

Execution under the formulary system of procedure, the creation of praetorian law, commenced with the seizure of the debtor's property, known as *missio in bona*. Usually it comprised the seizure of all the property of the debtor, which was then realised for the benefit of all his creditors by uniform proceedings.⁶⁹ Kaser thus points out that ordinary execution against the property, even during the classical period,⁷⁰ was always a procedure in insolvency and thus general execution. Together with this, he says, a "special execution" against particular pieces of property which favoured certain persons deserving protection was recognised only in exceptional cases.⁷¹

⁶⁵Burdick *Principles* at 636; Wenger *Institutes* at 228; Thomas *Textbook* at 83; Kaser *Roman private law* at 339 and 355; Van Warmelo *Introduction* at 275; Van Zyl *History and Principles* at 372.

⁶⁶As under the *legis actio* procedure, aimed at the debtor becoming a debt slave. See also De Zulueta at 135.

⁶⁷Kaser *Roman private law* at 355; Thomas *Textbook* at 109.

⁶⁸Van Zyl *History and principles* at 372.

⁶⁹Kaser *Roman private law* at 355.

⁷⁰See para 2.1 above.

⁷¹Kaser *Roman private law* at 355.

2.3.2.2.2 *Execution against the person and against property in the formulary system*

Execution against the person of the debtor was normal throughout the classical period, but by the last century of the republic⁷² execution against property was also possible.⁷³ A further important reform is that one could no longer proceed straight to execution after a requisite number of days. The judgment creditor now first had to institute another action, an action on the judgment, the *actio iudicati*.⁷⁴ Normally there would be no *litis contestatio* in this action, and the debtor would either pay, or if he could not, he would admit liability and execution would commence. The debtor could not dispute the judgment on its merits, but he could plead on its validity.⁷⁵ This would result in *litis contestatio* and a trial in the usual way. Vexatious litigation was discouraged by requiring the defendant to furnish security and the threat of liability of double the original judgment if he lost the case. This was therefore similar to the procedure of *manus iniectio iudicati* where a *vindex* was required for a trial and the threat of double liability also existed .⁷⁶

Failure by the defendant to defend or to pay resulted in the magistrate authorising the plaintiff to take the debtor into custody (*duci iubet*). He was thus in the same situation he would have been in under *manus iniectio* after abolishing the creditors' right to kill or sell his debtor.

Buckland⁷⁷ points out that it is disputed whether an *actio iudicati* was always a requirement, but he appears to be of the opinion that it probably was a requirement; one of the reasons being to prevent a creditor who had not yet been granted judgment, to proceed directly to execution. This reasoning looks like a progression towards leniency for the debtor.⁷⁸ It would appear that this may also

⁷²See para 2.1 above.

⁷³De Zulueta at 135; Jolowicz and Nicholas at 216; Thomas *Textbook* at 109.

⁷⁴Kaser *Roman private law* at 355; Jolowicz and Nicholas at 216.

⁷⁵Eg, on lack of jurisdiction or that it has already been satisfied.

⁷⁶See para 2.3.2.1.1 (i) above.

⁷⁷Buckland WW *Elementary principles of the Roman private law* at 389.

⁷⁸See M Roestoff 'n *Kritiese evaluasie van skuldverligtingsmaatreels vir individue in die Suid-Afrikaanse insolvensiereg* LLD Thesis University of Pretoria at 21 note 50 (hereafter Roestoff *Thesis*).

have been a further development of the idea of the *concursum creditorum* and the resulting *paritas creditorum* in bankruptcy.

The important innovation, however, was the introduction of the execution against the property of the debtor. In this respect a magistrate issued a decree that the judgment creditor take possession of all the debtor's property (*missio in bona*). The creditor would then advertise the attachment of the property as notification to other creditors to identify their claims.⁷⁹ After 30 days the creditors came together to elect a *magister* from the body of creditors and to proceed with the sale of the assets. The *magister* then prepared an inventory of the property and of the debts, thereafter selling the property to the highest bidder (*bonorum venditio*), being the person who offered the creditors the highest percentage on their debts. For example, a buyer offering a quarter was given the right to the debtor's assets, but he would then have to pay every creditor a quarter of what the debtor owed that creditor. The successful creditor had an interdict to recover property in the possession of third parties and he could bring a *Rutilian* action against the judgment debtor's debtors.⁸⁰

Nicholas points out that this was in effect bankruptcy; at this period in Roman law the creditor had to make his debtor bankrupt in order to enforce the smallest sum that the debtor would not pay voluntarily. The creditor could not simply seize one piece of property that could satisfy his debt and sell it.⁸¹ This clearly created greater hardship for the debtor than was necessary, but it is also clear that the interests of the debtor were of little importance. The object of this execution procedure was not that the state should assist the creditor by standing in for the debtor, but rather that the state should help the creditor to pressurise and punish the debtor if he did not pay his debts.⁸² This was normally achieved by imprisonment of the debtor, but it could now also be accomplished by taking away his property. Nicholas further points out that the relationship between the two forms of execution is uncertain as it is not known whether *missio in bona* always

⁷⁹Kaser *Roman private law* at 355 and further; Jolowicz and Nicholas at 217

⁸⁰Jolowicz and Nicholas at 217.

⁸¹Jolowicz and Nicholas at 217.

⁸²Jolowicz and Nicholas at 217.

accompanied the authorisation to imprison the debtor, or whether the debtor could be imprisoned without execution against his property, but usually the two went together.⁸³ Wenger, however, states that the creditor could waive his right to imprisonment and rely on *missio* alone.⁸⁴

Thus, probably from the time of Augustus,⁸⁵ there was a method that allowed the debtor in many cases to avoid execution against his person. This was accomplished by the debtor making a voluntary surrender of his property (*cessio bonorum*) to his creditor or creditors. This could probably be regarded as a root of what is known today as the voluntary surrender of a debtor's estate in South African insolvency law.⁸⁶ *Cessio bonorum* replaced the forcible putting in possession by the magistrate and also led to *venditio bonorum*, but it had big advantages for the debtor. The debtor escaped the *infamia* flowing from an enforced sale and was completely absolved from the danger of imprisonment for debt. If creditors did not receive full payment and the debtor later acquired enough assets to make it worthwhile, the creditors could bring a further action leading to another sale.⁸⁷ However, in such action the debtor had the *beneficium competentiae* limiting the condemnation to *id quod facere potest*, that is, what the defendant had. He could therefore always pay the amount of the judgment and need not suffer personal execution.⁸⁸ The debtor whose property had been forcibly taken also had the *beneficium competentiae*, but only for a year, while the debtor who had made *cessio* had it forever.⁸⁹ This leniency, however, was not available to all debtors. It was probably not at the disposal of debtors whose insolvency was due to their own fault, or to those who had insufficient property to hand over to their creditors.

⁸³Jolowicz and Nicholas at 217.

⁸⁴Wenger *Institutes* at 232.

⁸⁵Referred to as *cessio ex lege Iulia* (eg Gaius 3.78), probably meaning Augustus' law on procedure of 17 BC – see Jolowicz and Nicholas at 217 note 3; Kaser *Roman private law* at 357.

⁸⁶See s 3 of the Insolvency Act 24 of 1936.

⁸⁷De Zulueta at 134.

⁸⁸Jolowicz and Nicholas at 218 note 4.

⁸⁹In the law of the period of Justinian the *beneficium* allowed the debtor to retain the necessities of life – Jolowicz and Nicholas at 218 note 4. This appears to be the first indication of the concept of exempt property.

2.3.2.3 *Cognitio* procedure

Already in the period of the Principate⁹⁰ steps were being taken to replace the *formula* procedure with other procedures and by the middle of the fourth century AD it was abolished.⁹¹ It was replaced with a procedure known as the *cognitio extra ordinem* or *cognitio extraordinaria*.⁹² The development of this procedure was encouraged by the creation of an extensive bureaucracy during post-classical times. The state increasingly intervened in the legal sphere, with the result that legal disputes were no longer based on an arrangement between the parties to bring the dispute before a judge. Instead, the power now vested in the authorities to place a dispute before its officials, to hear and decide upon the issue before them, and then to have such decision executed.⁹³ The most significant characteristic of the *cognitio* procedure was that the entire procedure took place before one official only, who was appointed by the state and was often a trained jurist. Thus the two phases, *in iure* and *apud iudicem*, were abolished. Consequently, litigation was simpler and more convenient, and the administrative and juridical activities of the state fell to a large extent under a central authority.⁹⁴ An important innovation of this procedure was the institution of the possibility of an appeal. An appeal, of course, would postpone the execution of the judgment.⁹⁵

2.3.2.3.1 *Execution*

This execution procedure under *cognitio* differed from the *formula* procedure in that execution of a judgment was the business of the authorities, with the plaintiff having to do less.⁹⁶ Execution under this procedure was also, as in the *formula* procedure, initiated by the *actio iudicati*.⁹⁷ Execution could proceed against the person or the property of the *iudicatus*.⁹⁸ Bauer points out that although debtors theoretically remained liable to imprisonment for debt, execution against property was the norm.⁹⁹ After two

⁹⁰See para 2.1 above.

⁹¹Kaser *Roman private law* at 355; Van Zyl *History and principles* at 384.

⁹²Van Zyl *History and principles* at 384.

⁹³Wenger *Institutes* at 311; Kaser *Roman private law* at 359; Jolowicz and Nicholas at 397; Van Zyl *History and principles* at 384; Van Warmelo *Introduction* at 280; Thomas *Textbook* at 119.

⁹⁴Van Zyl *History and principles* at 384.

⁹⁵Kaser *Roman private law* at 363; Van Warmelo *Oorsprong* at 330.

⁹⁶Van Warmelo *Oorsprong* at 333.

⁹⁷Wenger *Institutes* at 311.

⁹⁸Wenger *Institutes* at 312; Jolowicz and Nicholas at 401.

⁹⁹Bauer *Thesis* at 54; Buckland W W *A manual of Roman private law* (2nd ed) (1947) at 392.

months had expired an *executor* (official) could proceed with the actual execution against the defendant, if necessary, by the use of force. If the defendant was obliged to pay a sum of money, and he was solvent, he could be pressurised to pay by taking (seizing) a pledge from him (*pignus in causa iudicati captum*). First, movable things would be seized, then lands and also rights.¹⁰⁰ If he still failed to pay the pledge would be sold after two months and the plaintiff would be paid out of the proceeds.¹⁰¹

If the defendant was insolvent, as with the *formula* procedure, his property could be attached. Property execution by way of a general execution became limited to its proper field by the special execution that had become possible, arising only where there were a number of creditors and the debtor's property was insufficient to satisfy the creditors' claims.¹⁰² So, if this property was insufficient to satisfy the creditors' claims, a further attachment of the entire estate occurred in order to be sold so that the creditors' claims could at least be partially satisfied. Apart from this, *cessio bonorum* could also be offered by the defendant. This would free him of *infamia* and afford him the *beneficium competentiae*.

If *cessio* did not occur, *missio in bona* would apply with the creditors being placed in possession of the debtor's property *bonorum servandorum causa* with a *curator bonorum* having actual custody and control. Within two to four years the creditors could enforce their claims, including those creditors who did not join in from the start. Once that time had lapsed, creditors not announcing themselves had only a claim against the debtor, while the seized property remained reserved for those who had announced themselves in time.¹⁰³ Thereafter, the property was sold by the appropriate officer.¹⁰⁴ But this was no longer *venditio bonorum*, being a sale *en bloc*. It was a *distractio bonorum* because the separate assets were sold separately, piece by piece to the highest bidder.¹⁰⁵ The proceeds were then

¹⁰⁰Wenger *Institutes* at 312.

¹⁰¹See generally Wenger *Institutes* at 311 and further, and Thomas *Textbook* at 119 and further.

¹⁰²Wenger *Institutes* at 314.

¹⁰³Wenger *Institutes* at 315.

¹⁰⁴Van Warmelo *Oorsprong* at 334.

¹⁰⁵Kaser states that under the formulary procedure a creditor was satisfied in exceptional cases only by the execution against particular pieces of property, selling particular things of the debtor, until the debt was satisfied (*distractio bonorum*) – Kaser *Roman private law* at 357.

distributed among the creditors according to their ranking. Ranking occurred in the sense that a creditor who was a pledgee was first satisfied out of the proceeds of the item pledged. The surplus thereof was available to other creditors. In the distribution of proceeds, preferred creditors ranked after the pledgee, for their full amounts. Thereafter, general chirographic creditors were satisfied in percentages calculated upon their claims.¹⁰⁶ Things in the estate belonging to a third party could be recovered by a *vindicatio* without participating in the bankruptcy proceedings.¹⁰⁷

The debtor became *infamis* and remained liable for that portion of creditors' claims that was not satisfied by the *distractio*, unless a *cessio bonorum* was made, which would exclude *infamia* and grant lasting *beneficium competentiae* for pre-bankruptcy debts, as described above.

2.4 Bankruptcy: The objects of execution in Roman Law

2.4.1 Execution against the person

What property was available to creditors for the satisfaction or enforcement of their claims against debtors? As described above, the only manner in which early Romans could satisfy a judgment debt was to seize the debtor as a slave. A simple procedure of seizing the debtors property and selling it was not a mode of execution used by the early Romans. The person of the debtor was the object of execution in the law of the Twelve Tables; his property being mentioned only incidentally.¹⁰⁸ Hunter finds this a strange anomaly that touching a person's property must have seemed unusually tyrannical or sacrilegious, but seizing his person and keeping him as a slave seemed the most natural thing in the world.¹⁰⁹ Wenger says "[o]f him who *si volet suo vivito* (Tab III, 4) it is assumed that he still has something and that he can dispose of it. Whether only during the sixty days after the *addictio* (Tab III, 5), or still longer, as long as he remains the subject of rights generally, may

¹⁰⁶Wenger *Institutes* at 316.

¹⁰⁷Wenger *Institutes* at 315.

¹⁰⁸Wenger *Institutes* at 230.

¹⁰⁹Hunter *Roman law* at 1033. However, one wonders whether such harshness during the earliest known period occurred simply because the vast expanse of humanity probably possessed little or no property. Perhaps property increased in importance and could actually be acquired only when agricultural pursuits began to develop, resulting in the beginning of a system of trading.

be left uncertain”.¹¹⁰ Here, Wenger says, there are psychological elements to be considered. So, while personal execution existed in full with its harsh consequences that could cost the debtor his life, freedom or home, few people held back until 60 days had lapsed with their property before releasing themselves. In reality therefore personal execution befell only a person without property. This changed when the harshest consequences of a *manus iniectio* (death or slavery) had ceased. Wenger is of the opinion that it would then be comprehensible if the debtor, to save his home for himself and his family, incurred a *manus iniectio* in order to eradicate his debt by working it off, provided, Wenger says, that separation of property execution from personal execution was at all possible. Thus, this *manus iniectio* resulted in temporary *quasi-slavery*. Because personal execution befell, chiefly, only the impecunious who had no property, its continued existence until far beyond the formulary procedure is understandable.¹¹¹

The execution of judgments by seizing the person of the debtor may be compared to a slave, son or wife who had committed an injury to another. The master, father or husband respectively had to pay compensation, or give up the offender, who was surrendered by mancipation. The aggrieved party held the offender *in mancipio*. If the master himself had committed the injury, he faced the same alternative of either paying compensation or being taken as a slave. The reasoning was simply that if he would not pay, he must work. Free labour was not known in ancient society and the only type that the law could follow was slavery or *mancipium*.¹¹²

2.4.2 Bankruptcy, or the sale of a debtor's universal succession

Hunter¹¹³ cites Festus who observed that a free man given *in mancipio* to another is *capite deminutus*, making his new master his universal successor. But universal succession distinguished between the dead and the living, the latter being of relevance here. The universal successor of a living person obtained everything up to the moment of succession, as well as everything that the person he succeeded

¹¹⁰Wenger *Institutes* at 230.

¹¹¹Wenger *Institutes* at 230.

¹¹²Hunter *Roman law* at 1034 -1035.

¹¹³At 1036.

could thereafter acquire. This was the result of succession by mancipation. A person given in mancipation not only lost all his existing rights, but was unable to acquire any new rights. But for a *debtor* there was the advantage that by making him a bankrupt or selling his universal succession, the past was taken away, but left him the future.¹¹⁴ Here, apparently, all the property of the debtor was available for the satisfaction of the creditors' debts.

If a debtor departed from his jurisdiction or hid away to avoid execution of a judgment debt by arrest and enslavement, he was sold up and made bankrupt against his will.¹¹⁵ The creditors could then enter onto his property (*missio in possessionem*), cutting him off from all right to enjoy his property,¹¹⁶ and giving the creditors a right of control and management.¹¹⁷ They acquired the right of mortgagees only, not of owners.¹¹⁸

In respect of the sale of the property, Hunter¹¹⁹ cites Theophilus¹²⁰ who stated that

The first step taken by creditors was to get custody (*possessio*) of the debtor's goods. Next, after a delay of thirty days, they select one of their number, called a *magister* ... After his appointment, he causes a notice to be issued in these words: – "So and so, a debtor of ours, has committed an act of bankruptcy; we, his creditors, are selling his property; let anyone who wishes to buy come forward". After certain days a third application was made to the Praetor to authorise a sale and settle the dividend, the sale being in this form, that the purchaser offered the creditors a certain portion of these debts; as, for example, one half. After this authority was obtained, another delay was allowed, and finally the buyer was vested in the universal succession of the bankrupt by the adjudication of the Praetor.

The reason for the delays, or drawn-out process of the forced sale, Gaius said, is that for living men care must be taken that they should not readily suffer forced sales of their goods.¹²¹ At this point the welfare of the debtor, it would appear, was also considered relevant. A further example of the interest of the debtor being given consideration is found in the following text of the Institutes of Justinian:

¹¹⁴Hunter *Roman law* at 1036.

¹¹⁵G. 3, 78; Hunter *Roman law* at 1037.

¹¹⁶D. 42, 4, 7.

¹¹⁷D. 42, 5, 8, 1.]

¹¹⁸Hunter *Roman law* at 1037; D. 13, 7, 26, pr.

¹¹⁹Hunter *Roman law* at 1038.

¹²⁰J. 3, 12, pr.

¹²¹G. 3, 79 as in Hunter *Roman law* at 1038.

The creditors may sue the debtor again for such an amount as he can pay, if, after making an assignment, he shall have subsequently acquired something sufficiently advantageous: for it would be inhuman that a man who had already been deprived of his property should be condemned to lose everything.¹²²

Thus, debtors who made voluntary assignments of their property were granted the *beneficium competentiae*, meaning that debtors could retain enough after-acquired property sufficient for their support.¹²³ Roman law therefore developed to a point where the sale of the debtor's universal succession was avoided. This was when curators were appointed. They sold the debtor's property in lots, thus saving his legal character (*existimatio*).¹²⁴ From the beginning of the empire, a person who was willing to pay, but unable to, could make a voluntary surrender of his property, thereby escaping the stigma of infamy. This, however, gave him only a qualified discharge from his creditors.¹²⁵

Roman law thus evolved to a point where judgment debts could be enforced by imprisonment and bankruptcy, which was practically sufficient, because if the debtor avoided his creditors and was, consequently, imprisoned, he could be made bankrupt. But in cases where the debtor was able to pay, imprisonment or bankruptcy were indirect methods of compulsion only. A simpler method was desired whereby the creditor could pass the person of his debtor and obtain payment out of his property. So, in the time of Emperor Antonius Pius judgment debts were enforced directly by seizure and sale of the debtor's property by public officials. This became the regular proceeding for the execution for debt when the debtor was not suspected of insolvency.¹²⁶

Any of the debtor's property could be taken into execution. However, the idea of exempt property was recognised in Roman law. Slaves, oxen and agricultural implements could not be taken into execution.¹²⁷ There was also a ranking of the

¹²²J. 4, 6, 40 translation by Sherman CP *Epitome of Roman Law in a single book*(1937) (1991 reprint) at 117 (hereafter *Sherman Epitome*).

¹²³*Sherman Epitome* at 117 note 246.

¹²⁴Hunter *Roman law* at 1043.

¹²⁵Hunter *Roman law* at 1043.

¹²⁶C. 7, 53, 9; Hunter *Roman law* at 1043.

¹²⁷C. 8, 17, 7; Hunter *Roman law* at 1043. These provisions are dealt with in the Digest and the Code of Justinian, both of which probably came into force on 30 December 529 (see Hunter at 92),

nature of the property that could be seized. Animals and moveables had to be taken and exhausted before recourse was had to the debtor's land¹²⁸ Money due to a debtor could be seized in execution¹²⁹ if it was undisputed, but not otherwise.¹³⁰ Creditors could either sell the debt or sue the debtor, as they deemed expedient.¹³¹ Thus money in a bank, standing to the credit of the debtor, could be seized in payment of his debt.¹³²

In respect of the surrender of property to bankruptcy, Ulpian, in the Digest, says that one who surrenders to bankruptcy is not deprived of his assets until they are sold, and if he intends making a defence, they will not be sold. Should he surrender to bankruptcy, but later make some acquisition, he can be sued only for what he can afford.¹³³ Further, Ulpian states that if a person who surrenders to bankruptcy later acquires some modest competence after the sale of his assets, there will be no second sale. In assessing the extent of such acquisition, Ulpian says the quantity thereof and not the quality is taken into account, provided that if something was left to him out of charity, for example, by way of monthly or annual sustenance, there should be no renewed sale of his assets on that account, for a man is not to be deprived of his daily bread. The same applies, according to Ulpian, if he is given some *usufruct* or legacy from which he derives no more than his maintenance.¹³⁴

2.5 Conclusion

It would appear that the initial difficulty in classifying the law had a very real effect on the concept of insolvency law, and more specifically the concept of an insolvent estate and assets belonging to, or excluded from, that estate. At first it was all about the procedure that was followed in dealing with the debtor, with the

so it is safe to say that they were already firmly entrenched in Roman law by this date.

¹²⁸D. 42, 1, 15, 8; Mommsen T and P Krueger *The Digest of Justinian* (English translation edited by A Watson) vol IV at 537 (hereafter Mommsen); Hunter *Roman law* at 1043.

¹²⁹C. 7, 53, 5; Hunter *Roman law* at 1043.

¹³⁰D.42, 1, 15, 9 Mommsen at 538; Hunter *Roman law* at 1043.

¹³¹D. 42, 1, 15, 10 Mommsen at 538; Hunter *Roman law* at 1043.

¹³²D.42, 1, 15, 11 Mommsen at 539; Hunter *Roman law* at 1043.

¹³³D.42, 3, 3 Mommsen at 545.

¹³⁴D. 42, 3, 6 Mommsen at 545.

emphasis on the person of the debtor who would be punished. This earliest development almost seems to have ignited the laxity of attitude towards the reform of insolvency law over the centuries generally, and specifically in South Africa, and specifically regarding the rights in respect of property in insolvent estates. The legal remedy that is being sought by the creditors in South African insolvency law, being the end-result, obscures the entire road that must be travelled before arriving at that remedy, thereby also obscuring rights of debtors in modern South Africa. But a slow reformation of particularly the concept of property in the estate is perhaps understandable in the light of the concept itself experiencing constant development and new categories of property coming into existence even today .

The earliest known execution process was against the person of the debtor. The reasons for creditors taking charge of the person of the debtor changed with the changing development of those early societies, but essentially the idea was that the debtor should repay his debts in the form of labouring for his creditor. Today, the ability of the debtor to earn a future salary that may be available to his creditors is arguably the most important asset in the insolvent estate. One may speculate that the inclusion of this “asset” in the insolvent estate finds its roots in earliest Roman law. As with most insolvent estates throughout history, and as it remains today, it is probable that the Roman debtor owned little or no property and the only means of recourse against the insolvent Roman debtor was probably the use of his labour.

As societies and economies developed, so too did the execution laws. Insolvency proceedings increasingly prevailed, gradually moving away from the concept of imprisonment for debt. The material right to execution, being the person and the property of the debtor, was linked to the procedure of execution, the procedure initially being at the forefront in the collection of debts. The *legis actiones* were originally very primitive with scant interest in the welfare of the debtor, who was entirely at the mercy of the creditor. But public opinion and creditor interests apparently slowly, and perhaps unintentionally, improved the fate of the debtor, resulting in the property of the debtor being more important or equally important

to the person of the debtor in the execution process. Further reform was achieved with the introduction of the formulary process which preferred execution against debtors' property and division of the proceeds thereof among the creditors. It would appear that the formulary system was perhaps the true origin of insolvency proceedings as they are known today. However, the object of this new execution procedure that developed was to allow the state to pressurise and punish the defaulting debtor, and its purpose was not to assist the debtor.

In this system something akin to the modern-day surrender also developed, bringing with it certain advantages for the debtor such as escape from *infamia*, completely absolving him from debt under certain circumstances and certain other benefits. Debtors with insufficient property were, however, denied these benefits, reminding one of the present-day voluntary surrender in South African law which excludes the debtor from the sequestration machinery if he has inadequate assets. But these first glimpses of leniency in Roman law look like the early foundations of the concept of exempt property, which then underwent further development during later periods.

In the *cognitio* procedure the state became a more important player, thereby doing away with disputes being based on an arrangement between parties who had to bring the dispute before a judge. Now the authorities had the power to place the dispute before their officials who were usually trained jurists. Execution also became the business of the authorities under the *cognitio* procedure; the plaintiff having to do less and execution against property becoming the norm. More emphasis was placed on execution against property by taking property as a pledge from solvent debtors, but if insolvent, property was attached. During this period the concept of placing the debtor's property with a curator *bonorum* also existed together with the idea that claims could be enforced over a period of two to four years. If assets were insufficient, the entire estate could be sold to satisfy claims at least partially. *Cessio bonorum* could also still be offered, which would free the debtor of *infamia* and allow him the benefit of *beneficium competentiae*. The idea of the release of the debtor was therefore now linked to existing assets that could be sold.

A further early concept of excluded property was that of property in the estate which, in fact, belonged to third parties. Such property could be vindicated by the third party without him joining the bankruptcy proceedings.

Regarding the objects of execution, execution of the person of the debtor eventually had as alternative execution against the property of the debtor, but the two existed simultaneously for a long period, particularly because the poorest debtors who owned nothing, befell personal execution. As society developed, the idea underlying personal execution was that the seized person could be released upon payment of compensation, failing which, he had to labour to redeem his debts.

Roman law gradually evolved to a point where judgment debts could be enforced by imprisonment and bankruptcy, which was practically sufficient, because if the debtor avoided his creditors and, consequently, imprisonment, he could be made bankrupt. But in cases where the debtor was able to pay, imprisonment or bankruptcy were indirect methods of compulsion only. A simpler method was wanted whereby the creditor could pass the person of his debtor and obtain payment out of his property. So, in the time of Emperor Antonius Pius judgment debts were enforced directly by seizure and sale of the debtor's property by public officials. This became the regular proceeding for the execution for debt when the debtor was not suspected of insolvency.¹³⁵ Any of the debtor's property could be taken into execution.

However, the idea of excluded or exempt property was recognised in Roman law. As the law developed, slaves, oxen and agricultural implements could not be taken into execution.¹³⁶ There was also a ranking of the nature of the property that could be seized. Animals and moveables had to be taken and exhausted before recourse was had to the debtor's land¹³⁷ Money due to a debtor could be seized

¹³⁵C. 7, 53, 9; Hunter *Roman law* at 1043.

¹³⁶C. 8, 17, 7; Hunter *Roman law* at 1043. These provisions are dealt with in the Digest and the Code of Justinian, both of which probably came into force on 30 December 533 (see Hunter at 92), so it is safe to say that they were already firmly entrenched in Roman law by this date.

¹³⁷D. 42, 1, 15, 8; Hunter *Roman law* at 1043; Mommsen at 537;

in execution¹³⁸ if it was undisputed, but not otherwise.¹³⁹ The creditors could either sell the debt or sue the debtor, as they deemed expedient.¹⁴⁰ Thus money in a bank, standing to the credit of the debtor, could be seized in payment of his debt.¹⁴¹ In respect of the surrender of property to bankruptcy, Ulpian, in the Digest, says that one who surrenders to bankruptcy is not deprived of his assets until they are sold and if he intends making a defence, they will not be sold. Should he surrender to bankruptcy, but later make some acquisition, he can be sued only for what he can afford.¹⁴² Further, Ulpian states that if a person who surrenders to bankruptcy later acquires some modest competence after the sale of his assets, there will be no second sale. In assessing the extent of such acquisition, Ulpian says the quantity thereof, and not the quality is taken into account, provided that if something was left to him out of charity, for example, by way of monthly or annual sustenance, there should be no renewed sale of his assets on that account, for a man is not to be deprived of his daily bread. The same applied if he is given some *usufruct* or legacy from which he derives no more than his maintenance.¹⁴³ So it is interesting to note that these exclusions or exemptions developed in Roman Law and eventually became settled in modern South African law¹⁴⁴ in a fashion very similar to this ancient Roman law.

¹³⁸C. 7, 53, 5; Hunter *Roman law* at 1043.

¹³⁹D.42, 1, 15, 9; Hunter *Roman law* at 1043; Mommsen at 538;

¹⁴⁰D. 42, 1, 15, 10; Hunter *Roman law* at 1043; Mommsen at 538;

¹⁴¹D.42, 1, 15, 11; Hunter *Roman law* at 1043; Mommsen at 539;

¹⁴²D.42, 3, 3; Mommsen at 545.

¹⁴³D. 42, 3, 6 – Mommsen at 545.

¹⁴⁴See ch 9 below.

Chapter 3: Roman-Dutch Law

3.1 Introduction

The aim of this chapter is to investigate the origins of some of the current insolvency law procedures and the earlier history of the manner in which assets are dealt with under South African insolvency law. More specifically, the aim is to investigate which assets of a debtor were included in an insolvent estate and which were excluded from the insolvent estate of the debtor. Considered first is the earliest insolvency procedure in the form of a type of voluntary surrender that was introduced to Holland in the fifteenth and sixteenth centuries. Also considered is the property that was included in a debtor's insolvent estate and property that the debtor was permitted to keep for his own use, and the condition upon which a debtor could be discharged from his debts after sequestration.

The procedure for insolvency under the Ordinance of Amsterdam of 1777 is briefly discussed, together with a form of exemption that the debtor was allowed if he complied with the provisions of the ordinance.

3.2 General

Insolvency law in South Africa is rooted to some extent in Roman-Dutch law, and partly in English law, with the foundations of both these systems in Roman law.¹ In the Netherlands there were originally no uniform rules in respect of an insolvency law system. As circumstances required, customs arose in various towns in Holland to provide for insolvent estates. In its development of insolvency law, Roman-Dutch law borrowed heavily from the principles of Roman law.²

¹Wessels JW *History of the Roman Dutch law* (1908) at 663 (hereafter Wessels). The principles of insolvency law in Roman law were discussed in ch 2 above.

²See also Burton WW *Observations on the insolvent law of the Colony* (1829) at 3 (hereafter Burton); Gane P *The selective Voet being the commentary on the Pandects* [Paris Edition of 1829] by Johannes Voet and the Supplement to that work by Johannes van der Linden, translated with explanatory notes and notes of all South African reported cases by Percival Gane vol 1(1957) at 362-363 (hereafter Gane); De Villiers *Die Ou-Hollandse insolvensiereg en die eerste vaste insolvensiereg van die Kaap de Goede Hoop* LLD Thesis (1923) Leiden at 7 (hereafter De Villiers).

During the fifteenth or sixteenth century the *cessio bonorum*, or the surrender of goods, appears to have been introduced in Holland together with the principle of *moratorium* or *respijt* (respite)³ “attended indeed in several of the cities by the imposition of some humiliating condition or mark of degradation upon the debtor”.⁴ Prior to this debts were apparently satisfied in Holland only by the attachment of the person of the debtor.⁵ The *cessio bonorum* was a difficult and expensive procedure. The cause of the debtor’s insolvency had to be addressed to the Court of Holland in a petition, together with an inventory of all his assets.⁶ This petition was then referred to the *burgomaster* and governing body where the insolvent was domiciled, for a report. After receiving this report, the court granted a writ (a rule *nisi*) calling on anyone to show cause why the provisional writ of *cessio bonorum* (*brieven van cessie*) should not be confirmed. The granting of the rule halted any future arrest of the petitioner, and its confirmation had the effect of staying any execution against his assets and put them in custody of a curator.⁷

The insolvent was, however, not discharged from his debts by the *cessio bonorum*, and after-acquired property could be claimed by the creditors. It only freed him from personal arrest and provided a stay of litigation against him.⁸ The *cessio* was

³The exact date of the introduction of the *cessio bonorum* is not known, but it appears to have been gradually introduced into Holland – see Burton at 3; Wessels at 664.

⁴Burton at 3-4. This procedure was similar to what is known in South African insolvency legislation as “voluntary surrender”, and was available to any debtor who was unable to fulfil his financial responsibilities. According to Gane, a procedure similar to what we know today as “compulsory sequestration” also existed in the common law of insolvency in the Netherlands, but was referred to as *missio in possessionem* or “entry into possession”. This was a procedure whereby creditors petitioned to be put into the possession of the estate of a debtor for safekeeping and sale in order to satisfy their claims against the debtor. See generally Gane vol 6 at 388 and further. De Villiers appears to interpret this debt collection procedure by creditors in Holland as an individual debt collection procedure only, and that no collective procedure by creditors existed – De Villiers at 3 and further. However, it would appear that the procedure of *missio in possessionem* similar to that procedure in Roman law did exist in Holland – see Gane vol 6 at 388 and further. For the purpose of this thesis what applies to *cessio bonorum* generally also applies to entry into possession, therefore no further discussion of this procedure will follow.

⁵Wessels at 664.

⁶Gane vol 6 at 370; Burton at 4.

⁷Van der Keesel DG *Select theses on the laws of Holland and Zeeland, Being a commentary on Hugo Grotius’ introduction to Dutch jurisprudence* (translated by CA Lorenz) (1855) at 884; Wessels at 664-665.

⁸Gane vol 6 at 373. Surrender of the debtor’s estate denied the debtor any rights of action that he had before the surrender, but it did not, however, deny him the right to sue for an apology regarding a wrong done to him prior to surrender, or to complete an action already started – Gane at 375. As will be shown below in para 3.5, at a later stage relief was granted to the debtor by granting him a

granted by the court only if the debtor's insolvency was a result of misfortune and it was basically a *voluntary surrender* of the insolvent's assets for the benefit of his creditors.⁹ Fraud or dishonesty by the petitioner could result in the refusal of the petition and immediate imprisonment.¹⁰ The insolvent could retain certain assets. His clothes, tools and property that could assist him in earning a living could be kept by him. The *brieven van cessie* included a clause stating that any assets obtained by the insolvent after petitioning successfully would be available for payment of his creditors in full.¹¹

A Placaat of 1544¹² introduced a Roman law rule which allowed a debtor to enter into a composition with all his creditors if they all agreed to it.¹³ However, where an heir refused to adiate if his creditors would not accept less than the debts due to them, the approval of the majority bound the minority.¹⁴ Later a rule developed in certain areas allowing the majority of creditors to bind the minority to a composition if three quarters of them, being entitled to two thirds of the debt, agreed to it. Over time a practice developed that allowed the insolvent a discharge from all his debts if one half of all his creditors, to whom he owed half his debts, consented to it.¹⁵

During the seventeenth century commissioners from chambers for the administration of derelict estates began to administer insolvent estates of persons who had obtained *cessio bonorum*, instead of private persons. By the eighteenth century it was customary for all insolvent estates to be administered by boards called *Desolate Boedelkamers*. Included were the insolvent estates of so-called *bankroetiers* or *bankbreakers* (bankrupts). Unlike debtors who became insolvent

discharge from all his debts owing at the time of sequestration, even if no composition had been entered into with his creditors, and he was given an allowance out of the proceeds of his estate if his creditors had certified that he had behaved honestly – Burton at 7.

⁹See, generally, Gane vol 6 at 362 and further. The person obtaining the writ had to serve it on the relevant officer and all his creditors, and had to prepare an inventory of his estate under oath, which included a preface explaining the misfortune that caused his need to obtain the benefit of cession – Burton at 5.

¹⁰Gane vol 6 at 367-368.

¹¹Wessels at 666; De Villiers at 60.

¹²See para 3.3 below.

¹³Wessels at 666.

¹⁴Wessels at 666.

¹⁵Wessels at 666.

through misfortune and basically voluntarily handed over their estates; bankrupts were debtors who fled the country to escape their creditors or who acted fraudulently and were considered akin to thieves.¹⁶ The law showed bankrupts and those who assisted them no mercy. Insolvency deprived the insolvent of his contractual capacity and his ability to appear in court as plaintiff or defendant while his estate was being administered by the Insolvency Chamber and prior to his rehabilitation. Bankrupts, however, could never be rehabilitated and therefore could never again enter into valid contracts or have *locus standi* to litigate in court.

3.3 Property of the estate

In the common law of the Netherlands relating to the surrender of goods, all the debtor's property had to be surrendered, except for cheap and everyday clothing, which was excluded and as Voet put it, "for the sake of his self respect must by no means be taken from him, inasmuch as it is not taken away even from those who have been condemned for crime".¹⁷ But in Holland, under the Edict of Charles V of 1544, the person surrendering his assets was allowed to keep his bed and blankets, and various items of movable property of little value.¹⁸

The property of the estate included property at the date of the surrender, as well as property acquired in the future, provided it was already "acquired in prospect", such as debts due to the debtor under a condition.¹⁹ Thus an annual payment to a debtor under contract, or to last for as long as he lived, was available to creditors.²⁰ Actions were also included under the description of "goods" equally as under the term "inheritance". Thus the surrender of goods also resulted in actions available to the debtor passing to his creditors together with the debtor's other

¹⁶Wessels at 667.

¹⁷Gane vol 6 at 371.

¹⁸Edict of Charles V of 26th May 1544, Articles 36 and 37; *Groot Placaat-Boek*, vol 1 page 327, which refers to "one bed with its appurtenances, and of each item of movable property one, with the exception that they shall not be allowed to have either pewter or silver work" as cited by Gane vol 6 at 371 note 4.

¹⁹Gane vol 6 at 371-372.

²⁰Gane vol 6 at 372. This was apparently first followed in South African case law in *Vicker's Trustees v Cloete & Others* 1914 CPD 575 at 583 where the trustees were in possession of money under a will which provided that that money should not be attachable, but without a gift over, or a discretion to, trustees to divert the inheritance in the event of insolvency.

assets.²¹ Also profits from feuds, *usufruct*, quitrent tenure,²² and property that had to be handed back to another under *fideicommissum* after his death, for the time that the person surrendering was able to reap them, formed part of the debtor's estate to be yielded to his creditors.²³

Actual *fideicommissary* property and actual feuds were not, however, surrendered, unless by certain customs they could as a last resort be attached and sold in order to execute a judicial decision, without prejudice to the lord.²⁴ Assets belonging to emancipated children of the debtor, or goods of those under the debtor's power could not be surrendered to his creditors. The assets of emancipated children could not even be claimed by the Treasury, as the *peculium* of the son was kept apart for that son and could not be sold off for the debt to the Treasury along with the father's other assets.²⁵

3.4 The Amsterdam Ordinance of 1777

Important for South African developments was the Ordinance of 1777 that was granted to the city of Amsterdam. This was the source of insolvency law at the Cape of Good Hope at the time of its annexation.²⁶

The 1777 Ordinance provided for several commissioners whose duty it was to confirm or reject a debtor's offer of composition, or failing a composition, to adjudge the estate to be insolvent and to commence with its administration.²⁷ The first duty of the commissioners was to enter upon, and take possession of, the estate, make an inventory of all the movable property and to seal all property as required.²⁸ This amounted to sequestration, which halted all executions against the

²¹Gane vol 6 at 396.

²²"Quitrent tenure" was defined as a contract of the law of nations based on good faith and depending on consent. By this one obtained the enjoyment of landed property in perpetuity or for more than a moderate time. It was granted on condition of improvement of the property and the production of a yearly quitrent. In the Netherlands it was also referred to as *erfpacht*. See Gane vol 2 at 269.

²³Gane vol 2 at 372.

²⁴Gane vol 2 at 372.

²⁵Gane vol 2 at 372.

²⁶See ch 4 on South African History below.

²⁷Art 3; Burton at 8. See De Villiers at 19 and further.

²⁸Art 4.

estate, but did not prejudice the right of a creditor obtained by execution prior to the sequestration.²⁹ The ordinance declared all transfers, cessions and mortgages for securing a debt made within 28 days prior to the sequestration void.³⁰

The primary object of the ordinance was to secure the property of the insolvent debtor.³¹ Thereafter the debtor could enter into negotiations with his creditors in a meeting of creditors where provisional sequestrators were elected to take care of the estate and could be appointed as curators if the estate was adjudged to be insolvent.³²

The sequestrators had the duty of preparing an inventory of the estate, or the completion of the inventory prepared by the commissioners, to take charge of the estate, to sell perishable items and generally to see to the administration thereof.³³ If the debtor within a month of his insolvency successfully entered into a composition that was confirmed by the chamber, the estate was released from sequestration. If no composition was achieved, the chamber declared the estate insolvent and the sequestrators were appointed to collect, liquidate and administer the estate.³⁴

Upon this declaration of insolvency, the ordinance required the insolvent to appear before the commissioners to deliver to them an inventory confirmed under oath, of all his assets, money, effects and outstanding debts. He also had to declare that when he stopped payment of his debts he had no other assets, and he also had to deliver to them all his books and documentation.³⁵

3.5 Exemptions under the Ordinance

If the insolvent debtor complied with all the provisions of the ordinance, surrendered all his assets in a *bona fide* manner and was not guilty of any fraudulent behaviour, a

²⁹Burton at 8.

³⁰Burton at 8.

³¹Burton at 8

³²Arts 5 and 6; Burton at 8-9.

³³Burton at 9.

³⁴De Villiers at 24; Burton at 9.

³⁵Burton at 10.

certain percentage of his property could be returned to him as an allowance.³⁶ If the proceeds of his estate proved sufficient to pay 20 percent of the concurrent creditors' claims, an allowance of 3 percent of his estate was paid to the debtor by the commissioners. If concurrent creditors received 50 percent of their claims, the debtor was entitled to 6 percent, and if 75 percent of concurrent claims was paid, he could receive 10 percent. The proviso was that no such allowance could exceed 10 000 guilders.³⁷

The debtor was also entitled to be discharged from all debts that were due prior to insolvency, upon obtaining a certificate from creditors and confirmation by the chamber.³⁸ Creditors who did not sign could oppose the certificate, whereupon the decision vested in the chamber.³⁹ The ordinance required the certificate to be signed by the majority of creditors, being half in value and six eighths in number, or *vice versa*. They had to declare therein that the insolvent had complied with the provisions of the ordinance and allow him the benefit thereof. The curators also had to sign the certificate, confirming that the insolvent had not acted fraudulently or in contravention of the ordinance, and that the creditor signatories are the majority in number and value.⁴⁰

3.6 Conclusion

The development of insolvency law in the Netherlands appears to have progressed somewhat slowly from the relatively late period of the fifteenth century. The early *cessio bonorum* seems to have been a difficult and expensive procedure that deliberately worked against the debtor, and it did not discharge him from his debts. At an early stage the idea of excluded or exempt property was known, but a distinction between property being either exempt or excluded, was apparently not made. By allowing the debtor to keep certain clothing, tools and low-value items the debtor was actually being granted exempt property, similar to that same

³⁶Burton at 11.

³⁷Burton at 11.

³⁸Art 41.

³⁹Burton at 11.

⁴⁰Art 40 and art 42; De Villiers at 47-48; Burton at 11-12.

exemption that exists in South African insolvency law⁴¹ today, and which is determined by the creditors.

But the exemptions in Roman-Dutch law at this point seemed to relate more to a debtor's dignity than to the idea of assisting the debtor with a fresh start. As Voet put it, the debtor could keep his cheap and everyday clothing to maintain his self-respect, as even condemned criminals were allowed to do so.⁴² A discharge from debts did begin to develop as a result of provisions of the Placaat of 1544. The Ordinance of 1777 developed the idea of exempt property and a discharge from debts quite considerably, and whether or not property would be exempted or a discharge granted, was linked to the bona fide behaviour of the debtor. Approval for the exemption and the discharge, however, lay with the creditors and the officials.

⁴¹See s 82(6) of the Insolvency Act 24 of 1936.

⁴²See para 3.3 above.

Chapter 4: A brief historical overview of the South African insolvency law

4.1 Introduction

Insolvency law in South Africa has its roots in both Roman-Dutch law and in English law. The main principles of both these systems were borrowed from Roman law.¹ The foundation of insolvency law of both these legal systems, in turn, is found in Roman law.²

During the fifteenth or sixteenth century *cessio bonorum* was introduced to Holland as part of Roman-Dutch law.³ Consequently, when the Cape was occupied by the Dutch in 1652, *cessio bonorum* was also introduced to the Cape,⁴ and to a large extent prevailed as the only system of insolvency law until 1803.⁵ In 1803 Commissioner-General De Mist issued instructions⁶ that established a chamber for abandoned estates, the *Desolate Boedelkamer*, for the administration of, amongst others, the estates of all persons who were granted *cessio bonorum*.⁷ These instructions were founded largely on the Amsterdam Ordinance of 1777 which regulated the *Amsterdamse Desolate Boedelkamer*.⁸ In 1818 the *Desolate Boedelkamer* was replaced with a sequestrator, taking over the functions of the *Boedelkamer*.⁹ This office was, however, a failure and was done away with in 1827. The estates that were formerly under the control of the sequestrator were taken over by a commissioner.¹⁰

¹Wessels JW *History of the Roman Dutch law* (1908) at 661 (hereafter Wessels) and see chs 2 and 3 above.

²See ch 2 above; Wessels at 661.

³De Villiers W *Die Ou-Hollandse insolvensiereg en die eerste vaste insolvensiereg van die Kaap de Goede Hoop* (LLD Thesis Rijksuniversiteit, Leiden 1923) at 62 (hereafter De Villiers).

⁴De Villiers at 62.

⁵De Villiers at 5 and 89 note 1. Mars WH *The law of insolvency in South Africa* (1924) at 4 (hereafter Mars (1924)) states that there seems to have been a dual form of relief at a debtor's disposal from the earliest period in the Cape Colony, namely an *order van preferentie en concurrentie*, and *cessio bonorum*, which was also noticed in the Roman Dutch practice.

⁶Commissioner De Mist *Provisioneele Instructie voor de Commissarissen van de Desolate Boedelkamer* (1803) (hereafter 1803 Instructions).

⁷De Villiers at 77; See also Burton WW *Observations on the insolvent law of the Colony* (1829) at 24-26 (hereafter Burton); De la Rey EM Mars *The law of insolvency in South Africa* (1988) at 4 (hereafter Mars (1988)) Smith CH *The law of insolvency* (1988) at 6 (hereafter Smith *The law of insolvency*); Bertelsmann E, Evans RG, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L and Steyn L Mars *The law of insolvency in South Africa* (ed C Nagel) (9th ed) (2008) at 6 and further (hereafter Mars (2008)).

⁸De Villiers at 8-9.

⁹Burton at 27; De Villiers at 105.

¹⁰Burton at 29.

Thereafter, Ordinance 64 of 1829 was introduced to regulate the administration of insolvent estates. This was really the foundation of the present South African system of insolvency law.¹¹ Various amendments followed before it was repealed and replaced with Ordinance 6 of 1843, which is considered to be an important landmark in South African insolvency law.¹²

The formation of the Union of South Africa led to the creation of the Insolvency Act 32 of 1916. This was a unified Act that applied to the entire Union.¹³ It was modelled on the Transvaal *Insolventiewet* 13 of 1895, which, in turn, was modelled on the earlier Cape Ordinance.

For the purpose of this research Ordinance 64 of 1829, Ordinance 6 of 1843, The Transvaal Insolvency Act 13 of 1895 (*Insolventiewet*), the Insolvency Act 32 of 1916 and the Insolvency Amendment Act 29 of 1926 will be considered. The purpose of this chapter is to compare, with South Africa's present legislation, the manner in which certain assets in insolvent estates were dealt with in earlier legislation, and to investigate the policies, if any, that dictated the relevant principles that applied to the inclusion of assets in, or the exclusion of assets from, insolvent estates. In doing so it is hoped that some of the reasons for the existence of the various problem areas in respect of assets in the insolvent estates of individuals would be uncovered.

4.2 Ordinance 64 of 1829

This ordinance was passed to achieve the due collection, administration and distribution of insolvent estates. It made provision for the surrender of an estate

¹¹Wessels at 670.

¹²Wessels at 670; Mars (1988) at 5. The other colonies and Republics modelled their insolvency legislation on Ordinance 6 of 1843. In Natal it came into force as Ordinance 24 of 1847 which was later repealed by the Insolvency Law 47 of 1887. In the Transvaal, the Cape Ordinance was largely followed in Ordinance 21 of 1880 (later replaced with the *Insolventiewet* 13 of 1895), and in the Orange Free State as *Ordonantie* 9 of 1878, and later as *Hoofstuk 104 van het Wetboek van den Oranjevrystaat*. The latter became *Chapter 104 of The statute law of the Orange River Colony* when the Orange Free State became a colony. The latter was also substantially the same as the Cape legislation; see also Buchanan DM *Buchanan's decisions in insolvency* (1906) at 239 (hereafter Buchanan); Mars WH *The law of insolvency in South Africa* (1917) at 6 (hereafter Mars (1917)).

¹³Mars (1917) at 6; Smith at 7.

by a debtor himself, and it provided for the sequestration of an estate on the petition of one or more creditors against any person having committed an act of insolvency.¹⁴

The effect of the order for sequestration under this ordinance was to divest the insolvent of his estate, and all persons administering any part of his estate for him, and to vest it in the Master of the Supreme Court.¹⁵ Included in this estate was all of the present and future estate, movable and immovable, personal and real, and every right, title, and interest in, and to, any property, movable or immovable, personal or real which belonged to or was due to the insolvent at the date on which the sequestration order was made.¹⁶ Also included in the insolvent estate was property that came to the insolvent during the course of sequestration of his estate. This included property “purchased or acquired by, or may revert, descend, or be devised, or come to the insolvent, while the insolvent estate shall remain under sequestration in the hands of the master, wheresoever the same may be found or known, together with all deeds, vouchers, papers, or writings respecting the same”.¹⁷

A form of exemption of some of the property of the insolvent debtor was also provided for by this ordinance. Firstly, under section 59 it was presumed that by the third meeting of creditors the trustee would have enough knowledge of the insolvent’s affairs so as to advise the creditors on what further course should be taken regarding the estate. This would allow the creditors to determine, among other things, whether to allow the insolvent, or any other person, to continue in the temporary care or management of any property of the estate. For this labour the trustee would affix an amount of compensation, also to be approved by the creditors at this third meeting.¹⁸ One can only assume, and it seems logical, that any property acquired with this compensation would be exempt from the assets in the insolvent estate of the debtor.

¹⁴See ss 1 and 2 and Burton at 31 and 40.

¹⁵S 49.

¹⁶S 49.

¹⁷S 49 and see Burton at 37-38 and 60.

¹⁸S 59 and see Burton at 119.

Secondly, at this third general meeting, if it had not already been decided upon earlier, the creditors could determine what part of the insolvent's wearing apparel, bedding, household furniture, and tools of trade and that of his family they would allow him to retain for his own use. Such property could apparently include property over which an execution creditor or the insolvent's landlord had a right of preference, if these parties gave their consent.¹⁹ In his discussion of privileged and preferent debts under this Ordinance, Burton²⁰ said that minors and others who were under guardianship or curatorship had a tacit mortgage over the estate of their tutors or curators, whether appointed generally or for a particular act as *ad litem*.

This applied also to that which the tutor or curator owed to them before taking that position. Furthermore, this right commenced with the guardianship and passed to the heirs of the minor or person under tutelage.²¹ Burton further states that a similar right of tacit mortgage belonged to minors and others to the estate of a father-in-law (stepfather) to whom the mother and guardian had married in a second marriage. This also applied to the estate of a step-mother whom the father and guardian had married in community of property. However, where there was no community, the stepmother's estate was freed from this burden.²² Furthermore a woman had a tacit mortgage on the estate of her husband for her dower or separate property secured for her by a duly registered ante-nuptial contract.²³

4.3 Ordinance 6 of 1843 (Cape Ordinance)

This ordinance abolished the procedure of *cessio bonorum* and made provision for a debtor to apply for the voluntary surrender of his estate, and for the compulsory sequestration of a debtor's estate upon application by one or more creditors.²⁴

Section 46 of this ordinance provided for the vesting of the insolvent estate in the Master of the Supreme Court after the sequestration order had been granted. It

¹⁹S 74 and 75 and see at Burton at 120.

²⁰At 139.

²¹Burton at 139.

²²Burton at 139.

²³Burton at 140.

²⁴Ss 1, 2 and 5.

divested the insolvent debtor of his whole estate and vested it in the Master, including all the present and future estate movable and immovable, personal and real; every right, title and interest in, and to, any such property, and any right of reversion to such property.²⁵

Under section 48 of this ordinance the sequestration of a debtor's estate had the effect upon the appointment of the trustee of divesting the Master or any provisional trustee of the estate and to vest it in the trustee. The estate included all the present and future estate, movable and immovable, personal or real, which belonged, or was due to the insolvent at the date of sequestration.²⁶ This included property to which there existed at that date any right of reversion or which may thereafter be purchased or acquired by or may revert, descend or be devised or come to the insolvent during the continuance of the sequestration and before the making of the order of the court confirming the account and plan of distribution.²⁷

Section 49 of the ordinance, however, made provision for certain exempt property that was excluded from the insolvent estate. Thus the hire, wages or reward of the insolvent debtor's work and labour or that of any of his family was excluded from the control of his trustee.²⁸ So too, any damages claimable by reason of any personal wrong or injury done to the insolvent or any of his family was also considered to be exempt property. Any property purchased with money obtained from the aforementioned exempt property was also excluded from the trustee's control.²⁹ However, property acquired by an insolvent by his own work and labour after his sequestration and before rehabilitation of his estate was not protected from execution against him for a deficiency in the estate in respect of any of the insolvent's debt that was due and still owing.³⁰

²⁵S 46.

²⁶S 48(a).

²⁷S 48(b). In the case of *In re: Hansen* 21 SC 625 22; SALJ (November 14th 1904) it was ruled that the right to a monthly pension granted to an insolvent before his insolvency vested in his trustee for the benefit of his creditors.

²⁸S 49(d).

²⁹S 49(d). In *De Villiers v Gadow* 17 SC Rep 295 the court stated that the date of the sequestration, being acceptance of surrender, must be taken as fixing the period when the insolvent was divested of his property. Here, the court ruled, a debt due to an insolvent doctor, for medical services, which accrued after preparation of schedules but before the acceptance of surrender, became vested in the trustee and was not recoverable by the insolvent.

³⁰S 127 and *Bartholomew v Stableford* 17 SC Rep 84.

Section 98 of the ordinance specifically regulated the sale by the trustee of the insolvent estate and it expressly provided for exceptions from the sale of the property of certain items. So the wearing apparel, bedding, household furniture and the tools of trade of the insolvent and his family were exempted from sale “until the creditors shall determine thereon”.³¹

An interesting further provision of this legislation was the ability of the Master or any trustee, whether provisional or elected, to grant and to allow to the insolvent out of the assets of the insolvent estate a moderate allowance for indispensable support of the insolvent and his family pending the decision of the creditors in regard to such support.³² It was also possible to commit the interim care of the insolvent estate to the insolvent until the estate was sold and the said Master or trustees could make a reasonable payment to the insolvent for being so employed in caring for the estate. This allowance, the extent or the continued payment thereof, whether for support or labour, if granted before the second meeting of creditors, had to be consented to by the creditors at a meeting held after the second meeting of creditors.³³ If a trustee made such an allowance to an insolvent without the consent of the creditors, he had to report the amount and grounds of such allowance to the Master. Any such allowance made without consent of the creditors was open to review by the Supreme Court upon application of the Master or any person interested in the due administration of the insolvent estate.³⁴

Section 83 of the Cape Ordinance made provision for the voiding of *mala fide* and gratuitous alienating of assets when the insolvent’s liabilities exceeded his assets. Gifts were included among these alienations that could be declared null and void in terms of section 83. However, in respect of certain insurance policies, section 6 of Act 21 of 1875 provided a measure of protection. This Act made provision for the situation where an ante-nuptial contract had been entered into in terms of which one of the

³¹Ss 25 and 98(a)-(c). Before selling household furniture allegedly belonging to the insolvent, the creditors’ directions to that effect, given at a duly convened meeting after the second meeting of creditors, was required. See *Bernstein v Bernstein’s Trustee* 14 SC Rep 161.

³²S 59.

³³S 59.

³⁴S 59.

spouses had covenanted and agreed, for the benefit of the other spouse, or for the benefit of children or descendants, to effect a policy of assurance upon the life of either of the spouses, or to cede and assign over such a policy for the intended benefit, and in either case to pay the annual premiums due on such policy. If the estate of the spouse who had covenanted and agreed was then sequestrated, no payment of premiums made by the spouse were deemed or taken to fall under, or come within, sections 83 and 84³⁵ of Ordinance 6 of 1843.

The practical application, in a sense, of this protective provision appears to have occurred in *Thorpe's Executors v Thorpe's Tutor*.³⁶ Thorpe (T) and his wife were married out of community of property. In 1876 T insured his life for five hundred pounds. In 1879 he notified the insurance company that he had ceded the policy to his wife “for the benefit of herself and our children”, who were minors. The wife died in 1882. At the date of the cession T had been solvent, but he now suffered financial difficulties. Money was advanced by friend C, for payment of the premiums. Thereafter, with T’s consent, C took the policy and paid the premiums on behalf of the minor children and to secure himself for his advances. T died in 1886. Without the policy his estate was insolvent. The court ruled that T’s children were entitled, as against T’s executors, to the amount of the policy, less the premiums paid by C, for which C had a lien on the policy.

4.4 Transvaal Insolvency Act 13 of 1895

To a large extent this Act was based on the Cape legislation of 1843. In *Kirkland v Romyn*³⁷ the court stated that “[t]he Transvaal Law of 1895 is in effect the old Cape Ordinance, but re-arranged, abridged, and in some instances amended”. As will be seen below, the Transvaal legislation contained substantial differences from the Cape legislation in respect of the assets of the insolvent estate.

As with the Cape legislation, this Act also provided for both the voluntary surrender and the compulsory sequestration of a debtor’s estate.³⁸ Section 26 of this Act

³⁵As an undue preference.

³⁶4 Juta 488.

³⁷1915 AD 327 at 330.

³⁸See ss 1 and 7 of Act 13 of 1895.

provided that the legal effect of the sequestration of a debtor's estate would be that the custody of the estate passed over, and legally vested in, the Master of the High Court, until the appointment of a provisional trustee or until the final election and confirmation of such trustee.

"Estate" in this legislation was defined as comprising all present and future property, whether movable or immovable, personal or real, and all rights of whatsoever description to such property, wherever they may be found to exist. It related to property belonging or due to the insolvent at the time of the granting of the order of sequestration or which subsequently, and any time before rehabilitation was acquired or became due to the insolvent. Included in the insolvent estate was any property belonging to the insolvent under attachment in the execution of judgment against the insolvent, or the proceeds thereof. This property had to be returned to the sequestrated estate.³⁹

Provision was expressly made for exempt property, which was dealt with in section 28 of this legislation. Thus the insolvent was entitled to receive and sue for, in his own name, the wages or reward for his work and labour or that of any of his family. This included the right to any pension granted for work or services already performed. The court apparently had a discretion to decide on the amount of the aforementioned exempt property that the insolvent would receive.⁴⁰

The insolvent was also entitled to a further exemption in the form of damages awarded by reason of any insult or any personal injury done to the insolvent or any member of his family. All such money received by the insolvent, and all goods purchased by him with such money were for his personal use and free from the control of his trustee or other lawful administrator of his estate.⁴¹

Provision was also made in this legislation for the protection of certain insurance policies. Any policy of life insurance by the insolvent *bona fide* effected for the

³⁹S 28 of Act 13 of 1895.

⁴⁰S 28 of Act 13 of 1895.

⁴¹Ss 28 and 32 of Act 13 of 1895.

benefit of his wife and children was excluded from the insolvent estate, and except for lawful rights obtained thereto by third persons, reserved for the insolvent. It was a requirement that the policy must have been taken out at least two years before the granting of the sequestration order.⁴²

The Transvaal legislation contained the same provisions⁴³ in respect of a necessary allowance that could be paid out of the insolvent estate, to the insolvent to support himself and his family, as payment for being employed to look after the insolvent estate, and the consent of the creditors for such payments, and the review by the court of the trustee's action regarding such payments without consent of the creditors, as was provided for in section 59 of the Cape Ordinance 6 of 1843.⁴⁴

4.5 Insolvency Act 32 of 1916

4.5.1 General

This Act brought about a uniform law of insolvency throughout the Union of South Africa by repealing and replacing the existing statute law of insolvency in the various provinces. It was structured on the Transvaal Insolvency Act 13 of 1895, but, as stated above, the latter Act was modelled on the Cape Ordinance 6 of 1843. The Insolvency Act 32 of 1916⁴⁵ contained no general provision repealing repugnant laws, but if it was in conflict with the common law, it was taken to repeal that law. It was not, however, considered a complete statement of the common law of insolvency and therefore did not interfere with any common law right consistent with its provisions.⁴⁶

This 1916 Act, like its predecessors, provided for both the voluntary surrender of a debtor's estate and for the application by creditors for the compulsory sequestration of a debtor's estate. Under this Act the sequestration order also had the effect of divesting the insolvent of his estate,⁴⁷ and in a compulsory

⁴²S 28 of Act 13 of 1895.

⁴³In s 97.

⁴⁴See para 4.3 above.

⁴⁵Hereafter the 1916 Act.

⁴⁶Mars (1917) at 6.

⁴⁷S 19. See also Wille and Millin *Mercantile law of South Africa* (1917) at 257 (hereafter Wille) and Nathan M *South African insolvency law: A commentary on the Insolvency Acts No 32, 1916 and No 29, 1926* (1928) at 77 (hereafter Nathan).

sequestration the date of the granting of the provisional order was the date of such divesting.⁴⁸

The estate vested first in the Master and ultimately, upon his appointment, in the trustee,⁴⁹ and the vesting occurred before attachment of the insolvent's assets by the sheriff of the court.⁵⁰ The estate remained so vested until the insolvent became reinvested with it after the acceptance of an offer of composition by creditors or until rehabilitation.⁵¹

Section 19(a) stated that the estate comprised all property, movable or immovable, including the proceeds of property in the hands of the sheriff or messenger under a writ of attachment, owned by the insolvent at the date of sequestration or acquired by him or accruing to him after the date of sequestration but before rehabilitation. "Movable property" included every kind of property and every right or interest that was not immovable property. "Immovable property" included land and every right or interest in land or minerals which was registrable in any registry within the Union.⁵²

4.5.2 Exempt property

Some of the insolvent's property was specifically exempted from passing to his trustee. These exemptions included property of the insolvent at the date of sequestration and property acquired during sequestration.

In respect of property acquired at the date of sequestration, the following exemptions applied:

- The arms and accoutrements of a member of any defence force and one horse used by him in the ranks.⁵³
- Damages recoverable for any damages or personal insult suffered by him.⁵⁴
- The wearing apparel and bedding of the insolvent. Apparently the insolvent was

⁴⁸*Estate van Heerden v Glatt* 26 SC 592.

⁴⁹S 19(a); but subject to certain exemptions as discussed hereafter.

⁵⁰*Sagorsky's Trustee v Joffe* (1916) TPD 661.

⁵¹S 23.

⁵²S 2; Nathan at 83.

⁵³S 19(a)(2).

⁵⁴S 21(4).

granted an absolute right to his wearing apparel and bedding. To gain the exemption of his household furniture and tools, however, he required his creditors' consent.⁵⁵

- An insurance policy effected by an employer as protection against his liability to an employee under the Workmen's Compensation Act 25 of 1914 and apparently also the amount of compensation due under such Act to an employee.⁵⁶
- Life insurance policies were exempt under certain circumstances. This exemption was limited to certain maximum amounts.⁵⁷

“Policy of life insurance” under the 1916 Act included a contract for securing an insurance endowment, bonus, or annuity upon the death of the insured or on the expiration of any period or on the happening of any event, as well as a fully paid-up policy granted for the surrender or exchange of a policy of an equivalent value. But it did not include any other property acquired in consideration of the surrender, pledge or cession of a policy.⁵⁸

The 1916 Act dealt only with the policies as defined above which had been effected by a husband in favour of, or ceded to, or for the benefit of, his wife or child or both. It provided that its provisions in respect of such policies were in substitution for the protection, upon the insolvency of the wife or husband, previously given to such policies by certain provincial statutes.⁵⁹ In respect of any other kinds of policies (not within the above definition), these provincial statutes still determined the extent of protection, if any, of such policies.⁶⁰ It would therefore appear that the 1916 Act did not apply to a policy of life insurance effected by a wife or to a policy of life insurance effected by a husband, but not in favour of, or ceded to, or for the benefit of, his wife or child or both.⁶¹

⁵⁵S 76(2) and see Mars 1917 at 85.

⁵⁶Mars WH and Hockly HE *The law of insolvency in South Africa* (2nd ed) (1924) at 93 (hereafter Mars (1924)).

⁵⁷S 26 of the Act.

⁵⁸S 26(2)(c) of the Act; This term was not defined in previous provincial legislation.

⁵⁹Namely, the Life Assurance Act 13 of 1891, of the Cape of Good Hope, the Life Assurance Protection Act 38 1908, of Natal, and Law no 12 of 1894 of the Orange Free State.

⁶⁰S 26(3) of the Act; Mars (1917) at 86.

⁶¹Mars (1917) at 86.

The extent of protection of the policies in question was, however, limited. If a policy had been effected by a husband in favour of, or ceded to, his wife, married out of community of property, either before or during the marriage, on the sequestration of her estate, the policy was protected to an amount not exceeding two thousand pounds together with any bonus claimable in respect thereof.⁶² Previously, under the Cape law, a policy of this nature passed absolutely to her trustee.⁶³ In terms of section 26 (2) of the Act of 1916, where the spouses were married in community of property and the policy was effected by the husband in good faith before or during the marriage in favour of, or ceded to, or for the benefit of, his wife or child or both, at a date exceeding two years prior to sequestration of the joint estate, a maximum of two thousand pounds, together with any bonus, was exempt from the trustee's control. However, such policy was entirely protected if it was so effected or ceded, in terms of a settlement in an ante-nuptial contract, more than two years before sequestration but within three months of the date of marriage.⁶⁴

Policies still to be considered are those effected by a husband for his own benefit and not ceded by him and policies effected by a wife. The protection afforded to such policies, if any, would be determined by the aforementioned provincial statutes, which were not repealed by Act 32 of 1916. If, in the Cape Province, a person, whether married or unmarried, effected a policy on his own life, that policy was absolutely protected after the lapse of three years from the date of payment of the first premium, to the extent of three hundred pounds, and a further hundred pounds for each year or part of a year exceeding such three years, but not exceeding two thousand pounds.⁶⁵ If the insured was a woman married in community of property, the same protection applied against the trustee of the joint estate.⁶⁶ However, a policy ceded by a wife to her husband, to whom she was married out of community of property, was not protected against the trustee of the husband's insolvent estate.⁶⁷

⁶²S 26(1).

⁶³*Estate Ellis v Ellis* 18 CTR 574; Mars 1917 at 87.

⁶⁴Ss 26(2) and 25.

⁶⁵S 16, Act 13 of 1891 (Cape).

⁶⁶S 17, Act 13 of 1891 (Cape).

⁶⁷*Estate Ellis v Ellis* 18 CTR 574.

Similar statutes existed in the Orange Free State and Natal,⁶⁸ but the previous Transvaal statute⁶⁹ was repealed by Act 32 of 1916.

It is interesting to note that if a man effected a policy on his life and the policy was silent about his wife and children, and the sum assured was made payable to his executors, administrators or assigns, it was presumed that he intended to reserve to himself the right to decide who the ultimate beneficiary would be. If he intended to benefit his wife and children by means of the policy, there had to be some evidence that he had carried out that intention before they could claim the benefit.⁷⁰ In the absence of such evidence, a wife or child could not claim that the policy had been taken out in her or his favour or ceded to her or him.⁷¹

On 1 January 1924 a new Insurance Act came into operation.⁷² It repealed the prior provincial statutes on the subject. On this development, Mars had the following to say:⁷³

It is unfortunate, however, that the legislature, when enacting the recent insurance Act, did not repeal and re-enact to the extent desired, such provisions of Act 32 of 1916 as dealt with life insurance policies, because many acute difficulties of construing the relevant sections of the two statutes would probably thus have been avoided.

One example of such difficulties referred to by Mars was the fact that the definitions of a “life insurance policy” contained in the two Acts differed. “Policy of life insurance” in Act 32 of 1916 included a contract for securing an insurance endowment, bonus or annuity upon the death of the insured or on the expiration of any period or on the happening of any event, as well as a fully paid-up policy, granted for the surrender or exchange of a policy of an equivalent value, but did not include any other property acquired in consideration of the surrender, pledge or cession of a policy.⁷⁴ In the Insurance Act 37 of 1923, however, a “life policy”

⁶⁸Law 12 of 1894 (OFS) and Act 38 of 1908 (Natal).

⁶⁹S 28 of Law 13 of 1895.

⁷⁰Mars 1917 at 86.

⁷¹*Wallach's Trustee v Wallach* (1914) AD 202 and Mars 1917 at 86.

⁷²37 of 1923.

⁷³Mars (1924) at 93.

⁷⁴S 26(2)(c) of Act 32 of 1916.

was defined as a policy insuring payment of money on death (except death by accident only) or the happening of any contingency dependent on human life and includes an instrument evidencing a contract that is subject to the payment of a premium or premiums for a return dependent upon human life or provides for the payment of an annuity for a term dependent on human life.⁷⁵

A consequence of the different definitions adopted by the two Acts was that a particular policy could possibly fall within the operation of only one of them. But if the policy fell within the definition of both, it was governed by both Acts. But if the Insolvency Act was in any way in conflict with the Insurance Act, it apparently had to be considered impliedly repealed in respect of such conflict.⁷⁶ In some respects, however, the combined effect of the two Acts was a matter of conjecture.⁷⁷

Act 32 of 1916 dealt only with policies falling within the above definition which had been effected by a husband in favour of, or ceded to, or for the benefit of, his wife or child or both.⁷⁸ Further, its provisions with reference to such policies were in substitution for the protection previously given to such policies by certain provincial statutes.⁷⁹ In respect of other policies, the Insurance Act of 1923 determined the extent of the protection, if any.⁸⁰ Thus, the Insolvency Act 32 of 1916 apparently had absolutely no application to a policy of life insurance effected by a wife or to a policy of life insurance effected by a husband, but not in favour of, or ceded to, or for the benefit of, his wife or child or both.⁸¹

Section 25 of the Insurance Act⁸² provided that a policy of life insurance effected by a wife either before or after marriage on her own life or after marriage on her husband's life was her separate property, despite being married in community of

⁷⁵S 57 of Act 37 of 1923.

⁷⁶Mars (1924) at 94-95.

⁷⁷Mars (1924) at 94-95. This is an early example of the problems that can arise in respect of one piece of legislation conflicting with another, when different fields of law overlap with each other. See also Evans RG and Abrie W "The taxability of insolvent spouses who are married in community of property" (2006) *Stell Law Review* at 105.

⁷⁸Mars (1924) at 94.

⁷⁹Mars (1924) at 94.

⁸⁰S 26(3) of Act 32 of 1916.

⁸¹Mars (1924) at 94.

⁸²37 of 1923.

property. Such policy was protected as against her husband's creditors, if it existed for three years. But the maximum protection was for two thousand pounds, together with any bonus claimable thereunder. Sections 26 and 27 of that Act provided that a policy effected by a husband or intended husband on his life or his wife's life in favour of, or ceded to, his wife, would not be void as a gift between spouses. Furthermore, although the marriage was in community of property, as between husband and wife, it would be her sole property. As against creditors, it would apparently be an asset in the common estate if that estate was sequestrated, but protected to the extent of two thousand pounds plus bonuses, if it was effected in her favour or ceded to her more than two years before sequestration.⁸³

A policy effected by an insolvent on his own life and which had been in existence for three years from payment of the first premium was protected to a maximum of two thousand pounds plus bonuses, provided it was not pledged. In respect of policies effected before or during marriage in favour of, or ceded to, or for the benefit of, a wife by the husband, it appeared that Act 37 of 1923 re-enacted the provisions of section 26 of Act 32 of 1916.⁸⁴

Act 37 of 1923 included an interesting provision intended to counter fraud in respect of these policies. It stated that if proved that a policy was effected or the premiums thereunder paid with the intent to defraud creditors, the court could order a sum equal to the premiums paid plus interest thereon to be a charge on the policy and payable out of the proceeds.⁸⁵

4.5.3 After-acquired property

Act 32 of 1916 made specific provision for the exemption from the insolvent estate of certain categories of property accruing to the insolvent or acquired by him after sequestration. The following property was so excluded from the control of the trustee:

⁸³S 28 of Act 37 of 1923 and s 26(2) of Act 32 of 1916 and see Mars (1924) at 96.

⁸⁴See s 28(1) of Act 37 of 1923 and see Mars (1924) at 96.

⁸⁵S 31 of Act 37 of 1923; Mars (1924) at 96.

- Wages or reward for work or labour or for professional or other services rendered by the insolvent or on his behalf. Included herein were profits from any trade conducted by him with the written consent of his trustee.⁸⁶ Property purchased with monies derived from any of these sources was also excluded from the insolvent estate.⁸⁷
- Any pension to which the insolvent was entitled.⁸⁸
- Damages recovered for any personal injury or insult and property acquired with monies received for damages for personal injury or insult.⁸⁹

In respect of the insolvent's pension and profits made by him from his profession, occupation, service or trade, the Master had a discretion to claim part thereof if in his opinion they exceeded what was required by the insolvent for himself and his dependants.⁹⁰ The Master would issue a certificate to this effect, upon production of which the Registrar of the Court would issue a writ of execution against the insolvent for the relative amount.⁹¹ Although the pension and profits themselves did not vest in the trustee, the 1916 Act specifically stated that the aforementioned surplus did so vest.⁹² Further, any provision in the laws governing public or railway servants' pensions could not deprive the trustee of his right to such surplus.⁹³

4.5.4 Property included in the insolvent estate

It was indicated above what the insolvent estate was comprised of and the exempt property expressly provided for by the Act of 1916 has been considered.⁹⁴ However, precisely what the insolvent estate was comprised of was stated in the Act in broad and general terms, as is done in the present Insolvency Act of 1936. It has therefore always been the task of the courts and academics, in most cases, to decide in detail what property did, in fact, pass to the trustee of an insolvent estate. As will be shown

⁸⁶Ss 21(2) and (5).

⁸⁷Mars (1917) at 99.

⁸⁸S 21(3). Prior to Act 32 of 1916 the insolvent's pension was not exempted from the insolvent estate and it passed to the trustee – see *In re: Hansen* 21 SC 625.

⁸⁹S 21(4).

⁹⁰S 21(2) and (3).

⁹¹S 21(7).

⁹²S 21(2) and (3); Mars 1924 at 97.

⁹³S 21(3).

⁹⁴See para 4.5.1 to 4.5.3 above.

below, South African insolvency legislation has tended not to legislate expressly what property forms part of the insolvent estate, leaving the courts and academics to speculate on this issue. This situation has been continued in the 1936 Insolvency Act, thereby perpetuating the uncertainty in respect of certain assets of an insolvent debtor *vis-à-vis* the insolvent estate. Be that as it may, under the 1916 Act, the following property passed to the trustee of an insolvent estate:

- Title deeds of the insolvent and other muniments of title,⁹⁵ including his books of account.⁹⁶
- Property apparently donated by the insolvent to his wife after the marriage.⁹⁷ It was, however, possible for a moderate gift to her not to have passed to the trustee.⁹⁸
- Money saved by a wife out of her spouse's allowance to her for household expenses. This money was *prima facie* held by her as his agent.⁹⁹ However, if the saved amount was moderate, having regard to the spouse's income and occupation, it did not vest in the trustee.¹⁰⁰
- Proceeds of an execution sale in the hands of an execution officer.¹⁰¹
- The goodwill of a business of the insolvent.¹⁰²
- All debts due to the insolvent and claims, if the cause thereof arose before sequestration.¹⁰³
- Where the insolvent, in his capacity as a *fiduciary* to property, made improvements to the property burdened with a *fideicommissum*, the improvements, or presumably their value, passed to the trustee.¹⁰⁴
- Various leases.¹⁰⁵
- A liquor licence in the insolvent's own name.¹⁰⁶

⁹⁵*Matthew's Trustee v Stewart* (1868) Buch at 251; *Handley NO v Michaelson* (1913) TPD 449.

⁹⁶S 77(1) of Act 32 of 1916.

⁹⁷*Hall v Hall's Trustee and Another* 3 SC 3 but compare *Simons and Others v Board of Executors* (1915) CPD 479; Mars 1917 at 89; Mars 1924 at 98.

⁹⁸*William's Estate v Williams* 7 NLR 93.

⁹⁹Mars (1917) at 90.

¹⁰⁰*Linde v Cohen NO* (1914) TPD 369.

¹⁰¹S 19(a)(i) of Act 32 of 1916; *Estate Roets v Ginsberg and Another* 25 SC 683.

¹⁰²*Dowson v Hobkirk and Another* (1912) WLD 1.

¹⁰³Mars (1917) at 90.

¹⁰⁴*In re: Insolvent Estate Barnardo* 20 CTR 473; Mars 1917 at 90.

¹⁰⁵*Hoosen v Mendelsohn and Others* 19 NLR 40.

¹⁰⁶Mars (1917) at 90.

- Rights of inheritance.¹⁰⁷ To this day, this issue has apparently been a thorny one for both the courts and the judicial commentators. Looking at the long history of debate around this problematic and uncertain area of insolvency law, it is remarkable that the legislature has never thought it necessary to deal with it in any insolvency legislation. It is therefore discussed in more detail here.

Apparently, during this early period, only the Cape court appears to have considered whether an insolvent's interest under a will passed to his trustee.¹⁰⁸ Initially, it was inclined to hold that even a *spes successionis*, a mere expectancy that may never materialise, formed part of the insolvent estate.¹⁰⁹ However, the court ultimately ruled that under Ordinance 6 of 1843 only those interests under a will that were vested in the insolvent at the date of sequestration or became so vested before the final plan of distribution passed to the trustee.¹¹⁰ Thus, where a *fideicommissum* was created, but the condition thereof had not yet been fulfilled, the fideicommissary's trustee could not sell the insolvent's chance of ultimately succeeding to the inheritance. The court relied on two considerations to justify this decision, namely the difference in the language of the Cape and English statutes and the provision in the Cape statute for the divesting of the insolvent estate. The insolvent could be divested only of vested rights.¹¹¹ Act 32 of 1916 used different phraseology to that of the old Cape Ordinance. The 1916 Act provided that the insolvent would be divested of all his property when sequestrated, as well as all property that he may acquire or that may accrue to him during sequestration.¹¹² Further, "property" was defined as including movable and immovable property within the Union and contingent interests in property.¹¹³ At this point Mars¹¹⁴ stated the following in respect of the wording of this legislation:¹¹⁵

It may fairly be urged that the use of the word *divest* lends colour to the view that, as under the old Cape Ordinance, only vested interests pass to a trustee in insolvency, but the definition of property strongly militates against this view, and it

¹⁰⁷See Nathan at 90.

¹⁰⁸Mars (1917) at 90; Mars (1924) at 99.

¹⁰⁹*Quin v Board of Executors* (1870) Buch at 78; Mars (1924) at 99.

¹¹⁰*Nortje v Nortje* 6 SC 9; *Van Breda v The Master* 7 SC 360; *Jones v Matthews* 14 SC 68; *Whitehead v Estate Whitehead* 25 SC 65; Mars (1924) at 99.

¹¹¹*Jones v Matthews* 14 SC 68; Mars 1917 at 91; Mars 1924 at 99.

¹¹²S 19(a).

¹¹³S 2.

¹¹⁴Mars (1917) at 91.

¹¹⁵For the latter opinion Mars cites *Smit v Smit's Executrix* 14 SC 142.

seems that the intention of the statute was that not only vested rights but that any expectancy or possibility of succession should pass to the trustee. This, however, is clear – that if an insolvent consents to his trustee dealing with any interest or expectancy in his estate, he is precluded from afterwards claiming that his trustee had no right so to do, even as a fact his trustee would but for his consent have had no such right.

Mars then stated that if his suggested interpretation of Act 32 of 1916 were correct, the difficulty that previously existed in practice of determining whether a particular interest vested or not would fall away. Mars’s view is probably the interpretation that the legislature had hoped for, but history and the complexity of the meaning of the word “vest” and the definitions of “property” and “disposition” in modern-day legislation has proved Mars wrong.¹¹⁶

Citing, among others, *Van Schoor’s Trustees v Muller’s Executors*,¹¹⁷ Mars stated,¹¹⁸ without further consideration or explanation, that an heir’s right of adiation or repudiation continues, whatever his embarrassments may be up to the moment of sequestration of his estate, but thereupon passes to his trustee. As will be shown below,¹¹⁹ over the years a lot more has been said about the repudiation of an inheritance. Presumably the question of a repudiated inheritance possibly being considered an impeachable disposition, or an act of insolvency and the nature of the rights attaching to an inheritance did not come to mind when Mars considered these issues. The 1916 Act, however, did make provision for acts of insolvency¹²⁰ and impeachable dispositions.¹²¹

- *Bequest to a woman married in community of property*: In *De Ville v Theunissen*¹²² it was confirmed that unless there was a condition attached to the bequest to the contrary, any interest accruing to a woman married in community of property before the sequestration of her husband’s estate vested in his trustee. Here Mars stated, correctly, that because it was actually the joint estate of both spouses that was sequestrated in such a case, it seemed on principle

¹¹⁶See the discussion thereof in ch 8 below.

¹¹⁷3 Searle 137.

¹¹⁸Mars (1917) at 92.

¹¹⁹See the discussion thereof in ch 8 below.

¹²⁰See s 8 of the Act.

¹²¹See, eg, ss 24 to 29 and s 33 of the Act.

¹²²(1878) Buch 171.

that the whole of any bequest accruing to her during sequestration must also vest in his trustee.¹²³ Mars, however, refers to direct authority for the view that in such event only one half of the interest passed to the trustee and the other half was preserved for the wife personally.¹²⁴ Mars gives no further opinion on this matter. Today, however, it is known that this decision was incorrect. No express provisions in the 1916 Act, or any legislation thereafter regulated this issue and since then, the matter has been clothed in uncertainty for decades, until the correct position was set out in *Badenhorst v Bekker NO en Andere*.¹²⁵

- *Prohibition against attachment of bequest:* Whether a testator could bequeath property to a woman married in community of property in a manner that would prevent it passing to her husband's trustee in insolvency was already a debatable point in the early history of South African insolvency law.¹²⁶ Although there was an earlier decision¹²⁷ to the contrary, Mars considered it settled that a direction in a will merely that a bequest may not be attached by the beneficiary's creditors was of no effect in law. However, if a further direction existed that on the beneficiary's insolvency the bequest may not pass to the designated beneficiary, but must pass to another person or that the executors may in their absolute discretion divert the inheritance to some other person, then that bequest would not pass to the trustee of the insolvent estate. Mars pointed out that in marriages in community of property the rights of both spouses merged in the common estate and thus it seemed on principle that to keep a bequest to a wife out of the insolvent estate of her husband, a bequest of the property over to some third person would be necessary.¹²⁸ Apparently there was authority for the argument that even without such gift over, property could be bequeathed to a wife to the exclusion of her husband's trustee. To achieve this effect, the language of the testator apparently had to be clear and direct.¹²⁹

¹²³Mars (1917) at 93.

¹²⁴*In re: William Dynes Estate* 6 NLR 43; *Ex parte van der Merwe* (1913) TPD 372.

¹²⁵See ch 10 below.

¹²⁶See Mars (1917) at 94.

¹²⁷*Blignaut's Trustee v Cilliers' Executors and Others* (1868) Buch 206.

¹²⁸See Mars (1917) at 94.

¹²⁹*Blignaut's Trustee v Cilliers' Executors and Others* (1868) Buch 206 and Voet 7, 1, 32; 23, 4, 45; 23, 2, 77 as cited in Mars (1917) at 94 note 49.

- *Property disposed of by the insolvent but not delivered:* Generally, one cannot part with one's *dominium* in property unless delivery has been effected. Prior to delivery the obligee has only a personal claim and no real right over the property. Thus any movable property sold by the insolvent, but not transferred, during the period of the 1916 Act passed to his trustee and the purchaser ranked as an ordinary concurrent creditor of the estate.¹³⁰ This rule applied even if the purchaser had paid the full purchase price and was in possession of the property.¹³¹ This rule was set down in the early case of *Harris v Trustees of Buissine*.¹³² So, where two persons jointly purchased a farm that was transferred into the name of one of them and his estate was sequestrated, the other had only a concurrent claim against the insolvent estate.¹³³ Mars pointed out that this rule worked great hardship in many cases and that the courts would not extend its operation unless compelled to do so.¹³⁴
- *Property purchased by, but not delivered to, the insolvent:* Where property was purchased by an insolvent before sequestration, but not yet delivered to him, his trustee could not claim that property without tendering payment of the purchase price. This was so even if the sale was on credit and the date of payment agreed upon had not yet arrived.¹³⁵
- *Property purchased by, and delivered to, the insolvent, but not paid for:* If the insolvent at the date of sequestration had failed to pay the purchase price of property delivered to him, that did not of itself entitle the seller to claim the property from the trustee.¹³⁶ If the sale was a cash sale,¹³⁷ the seller could claim return of the property if within ten days of delivery he notified the insolvent or the legal representative of the estate in writing that he was reclaiming the property.¹³⁸ If the trustee disputed the seller's right, the latter had to institute proceedings within seven days after the trustee's notification that he disputed the claim. Return of the property could not be enforced unless the seller

¹³⁰Mars (1924) at 103.

¹³¹Mars (1924) at 103.

¹³²2 Menz 105.

¹³³*Kleugden & Co v Rabies' Trustee* Foord 63 as cited in Mars (1917) at 95.

¹³⁴See Mars (1917) at 96.

¹³⁵Mars (1917) at 97.

¹³⁶S 35(2) of Act 32 of 1916.

¹³⁷Every sale was deemed to be for cash unless the seller expressly or tacitly agreed otherwise.

¹³⁸S 35(1) of Act 32 of 1916. This right to reclaim was limited to movable property.

refunded any payments received by him.¹³⁹

- *Property pledged or subject to a lien*: The trustee of the insolvent estate at common law had a right and duty to take possession of the insolvent's assets, even though they were pledged or otherwise encumbered, and to sell them to the best advantage.¹⁴⁰ The 1916 Act did not specifically repeal the common law, but stated that a creditor who was in possession of movable property at the date of sequestration, held as security for his claim, was entitled to retain such possession and to take over that property at the amount of the valuation placed thereon in his proof of debt. However, the trustee could, within six weeks of the proof of such debt, if directed by the creditors to do so, take over the same for the benefit of the estate at such valuation.¹⁴¹

These provisions applied only in respect of movable property and, in addition, only if the creditor in possession had proved his claim. Here Mars was of the opinion that as against a creditor in possession who had not proved a claim, the trustees common law right to claim delivery of the property held by the creditor still remained.¹⁴²

4.6 The Insolvency Act 1916 Amendment Act 29 of 1926

This Act came into effect from 1 October 1926. It amended and made additions to the principal Act of 1916. Of importance to this thesis is section 10 of the 1926 Act which amended section 19 of the 1916 Act. It added subsections (2), (3), (4) and (5) to section 19, which provided for an additional effect of an order of sequestration, by vesting in the Master, and ultimately in the trustee, the estate of the solvent spouse of the insolvent. This is the section that preceded section 21 of the present Act. These provisions, which may be considered the most important alteration to the 1916 Act, will now be considered in more detail.

¹³⁹S 35(1) of Act 32 of 1916. The rationale behind this provision was that though a sale may be for cash, the seller had to claim his goods or the cash within reasonable time, or it would be implied that the contract was for credit – see *Seluka v Suskin and Another* (1912) TPD 269.

¹⁴⁰Voet 42, 7, 7 as cited in Mars (1924) at 106.

¹⁴¹S 77(1), (2) and (3); Mars (1924) at 106.

¹⁴²Mars (1924) at 106.

These subsections had the general effect of vesting the entire estate of the solvent spouse, married out of community of property, in the Master and ultimately in the trustee of the insolvent spouse, who would then deal with the solvent spouse's estate in accordance with these subsections. This applied where the insolvent was married, and not living apart from, the solvent spouse under a judicial order of separation or a notarial deed of separation. If the spouse was living apart from the insolvent spouse, but not so separated, the estate of the solvent spouse fell under the operation of these subsections.¹⁴³

The trustee was obliged to release the following categories of property:¹⁴⁴

- property that belonged to the solvent spouse separately immediately before the marriage;
- property acquired by the solvent spouse under a marriage settlement;
- property acquired during the marriage with a title valid as against the creditors of the insolvent spouse;
- insurance policies protected under the relevant legislation;
- property acquired by the solvent spouse with the income or proceeds of any of these categories of property.

Subsections (2)(a) and (b) could not be easily reconciled.¹⁴⁵ The trustee had a duty under subsection (2)(a) of releasing such property *as is shown* to be included in one of the above categories of property. It was not stated by whom this must be shown. It would, however, appear that the onus was on the solvent spouse to show that the property was his or her separate property.¹⁴⁶ Under subsection (2)(b), the trustee could realise any property that *ostensibly belonged to the solvent spouse*, with the leave of the court. If he had not obtained such leave, he could not realise it unless he had given six weeks' notice that he intended doing so.¹⁴⁷ Such notice had to be given to the solvent spouse or his or her agent. The notice also had to be published in the *Gazette* and in a local newspaper of the

¹⁴³S 19(2).

¹⁴⁴S 19(2)(a)(i)-(v).

¹⁴⁵Nathan at 97.

¹⁴⁶Nathan at 97.

¹⁴⁷Subsection (2)(b).

district or residence of the solvent spouse. The notice had to call on the separate creditors for value of the solvent spouse to prove their claims. Creditors *ex titulo lucrativo*, such as donees, was not provided for.¹⁴⁸ Subsection 2(b) therefore enabled the trustee to realise ostensible property of the solvent spouse, if that spouse had not obtained the release thereof. Ostensible property would include property mentioned in the categories in subsection 2(a)(i)-(v).¹⁴⁹

The trustee could voluntarily release disputed property, but could later establish his title thereto.¹⁵⁰ If he established his title, the solvent spouse's creditors were not entitled to any rights in the property other than those they would possess apart from the Act. The words "his title" were therefore understood to be that the title to the property concerned was really that of the insolvent spouse.¹⁵¹ If the trustee had realised property that actually belonged to the solvent spouse, that spouse could still claim the proceeds thereof by application to court.¹⁵²

A proved creditor of a solvent spouse had no voting rights at meetings in the insolvent estate, but he could set aside any resolution that affected him adversely. He was also not liable to a contribution in the insolvent estate.¹⁵³

The virtual effect of how the trustee was to deal with property of the solvent spouse which he had realised, was to make such property administrable and subject to proof by creditors as if it were also under sequestration.¹⁵⁴ This issue, which was regulated by subsection 2(d), was not easy to interpret. It will not be considered in further detail at this point, but suffice to say, that it was a precursor to some of the problems and litigation that would be experienced by these provisions regarding the solvent spouse's assets in this and later legislation.¹⁵⁵

¹⁴⁸Nathan at 97.

¹⁴⁹Nathan at 97.

¹⁵⁰S 19(5).

¹⁵¹Nathan at 97-98.

¹⁵²S 19(2)(c).

¹⁵³S 19(2)(e).

¹⁵⁴S 19(2)(d) and see Nathan at 98.

¹⁵⁵This aspect is considered in some detail in ch 10 below under the discussion of s 21 of the Insolvency Act 24 of 1936.

One of the ways in which the interests of the solvent spouse were protected was to exclude his property from vesting in the trustee for a defined period, if he could, under certain circumstances, satisfy the court at sequestration or later that he was willing to make arrangements to protect the interests of the insolvent estate in the property of the solvent spouse.¹⁵⁶ The solvent spouse could prove his claim to such assets during this defined period, and the trustee had to notify the spouse in writing whether or not he would release the assets.

The solvent spouse enjoyed a further measure of protection under subsection (4), if, as a result of the assets vesting in the trustee, an application was made to sequester his estate by reason of an act of insolvency committed since such vesting. Then, if the court was satisfied that the act of insolvency was due to such vesting, it could postpone the order or make any necessary interim order, provided that it appeared that proceedings were being taken for the release of the property, or that it had been released and the solvent spouse could discharge his liabilities.¹⁵⁷

4.7 The Insolvency Act 24 of 1936

This Act came into force throughout the Union of South Africa on 1 July 1936. It consolidated and amended the law of insolvency. Because this Act is essentially the same legislation that is still in force today, only that part of the Act that differs from the present Act, or in which important developments occurred regarding assets in insolvent estates will be considered here in detail. In this Act the vesting provisions, the definitions of movable and immovable property and the assets included in, or exempted from, the insolvent estate essentially remained unchanged, and where relevant, the common law applied.

The provisions of section 19 of the 1926 Act, which provided for the vesting of a solvent spouse's assets in the trustee of the insolvent spouse's estate, were re-stated in section 21 of the 1936 Act. On this point it is interesting to note that the legal uncertainty that has emanated from section 21 of the Act over many years

¹⁵⁶S 19(3).

¹⁵⁷S 19(4) and Nathan at 99.

had already found root in 1936. For example, in his discussion of property vesting in the trustee and that which does not vest in the trustee, Hockly twice mistakenly seems to attempt to apply section 21 to spouses married *in community* of property. In his discussion of bequests to women married *in community* of property, and the possibility that they acquire such bequests to the exclusion of the trustee of the (joint) insolvent estate, he says:¹⁵⁸

It must be remembered that now, on the insolvency of one spouse all the property of the other spouse automatically vests in the trustee of the insolvent spouse, [by virtue of section 21] and that the solvent spouse has to take steps to recover from the trustee her own separate property. The foregoing must accordingly be read subject to what is said in Chapter IX.

When reading this text it is difficult to decide whether Hockly was merely trying to emphasise the fact that all assets vested in the insolvent estate, irrespective of the marital regime that may have been entered into by the spouses. However, since then, others have often made the mistake of attempting to apply section 21 of the Act to marriages in community of property.¹⁵⁹ One is tempted to conclude that Hockly too was making the same mistake.

As will be shown below,¹⁶⁰ another problem child in respect of assets in insolvent estates has been the position of life insurance policies in insolvent estates. The 1936 Act made specific provisions in section 28 to regulate the position in respect of such policies. Both the Insolvency Act of 1936 and the Insurance Act¹⁶¹ provided for the limited exemption of insurance policies under certain circumstances. These provisions were, however, virtually identical to the previous dispensation and the discussion¹⁶² of such policies above also applies to policies under the 1936 Insolvency Act.

Section 28 of the Insolvency Act¹⁶³ has been repealed by section 78 of the

¹⁵⁸Hockly HE *Mars The law of insolvency in South Africa* (3rd ed) (1936) at 172 and 173 (hereafter Mars (1936)).

¹⁵⁹See ch 10 below on the discussion of the position of the solvent spouse.

¹⁶⁰See para 4.7.1 and further and ch 9 below.

¹⁶¹37 of 1923. This Act repealed earlier provincial statutes on the subject.

¹⁶²See para 4.5.2 above.

¹⁶³24 of 1936

Insurance Act,¹⁶⁴ and the Insurance Act, in turn, has been repealed and replaced with the Long-term Insurance Act.¹⁶⁵

The Insurance Act, which repealed section 28 of the Insolvency Act, contained provisions similar to those of section 28 of the Insolvency Act. These provisions of the Insurance Act were found in sections 39 to 44. The relevant provisions of section 44 read as follows:¹⁶⁶

(1) If the estate of a man who has ceded or effected a life policy in terms of section 42 or 43 has been sequestrated as insolvent, the policy or any money which has been paid or has become due shall be deemed to belong to that estate: Provided that, if the transaction in question was entered into in good faith [and within certain time periods or under certain conditions] ... only so much of the total value of all such policies ... as exceeds R30 000 shall be deemed to belong to the insolvent estate.

The effect of section 44 was that if a life insurance policy ceded to a woman, or effected in her favour, by her husband more than two years before the sequestration of her husband's estate, she would receive a maximum of R30 000 from the policy. Any amount exceeding the R30 000 was deemed, as against the creditors of the husband, to belong to the husband's insolvent estate. If it was ceded or effected less than two years from the date of sequestration, the wife would receive no benefit from the policy at all.¹⁶⁷

4.7.1 The purpose of section 44 of the Insurance Act

Section 44 of the Insurance Act (and the repealed section 28 of the Insolvency Act 24 of 1936 and section 26(2) of the Insolvency Act 32 of 1916) had the dual purpose of protecting both the wife of the insolvent husband as well as his creditors. Firstly, in view of the common law rule prohibiting donations between spouses, section 44 provided a married woman with a benefit that would otherwise

¹⁶⁴27 of 1943 (hereafter referred to as the Insurance Act).

¹⁶⁵52 of 1998 (hereafter referred to as the Long-term Insurance Act). See Smith A "The difficulties of simplicity" (2000) *JBL* 85; Smith A "The protection of insurance policies from insolvency under s 63 of the Long-Term Insurance Act 52 of 1998" (2000) *SA Merc LJ* 94.

¹⁶⁶S 44(1)(a)-(b).

¹⁶⁷See *Brink v Kitshoff* 1996 (4) SA 197 (CC) 211 F-I; the paragraphs that follow, discussing insurance legislation are included here so as to place them within their development in the historical context. A more comprehensive discussion follows in ch 9 below.

have been denied her.¹⁶⁸ Secondly, the interest of the creditors was protected from the possibility of collusion and fraud between the husband and wife.¹⁶⁹

However, with the introduction of section 22 of the Matrimonial Property Act,¹⁷⁰ which allowed for donations between spouses, the first purpose above fell away and, in fact, turned to a burden on a married woman who may have been affected by section 44.¹⁷¹ But for section 44, a policy envisaged in that section could in its entirety have amounted to a valid donation to the wife if the requirements of validity had been met and the suspicion of simulation had been removed. Furthermore, only a married woman was affected by the provisions of this section, not a married man in whose favour his wife had taken out a policy or ceded it to him. This situation inevitably led to the decision of the Constitutional Court in *Brink v Kitshoff*¹⁷² whereby section 44(1) and (2) was declared unconstitutional and therefore invalid.

4.7.2 Brink v Kitshoff 1996 (4) SA 197 (CC)

In this case a life insurance policy valued at R2 million in respect of Mr Brink was taken out in 1989. Mr Brink was reflected as the owner in the policy, and in 1990 he ceded it to his wife, the applicant in this case. Mr Brink died in 1994 and his estate was found to be insolvent. It was dealt with in terms of section 34 of the Administration of Estates Act 66 of 1965. The executor demanded that the insurer, in terms of section 44 of the Insurance Act, pay into the estate all but R30 000 of the proceeds of this insurance policy. The insurer refused to do so and the matter eventually came before the Constitutional Court.

O'Regan J found that section 44(1) and (2) treated married women and married men differently, thereby disadvantaging married women but not married men.¹⁷³ Section 44(1) and (2) was therefore discriminatory against women on the grounds

¹⁶⁸The insurance policies under discussion can be regarded as donations between spouses. See *Brink v Kitshoff* 1996 (4) SA 197 (CC) 218 G-J.

¹⁶⁹*Brink v Kitshoff* 1996 (4) SA 197 (CC) at 218 G-J.

¹⁷⁰88 of 1984.

¹⁷¹*Brink v Kitshoff* 1996 (4) SA 197 (CC) at 218 G-J.

¹⁷²*Brink v Kitshoff* 1996 (4) SA 197 (CC).

¹⁷³At 217 F-G.

of both sex and marital status, thereby contravening section 8 of the interim Constitution.¹⁷⁴ The next question to be considered was therefore whether section 44(1) and (2) could be justified in terms of the limitation clause in the Constitution.¹⁷⁵ This would require this section to be shown to be reasonable and justifiable in an open and democratic society based on freedom and equality, and that it did not negate the essential content of section 8 of the interim Constitution. Consequently, one had to consider the purpose and effects of the infringing provision, and weigh them against the nature and extent of the infringement caused.¹⁷⁶

O'Regan J held that the first purpose of section 44 of the Insurance Act, namely to provide married women with a benefit that they had been denied because of the common law prohibition of donations between spouses, had fallen away when the common law rule was abolished by section 22 of the Matrimonial Property Act.¹⁷⁷ Section 44 of the Insurance Act therefore had become disadvantageous to married women. The second purpose of protecting creditors of insolvent estates was still achieved. Although the court considered the protection of creditors to be a valuable and important public purpose, and that the close relationship between spouses could lead to collusion or fraud, it was not persuaded that the distinction between married men and married women could be said to be reasonable and justifiable.¹⁷⁸ No persuasive reasons were advanced to show why section 44 should apply only to transactions in which husbands effected or ceded policies in favour of their wives and not to similar transactions by wives in favour of their husbands. The court found that there seemed to be no reason why fraud or collusion did not occur when husbands, rather than wives, were the beneficiaries of insurance policies. Avoiding fraud or collusion, the court found, did not suggest a reason as to why a distinction should be drawn between married men and married women.¹⁷⁹ The court held that there were sufficient other legislative

¹⁷⁴Constitution of the Republic of South Africa Act 200 of 1993; s 9 of the present Constitution of the Republic of South Africa Act 108 of 1996.

¹⁷⁵S 33 of the interim Constitution and s 36 of the present Constitution.

¹⁷⁶At 218 F-H.

¹⁷⁷88 of 1984.

¹⁷⁸At 218 I-J.

¹⁷⁹At 219 A-C.

provisions¹⁸⁰ that could reasonably serve the purpose of protecting the interests of creditors in a manner less invasive of constitutional rights. The discrimination caused by section 44(1) and (2) of the Insurance Act were therefore not considered to be reasonable or justifiable in the light of the purpose of the legislation and the court declared these provisions invalid.¹⁸¹

The effect of the *Brink* decision is that the benefits of policies effected in favour of, or ceded to, one spouse by another would ostensibly belong to the estate of the recipient spouse without any limitation, and irrespective of the insolvency of the other spouse. This, of course, is subject to the provisions of section 21 of the Insolvency Act.¹⁸²

4.7.3 The Long-term Insurance Act 52 of 1998

Not long after the judgment in *Brink v Kitshoff*¹⁸³ the Long-term Insurance Act came into operation, repealing the Insurance Act. For purposes of insolvency law the only form of protection expressly offered by this new Act is found in section 63 thereof. This provision is similar to section 39 of the old Insurance Act. In summary, section 63 of the Long-term Insurance Act affords protection of policy benefits of certain long-term policies in terms of which such person or his or her spouse is the life insured, if the policy has been in force for at least three years.¹⁸⁴ During such person's lifetime, the policy benefits will not form part of his insolvent estate.¹⁸⁵ This protection of the policy benefits is, however, limited to a maximum amount of R50 000.¹⁸⁶ Any sum in excess thereof will form part of such person's insolvent estate.

No provisions similar to those of section 44 of the Insurance Act are included in the Long-term Insurance Act. Either of the spouses in a marriage will therefore be

¹⁸⁰Such as ss 26, 29, 30 and 31, for impeaching transactions, and s 21 for vesting the solvent spouse's assets in the trustee.

¹⁸¹At 219 F-H.

¹⁸²24 of 1936.

¹⁸³Cited in para 4.7.2.

¹⁸⁴S 63(1).

¹⁸⁵S 63(1)(a).

¹⁸⁶S 63(2)(a).

entitled to take out, or cede a policy in favour of, the other without any limitations on the donee spouse if the donor spouse should be sequestrated. If the transaction is proved to be valid and *bona fide*, and cannot be impeached, then the entire policy benefit will remain the property of the solvent spouse in whose favour it had been effected. Conversely, if the donee spouse should be sequestrated, the total policy benefits received by that spouse will vest in his or her insolvent estate.¹⁸⁷

4.8 Conclusion

By 1829 insolvency legislation¹⁸⁸ dictated what the insolvent estate of a debtor would comprise. All the debtor's property at the date of sequestration and that acquired during sequestration formed part of his insolvent estate. Exempt property was also provided for, but this depended largely on the will of the creditors to grant such exemption. The exemption was limited to certain compensation earned by the debtor for his temporary care and management of property of the estate, and personal items of the insolvent and his family, including tools of his trade.

It is interesting to note that this early legislation made specific provision for the protection of minors and others under guardianship or curatorship, giving them a "tacit mortgage" over the curator or guardian's estate. This added a social bent to this early legislation, something that has been eroded over the years and is lacking in today's legislation.

As time passed there was little legislative change regarding the vesting of assets in insolvent estates, but provisions regarding exempt property were extended. For example, it was specifically legislated that compensation for work done by the debtor or that of his family was exempt from his insolvent estate. So too damages awarded for a personal wrong or injury to the insolvent or any member of his family excluded from insolvent estates. Wearing apparel, bedding, household furniture and tools of the trade could be excluded to the extent that the creditors allowed.

¹⁸⁷A more comprehensive discussion of insurance policies follows in ch 9 below.

¹⁸⁸Ordinance 64 of 1829.

The Master or any trustee could grant the insolvent a moderate allowance out of the estate assets for the indispensable support of him and his family, pending further decision by the creditors. Towards the end of the nineteenth century insolvency legislation had also made provision for a measure of protection in insurance policies if included in an antenuptial contract.

The earliest Transvaal legislation was essentially the same as the 1843 Cape legislation that served as a model for most of the colonies or provinces, but it included the right to any pension for work done, as an exempt asset. Further, specific provision for the protection of insurance policies was included in this legislation.

The 1916 Insolvency Act unified the law of insolvency in the Union of South Africa. It also contained specific vesting provisions, defined the content of the insolvent estate and catered for exempt property. Exemptions were extended and certain life insurance policies, which were partially protected from the insolvent's creditors, were specifically regulated in this legislation. But together with the preceding legislation of the colonies, this Act of 1916 entrenched and perpetuated gender-based provisions, and a lack of clarity concerning particularly property excluded from insolvent estates, some of which still haunt insolvency law in South Africa at present. In 1923 new legislation¹⁸⁹ governing insurance policies sowed the seeds for further disharmony and confusion in insolvency law because the status of policy benefits in insolvent estates now had to be sought from the provisions of both the insurance legislation and the insolvency legislation. Had this issue been dealt with in only the insolvency legislation, many of the problems being grappled with today may have been avoided. This set the trend for the legislature to juggle insurance-related issues between insurance and insolvency legislation, thereby contributing to much uncertainty regarding its interpretation.

Exempt property, or what the legislature considered to be exempt property, was expressly dealt with, and to some extent extended. But no distinction was made

¹⁸⁹Act 37.

between excluded property and exempt property. An interesting provision, similar to present legislation, was that the Master could claim any surplus pension or profits made by the insolvent if they exceeded what the insolvent needed for himself and his dependants. A difference, though, was that while the pension and the profit did not vest in the trustee, the Act specifically stated that such surplus did so vest. While a provision of this kind may possibly have created confusion in identifying pension or profit from surplus, it did probably give clarity on the insolvent estate's right to such surplus. Failure to regulate surplus income in present legislation has created some problems in practice and this issue will be discussed in chapter 9.¹⁹⁰

One can assume that any legislature intends legislating with the utmost clarity in order to avoid interpretational problems and legal uncertainty stemming from any legislation. With hindsight, it becomes known that legislation often fails for a multitude of reasons in this endeavour for perfection. In this respect, one is reminded of the following comment by Mars when a new Insurance Act came into operation on 1 January 1924,¹⁹¹ repealing the prior provincial statutes on the subject:¹⁹²

It is unfortunate, however, that the legislature, when enacting the recent insurance Act, did not repeal and re-enact to the extent desired, such provisions of Act 32 of 1916 as dealt with life insurance policies, because many acute difficulties of construing the relevant sections of the two statutes would probably thus have been avoided.

A considerable number of problem areas exist in respect of the status of property *vis-à-vis* insolvent estates, either because of a failure to legislate on these problem areas or due to sluggishly conceived legislation. The issue of an inheritance comes to mind in respect of a failure to legislate. Inheritance as an asset included or excluded from an insolvent estate has been a complex and thorny issue for decades, yet no insolvency legislation has ever dealt with this issue. So too the question whether an inheritance could be excluded from a community estate of spouses has been ignored by insolvency legislation for decades and one may

¹⁹⁰See para 9.2.4 below.

¹⁹¹37 of 1923.

¹⁹²Mars (1924) at 93.

conclude that it has not yet been finally resolved by the courts. An example of sluggish legislation that directly created a problem area in respect of property in insolvent estates is the present section 21 of the Act, a section that has its roots in the 1926 Insolvency Amendment Act.

It is remarkable that so many problem areas concerning assets in insolvent estates, with foundations in the early history of South African legislative law, continue to persist. It is also remarkable that despite the courts and academic commentators having grappled with these issues since their inception, the legislature has been blind to the shortfalls in the insolvency legislation. The property that the insolvent estate comprises is the solid foundation upon which the entire sequestration regime rests, and one would have thought that by now the problem areas concerning estate assets would have been eradicated. These problems, all of which have a considerable history in South African law, will be considered further in following chapters of this thesis.

It should, however, be mentioned at this point that South Africa has embarked on a mission to review its insolvency law system.¹⁹³ This reform process has, however, paid scant attention to foreign insolvency systems. What follows in part III below is a survey of foreign insolvency systems from which local insolvency law can benefit.

¹⁹³See ch 12 below.

PART III: COMPARATIVE SURVEY

Chapter 5: United Kingdom

5.1 Brief historical overview

5.1.1 Introduction

“C” is different from what we’ve looked at so far. “E” is the vast domain of energies, and “m” is the material stuff of the universe. But “c” is simply the speed of light ... *Cleritas* is the Latin word meaning “swiftness”¹

“*Cleritas*” is not the word that comes to mind when analysing the development and reform process of insolvency law. The chapters above have examined the snail-like progress in this development, and in improving the position of the debtor. In England too, the development in this field, and particularly regarding property in bankrupt estates, was slow. But the insolvency law of the United Kingdom was woven into that of South Africa under colonisation, so it is important to investigate these roots of South African law. Furthermore, the United Kingdom insolvency system underwent a radical reform in the 1980s, and now that system has interesting innovations that can enrich a South African reform process.

The law of bankruptcy in the United Kingdom has its roots in the assumptions and the legislation of Tudor and early Stuart society.² In that period the essential distinction between bankrupts and other debtors was made. The result was that however great most debtors’ liabilities were, they could not go bankrupt.³ In England the early history of insolvency in the sense of a debt enforcement procedure was an individualistic procedure and it was generally limited to cases of insolvent traders.⁴ A creditor obtained judgment and execution against the person or property of his debtor entirely for his own benefit.⁵

¹Bodanis D $E=mc^2$ *A Biography of the world’s most famous equation* (2000) at 37.

²Jones WJ *The foundations of English bankruptcy: Statutes and commissions in the early modern period* at 5 (1979) (hereafter *Jones Foundations*).

³*Jones Foundations* at 5.

⁴This restricted application persisted until 1861 (Bankruptcy Act 1861 (24 and 25 Vict c 134) s 69) when it was legislated that the provisions of the Bankruptcy Act would apply to all debtors, whether traders or not. See Cork K *Insolvency law and practice Report of the Review Committee* (1982) at 14 and further (hereafter the *Cork Report*) and Fletcher *The law of insolvency* (3rd ed) (2002) at 6 and 8 (hereafter *Fletcher Insolvency law*).

⁵Bauer HG *The bankrupt’s estate: A study of individual and collective rights of creditors under Roman and early English bankruptcy laws* (1980) at 33 (hereafter *Bauer Thesis*).

Initially, however, the institution of imprisonment of persons for debt owing to creditors was foreign to English law.⁶ Execution could be taken only against the assets of the debtor during the twelfth and thirteenth century. A writ, known as the *levari facias*, a pre-thirteenth-century remedy, authorised the use of profits emanating from the debtor's land (chattels and rent) to satisfy a judgment creditor's claim. This did not provide a useful remedy of sale and distribution of assets.⁷ In accordance with what was known as a writ of *feri facias*, however, a true collection procedure was developed, since the movable assets of the debtor could be sold in execution.⁸ The Statute of Westminster⁹ provided for the writ of *elegit*¹⁰ which allowed a creditor to take possession of half the debtor's lands as well as all the profits and rents for a term of years, but these could not be sold. This developed into a judgment lien valid for a limited period.¹¹ A development that laid the foundation for English and United States exemption law was the statute's provision that the debtor's oxen and plough animals could not be levied upon.¹² Execution on the person became permissible only in 1283 and 1285 when it was introduced by the Statute of Merchants,¹³ which provided for imprisonment of defaulting debtors, however, this remedy was available only to traders. It was introduced to stimulate foreign trade by protecting foreign merchants, in that it provided them with an efficient means of personal and proprietary execution. In 1352 and 1503 its applicability was extended, allowing creditors to imprison debtors in almost all instances.¹⁴

A writ of *capias ad respondendum*, together with the writ of *capias ad satisfaciendum*, enabled the creditor to bring the debtor into court upon imprisonment and to deprive

⁶Although imprisonment for debt was introduced in the late thirteenth century, an assignment for the benefit of creditors similar to *cessio bonorum* in Roman law apparently was not possible in early English history; see Dalhuisen JH *Dalhuisen on international insolvency and bankruptcy* vol 1 (1986) 1-43 (hereafter Dalhuisen *International insolvency*); Bauer *Thesis* at 33.

⁷Bauer *Thesis* at 33.

⁸Bauer *Thesis* at 33.

⁹Statute of Westminster II of 1285.

¹⁰Abolished in England only in 1956; see Dalhuisen *International insolvency* at 1-39.

¹¹Dalhuisen *International insolvency* at 1-39.

¹²Dalhuisen *International insolvency* at 1-39.

¹³11 Edward I (1283), which became known as the Statute of Acton-Burnell, and 13 Edward I (1285).

¹⁴Holdworth *History of English law VIII* (1936) 231 as cited in Bauer *Thesis*; the *Cork report* at 14 *an further*; Dalhuisen *International insolvency* at 1-41. See also Bauer *Thesis* at 35.

him of his goods in payment of his debts.¹⁵ These writs could be invoked without the creditor becoming liable for the debtor's support. In this respect, the court in *Manby v Scott*,¹⁶ in the mid seventeenth century, stated that:

[i]f a man be taken into execution and lies in prison for debt, neither the plaintiff at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink, or clothes; but he must live on his own, or on the charity of others; and if no man will relieve him, let him die in the name of God.

The writs of *feri facias* and *elegit* were excluded by this remedy and much later were made preventable by an assignment for the benefit of creditors.¹⁷

5.1.2 Execution against property

During early English history land occupied a central position under the feudal system. Execution against the debtor's property was consequently limited to personal property and the profits or rents of real property.¹⁸ The writs of *feri facias*, *levari facias* and *elegit* were specific remedies under the common law for execution against a debtor's property.¹⁹ For merchant creditors, the Statutes of Merchants and the Statute of Staples provided procedures that could be used.²⁰

These individual remedies remained in force for a long time. The sale of the debtor's land became possible only in the nineteenth century.²¹

¹⁵These measures were introduced because the leniency of English law had resulted in abuse, particularly by wrongdoers without property. Thus, because of abuse by debtors, the law shifted towards the protection of creditors. See Bauer *Thesis* at 37-39. In this respect Jacob JH *The reform of civil procedural law and other essays in civil procedure* (1982) (hereafter Jacob) at 296 says that the introduction of imprisonment for debt reflected the longstanding dissatisfaction towards debtors who failed to satisfy their debts. He says that it was "a reflection that had persisted over many centuries that debtors were almost outside the protection of the law, that they were people who battered on society and were basically fraudulent and their practice of defaulting in paying their debts undermined confidence and credit in society and that therefore no sympathy or indulgence should be extended or expended on them".

¹⁶1 Mod 124 132 86 Eng Rep 781, 786 (ex 1659) as cited in Countryman V "Bankruptcy and the individual debtor – a modest proposal to return to the seventeenth century" (1983) *Catholic University Law Revue* 809 at 811.

¹⁷Dalhuisen *International insolvency* at 1-41.

¹⁸Bauer *Thesis* at 39.

¹⁹See para 5.1.2 above, and see also in Pollock F and Maitland FW *The history of English law before the time of Edward I* (vol 2) (1959) (hereafter Pollock *History*) at 596 "But our common law will not seize his land and sell it or deliver it to the creditor; seignorial claims and family claims have prevented men from treating land as an available asset for the payment of debts".

²⁰See paras 5.1.3.2 and 5.1.3.3 below.

²¹Dalhuisen *International insolvency* at 1-40.

5.1.2.1 The writs of *fiery facias*, *levary facias* and *elegit*

English courts developed methods of final process to enforce their judgments by the creation of specialised writs of execution, namely *fiery facias* and *levary facias*. The former writ granted a creditor the right to cause the sheriff to levy and seize his debtor's chattels, while the latter writ granted satisfaction of a debt from the profits of the debtor's land.²² Neither of these writs permitted the creditor to obtain the debtor's land itself. In 1285 it became possible by statute²³ for a creditor to take possession of half of his debtor's lands, as well as his chattels, under the writ of *elegit*. However, this right of possession was in the nature of a chattel interest and possession had to be relinquished upon payment of the debt by the debtor.²⁴

5.1.2.2 The Statutes of Merchants

As described above, these statutes of 1283 and 1285²⁵ provided for execution against the debtor's property, and imprisonment for debt when debts were owing to merchant creditors. The statute of Acton Burnell²⁶ provided for execution against the debtor's personal property, but not against real property. In 1285 the succeeding statute²⁷ improved the position of creditors by providing for a form of execution against the debtor's real property, similar to the writ of *elegit*.²⁸ In 1311 the operation of the Statutes of Merchants was limited by another statute²⁹ to debts between merchants which arose in consequence of their dealings as merchants.³⁰

5.1.2.3 The Statute of Staples

The Staples Court was a specialised court created to promote security of transactions between merchants in certain basic commercial commodities. The Statute of Staples of 1353 provided creditors with remedies against property of debtors regarding debts

²²Pollock *History* at 569.

²³The Statute of Westminster, 13 Edward I, c18 (1285).

²⁴Bauer *Thesis* at 40.

²⁵See 5.1.2 above.

²⁶Statute of Merchants 11 Edward I (1283) see para 5.1.2. above.

²⁷13 Edward I (1285) see 5.1.2 above.

²⁸Bauer *Thesis* at 42.

²⁹5 Edward II, c 33 (1311).

³⁰Bauer *Thesis* at 42.

within the jurisdiction of the Staple Court.³¹ To improve foreign trade and the collection of customs, certain “staple towns” were identified. Dealings in certain commodities could take place only in those towns.³² If unpaid debts arose within their jurisdiction, Staple Courts could imprison the debtor, and seize and sell his goods if found in the relevant town. If the creditors’ claims were not satisfied by such goods, and the debtor could not be traced to be imprisoned, the creditors could seize his land and other assets in a procedure similar to the Statute of Merchants of 1285.³³

5.1.3 *Collective rights*

At this point creditors’ remedies were still of an individualistic nature, and this system was proving to be unfair and expensive. But it was only in the sixteenth century that creditors’ collective rights attained recognition and this was by way of the early bankruptcy statutes, which were also limited to traders.³⁴ In respect of other debtors, bankruptcy became an alternative to creditors only in the nineteenth century. The Statute of 34 & 35 Henry VIII³⁵ appears to be the earliest English bankruptcy legislation,³⁶ encompassing the basic principle of collective property execution.³⁷ It allowed creditors, under certain circumstances, to initiate the collection and sale of the bankrupt’s estate, comprising all his personal and real property.³⁸ The proceeds were distributed *pro rata* to the respective creditors in accordance with their respective claims.³⁹

³¹Bauer *Thesis* at 43.

³²Bauer *Thesis* at 44.

³³Bauer *Thesis* at 44.

³⁴Bauer *Thesis* at 62 - 63.

³⁵34 & 35 Henry VIII, c 4 (1542-3) “An Act Against Suche Persones As Do Make Bankrupte”; Blackstone W *The commentaries on the laws of England* (1876) at 422 (hereafter Blackstone); Stephen S *New commentaries on the laws of England* vol II (10th ed) (1886) at 152 (hereafter Stephen); Jenks E (general editor) *Stephen’s commentaries on the laws of England* vol III (18th ed) (1925) at 152 (hereafter Jenks); *Cork Report* at 16; Jones *Transactions* at 11; Dalhuisen *International insolvency* at 1-41 note 54; Rajak H “Creditors and debtors – the background to the insolvency legislation of 1986” (1990-1991) *The King’s College Law Journal* at 17.

³⁶Dalhuisen *International insolvency* at 1-41 note 54.

³⁷Tabb CJ “The historical evolution of the bankruptcy discharge” (1991) *Am Bankr LJ* at 325; Tabb CJ *Bankruptcy anthology* (2002) at 525 and further (hereafter Tabb *Anthology*) for essays on the historical developments.

³⁸This act provided for an involuntary measure affecting only dishonest and absconding debtors, who, upon petition of their creditors, could have their assets seized by the Lord Chancellor, who would distribute the proceeds among them.

³⁹Bauer *Thesis* at 65. See generally Blackstone at 422 and further.

Under early English bankruptcy legislation insolvency of the debtor was not a requirement for creditors to avail themselves of the bankruptcy process. The remedy was available if the debtor's conduct fell within certain proscribed acts.⁴⁰ "Fleeing" and "keeping house" were considered such acts.⁴¹ "Fleeing" to escape one's creditors, was common on the continent,⁴² but this practice arrived late in England. This was because English debtors could avoid their creditors by the practice known as "keeping house". In terms of this practice, a debtor would take refuge in his house with his creditor's goods, enjoying immunity from the law, which was deemed to cease at the debtor's doorstep. Bauer thinks this is perhaps related to the English idea that a man's home is his castle.⁴³ But this may also be one of the very early foundations of the idea of exempt property in bankruptcy, and more specifically the idea that the family home should be protected.

This statute of Henry VIII also provided creditors, collectively, with specific remedies against the person and the property of the debtor.⁴⁴ The debtor could be imprisoned, and his property could be collected and sold, with the proceeds being divided proportionately among the creditors. In addition, in respect of assets that could be taken, the statute allowed the judicial authorities to take the following:⁴⁵

theyre land[s] tenement[s] fees annuities and offices, whiche they have in fee simple fee taylor terme of lief terme of yeres or in the right of theyre wives, asmuche as in the interest right and title of the same Offendours shall extende or be, and maie thenne lawfullye be departed with by the saide Offendour, and allso with theyre money good[s] catall wares merchaundises and debtes wheresoever they maie be founde or knowne; And to cause theyre saide land[s] tenement[s] fees annuities offices good[s] catallswares merchaundises and debt[s] to be searched viewed rented and appraised, and to make sale of the saide land[s] tenement[s] fees annuities and offices asmuche as the same Offendour maie [then] lawfullye give graunte or departe with, or otherwyse to ordre the same for true satissfaccon and paiement of the saide creditoure's.

⁴⁰Bauer *Thesis* at 68.

⁴¹34 & 35 Henry VIII, c 4 para 1 (1542-3) and see Bauer *Thesis* at 66.

⁴²Jones *Foundations* at 13-14.

⁴³ Bauer *Thesis* at 68.

⁴⁴Bauer *Thesis* at 70; Rajak at 17. See also Tabb CJ "The top twenty issues in the history of consumer bankruptcy" (2005) *Social Science Research Network Electronic Paper Collection*: [http://papers.ssrn.com/pape.tar?abstract id under the paragraph heading "What future income is shielded?"](http://papers.ssrn.com/pape.tar?abstract id under the paragraph heading 'What future income is shielded?)

⁴⁵34 & 35 Henry VIII, c 4 para 1 (1542-3) as cited in Bauer *Thesis* at 70; Rajak at 17; McCoid, II JC "Discharge: "The most important development in bankruptcy history" (1996) *Am Bankr LJ*; Tabb CJ *Anthology* at 525 and further. See generally Tabb CJ "The top twenty issues in the history of consumer bankruptcy" (2005) <http://papers.ssrn.com/pape.tar?abstract id>.

Thus, for the first time in English legal history the principle of collective rights of creditors to satisfaction from their debtors' property, a principle that was recognised in Roman law more than a thousand years before was legislated into English law.⁴⁶ The statute provided for the collection of all property from the debtor, both personal and real. Real property of any nature could be collected and sold if, at the moment of collection it could be lawfully departed with by the debtor.⁴⁷

5.1.3.1 Property available to creditors

All money, goods, chattels, wares, merchandise and debts, wherever found or known, could be collected and sold for the benefit of the creditors. This included all personal property, tangible and intangible. It also included rights of action. The debtor's estate also included assets in foreign jurisdictions.⁴⁸ The statute of Henry VIII apparently laid down the foundation in English law for the principle that all the debtor's property be included in his bankrupt estate. From that point it appears that the finer details regarding this principle were defined by the relevant judicial authorities concerned.⁴⁹ So, for example, the question arose in *Cruttwell v Lye*⁵⁰ whether goodwill of a bankrupt's business should be included in his estate, thereby allowing it to be sold by his creditors, or whether it remains with the debtor to use in a subsequent business. Here the purchaser of the bankrupt's business tried to prevent the bankrupt from resuming his trade. The court discussed the general principle that anything that could be disposed of becomes part of the bankrupt's estate and passes to the assignee. The court refused the injunction because it would deprive the bankrupt of his "future means of existence". But in the earlier case of *Hesse v Stevenson*⁵¹ the court found that intangibles such as intellectual property rights (a patent right) were capable of forming part of the bankrupt's estate, thereby passing to his assignees upon bankruptcy.⁵² In *Weatherall v Geering*⁵³ the general rule was recognised that all

⁴⁶Bauer *Thesis* at 71.

⁴⁷Bauer *Thesis* at 71.

⁴⁸Bauer *Thesis* at 73; In *Phillips v Hunter* 2 H B 1 401; 126 Eng Rep 618 (1795) (as cited in Bauer *Thesis* at 73) the court found that the estate included debts owing to the bankrupt in foreign jurisdictions.

⁴⁹Bauer *Thesis* at 73-75.

⁵⁰17 Ves Jun 334; 34 Eng Rep 129 (1810) as cited in Bauer *Thesis* at 75.

⁵¹3 Bos & Pul 564; 126 Eng Rep 305 (1803) as cited in Bauer *Thesis* at 74.

⁵²Bauer *Thesis* at 73-4.

⁵³12 Ves Jun 504; 33 Eng Rep 191 (1806) (as cited in Bauer *Thesis* at 77).

contractual rights of the bankrupt become part of his estate, but that the assignees of the bankrupt could not compel specific performance of a pre-bankruptcy agreement if that agreement included a provision against assignment.

Furthermore, interpretation of the statute of Henry VIII soon clarified that the bankrupt's estate consisted only of such personal property to which the bankrupt had both legal as well as equitable ownership. Thus a general rule developed that property of third parties in possession of the bankrupt did not become part of the bankrupt's estate.⁵⁴ In *Toovey v Milne*⁵⁵ Chief Justice Abbot excluded trust money from the bankrupt estate when holding that money advanced to the bankrupt for a special purpose was "clothed with a specific trust".

Property in the hands of third parties, but belonging to the bankrupt, was also included in the bankrupt estate. In this regard the statute provided that parties could be called and examined if it was suspected that the bankrupt's property was being held by third parties. If it was then found that they were wrongfully holding such property to the detriment of the creditors, they were held liable for twice the value of such property, unless they disclosed fully and honestly the extent of the property in their possession.⁵⁶

This first bankruptcy statute in English law was therefore the foundation for further development of the modern law of collective proprietary execution.⁵⁷ Although it was incomplete and left many questions unanswered, it initiated the principles that would begin to define which assets formed part of the bankrupt estate and which would be excluded, either for the benefit of the bankrupt or for the benefit of third parties. After the statute of Henry VIII, several other statutes further developed the English bankruptcy procedure, but they often related mostly to issues such as the actual collection of assets belonging to the bankrupt estate, and the parties

⁵⁴Bauer *Thesis* at 78. *Brassey v Dawson* 2 Strange 978; 93 Eng Rep 980 (1173) held that land tax money in possession of a bankrupt tax collector did not become part of the bankrupt's estate as it was a debt owing to the King.

⁵⁵*Toovey v Milne* 2 B & Ald 682; 106 Eng Rep 514 at (1819) 515 (as cited in Bauer *Thesis* at 83).

⁵⁶Bauer *Thesis* at 86.

⁵⁷Bauer *Thesis* at 90. See generally Blackstone at 422 and further.

concerned, while only some attended to the actual status of the assets that comprised that estate.⁵⁸

The statute of 1 James I c 15 (1603-1604) made provision for the protection of third parties who made payments to bankrupts if the payments were made in good faith and without knowledge of the bankruptcy.⁵⁹ The statute of 21 James I, c 19 (1623-1624) introduced the concept of “reputed ownership”, meaning that property in the possession of the bankrupt upon bankruptcy which appeared to belong to him, but which was not his, became subject to his creditors’ claims. It was directed at situations where a bankrupt conveyed goods to another prior to bankruptcy, but retained their possession and power of disposition.⁶⁰ By the end of the seventeenth century the legal path had taken its final direction towards the protection of the rights of creditors to obtain satisfaction from the bankrupt’s property. All the debtor’s property at the time of bankruptcy, including property in his possession that ostensibly belonged to him, became available for the benefit of creditors. All after-acquired property of a bankrupt also became subject to creditors’ claims.⁶¹

5.1.3.2 Debtor relief in respect of assets

Improving the station of the debtor in the universe of bankruptcy in England was slow. History has shown that “swiftness” was considered of little importance in considering the interests of the debtor and his dependants. Only in 1705 the

⁵⁸See, eg, 13 Elizabeth, c 7 (1571) which is considered the second English bankruptcy statute, but was restricted to merchants. The distinction between traders and non-traders was formerly dependent upon the notion of such traders being engaged in the manufacturing, or the buying and selling of goods. So “non-traders” were any persons in employment, or working in a recognised profession or landowners or farmers. Therefore, as long as the bankruptcy laws did not apply to such persons, if they became insolvent, they were exposed to the rigours of the common law procedures of debt enforcement through the seizure and sale of their property. Apart from the severity of these procedures, a principle feature thereof was their non-collective approach; see Fletcher *Insolvency law* at 8. This statute of Elizabeth introduced acts of bankruptcy and regulated the administration, collection and distribution of the estate, and included a provision against fraudulent conveyances; see Dalhuisen *International insolvency* at 1-42 to 1-43. The statute of 1 James I c 15 (1603), was the third bankruptcy statute. The statute of 21 James I, c 19 (1623-24) provided for all bankrupt laws to be construed liberally in favour of creditors. The statute of 8 & 9 William III, c 18 (1697) was enacted to allow debtors to make arrangements with their creditors; see Bauer *Thesis* at 91 and further. See generally Duffy IPH “English bankrupts, 1571-1861” (1980) *The American Journal of Legal History* at 283 (hereafter Duffy).

⁵⁹Bauer *Thesis* at 132; See generally Duffy at 283.

⁶⁰Bauer *Thesis* at 132; Duffy at 287.

⁶¹Bauer *Thesis* at 152.

bankruptcy statute of Queen Anne initiated a meaningful improvement in the position of debtors.⁶² Bauer considers it “[p]erhaps the most far reaching change ever made by a bankruptcy statute”.⁶³ This statute made provision in favour of bankrupts for exempt property in exchange for surrendering the balance and a complete discharge of liability for his debts. However, only minor changes were made affecting the estate property of the bankrupt.⁶⁴ His estate continued to include all property at the time of bankruptcy. The discharge provisions released the bankrupt from his pre-bankruptcy debts, but the effect of this on after-acquired property was uncertain as the statute was silent on this matter.⁶⁵

The next important development in English law was the Statute of 5 George II, c 30 (1732) which attended to many aspects of bankruptcy law. It represented a departure from the stringent regulation of the bankrupt’s property in favour of his creditors, leaving him with virtually nothing.⁶⁶ Under this statute, as under that of Anne, the bankrupt had to surrender himself and disclose fully what property he had and the circumstances regarding prior transfers. However, this statute also made provision for certain exemptions. *Bona fide* transfers made in the way of “trade or dealings” and ordinary expenses incurred in respect of family, did not have to be disclosed.⁶⁷ This statute also made provision for exemptions of certain property from the bankrupt’s estate. The bankrupt’s necessary wearing apparel, and that of his wife and children did not have to be delivered to the commissioners of the estate. In all cases where debtors became bankrupt after the effective date of the statute, the bankrupt was allowed to keep exempt property consisting of his tools, household goods, furniture and wearing apparel.⁶⁸

This statute also made provision for the protection of after-acquired property if certain conditions were met, namely, that if creditors recovered at least fifteen shillings in the pound, the bankrupt’s after-acquired assets were not subject to

⁶²4 & 5 Anne c 4 (1705). See Duffy at 287.

⁶³Bauer *Thesis* at 153. Duffy at 287.

⁶⁴Bauer *Thesis* at 154.

⁶⁵Bauer *Thesis* at 159.

⁶⁶Bauer *Thesis* at 169; Duffy at 287.

⁶⁷5 George II, c 30, par 1 (1732). Duffy at 287.

⁶⁸Bauer *Thesis* at 170.

creditors' claims.⁶⁹ Under no circumstances, however, could the bankrupt be deprived of the aforementioned tools of his trade, necessary household goods and furniture, and the necessary clothing of his wife and children.⁷⁰

From this point on a considerable number of further bankruptcy statutes were introduced up to the time of the consolidating and amending Acts of 1824 and 1825,⁷¹ but it is not necessary to consider these further statutes for the purpose of this thesis. By the eighteenth century the law in England had not yet developed a general concept of bankruptcy as a manner of procuring relief and a possible discharge for the debtor. Likewise, there was as yet no thought of achieving a balance between social and individual interests in bankruptcy.⁷² Only during the nineteenth century did various bankruptcy statutes prepare the foundations for bankruptcy as it is known today.⁷³

The Bankrupting Act 1883⁷⁴ resulted as a direct response to public disapproval of the administration of bankrupts' estates. It was designed to stamp out abuse in respect of the realisation and distribution of assets, which allegedly had favoured "that class of the community which lived by preying upon bankrupt estates at the expense of debtors and creditors alike".⁷⁵ This new Act provided for an impartial and independent examination into the cause of each bankruptcy and the conduct of each bankrupt.⁷⁶ The basic foundations that had been laid down in respect of the assets in bankrupt estates in earlier legislation apparently received little attention in new or amending legislation.⁷⁷

⁶⁹5 George II, c 30 par 9 (1732).

⁷⁰Examples of cases dealing with the status of such after-acquired property are *Ex Parte Proudfoot* 1 Atk 252; 26 Eng Rep 162 (1743); *Kitchen v Bartsch* 7 East 52; 103 Eng Rep 21 (1805) and *Carleton v Leighton* 3 Mer 664; 36 Eng Rep 255 (1805); see Bauer *Thesis* at 171.

⁷¹"An Act to Consolidate and Amend The Bankrupt Laws" 5 George IV, c 98 (1824) and "An Act to Amend The Laws Relating to Bankrupts" 6 George IV, c 16 (1825). These laws form the foundation of modern English bankruptcy law. They repealed all prior bankruptcy laws and replaced them with a single statute; see Dalhuisen *International insolvency* at 1-43.

⁷²Fletcher *Insolvency law* at 9. See also Roestoff M 'n *Kritiese evaluasie van skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg* LLD Thesis University of Pretoria (2002) at 87 in respect of the development of the idea of a composition between debtors and creditors.

⁷³In 1813 a Court for the Relief of Insolvent Debtors was created to alleviate the plight of the non-trader, followed by the further reforms in the Bankruptcy Acts of 1824 and 1825; see Fletcher *Insolvency law* at 9.

⁷⁴46 and 47 Vict C 52; see Stephen at 155.

⁷⁵Cork *Report* at 19.

⁷⁶Cork *Report* at 19.

⁷⁷Cork *Report* at 19.

In the 1883 Act the effect of a bankruptcy order was to vest the property of the debtor in the official receiver of the court pending the appointment of a trustee, at which time the property passed to, and vested in, the trustee.⁷⁸ This property included all the land, tenements and hereditaments of the debtor wherever situated in the United Kingdom or in Her Majesty's dominions.⁷⁹ Also included in the estate was all the debtor's personal estate and effects "present and in expectancy".⁸⁰ Thus it included all the debtor's property at the date of bankruptcy, and that acquired during the bankruptcy, and all the powers the debtor could exercise in respect of that property.⁸¹ Property of third parties reputedly owned by the bankrupt also passed to the trustee in certain cases, to protect creditors from fraud and fallacious appearances.⁸² Personal estate coming to the bankrupt through his wife also vested in the trustee, and if through her he was entitled to a life or other interest in real estates, the trustee could receive the rents derived from them.⁸³ But the trustee was not entitled to property of the wife that was settled on her for her separate use upon her marriage, or by means of the Married Women's Property Acts of 1870, 1874 and 1882, or otherwise.⁸⁴

The 1883 Act also provided for exemptions, but the concept of excluded property as distinct from exempt property does not seem to be made at this point in history.⁸⁵ However, some of the examples that will now be mentioned would probably have amounted to excluded property that never formed part of the bankrupt estate. Thus, income earned through personal labour after insolvency was excluded from the insolvent estate, as was an award made to the bankrupt resulting from a right of action for a personal wrong against the bankrupt.⁸⁶ Trust property held by the bankrupt as trustee was also excluded,⁸⁷ as was a debtor's military pay or other crown payments, the tools of his trade and the necessary

⁷⁸Ss 20 and 21 and see Stephen at 174.

⁷⁹Stephen at 175.

⁸⁰Stephen at 175.

⁸¹Stephen at 175.

⁸²S 44; Stephen at 175

⁸³Stephen at 175 note (o).

⁸⁴Stephen at 175.

⁸⁵See ch 9 below for a discussion on excluded and exempt property and the distinction between the two.

⁸⁶Stephen at 176.

⁸⁷S 44.

clothing belonging to him and his dependants, capped at a certain maximum amount.⁸⁸ The trustee could also exclude certain property that would be onerous to the estate by disclaiming his right to that property, thereby discharging him from any personal liability regarding such property.⁸⁹

The next Act to consider is the Act of 1914; a result of the Muir MacKenzie Committee in 1908. It was largely a tidying-up and consolidating exercise that did not materially alter the 1883 system.⁹⁰ The vesting provisions under this Act were the same as those under the 1883 Act, vesting all the property at the commencement of bankruptcy and that acquired during bankruptcy in the trustee.⁹¹ The doctrine of reputed ownership also applied to the 1914 Act.⁹²

The exempt property provided for in this Act included income earned for personal labour or services,⁹³ and trust property held by the bankrupt in his capacity as trustee. However, the trustee was entitled to claim excess income that was not required for the survival of the debtor and his family.⁹⁴ Tools of the trade and wearing apparel of the debtor and his family were also exempt to a specified maximum amount.⁹⁵ A right of action in tort in the nature of a personal injury was also excluded, as was military and crown pay, but a court could under certain circumstances order portions of such pay to vest in the trustee.⁹⁶

But until the trustee intervened, he did not have complete title to other personal property of the debtor, including leaseholds and real property acquired by the bankrupt during bankruptcy. Thus a *bona fide* purchaser for value of such after-acquired property was protected as against the trustee if the transaction took place

⁸⁸Stephen at 176-177.

⁸⁹S 55; Stephen at 177.

⁹⁰Jenks at 666.

⁹¹Jenks at 682.

⁹²S 38; Jenks at 682.

⁹³If in the nature of a salary or a pension. Income of a miner and prospective earnings of a professional person dependent on his own knowledge or skill was also excluded from vesting in the trustee – see Jenks at 684.

⁹⁴S 38; Jenks at 683.

⁹⁵S 38.

⁹⁶Jenks at 683-684.

before the trustee intervened to claim that property.⁹⁷ Provision was also made in this Act for the exclusion of onerous property from the bankrupt estate by means of a disclaimer by the trustee.⁹⁸

It is therefore clear that by the time the 1914 Act saw the light, considerably well-established policies and legislation in respect of assets included in bankrupt estates, as well as excluded or exempt assets existed. While there does not appear to have been a formal division between excluded property and exempt property, the above discussion shows that policies and legislation that made provision for on the one hand, excluded property that never formed part of the bankrupt estate and, on the other, exempt property that formed part of the estate, but could be exempted to a specified degree under specified circumstances existed. These policies regarding the inclusion, exclusion and exemption of estate property appeared to find their origins in the protection of the rights of third parties, the protection of creditor interests and the dignity of the debtor. At this juncture it appears that the idea of socio-economic and welfare interests of the debtor, or the interest of the state was not yet a well-formulated policy in the United Kingdom. It would appear that the more progressive policies that underpin the present insolvency legislation in that country were formulated over a lengthy period as from the 1914 Act and finally more earnestly identified in more detail by the *Cork Report*.⁹⁹

During the years that followed the 1914 Act there were various amendments to English bankruptcy legislation, but for the purpose of this thesis, the next relevant legislation to consider regarding the position of assets in bankrupt estates in England is the existing Insolvency Act of 1986. It is the result of the *Cork Report*,¹⁰⁰ which vigorously argued for a fundamental reform of insolvency law.

⁹⁷S 47 of the Act of 1914, which gave statutory effect to the rule in *Cohen v Mitchell* (1890) 25 QBD 262; see Jenks at 684.

⁹⁸See further s 54 and Jenks at 685.

⁹⁹See para 5.2 below.

¹⁰⁰Reference in para 5.1.2 above

5.2 Insolvency reform in the United Kingdom as envisaged by the Cork Report

5.2.1 General

The Cork Advisory Committee, chaired by Mr Kenneth Cork (later Sir), was established to consider the terms of the Draft European Economic Council Bankruptcy Convention and to advise the Department of Trade on the effect it would have on the United Kingdom. The result was *The Report of the Cork Advisory Committee* which became an important contribution to the movement for reform of insolvency legislation in the United Kingdom, as it suggested that a comprehensive review of insolvency law in the United Kingdom be undertaken.¹⁰¹ Consequently, a Review Committee on Insolvency Law and Practice was established in 1977, with Mr Cork again in the chair.

The final report¹⁰² of this committee argued vigorously for a fundamental reform of insolvency law in England and Wales. Its main focus was on the creation of a unified Insolvency Act for companies and individuals, and the creation of unified insolvency courts to administer the law.¹⁰³ This was eventually achieved when the Insolvency Act 1986 was enacted. However, the *Cork Report* is a voluminous document, comprehensively dealing with the suggested reform of all aspects of insolvency law in the United Kingdom, including the position relating to assets in insolvent estates. This chapter will consider some of the *Report's* proposals in respect of reforming the position of certain assets in bankrupt estates of individuals.

5.2.2 Assets and exempt property

A question that the *Cork Report* considered was the availability of assets for distribution among creditors.¹⁰⁴ A suggestion received by the Cork Committee was that the exempt property of a bankrupt must be brought in line with modern

¹⁰¹Fletcher *Insolvency law* at 15.

¹⁰²See the reference to the *Cork Report* in para 5.1.2 above.

¹⁰³*Cork Report* at 61.

¹⁰⁴*Cork Report* at 61.

conditions. In particular, there was a call for clarity of the law in respect of the matrimonial home.¹⁰⁵

Another issue in respect of assets in bankruptcy that received attention in the *Cork Report* was the insolvent's surplus income.¹⁰⁶ The consensus here appeared to be that too little emphasis was placed on surplus income as an available asset during the insolvency of the debtor. It was thought that far more emphasis should be placed on the prospect of the debtor's ability to pay his debts out of surplus future income.¹⁰⁷

Trust property in insolvent estates also received specific attention in the *Cork Report*.¹⁰⁸ Trust property held by the bankrupt for others never formed part of the bankrupt estate, simply because such property belonged to the beneficiaries of the trust and not to the bankrupt. Earlier Bankruptcy Acts provided that the commissioners should take "order and direction" of the property to which the bankrupt was possessed or entitled "in his own right".¹⁰⁹ Later Acts made express provision for the exclusion of trust property from the bankrupt estate.¹¹⁰ Thus, the general rule has always been that the trustee in bankruptcy cannot take a better title to property than that possessed by the bankrupt himself. This rule applied to express, implied and constructive trusts.¹¹¹ The Cork Committee was urged both by the public and by the trading community to maintain this principle in respect of trusts, and to pay particular attention to the interests of persons who had made payments in advance to an insolvent trader for goods not yet delivered or services not yet rendered, and to retention money and direct payments to sub-contractors under building contracts. The committee proposed that the law in this respect not be altered and that trust property be excluded from the bankrupt estate.¹¹²

¹⁰⁵*Cork Report* at 64.

¹⁰⁶*Cork Report* at 140.

¹⁰⁷*Cork Report* at 140.

¹⁰⁸At 239.

¹⁰⁹*Cork Report* at 239.

¹¹⁰See, eg, the Bankruptcy Act of 1869, which first made such express provision, and the Bankruptcy Acts of 1883 and 1914.

¹¹¹*Cork Report* at 239.

¹¹²*Cork Report* at 240-246.

The doctrine of reputed ownership was also considered by the Cork Committee. This doctrine implied that property of the bankrupt estate included, under some circumstances, property owned by a third party.¹¹³ The rationale behind the doctrine was to prevent a trader obtaining false credit by the apparent possession of ostensible ownership of property in the shape of trade goods which, in fact, belonged to other people.¹¹⁴ This doctrine in bankruptcy law had been criticised over a long period and its removal from bankruptcy law was recommended.¹¹⁵

Although insolvency proceedings are aimed at distributing the debtor's assets in favour of the creditors, a further aim of insolvency law is to assist the sequestrated debtor to achieve his rehabilitation so as to resume a position as a productive member of society. For this purpose it is necessary to provide for excluded or exempt property that will not vest in the trustee of the insolvent estate. The *Cork Report* therefore also considered the position in English law of exempt property and family assets.¹¹⁶

In this respect section 38 of the Bankruptcy Act of 1914 specifically excluded from the bankrupt estate trust property held by the bankrupt for another person, and the bankrupt's tools of his trade, and the necessary wearing apparel and bedding of himself, his wife and children, inclusively not exceeding the value of 250 pounds. The *Cork Report* thought the provisions stringent and needed restating, particularly in the light of changes in the general standard of living, including the opinion that there was a standard below which no person in the community should be expected to live.¹¹⁷

The *Report* consequently recommended, among other things, that "tools of trade" must relate to the exemption of "tools and equipment", construed widely enough "to include the equipment indispensable for trades, professions and callings of all kinds", including books and in exceptional cases a motor vehicle.¹¹⁸ The exempt assets must not, however, be of excessive quantity or value, and it must be within the trustee's

¹¹³The doctrine was first introduced by the Bankruptcy Act of 1623 during the reign of James I; *Cork Report* at 248.

¹¹⁴*Cork Report* at 248.

¹¹⁵See, eg, *Belcher v Bellamy* (1848) 2 Ex 303 and *Cork Report* at 248-250.

¹¹⁶*Cork Report* at 251.

¹¹⁷*Cork Report* at 251-252.

¹¹⁸*Cork Report* at 252.

discretion whether the items fall within the relevant criteria. But the debtor and any creditor should have a right of appeal to the court against the trustee's decision.¹¹⁹ Another recommendation was that there should be no automatic right for the debtor to retain any tools and equipment, which would eliminate the need for a monetary limit, bearing in mind that the value of such assets differed from trade to trade or among professions. Any figure chosen would be arbitrary and would be excessive in some instances, but inadequate in others.¹²⁰

In respect of clothing, furnishing and other personal items, the *Report* found that there was a change in living standards and in patterns of life. Thus, the need for personal mobility in modern life, for example, may require the exemption from a debtor's estate of some form of transport, depending on the circumstances. Further, for mostly practical reasons it was not considered prudent to require a prescribed list of categories of property, or a fixed value in this respect. It was recommended that the debtor retain the items agreed to by the trustee, with recourse to the court by an aggrieved debtor or creditor.¹²¹

An important issue considered by the *Cork Report* is the position of the family home as an asset, often the most valuable, in the bankrupt's estate. A shortage in domestic accommodation and the high expense of housing was a factor that was considered in formulating a policy in respect of exempting the family home from an insolvent estate.¹²² The crux of the *Report's* suggestion, stated briefly, was that a new Insolvency Act should give the court specific power to postpone a trustee's rights of possession and sale of the family home. Here the court would take into account the welfare of any children of the family and of any ailing or elderly adults in the family. In its recommendations the *Report* defined the "family home" as a dwelling in which there is or are living:

- the debtor and his wife;
- the debtor or his wife with (in either case) a dependent child or children;

¹¹⁹Cork *Report* at 251-252.

¹²⁰Cork *Report* at 252.

¹²¹Cork *Report* at 254-255.

¹²²Cork *Report* at 255.

- the debtor's wife;
- the debtor, and a dependent parent of the debtor or of his wife who has been living there as part of the family on the basis of a long-term arrangement.

The *Report* recommended that on an order for liquidation of assets or bankruptcy, the debtor's interest in the family home will vest in the trustee, but any dispute in respect of such interest must be resolved by the insolvency court.¹²³

The next issue concerning assets in the bankrupt estate that was considered by the *Cork Report* was that of claims between spouses.¹²⁴ Under the 1914 Bankruptcy Act¹²⁵ any assets of a woman married to a husband whose estate had been sequestrated, lent or entrusted to him for his trade or business was treated as assets of his estate. His wife could not claim any dividend as a creditor regarding such assets until the claims of her husband's other creditors had been satisfied.¹²⁶ The converse also applied where it was the husband lending or entrusting assets to his wife for the purpose of her trade or business, and she became bankrupt. The husband's claim as a creditor to a dividend in this instance was postponed to the claims of all other creditors of his wife.¹²⁷ The subtle difference between the two situations was, however, that the money or other estate lent or entrusted by a husband to a wife was not expressed to be treated as assets of her estate in her bankruptcy. This therefore preserved the position that existed prior to 1882, which treated the respective assets of the husband and wife differently. The *Report* conceded that the distinction between sexes was inappropriate. It agreed with the Law Commission that "[m]arriage is a form of partnership and, on normal partnership principles, neither partner should compete with the partners' creditors".¹²⁸ The *Report* therefore stated that either the

¹²³Cork *Report* at 256-257.

¹²⁴Cork *Report* at 259.

¹²⁵Section 36(2).

¹²⁶Under earlier legislation, before what can be called an improvement of the rights of women under the Married Women's Property Act of 1882, all the wife's assets were available to her husband's creditors, unless they were held in trust for her separate use. However, the husband's assets were not available to the wife's creditors unless she had pledged his credit – see the *Cork Report* at 259.

¹²⁷S 36(1) of the 1914 Bankruptcy Act.

¹²⁸Law Commission Report No 25 – Financial Provision in Matrimonial Proceedings, as cited in the *Cork Report* at 260.

provision¹²⁹ that property of the wife lent or entrusted to her husband for business purposes be treated as an asset in his bankrupt estate must be excluded from future legislation or, alternatively, a corresponding provision should be applied when the husband lent or entrusted money to his wife for business purposes.¹³⁰ It suggested that any statutory provisions must apply not only to husband and wife, but also to persons of the opposite sex living together as husband and wife.¹³¹

5.2.3 After-acquired property

Under the 1914 Bankruptcy Act property in the bankrupt estate included the debtor's property at the commencement of the bankruptcy as well as property acquired by, or devolving upon, the debtor between bankruptcy and discharge of the debtor.¹³² However, third parties were protected in that the title of the trustee to such after-acquired property was subject to the power of the bankrupt to enter into a transaction for value with a *bona fide* third party.¹³³ The report did not recommend any changes in this respect.

In respect of the vesting of after-acquired property it was always thought that kind of property did not vest absolutely in the trustee until he intervened to claim it prior to any transfer by the bankrupt.¹³⁴ But *In re Pascoe*¹³⁵ this was considered contrary to the clear language in section 38 of the 1914 Act. The principle¹³⁶ in *Cohen v Mitchell*,¹³⁷ the court found, applied only to transactions. It had nothing to do with the title to property as between the bankrupt and the trustee, “[b]ut merely with the title to property as between the trustee on the one hand and, on the other, the third party with whom the transaction by the bankrupt was carried out”.¹³⁸ After-acquired property, the court held, vested in the trustee subject only, for as long as it remained in the possession of the bankrupt, to his power under section 47 to claim

¹²⁹As in s 36(2) of the 1914 Bankruptcy Act.

¹³⁰The Commission at 260 preferred this second alternative.

¹³¹Cork Report at 261.

¹³²S 38 of the 1914 Bankruptcy Act.

¹³³See *Cohen v Mitchell* (1890) 25 QBD 262 and s 47(1) of the 1914 Bankruptcy Act.

¹³⁴Based on *Cohen v Mitchell* (1890) 25 QBD 262 and subsequent decisions.

¹³⁵[1944] Ch 219.

¹³⁶Which was contained in s 47 of the 1914 Bankruptcy Act.

¹³⁷(1890) 25 QBD 262.

¹³⁸Cork Report at 263.

title to such property.¹³⁹ The result of the *Pascoe* case was that the trustee no longer had an option to claim or leave after-acquired property, and that onerous property, for example, an unprofitable lease, would vest in the trustee without intervention on his part and even against his wishes. This position was thought to be undesirable and the *Report* agreed that the position regarding after-acquired property be restored to what it was thought to be prior to *In re Pascoe*.¹⁴⁰ This would mean that if the trustee intervened to claim any after-acquired property, it would then vest in him, subject to any burdens affecting it, but until he did so, he would not be bound by any liability regarding any such burdens.¹⁴¹

In respect of personal earnings as an after-acquired asset, it has always been accepted that a portion of earnings necessary for the maintenance of the bankrupt and his family does not pass to his trustee. While the *Report* accepted this, it suggested that more emphasis should be placed on the payment of debts out of the debtor's surplus net income. The debtor's ability to make such payments, the *Report* states, should be examined and considered at an early stage of the administration of his affairs.¹⁴² The majority of the Cork Committee thought that creditors would resent a position where an insolvent may have acquired substantial assets before his discharge to which the creditors could make no claim. It was therefore recommended that there should be no general provision allowing the trustee to claim after-acquired property of a debtor subject to an order for liquidation of assets, as opposed to a debtor who had been declared bankrupt. In respect of a debtor subject to an order for liquidation of assets, it was proposed that only property in the nature of "windfalls" should be available for the benefit of the creditors. "Windfalls" were described as gifts, inheritance, gambling or prize money won in any form of lottery or competition before the date of the debtor's discharge.¹⁴³

¹³⁹Cork *Report* at 263.

¹⁴⁰Cork *Report* at 263.

¹⁴¹Cork *Report* at 263.

¹⁴²Cork *Report* at 264. Detail regarding the ability of the court to make orders concerning such payments from the debtor's personal income were provided for in s 51 of the 1914 Bankruptcy Act.

¹⁴³Cork *Report* at 267.

Many of the proposals of the *Cork Report* in respect of assets in the bankruptcy estate were included in the Insolvency Act of 1986.¹⁴⁴

5.3 The Insolvency Act of 1986¹⁴⁵

5.3.1 *The bankruptcy order in the United Kingdom and its consequences*

5.3.1.1 Some general and procedural aspects

In English law a bankruptcy order made by a court against a debtor results in the commencement of a unitary procedure, applying the same material provisions regarding a bankruptcy petition, whether it be presented by the debtor himself or by a creditor.¹⁴⁶ The bankruptcy order is drawn up by the Registrar of the court in the requisite form.¹⁴⁷ The date of the presentation of the petition, and the date and time of the making of the order must be stated in the order. It must also contain a notice calling the bankrupt to see the official receiver at a specific place after the notice has been served on the bankrupt,¹⁴⁸ and actions or proceedings against the bankrupt may be stayed in the order. The Registrar sends at least two sealed copies of the order to the official receiver and he must send one of them to the bankrupt.¹⁴⁹ The Chief Land Registrar is notified of the order by the official receiver, and then registers the order in the register of writs and orders affecting land. This serves as notification to the public as from the date of registration, after which all persons are deemed to have actual notice of the order regarding any land affected by it.¹⁵⁰ The order must also be published in the *London Gazette* and newspapers that the official receiver may decide upon.¹⁵¹

¹⁴⁴See Sealy LS and Millman D *Annotated guide to the insolvency legislation* (10th ed) (2007) at 1.

¹⁴⁵Hereafter the Act or the Insolvency Act.

¹⁴⁶Insolvency Rules 1986, rules 6.33 to 6.35 and rules 6.45 to 6.47 respectively for the creditor's petition and the debtor's petition which are worded in similar terms. See generally Gregory R and Sealy LS (gen ed) *Bankruptcy of individuals and partnerships* (1988) at 70 and further (hereafter *Gregory Bankruptcy*); Berry *Personal insolvency* at 156 and further; Sealy LS and Millman D *Annotated guide to the insolvency legislation* (4th ed) (1994) at 852 and further (hereafter *Sealy Legislation* (4th ed)); Fletcher *Insolvency law* at 149 and further; Keay AR and Walton P *Insolvency law: Corporate and personal* (2003) at 317 (hereafter *Keay Insolvency*); Frieze SA *Personal insolvency law – in practice* (2004) at 53 (hereafter *Frieze*); Doyle L and Keay A *Insolvency legislation: Annotations and commentary* (2005) at 1040 and further (hereafter *Doyle Legislation*); and generally Sealy LS and Millman D *Annotated guide to the insolvency legislation* (10th ed) (2007) (hereafter *Sealy Legislation* (10th ed)).

¹⁴⁷Rules 6.33(1) and 6.45(1) and see ss 264, 271 and 272 of the Act.

¹⁴⁸Rules 6.33(2) and 6.45(2); Fletcher *Insolvency law* at 149; generally see *Sealy Legislation* (10th ed).

¹⁴⁹Rules 6.34(1) and 6.46(1); *Doyle Legislation* at 1040-046; *Frieze* at 26 and further and 50; *Keay Insolvency* at 317.

¹⁵⁰Rules 6.34(2)(a) and 6.46(2)(a).

¹⁵¹Rules 6.34(2)(b) and (c) and 6.46(2)(b) and (c) and see rules 12.20 and 13.13(4).

5.3.1.2 Effects of the order

A bankruptcy order is of immediate effect on the day it is made. As a judicial act it is deemed to be effective from the moment at which that day commences.¹⁵² It takes precedence over all other non-judicial acts such as the debtor's private transactions completed on the same day.¹⁵³ The debtor loses the power to deal with his property when the bankruptcy order is made against him. This is because the official receiver takes on the position of receiver and manager of the bankrupt estate until it vests in a trustee.¹⁵⁴ However, automatic transfer of the title to the debtor's estate occurs only when the trustee has been appointed. In respect of the bankrupt's property, this is the most important effect of the bankruptcy order.¹⁵⁵

During the period before the appointment of the trustee, while the bankrupt remains the title holder to his property, he is in the position of an occupier of his business and private premises. He therefore remains personally liable for the costs of services to the premises.¹⁵⁶ So too, he remains the person with *locus standi* to launch legal proceedings to recover what is still his, but he may be required to provide security for costs prior to any action being instituted.¹⁵⁷ If he succeeds in such action, whatever is recovered must be given to the official receiver for the benefit of the creditors.¹⁵⁸ However, in most cases the bankruptcy order suspends any litigation against the debtor so as to maintain the principle of equality of creditors in bankruptcy, which is one of the principle consequences of a bankruptcy order.¹⁵⁹

¹⁵²Keay *Insolvency* at 317.

¹⁵³See Fletcher *Insolvency law* at 151.

¹⁵⁴Insolvency Act s 287; Sealy *Legislation* (10th ed) at 334.

¹⁵⁵Bar in special cases regulated by s 297 where vesting is immediate upon the making of the bankruptcy order; Fletcher *Insolvency law* at 151; Keay *Insolvency* at 317; Sealy *Legislation* (10th ed) at 341.

¹⁵⁶See, eg, *Re Smith* [1893] 1 QB 323 as cited in Fletcher *Insolvency law* at 152 note 24. The official receiver however has a duty to protect the estate prior to the trustees appointment. When the official receiver is appointed the bankrupt is prevented from dealing with any asset in the estate. See Keay *Insolvency* at 318.

¹⁵⁷*Semler v Murphy* [1967] 2 All ER 185.

¹⁵⁸*Rhodes v Dawson* (1886)16 QBD 548 at 554.

¹⁵⁹Insolvency Act s 285(3)(a) and see Crystal M, Phillips M and Davis G (editors) *Butterworths insolvency law handbook* (2006) at 165 (hereafter Crystal), and Fletcher *Insolvency law* at 152 and note 27 and the cases cited therein; Sealy *Legislation* (10th ed) at 331 and further.

The United Kingdom Insolvency Act of 1986 and the Rules make specific provision for the consequences of insolvency for estranged spouses.¹⁶⁰ Initially, if one of them was sequestrated, an obligation resulting from family or domestic proceedings was not provable against the bankrupt estate of the person in respect of whom the order was made.¹⁶¹ Furthermore, if a debtor was discharged from bankruptcy, he was not released from any bankruptcy debt that emanated from an order made in family or domestic proceedings, unless the bankruptcy court had ruled differently.¹⁶² So, if the court awarded a wife periodical payments, the husband's bankruptcy did not interrupt his liability for these payments. But if he fell behind with these payments, the wife could not prove a claim in respect of the arrears. All she could do was to obtain an order to have him committed for contempt.¹⁶³ Fletcher states that if a wife had been granted a maintenance order that her husband pay her a capital sum that had not yet been paid before the bankruptcy order, she would probably have to wait until he has been discharged from bankruptcy before the order could be enforced, because the husband's personal ownership and control over his assets is removed by the onset of bankruptcy.¹⁶⁴ But rule 12.3(2) was amended¹⁶⁵ to make these obligations (lump sums and costs awarded) resulting from family or domestic proceedings provable in respect of bankruptcy orders made on or after 1 April 2005. The debtor will thus be released from them on discharge. But obligations such as maintenance orders are not provable¹⁶⁶ and the debtor will not be released from them on discharge.

¹⁶⁰“Spouse” includes a civil partner or a former civil partner – Civil Partnership Act 2004; see the definition of “associate” in s 435 of the Insolvency Act 1986 which was substituted by the Civil Partnership Act 2004 section 261(1) – see Doyle *Legislation* at 533; “Associate” carries a very wide meaning and includes an individual's husband or wife or civil partner (s 435 (2)(a)) Crystal at 256.
¹⁶¹Rule 12.3(2)(a). S 281(8) of the Insolvency Act describes “family or domestic proceedings”. Cf *Russel v Russel* [1998] BPIR 259. *Caldwell v Jackson* [2001] BPIR 966 at 974 held that the policy behind rule 12.3 requires the limitation in rule 12.3(2) stating what is not provable, to be read narrowly. See also *Levy v Legal Services Commission* [2000] BPIR 1065 and *Wehmeyer v Wehmeyer* [2001] BPIR 548.

¹⁶²S 281(5); Fletcher *Insolvency law* at 154. Prior to its amendment, rule 12.3(2)(a) stated as follows:

(2) The following are not provable –

(a) in bankruptcy ... any obligation arising under an order made in family ... proceedings [or under a maintenance assessment made under the Child Support Act 1991].

¹⁶³Fletcher *Insolvency law* at 154.

¹⁶⁴Fletcher *Insolvency law* at 154.

¹⁶⁵Insolvency (Amendment) Rules 2005.

¹⁶⁶Doyle *Legislation* at 1184.

5.3.1.3 Effect of the bankruptcy order on assets of the debtor

5.3.1.3.1 Introduction

This section considers the effect of a bankruptcy order on the bankrupt's assets that are situated within the jurisdiction of the English courts, thus relating to a bankruptcy order made by a court in England and Wales. It will therefore not include the position of assets outside this jurisdiction and which therefore may be subject to the provisions of the European Community Regulation on Insolvency Proceedings.¹⁶⁷ The principal consequence of a bankruptcy order in English law is probably that it divests the bankrupt of his property and automatically vests it in the debtor's trustee in bankruptcy when that trustee is appointed. Thereafter, as Fletcher¹⁶⁸ puts it:

In view of the complexities which can exist in relation to the holding and use of property, intricate and particularised provisions are necessary to ensure that this simple-sounding objective may be realised in practice.

English law also makes provision for the exclusion of certain assets of the debtor from his bankrupt estate, while under certain circumstances the trustee's right or title to certain assets may be either limited or extended. This section will also consider which assets of a debtor actually form part of his bankrupt estate and consequently vest in the trustee, and which assets are excluded from vesting in the trustee, or in respect of which the trustee's rights are curtailed or extended.

5.3.1.3.2 Property vesting in the trustee

Section 306(1) of the Act contains the basic principles in respect of the proprietary effects of a bankruptcy adjudication. This provision states that:

The bankrupts estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.

Furthermore, the Act makes specific provision for the automatic vesting of property, by operation of law, as provided for by section 306(2), as follows:

¹⁶⁷Council Regulation (EC) No 1346/2000 of 29 May 2000 that came into force on 29 May 2002. See generally Crystal at 407 and further and Omar PJ *European Insolvency law* (2004).

¹⁶⁸*Insolvency law* at 195.

Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee ... it shall so vest without any conveyance, assignment or transfer.

For a further understanding of this vesting, it is necessary to enquire what it is that vests, namely "property", and what is meant by "the bankrupt's estate". "Property" is broadly defined in the Act,¹⁶⁹ which states that it

includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.

This is a broad definition of "property". In *Bristol Airport PLC v Powdrill; Re Paramount Airways Ltd*¹⁷⁰ the court said of this definition that "[i]t is hard to think of a wider definition of property". Fletcher states that the use of the word "includes" in this comprehensive definition makes it a non-exclusive formulation, and the courts may therefore, should the need arise, have to determine whether some novel or unusual form of proprietary interest will be considered "property" for purposes of the Act.¹⁷¹ Conversely, he says, certain species of rights that are classified as merely personal rights do not constitute "property" forming part of the bankrupt estate.¹⁷²

The property of the bankrupt is succeeded to in title by the trustee subject to the condition that the trustee essentially steps into the shoes of the bankrupt debtor. This means that the trustee acquires the same title that the debtor actually had at the date of his adjudication. This includes any limitations or flaws in such title. The trustee cannot receive greater rights to the property than the bankrupt himself had.

¹⁶⁹S 436 of the Act.

¹⁷⁰[1990] Ch 744 at 759.

¹⁷¹Fletcher *Insolvency law* at 196. Doyle *Legislation* at 535. See ch 11 below in respect of novel forms of property, eg, a citizen's right to state grants, social security or benefits, which have been described as "state largesse".

¹⁷²Fletcher *Insolvency law* at 196; *City of London Corporation v Brown*, *The Times*, 11 October, 1989, (1990) 60 P & CR 42 (CA) held that non-assignable, secure periodic tenancy arising by virtue of s 86 of the Housing Act 1985 confers only personal rights that could not be regarded as "property" for the purpose of section 306; cf *Re Rae* [1995] BCC 102; *Griffiths v Civil Aviation Authority* [1997] BPIR 50 where personal and non-transferable rights to hold a licence did not vest in the trustee, and *Official Receiver v Environment Agency* [1999] BPIR 986 where a waste management licence was considered to be property for the purpose of s 436 by the Court of Appeal. See also *Performing Right Society Ltd v Rowland* [1997] 3 All ER 336, and the general discussion of the concept of "property" in *In re Oasis Merchandising Services Ltd: Ward v Aitken* [1997] 1 All ER 1009 (CA) which dealt with the nature of the right to take proceedings under section 214 of the Act, relating to wrongful trading in cases of company insolvency. See also Keay *Insolvency* at 317-318; Frieze at 89; Sealy *Legislation* (10th ed) at 479-480.

This is referred to as the trustee taking title “subject to equities”.¹⁷³ “Equity”, however, must have arisen prior to the commencement of bankruptcy if it is to prevail against the trustee.¹⁷⁴ This protection of persons who dealt with the bankrupt after the point at which the law considers him technically incompetent to transfer his title to his property is known as the rule in *Ex Parte James*.¹⁷⁵

5.3.1.3.3 The Human Rights Act 1998

The impact of the European Convention on Human Rights, enacted into English law by the Human Rights Act of 1998, reinforced the exclusionary principle in English bankruptcy law.¹⁷⁶ So, article 8 of the Convention which establishes rights requiring respect for a person’s private and family life, home and correspondence, has been held to create a distinction between the bankrupt’s general books, papers and records, and those that consist of correspondence of a private or personal nature.¹⁷⁷ Correspondence of a personal and private nature, although possibly valuable, are excluded from the insolvent estate. The trustee in bankruptcy may take possession of such personal items when they include material or information about the available estate and needed for its proper administration thereof, but he cannot retain them permanently or utilise them in favour of the creditors of the debtor.¹⁷⁸

5.3.1.4 Property included in the bankrupt estate

Section 283 of the Act and several related sections determine the composition of the bankrupt’s estate. Section 283(1) provides that the bankrupt’s estate for statutory purposes includes

¹⁷³Fletcher *Insolvency law* at 214.

¹⁷⁴The trustee’s title to the property is fixed by law at the commencement of bankruptcy.

¹⁷⁵*Re Condon, ex parte James* (1874) 9 Ch App 609. The foundation of this rule is the premise that as an officer of the court the trustee ought to act ethically by avoiding using his legal entitlement to retain property, which in a moral sense, belongs to another person. See also Frieze at 181 and Doyle *Legislation* at 397.

¹⁷⁶Fletcher *Insolvency law* at 197.

¹⁷⁷Fletcher *Insolvency law* 197.

¹⁷⁸*Haig v Aitken* [2000] 3 All ER 80 and 88-89; *Trustee of the Estate of Omar v Omar* [2000] BCC 434. The First and Sixth Protocols of the European Convention are now enacted (in English law) by sch 1 to the Human Rights Act of 1998. Art 1 regulates the right to protection of property and the peaceful enjoyment of possessions.

- (a) all property belonging to, or vested in, the bankrupt at the commencement of the bankruptcy: and
- (b) any property which by virtue of the provisions elsewhere in the Insolvency Act is comprised in that estate or is treated as falling within paragraph (a).¹⁷⁹

5.3.1.4.1 Property belonging to the debtor at the commencement of bankruptcy

It has been stated above that the debtor's estate vests in the trustee only when he is appointed.¹⁸⁰ However, the commencement of bankruptcy is the moment at which the content of the bankrupt's estate, which later so vests, is determined.¹⁸¹ Until such time as vesting in the trustee occurs, the estate is protected by virtue of section 284 which restricts the debtor's power to deal with the property, while provision is also made for the setting aside of transactions entered into prior to the bankruptcy petition being presented.¹⁸²

(a) Equitable interests

Mere equitable interests in property, such as the right to claim a payment or to seek specific performance to a contract, form part of the insolvent estate.¹⁸³ The trustee will, however, first want to determine whether it will be beneficial for the

¹⁷⁹By "elsewhere in the Act" this section also envisages, other sections of the Act that may be applied, eg, in the collection of assets for the benefit of, and to be included in, the bankrupt estate. Eg, the provisions of the Act that are used to set aside certain transactions (impeachable or voidable transactions) entered into by the bankrupt at different points in time are such provisions "elsewhere in the Act", that can be used to come by property that forms part of the bankrupt estate. However, most of these provisions are beyond the scope of this thesis. Property collected by the trustee by means of such provisions will therefore not be considered. Generally, only the assets of the bankrupt at the commencement of bankruptcy, and those acquired during bankruptcy but prior to the bankrupt's discharge will be considered in this chapter.

¹⁸⁰See para 5.3.1.3.1 above.

¹⁸¹The making of the bankruptcy order, is technically the date of the commencement of the bankruptcy, meaning the date of the order and not when the petition was presented – see s 278(a) and Crystal at 158 and Sealy *Legislation* (10th ed) at 319. The 1986 Insolvency Act altered the former position known as the "relation back" doctrine which determined the date of bankruptcy as the date upon which the act of bankruptcy on which the order was founded, was committed. Thus the commencement of bankruptcy could occur several months before the order was granted, thus creating confusion as to the composition of the insolvent estate of the debtor; Bankruptcy Act 1914 and see Fletcher *Insolvency law* at 198.

¹⁸²Ss 339-344 of the insolvency Act. See also Doyle *Legislation* at 372 and further in respect of restrictions of dispositions of property under section 284 of the Insolvency Act; Keay *Insolvency* at 318.

¹⁸³Fletcher *Insolvency law* at 198.

estate if he pursues such equitable interest. An equitable interest in the form of a beneficial entitlement granted by a trust or a settlement is also included in the estate. However, a forfeiture clause in the instrument of settlement may terminate the bankrupt's interest from a date before the moment of bankruptcy, thereby excluding such interest from the debtor's bankrupt estate.¹⁸⁴ A further discussion of forfeiture clauses follows below.¹⁸⁵

(b) Intangible property

Intangible assets are considered "property" in the bankrupt estate.¹⁸⁶ Included in this is the goodwill of a bankrupt's business. The title to any trademarks, patents, copyrights, secret formulas or other industrial or intellectual property falls within the insolvent estate. Entitlement to royalties and licence fees are also included and may be sold for the benefit of the creditors.¹⁸⁷ But the bankrupt is not prohibited, as in the voluntary sale of a business, from soliciting his former customers if he later resumes his former trade.¹⁸⁸ He may, however, enter into a voluntary covenant to this effect with the purchaser of his business.¹⁸⁹

Fletcher points out that goodwill that is personal to the bankrupt, such as that encountered with doctors, lawyers and architects will perforce be incapable of passing to a purchaser of such business or to the trustee.

(c) Choses in action

Also called "things in action" or "causes of action", the classic definition of this term was coined in *Torkington v Magee*¹⁹⁰ where it was described as "all personal rights of property which can only be claimed or enforced by action and not by taking physical possession".

¹⁸⁴Fletcher *Insolvency law* at 198. In this respect Doyle *Legislation* at 367 says the bankrupt's estate includes any power exercised by the bankrupt over property.

¹⁸⁵See para 5.3.1.5 below.

¹⁸⁶Fletcher *Insolvency law* at 199.

¹⁸⁷*Re Keene* [1922] 2 Ch 475 (compelling the debtor to reveal his secret formulas); *Performing Right Society Ltd v Rowland* [1997] 3 All ER 336; Fletcher *Insolvency law* at 199.

¹⁸⁸*Walker v Mottram* (1881) 19 Ch D 355; *Green and Sons (Northampton) Ltd v Morris* [1914] 1 Ch 562.

¹⁸⁹Fletcher *Insolvency law* at 199.

¹⁹⁰[1902] 2 KB 427, 430.

They are among types of intangible property in the definition in section 436. “Chose in action” denotes a personal right to claim property and not actual corporeal property itself. It includes the right to claim payment of money.¹⁹¹ All property in the nature of choses in action will therefore generally pass to the trustee.¹⁹² But there is an exception regarding torts of a “personal” nature. Here the debtor remains personally entitled to sue and to retain the fruits of the successful litigation, failing which, Fletcher says “[h]is incentive to vindicate the legal wrongs done to him would be much diminished”.¹⁹³ Torts envisaged here include claims for defamation¹⁹⁴ or injury to credit or reputation or for “wounded feelings”.¹⁹⁵ Where such causes of action arise after his adjudication, the debtor also retains the right to sue.¹⁹⁶

If the damages suffered are both “personal” and “proprietary” in nature, such as a claim for negligence that includes pain and suffering and loss of earnings, such claim vests in the trustee.¹⁹⁷ But if “personal” damages are then recovered, the trustee holds them on constructive trust for the bankrupt.¹⁹⁸ Categorising claims as “personal” or “proprietary” may lead to problems in identifying the nature of the respective parts of the claim for damages. So *In Re Kavanagh*,¹⁹⁹ where such uncertainty arose, the court awarded the trustee and the bankrupt an equal share of the proceeds.

Insurance benefits for permanent disability form part of the bankrupt estate if the policy fails to specify that any element of the payment is calculated by reference to the insured’s pain and suffering.²⁰⁰ Fletcher states that this principle has been respected and applied by the European Court of Human Rights in *Ringeisen v Austria*²⁰¹ to enable a successful applicant to receive and retain payment awarded

¹⁹¹Frieze at 93; Fletcher *Insolvency law* at 200.

¹⁹²Through the effect of ss 283, 306 and 436.

¹⁹³Fletcher *Insolvency law* at 200.

¹⁹⁴*Re Wilson, ex p Vine*, (1878) 8 Ch D 364; *Wilson v United Counties Bank Ltd* [1920] AC 102 (HL).

¹⁹⁵Doyle *Legislation* at 368; Frieze at 93; Fletcher *Insolvency law* at 200.

¹⁹⁶See further para 5.3.1.5 below.

¹⁹⁷Doyle *Legislation* at 369; Frieze at 93; Fletcher *Insolvency law* at 200.

¹⁹⁸*Ord v Upton* [2000] Ch 352; [2000] 1 All ER 193 (CA).

¹⁹⁹[1950] 1 All ER 39.

²⁰⁰*Cork v Rawlins* [2001] 4 All ER 50 (CA).

²⁰¹Case 2614/65, 1 EHRR 455, 504 and 513; 16 YBECHR 468; (1972) 21 ICLQ 377, 795; (1974) 23 ICLQ 193.

to him under article 50 of the European Convention of Human Rights as “just satisfaction” for the wrong done to him. It was ordered that payment be made in such a way that the money could be kept out of reach of the creditors in the applicant’s bankruptcy in Austria.²⁰²

(d) Insurance

If the bankrupt has effected a contract of insurance covering his potential liabilities to third parties and such liability is incurred by the insured either before or after bankruptcy, his rights against the insurer do not vest in the trustee. They are transferred to, and vest in, the third party concerned. This is a special statutory rule provided for by section 1 of the Third Parties (Rights against Insurers) Act of 1930.

(e) The home of the bankrupt

(i) Sections 335A to 338

In English law there are two situations that must be considered in respect of the bankrupt’s home. One must distinguish between the bankrupt who is the sole owner of the matrimonial home (possibly with rights of occupation in favour of an occupying spouse), and where there is joint ownership between the bankrupt and his present or former spouse.²⁰³ In the first situation, prior to 1986, the law vacillated between favouring and denying the spouse’s occupational rights as against the trustee. In the second situation execution of the trust of land resulting from joint ownership of the matrimonial home could be ordered by the court. This position was well settled prior to 1986.²⁰⁴ The courts had a discretion to order the sale of a property occupied by a spouse and children. But in practice the tendency was to allow the interests of creditors to take precedence over those of the wife and children.²⁰⁵

²⁰²Fletcher *Insolvency law* at 200.

²⁰³“Spouse” includes a civil partner or a former civil partner – Civil Partnership Act 2004; see the definition of “associate” in s 435 of the Insolvency Act 1986 which was substituted by the Civil Partnership Act 2004 s 261(1).

²⁰⁴The trustee in bankruptcy applies for this under (now) s 14 of the Trusts of Land and Appointment of Trustees Act 1996, which replaced the procedure under the (repealed) s 30 of the Law of Property Act 1925. See Fletcher *Insolvency law* at 204; Doyle *Legislation* at 435.

²⁰⁵See note 52 in Fletcher *Insolvency law* at 204.

The *Cork Report* proposed a revised measure concerning the conflicting interests regarding the matrimonial home. It suggested delaying the enforcement of creditors rights, but not cancelling them.²⁰⁶

In the 1986 Act the provisions relating to the family home are embodied in sections 336 to 338, and section 335A which was inserted by the Trusts of Land and Appointment of Trustees Act 1996.²⁰⁷ These provisions allow for the postponement of the sale of the family home for up to one year from the date on which it vested in the trustee. After that period the further postponement is allowed only in exceptional circumstances. The court of bankruptcy has exclusive jurisdiction regarding all proceedings involving the family home of the debtor.²⁰⁸

If the bankrupt is the sole beneficial owner of the matrimonial home, he is prevented from granting occupation to a spouse in the period between the presentation of the petition and the vesting of the property in the trustee.²⁰⁹ But the non-bankrupt spouse can acquire statutory rights of occupation under the Family Law Act 1996 that can create a charge on the estate or interest of the bankrupt. Such charge then remains effective despite the bankruptcy, and it binds the trustee and persons deriving title over the property through him.²¹⁰ The solvent spouse without a beneficial interest in the family home is therefore placed in a similar position to a spouse with such an interest, with respect to protected rights of occupation.²¹¹ An application to evict²¹² an occupying spouse from the home must be made to the bankruptcy court, which has

²⁰⁶*Cork Report* above at 255.

²⁰⁷In s 25(1), sch 3, para 23. See also Schofield G and Middleton J (eds) and others *Debt and insolvency on family breakdown* 2003 at 101 and further (hereafter Schofield).

²⁰⁸Ss 335A(1), 336(2)(b) and 337(4) Insolvency Act. Sealy *Legislation* (10th ed) at 376 points out that these provisions are part of a package to cater for the rights of both the trustee and the debtor and his family regarding the family home, often the most valuable asset of the debtor. S 335A applies in any case where a trustee applies for an order under s 14 of the 1996 Act. It therefore applies to *any* trust of land under which the bankrupt has an interest, irrespective of whether the beneficial co-owner is a spouse, a former spouse, an unmarried co-habitee or any other person – Doyle *Legislation* at 435. Regard must, however, be taken of the onus on the trustee to take certain action in respect of a dwelling as required by the provisions of ss 283A and 313A discussed in para (ii) below.

²⁰⁹S 336(1) Insolvency Act. Frieze at 136; Crystal at 192; Sealy *Legislation* (10th ed) at 377-378. The 1986 Act failed to define the term “spouse”, but in the 1996 Act it is defined to include a husband or wife, as well as any such party to a polygamous marriage, and “former spouse” must be construed accordingly – see Doyle *Legislation* at 438. See para (i) above regarding civil partnerships.

²¹⁰S 336(2) Insolvency Act.

²¹¹Fletcher *Insolvency law* at 205.

²¹²Under s 33 of the Family Law Act 1996.

the discretion to make an order it deems just and reasonable.²¹³ In doing so, the court takes the following into account:

- the bankrupt's creditors interests;
- any contributing conduct of the spouse or former spouse to the bankruptcy;
- financial resources and needs of the spouse or former spouse;
- the needs of any children; and
- all the circumstances of the case other than the needs of the bankrupt.

No express reference is made to any other dependants, such as the elderly or ailing, but the court may consider these dependents under the category "all the circumstances of the case".²¹⁴

During the first 12 months after the first vesting of the estate in the trustee the court has an unfettered discretion regarding the order it may make. But in any application that is made to the court after this one-year period the court must assume that the interests of the creditors take precedence over all other matters, unless exceptional circumstances exist.²¹⁵ While this allows for a "period of grace" for the parties to prepare for the giving up of their home, it also allows the trustee to confidently time the eviction and sale of the home after the one-year period.²¹⁶

Section 337 regulates the position where any persons under the age of 18 are occupying a dwelling together with the bankrupt when the petition was presented and at the commencement of the bankruptcy.²¹⁷ If the bankrupt has an

²¹³S 336(4) Insolvency Act; Frieze at 136; Sealy *Legislation* (10th ed) at 377-378.

²¹⁴Fletcher *Insolvency law* at 205; Keay *Insolvency* at 323; Doyle *Legislation* at 436. See *Cloughton v Charalamabous* [1998] BPIR 558 in respect of an elderly ailing spouse of a bankrupt whose age and poor health constituted exceptional circumstances.

²¹⁵S 336(5) Insolvency Act. For examples of what may or may not be considered exceptional circumstances see *Cloughton v Charalamabous* [1998] BPIR 558; *Re DR Raval* [1998] BPIR 389; and *Re Citro* [1991] Ch 142 and Schofield at 109.

²¹⁶Fletcher *Insolvency law* at 206; Keay *Insolvency* at 324; Fletcher, Keay and Doyle *Legislation* at 438.

²¹⁷Sealy *Legislation* (10th ed) at 337-338. Howell G *Family breakdown and insolvency* (1993) at 208 (hereafter Howell) makes the interesting point that the issue of the family home in this context presents a stark contrast between policies espoused by family law on the one hand, and insolvency law on the other. He says, "In family law, the welfare of the child is the paramount consideration. That, however, is simply not the case when bankruptcy intervenes and it is a question of seeking to balance the interest of the creditors against the interests of the child and family. That is not to say that there would not be sympathy on the part of the trustee in bankruptcy and some support under the law for the position of children. However, if the trustee in bankruptcy wishes to push the matter through, then the interests of the

occupational interest in that home resulting from his beneficial estate or interest in the property, section 337(2) gives him the following rights against the trustee:

- if occupying the home, a right not to be evicted or excluded from it except with court approval; and
- if not occupying, it, with the approval of the court, the right to enter into and occupy the property.

These rights constitute statutory matrimonial home rights in respect of the Family Law Act 1996, being a charge in the nature of an equitable interest binding on the trustee.²¹⁸ The trustee therefore must apply for leave to evict under section 33 of the Family Law Act 1996 as described above, and the court must consider the same factors stated above in exercising an order it thinks just and equitable.²¹⁹ Here too, barring exceptional circumstances, under section 337(6) of the Act the presumption in favour of creditors applies if the application to evict is brought after the twelve-month period, as described above.

The next situation to consider is where a trust of land has arisen because the matrimonial home is owned jointly by the bankrupt and his spouse or former spouse. Here the trustee must apply for an order²²⁰ allowing him to sell the property.²²¹ The solvent spouse's beneficial interest attaches to the proceeds of the sale. The trustee is then entitled to the amount representing the bankrupt's beneficial interest in the home. If the solvent spouse has had sole occupation of the home and has paid expenses such as repairs, improvements and mortgage bond instalments, these expenses must be taken into account in calculating that spouse's share in the property.²²² The above provisions regarding the sale of the land and the discretion of the court also apply here.²²³

creditors will prevail". See also *Mullard v Mullard* [1981] 3 FLR 330 CA which is authority for the proposition that it would not be right, under the Matrimonial Causes Act 1973, to prefer creditors claims over those of the other spouse and children where the one spouse has substantial debts where bankruptcy proceedings have not been instituted.

²¹⁸Ss 337(2)(b) and (3) of the Insolvency Act as amended by the Family Law Act 1996, s 66(1) and sch 8 part III; Fletcher *Insolvency law* at 206

²¹⁹But now in accordance with s 337(5) of the Insolvency Act. Conversely, the bankrupt must apply for leave to occupy.

²²⁰Under s 14 Trusts of Land and Appointment of Trustees Act 1996.

²²¹S 335A Insolvency Act.

²²²*Re Pavlou* [1993] 3 All ER 995.

²²³In terms of s 335A(2) and (3) which is the same as s 336(4) and (5).

If the trustee is unable to realise a dwelling because of the existence of an occupying interest of a spouse and or children as in any of the situations envisaged above, or for any other reason, the trustee may apply for a charging order regarding that property for the benefit of the bankrupt estate.²²⁴ The benefit of such a charge then forms part of the bankrupt estate. It attaches to the property until it can be enforced. The order must therefore provide for the property itself to cease to be part of the bankrupt estate and to revert in the debtor subject to the charge.²²⁵

(ii) *Section 283A*²²⁶

Section 283A regulates the position where the bankrupt's property is a dwelling house occupied by him, his spouse or former spouse.²²⁷ This property re-vests in the bankrupt if within three years from the date of the bankruptcy order the trustee has failed to take action. Taking action means realising the bankrupt's interest, applying for an order for possession or sale of the dwelling, application for a charging order under section 313 or coming to an agreement with the bankrupt for him to pay a specified sum to the trustee.²²⁸ This has become known as the "use it or lose it" rule, and it applies to all bankruptcies brought by petition on or after 1 April 2004.²²⁹ Section 283A(1) defines the property or properties to which the section applies, which includes any dwelling house which at the date of the bankruptcy order was "the sole or principal residence" of the bankrupt, his spouse, or a former spouse.

These provisions are intended to rectify a previous abusive practice whereby the trustee would take no action in respect of the bankrupt's home, but then often years later take steps to realise the property, including its enhanced value, usually to the surprise of the now discharged bankrupt. Action must be taken by the trustee irrespective of the state of the property market.²³⁰ But section 313 does

²²⁴S 313 Insolvency Act. Sealy *Legislation* (10th ed) at 359 and further.

²²⁵S 313(2) of the Insolvency Act and see rule 6.237.

²²⁶This provision was introduced by s 261 of the Enterprise Act 2002, with effect from 1 April 2004.

²²⁷These provisions must be read together with s 313, regarding a charge on the bankrupt's home, and s 313A concerning the application for the sale, possession or charge of a low value home. A "dwelling house" is defined in s 385 to include "any building or part of a building which is occupied as a dwelling and any yard, garden, garage or outhouse belonging to the dwelling house and occupied with it"; see Crystal at 222; Sealy *Legislation* (10th ed) at 328 and further.

²²⁸S 283A(3)(a)-(e) of the Act; Frieze at 96.

²²⁹Frieze at 96.

²³⁰Doyle *Legislation* at 371.

assist the trustee in that he may apply for a charge on a bankrupt's interest in a dwelling house where the trustee cannot, for any reason, take the relevant action in respect of the dwelling. Such a charge, which will secure the bankrupt's interest in the dwelling (as assessed by the court) will be enforceable even after the discharge of the bankrupt or the release of the trustee.²³¹ However, where the relevant dwelling is of low value, section 313A places restrictions on the actions of the trustee²³² in that the section 313 application can be dismissed by the court.²³³ If such application is dismissed, section 283A(4) provides that the interest will no longer form part of the bankrupt's estate and it will vest automatically in the bankrupt, subject to a contrary order by the court.

Section 283A thus excludes any interest of the bankrupt in a dwelling house from the bankrupt's estate at the end of the aforementioned three-year period, subject, of course, to the extensions provided for in section 283A(5) and (6). The onus is therefore on the trustee to take the necessary action to secure such interest in a dwelling within the prescribed period.

5.3.1.4.2 After-acquired property

(a) General

The date upon which the content of the bankrupt estate must be assessed is the date of the bankruptcy order. But property acquired by the bankrupt from the date of the commencement of the bankruptcy to the date of his discharge may be claimed by the trustee for the benefit of the creditors in terms of section 307 of the Insolvency Act.²³⁴ Section 307(1) enables the trustee to claim after-acquired property by notice in writing.

²³¹S 313 of the Act.

²³²Low value is described in s 313A(2) and (3), presently a value below £1 000 as prescribed by art 2 of the Insolvency Proceedings (Monetary Limits) (Amendment) Order 2004 (SI 2004/547). Art 3 of the Order stipulates, for the purposes of s 313A(3), that the court must disregard the value of the property equal to the value of any loan secured by mortgage or any other charge against the property, the value of any third party interest and the value of reasonable costs of sale – see Frieze at 139; Doyle *Legislation* at 415.

²³³S 313A(2) of the Act.

²³⁴This is one of the provisions envisaged by s 283(1)(b) that may be applied in the collection assets that will be considered to form part of the bankrupt estate. By "elsewhere in the Act" s 283(1)(b) also envisages, eg, sections of the Act that regulate impeachable and voidable transactions that may be applied to augment the property that comprises the bankrupt estate. However, a number of these provisions found "elsewhere in the Act" are beyond the scope of this thesis. Property collected by the trustee by means of such provisions will therefore not be considered. Generally, only the assets of the bankrupt at the commencement of bankruptcy, and those acquired during bankruptcy but prior to the bankrupt's discharge, will be considered in this chapter. See also Keay *Insolvency* at 321 and Sealy *Legislation* (10th ed) at 352.

This provision codifies the principle known as the rule in *Cohen v Mitchell*,²³⁵ which includes the rule that the trustee's claim to after-acquired property may be opposed under certain conditions.²³⁶ To defeat the trustee's claim, the property must have been disposed of by the bankrupt to another person transacting with him in good faith, for value and ignorant of the bankruptcy. Subject to this, the trustee's claim may be defeated whether or not the transaction occurs before or after the trustee serves the requisite notice²³⁷ on the bankrupt. A donation, however, may be claimed by the trustee irrespective of the circumstances under which it was received by the donee.²³⁸

There is a duty upon the bankrupt to notify the trustee within 21 days of property devolving upon him.²³⁹ The trustee has a 42-day period to serve a notice under section 307 claiming after-acquired property. The 42-day period commences on the day on which it first came to the knowledge of the trustee that the property in question was acquired by, or devolved upon, the trustee.²⁴⁰ If the bankrupt fails to comply with his duty to inform the trustee of after-acquired property, the 42-day period for service of the notice by the trustee only commences when the trustee finds out about the relevant property.²⁴¹ This 42-day period for the service of the section 307(1) notice may be extended with the leave of the court if good cause is established to justify the extension of the period.²⁴²

Upon the trustee's service of notice claiming after-acquired property, the property in question vests in the trustee with retrospective effect to the date when the property was first acquired.²⁴³ This doctrine of relation back is subject to the rights of *bona fide* third

²³⁵(1890) 25 QBD 262.

²³⁶Fletcher *Insolvency law* at 208. Prior to the 1986 Act, s 38(1) of the 1914 Act provided that all after-acquired property devolved automatically on the trustee before discharge.

²³⁷Under s 307(1).

²³⁸*Re Bennet* [1907] 1 KB 149.

²³⁹See s 333(2) and rule 6.200.

²⁴⁰See s 309(1)(a). Sealy *Legislation* (10th ed) at 352.

²⁴¹S 309(1)(a).

²⁴²See *Solomons v Williams* [2001] BPIR 1123 at 1136 F-H regarding factors to be taken into account in order to establish good cause for the extension of the time period.

²⁴³S 307(3) Insolvency Act. Only property that formed part of the bankrupt's estate as at the date of appointment of the trustee automatically vests in the trustee under s 306. Property acquired by or devolving upon the bankrupt after the commencement of the bankruptcy (which is defined in s 278(a) as the date of the bankruptcy order), is that of the bankrupt, unless the trustee claims it by virtue of s 307, or it is subject to an income payments order under s 310A or 310 – see Doyle *Legislation* at 401.

parties, as stated above, but apart from the latter the trustee's title to the relevant property prevails over that of third parties, irrespective of whether the third party transacted with the bankrupt prior to or after the trustee's notice of claim to the property.²⁴⁴

After-acquired property claimed by the trustee may be real or personal, varying from tangible to intangible and may include, among other things, a legacy.²⁴⁵ Under this heading, however, only insurance policies and income will be considered.

(b) Insurance policies as after-acquired property

The situation envisaged here is where the bankrupt, after bankruptcy effects a policy of insurance upon his own life or has kept such policy that he effected prior to his bankruptcy alive, without the trustee's knowledge.

Referring to case law, Fletcher says that the trustee will be considered the owner of the proceeds of the policy, as with any other property the debtor fails to disclose. The trustee may claim the policy or the proceeds as soon as he finds out about them,²⁴⁶ even after the discharge from bankruptcy.²⁴⁷ But if the premiums of such policy were paid by some other person, this person will be entitled to repayment of the relevant sum plus interest.²⁴⁸

So, where the payment of money under an insurance policy was accelerated because of the insured's permanent disablement, the Court of Appeal in *Cork v Rawlins*²⁴⁹ held that the money formed part of the insured's bankrupt estate, because no part of the sum payable related to pain and suffering.

If a life policy was effected by the bankrupt for his wife and/or children, a trust is

²⁴⁴Fletcher *Insolvency law* at 210.

²⁴⁵*Hunt v Fripp* [1898] 1 Ch 675.

²⁴⁶Fletcher *Insolvency law* at 210 who cites *Tapster v Ward* (1909) 101 LT 503; *Re Phillips* [1914] 2 KB 689.

²⁴⁷*Re Collier* [1930] 2 Ch 37 cited in Fletcher *Insolvency Law* at 210.

²⁴⁸Fletcher *Insolvency law* at 210.

²⁴⁹[2001] 4 All ER 50.

created which excludes the policy from the bankrupt's estate during the life time of that immediate family.²⁵⁰

(c) Income

The bankrupt is allowed to retain a portion of his income which is sufficient to maintain himself and his dependants. This is part of the policy in English law to allow the bankrupt to continue to care for himself and his dependants. The rationale behind this policy is that it will leave the dignity and self-respect of the bankrupt and his dependants intact and, secondly, that it reduces the social-welfare burden of the state if the bankrupt is able to maintain himself and his dependants.²⁵¹ The trustee may obtain an income payments order from the court as a measure by which to collect the surplus income to which he may be entitled for the benefit of the bankrupt estate, and income so collected specifically forms part of the bankruptcy estate.²⁵²

The Act defines "income" broadly. It includes every payment in the nature of income which is intermittently made to the bankrupt, or to which he becomes entitled to from time to time.²⁵³ It has been held that the test whether a payment is regarded as income is largely a matter of common sense,²⁵⁴ and for the purpose of section 310 it need not be an income produced by regular activity or business. In *Supperstone v Lloyd's Names Association Working Party and Others*²⁵⁵ Evans-Lombe J held that even if a fee payment is a "one off" it still constitutes income "from time to time" under section 310; that phrase meaning payments at any time during the relevant period and not only periodical or regular payments. Section 310(2) provides that an income payments order must not reduce the bankrupt's income below what is reasonably required for his and his family's maintenance. This will obviously be a factual question in every case. "Family" is defined in

²⁵⁰Schofield at 71.

²⁵¹Fletcher *Insolvency law* at 211-212; Sealy *Legislation* (10th ed) at 356 and further. Under the 1914 Act salary and income received by the bankrupt vested in the trustee (s 51(2)).

²⁵²By means of s 310(1) Insolvency Act. See also s 310(3) and (5).

²⁵³S 310(7).

²⁵⁴*Affleck v Hammond* [1912] 3 KB 162 at 169.

²⁵⁵[1999] BPIR 832; Schofield at 81; Keay *Insolvency* at 321.

section 385(1) as any persons who are living with the bankrupt and are dependent on him.²⁵⁶

5.3.1.5. Property excluded from the bankrupt estate

(a) General

Exceptions to the rule that all the debtor's property vests in the trustee exist by virtue of statutory provisions, case law and specific arrangements between the debtor and other persons. Some of these exceptions will now be considered.

(b) Exempt property and family assets

It has long been policy in English law that the bankrupt debtor should not be divested of certain assets that are essential for the maintenance of himself and his dependants. Thus personal clothing, domestic furniture, and tools and equipment used for earning a living are excluded from the bankrupt estate by statutory exemption.²⁵⁷

Recommendations of the *Cork Report*²⁵⁸ to make this category of exemptions more flexible were accepted and embodied in section 283(2) of the Act. Two separate categories now exist. First, tools, books, vehicles and other equipment necessary for use in the bankrupt's employment business and vocation are exempt.²⁵⁹ Second, clothing, bedding, furniture, household equipment and provisions necessary to satisfy the bankrupt and his family's basic needs.²⁶⁰ Whether necessity exists will be a factual question that may differ from case to case.²⁶¹

Exemption under the first category requires that the relevant item must be *necessary* for the *personal* use by the bankrupt to *earn his livelihood*. These three criteria must be present for the exemption to apply. The inclusion of a vehicle as an exempt asset is a movement in the direction of a more liberal policy or philosophy in English

²⁵⁶Sealy *Legislation* (10th ed) at 356 and further.

²⁵⁷Formerly s 38(2) of the Bankruptcy Act 1914. Doyle *Legislation* at 367.

²⁵⁸See ch 5.2 above.

²⁵⁹S 283(2)(a). Schofield at 76-77; Frieze at 90.

²⁶⁰S 283(2)(b). S 385(1) defines "family" as the persons(if any) who are living with the bankrupt and are dependent on him.

²⁶¹Fletcher *Insolvency law* at 228.

bankruptcy law.²⁶² Under the second category property that satisfies the *basic, domestic* needs of the bankrupt and his family may be exempt from the bankrupt estate. Here too, the exemption will hinge on the factual question in each particular case whether an item is necessary for basic domestic needs.

No monetary limit has been placed on any of the categories of exempt items. However, section 308 allows the trustee to claim any exempt property with a higher intrinsic value than the cost of providing a reasonable replacement of such items. Section 308(4) defines “reasonable replacement”, but essentially it is a matter of judgment in each set of circumstances. Here, the trustee’s decision may be challenged in court.²⁶³

In *Haig v Aitken*²⁶⁴ a trustee applied to court to claim the bankrupt’s private and personal correspondence as part of the bankrupt estate. The court refused the application, finding that it was not included in the definition of property for the purposes of section 283 of the Insolvency Act 1986. In this case the Human Rights Act also had to be considered. Article 8 of the European Convention on Human Rights, which regulates the right to respect for private and family life, was referred to by the judge to support a ruling that private and personal correspondence be excluded from the estate.

(c) Awards for personal damages

It was stated above that all property in the nature of choses in action, being personal rights, will generally pass to the trustee.²⁶⁵ But there is an exception regarding torts of a “personal” nature. Here the debtor remains personally entitled to sue and to retain the fruits of the successful litigation, failing which, Fletcher²⁶⁶ says, “his incentive to vindicate the legal wrongs done to him would be much diminished”. Torts envisaged

²⁶²In *Pike v Cork Gully* [1997] BPIR 723 a horsebox was held to be a tool of the trade, and Frieze at 90 therefore argues that any vehicle used by the bankrupt to travel to and from work might be excluded from the bankruptcy estate as a tool of the trade.

²⁶³S 303(1). See generally Fletcher *Insolvency law* at 229 and Doyle *Legislation* at 369.

²⁶⁴[2000] 3 All ER 80.

²⁶⁵Through the effect of ss 283, 306 and 436. See para 5.3.1.4.1 above.

²⁶⁶Fletcher *Insolvency law* at 200; Frieze at 90; Doyle *Legislation* at 368. See also *Heath v Tang* [1993] 1 WLR 1421 at 1423 A-B and *Beckham v Drake* (1849) 2 HL Cas 579 at 604.

here include claims for defamation²⁶⁷ or injury to credit or reputation or for “wounded feelings”.²⁶⁸ Also in *Davis v Trustee in Bankruptcy of the Estate of Davis*²⁶⁹ a claim for medical negligence that resulted in a personality change was considered a claim for personal injury. Where such causes of action arise after his adjudication, the debtor also retains the right to sue.²⁷⁰

If the damages suffered are both “personal” and “proprietary” in nature, such as a claim for negligence that includes pain and suffering and loss of earnings, such claim vests in the trustee.²⁷¹ But if “personal” damages are then recovered, the trustee holds them on constructive trust for the bankrupt.²⁷² Doyle points out that it would also be possible for the trustee to assign the cause of action to the bankrupt on condition that the bankrupt accounts to the trustee for the proceeds of the loss of income part of the claim.²⁷³ Categorising claims as “personal” or “proprietary” may lead to problems in identifying the nature of the respective parts of the claim for damages. So in *Re Kavanagh*,²⁷⁴ where such uncertainty arose, the court awarded the trustee and the bankrupt an equal share of the proceeds.

Insurance benefits for permanent disability form part of the bankrupt estate if the policy fails to specify that any element of the payment is calculated by reference to the insured’s pain and suffering.²⁷⁵ Fletcher states that this principle was respected and applied by the European Court of Human Rights in *Ringeisen v Austria*²⁷⁶ to enable a successful applicant to receive and retain payment awarded to him under article 50 of the European Convention of Human Rights as “just satisfaction” for the wrong done to him. It was ordered that payment be made in a manner that the money could be kept out of reach of the creditors in the applicant’s bankruptcy in Austria.²⁷⁷

²⁶⁷*Re Wilson, ex p Vine*, (1878) 8 Ch D 364; *Wilson v United Counties Bank Ltd* [1920] AC 102 (HL).

²⁶⁸Fletcher *Insolvency law* at 200; Frieze at 93; Doyle *Legislation* at 368.

²⁶⁹[1998] BPIR 572.

²⁷⁰Doyle *Legislation* at 368.

²⁷¹ Fletcher *Insolvency law* at 200; Frieze at 93; Doyle *Legislation* at 369.

²⁷²*Ord v Upton* [2000] Ch 352; [2000] 1 All ER 193 (CA).

²⁷³Doyle *Legislation* at 369.

²⁷⁴[1950] 1 All ER 39.

²⁷⁵*Cork v Rawlins* [2001] 4 All ER 50 (CA).

²⁷⁶Case 2614/65, 1 EHRR 455, 504 and 513; 16 YBECHR 468; (1972) 21 ICLQ 377, 795; (1974) 23 ICLQ 193.

²⁷⁷Fletcher *Insolvency law* at 200.

(d) Trust property

If the debtor holds property in trust for another person, that property is not included in his bankrupt estate.²⁷⁸ This is not only the position in respect of an express trust, but also in other relationships that have the characteristics of a trust. For example, where there is a relationship between parties which in law creates a fiduciary responsibility, certain monies in the hands of the bankrupt debtor may be included in a trust in favour of the persons in respect of whom he holds such fiduciary position.²⁷⁹ This would be the case where solicitors holding a client's money or bankers who possess money that is to be used on behalf of a client. For this exception to apply, the bankrupt must be a "bare" trustee of the property concerned. If he also enjoys a beneficial interest in the trust estate, the property does not fall within the exemption created by section 283(3)(a), which applies to property held on trust for "any *other person*".²⁸⁰

(e) Legacies and forfeiture clauses

If a bankrupt has benefited from a legacy before the commencement of his bankruptcy, the legacy will vest in the bankrupt estate. If the bankrupt becomes entitled to the legacy after the commencement of the beneficiary's bankruptcy, the legacy will be treated as after-acquired property to be utilised for the benefit of the creditors.²⁸¹ A legacy can be protected from forming part of a bankruptcy estate if the testator removes the beneficiary from his will if he learns of the impending bankruptcy. Alternatively, the testator must create a protective trust whereby a beneficiary may benefit from the will, only if he is not a bankrupt at the time of the death of the testator, losing his rights if he is a bankrupt at that time.²⁸² A further protective mechanism is the creation of a discretionary trust whereby the trustees appointed in the will must decide whether or not a particular beneficiary must benefit from the will.²⁸³

²⁷⁸S 283(3)(a). Only the position generally applicable to trusts is discussed here. Unusual instances where the courts have declared certain assets impressed with a trust, such as the rule in *Ex Parte Waring (Re Brickwood, ex part Waring* (1815) 19 Ves Jun 345; 34 ER 546) and the position of mixed funds (the rule in *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 572; 35 ER 781) that may include trust funds, will not be considered. A power of appointment over settled property, which is similar to a trust, will also not be discussed. For a more comprehensive discussion of these issues, see Fletcher *Insolvency law* at 219 to 220; Frieze at 90; Doyle *Legislation* at 367.

²⁷⁹Fletcher *Insolvency law* at 218.

²⁸⁰Fletcher *Insolvency law* at 219.

²⁸¹Frieze at 94.

²⁸²Frieze at 94.

²⁸³Frieze at 94.

Forfeiture clauses relate to beneficial interests to which the debtor may be entitled either before or after bankruptcy, but which are forfeited if the beneficiary becomes bankrupt. However, three particular conditions must be met for such clauses in instruments of settlement to be effective.

First, Fletcher points out, because of the possible effects of the principle of “relation back” of the trustee’s title to the date of the bankruptcy order, the forfeiture clause must be expressed to operate on the presentation of the bankruptcy petition by or against the beneficiary, such as may lead to his adjudication.²⁸⁴ The settlement may, for example, include a clause stating that the interest will be forfeited if the beneficiary does or suffers anything whereby he would be deprived or liable to be deprived of the beneficial enjoyment thereof.²⁸⁵

Second, a gift over is required of the forfeited interest. Failing this, the forfeiture clause will not prevent the interest from vesting in the trustee.²⁸⁶

Third, the forfeiture clause cannot be structured so as to take effect upon the bankruptcy of the settlor himself. This is because the owner of property cannot avoid his creditors’ legal rights against his property by means of qualifying his own interest in it, in the event of his bankruptcy by way of a settlement or contract.²⁸⁷

If the trustees of *the settlement* themselves have terminated the beneficiary’s absolute interest prior to the latter’s bankruptcy, the trustee in bankruptcy will enjoy no claim to that asset. But if in the latter instance the settlement states that continued payments must be made to the bankrupt beneficiary on a discretionary basis, his right to such payment after adjudication is limited to the amount needed for his necessary maintenance. The surplus will be available to his creditors.²⁸⁸

In the construction of wills and settlements providing for forfeiture clauses in the event of a beneficiary’s (grantee’s) bankruptcy, the court, to give effect to the

²⁸⁴Fletcher *Insolvency law* at 223.

²⁸⁵Fletcher *Insolvency law* at 223.

²⁸⁶Fletcher *Insolvency law* at 224.

²⁸⁷Fletcher *Insolvency law* at 224.

²⁸⁸Fletcher *Insolvency law* at 224.

settlor or testator's intentions as to who should have the benefit of that property, "has construed the clauses creating the limitation over in the event of bankruptcy in such a way as to apply them to a bankruptcy already existing, either at the date of the will or the settlement or at the time when the grantee's interest would, but for the bankruptcy, have fallen into his possession".²⁸⁹

(f) Rights to pensions

As with certain exempt items, the policy to allow the bankrupt to keep a portion of his estate to maintain himself and his dependants also applies to certain pensions. The trustee's right in respect of pensions may be subject to special statutory provisions governing the pension in question. For example, statutes regulating pensions of members of the armed forces make any assignment of such pensions void, but they are capable of passing to the trustee in bankruptcy.²⁹⁰ Other legislation, however, expressly prohibits the pension benefit from passing to the trustee or from being burdened in any manner at all in the event of the bankruptcy of the beneficiary.²⁹¹ These provisions merely exclude the benefits from vesting in the trustee and it would appear that a court is not precluded from making an income payments order in respect of such benefits.²⁹² But these provisions relate to public servants and officials.

Issues of principle arise in respect of personal pension schemes and occupational pension schemes. Self-employed individuals provide for their future retirement by way of private or personal pension schemes.²⁹³ Payment may result from old age or incapacity, by way of periodical or lump-sum payments. Employers, in turn, provide for occupational pension schemes as part of the employment package. The question to be considered is whether any part of these pensions, be it capital

²⁸⁹Berry *Personal insolvency* at 182; see also *Re Evans, Public Trustee v Evans* [1920] 2 Ch 304, CA which was applied *In re Walker, Public Trustee v Walker* [1939] Ch 974 [1939] 3 All ER 902 where a forfeiture clause prevented the vesting of an annuity in the bankrupt where the bankrupt had obtained his discharge after the testator's death, but before the annuity became first payable.

²⁹⁰See, eg, the Army Act 1955 s 203, Air Force Act 1955 s 203 and Naval Discipline Act 1957 ss 159(4) and (4A).

²⁹¹See, eg, the Police Pensions Act 1976 s 9; Social Security Administration Act 1992 s 187(1).

²⁹²Under s 310 of the Act; see Fletcher *Insolvency Law* at 230; Sealy *Legislation* (10th ed) at 355. See also, generally, Frieze at 91.

²⁹³Fletcher *Insolvency Law* at 230; Sealy *legislation* (10th ed) at 355. See also, generally, Frieze at 91.

or current or future payments, should be available to the creditors of the bankrupt.²⁹⁴ In respect of personal pension schemes, the courts in England have ruled²⁹⁵ that the debtor's contractual²⁹⁶ rights to the benefits are considered property as envisaged by the Act²⁹⁷ and therefore vested in the trustee. With this personal pension scheme the beneficiary will not be able to withhold the benefits from creditors of a bankrupt estate by means of a forfeiture clause or a prohibition on assignment.²⁹⁸ This would be in conflict with the principle of bankruptcy that one cannot use protective trusts created by one's own disposition if that person is also the principle beneficiary, as a means to avoid the claims of creditors in bankruptcy.²⁹⁹ But this objection will not apply to an occupational pension scheme because the employer is the settlor, and not the bankrupt employee.³⁰⁰

The inconsistencies in this field of law were addressed in the Pensions Act 1995 and the Welfare Reform and Pensions Act 1999. Among other things, it was recognised that the case law had a very harsh impact on bankrupts who could lose their whole pension despite the fact that they may have existed for decades.³⁰¹ The 1995 Act then resulted from the *Report of the Pension Law Review Committee*.³⁰² This report proposed applying the system of exemption of future pension entitlements, as embodied in the aforementioned public sector statutory schemes, to all types of occupational pension schemes.³⁰³ This would mean that pension entitlements would not vest in the trustee in bankruptcy, but the trustee would be able to obtain an income payment order under section 310 of the Insolvency Act so as to claim any excessive pension payments received by the bankrupt. Section

²⁹⁴Fletcher *Insolvency law* at 230; Sealy *Legislation* (10th ed) at 355. See also, generally, Frieze at 91.

²⁹⁵See *Re Landau* [1998] Ch 223; *Krasner v Dennison*, *Lawrence v Lesser* [2000] 3 All ER 234 (CA); *Patel v Jones* [2001] BPIR 919; *Rowe v Sanders* [2002] BPIR 847; *Re the Trusts of the Scientific Investment Pension Plan* [1998] BPIR 410 and *Malcolm v Benedict Mackenzie* [2004] EWCA Civ 1748, [2005] BPIR 176. As mentioned in this paragraph, a vast majority of pension interests have now been excluded from bankruptcy estates by legislation, so recent case law in this respect is diminishing in importance. For pre-existing and ongoing cases, the important case law remains this mentioned in this footnote. See Frieze at 90-91; Doyle *Legislation* at 399 and 406.

²⁹⁶Under s 283(1) of the Act.

²⁹⁷S 436 of the Act.

²⁹⁸See Frieze at 90-91; Doyle *Legislation* at 399 and 406.

²⁹⁹See sub-para (e) above.

³⁰⁰See Frieze at 90-91; Doyle *Legislation* at 399 and 406.

³⁰¹See Keay *Insolvency* at 322.

³⁰²Cm 2342 – I (September 1993) chaired by Prof R Goode.

³⁰³Cm 2342 – I paras 4.14.33 to 4.14.35 (pp 458-459).

95 of the Pensions Act 1995 initially dealt with this proposal by inserting sections 342A, B and C into the Insolvency Act of 1986, which were intended to empower the court to order restitution of excessive payments made to an occupational pension scheme by, or on behalf of, the bankrupt within five years preceding the presentation of the bankruptcy petition on which adjudication took place.³⁰⁴

The case of *Re Landau*³⁰⁵ resulted in the second revision of the law in this field, in the form of the Welfare Reform and Pensions Act 1999. Section 15 of this Act replaced sections 342A, B and C of the Insolvency Act.³⁰⁶ The effect of the *Landau* case is reversed by sections 11 to 14 of the 1999 Act. Regarding personal pension schemes, sections 11 and 12 exclude from a bankrupt estate pension rights under an approved pension arrangement,³⁰⁷ but it is effective only to petitions presented after the coming into force of section 11, which was 29 May 2000.³⁰⁸ Section 12 allows the Secretary of State to provide for similar exemption in respect of pension arrangements that are unapproved within the meaning of the Act.³⁰⁹ An agreement between the trustee and the bankrupt regarding the exclusion to exclude those rights from the bankrupt estate in circumstances where they would otherwise not be excluded is provided for by the Occupational and Personal Pension Schemes (Bankruptcy) Regulations 2002.³¹⁰

Thus, regarding both personal and occupational pension schemes, the funds lodged in them will not automatically vest in the trustee for the benefit of creditors, but excessive contributions to those schemes could be clawed back by the trustee.

³⁰⁴See Fletcher *Insolvency law* at 231.

³⁰⁵[1998]Ch 223 (Ferris J)

³⁰⁶Sealy *Legislation* (10th ed) at 387.

³⁰⁷Broadly defined in s 11(2).

³⁰⁸See s 342A-F Insolvency Act which regulates pensions.

³⁰⁹The 1999 Act does however provide for reclaiming excessive contributions to a pension policy or scheme by the introduction of s 342 C of the 1986 Insolvency Act.

³¹⁰Howell G *Family breakdown and insolvency* (1993) at 208 (hereafter Howell) makes the interesting point that the issue of the family home in this context presents a stark contrast between policies espoused by family law on the one hand, and insolvency law on the other. He says, "In family law, the welfare of the child is the paramount consideration. That, however, is simply not the case when bankruptcy intervenes and it is a question of seeking to balance the interest of the creditors against the interests of the child and family. That is not to say that there would not be sympathy on the part of the trustee in bankruptcy and some support under the law for the position of children. However, if the trustee in bankruptcy wishes to push the matter through, then the interests of the creditors will prevail". SI 2002/427; see Doyle *Legislation* at 368.

Furthermore, the trustee will be able to apply for an income payments order in respect of pension payments to the bankrupt after adjudication, so as to claim excess funds that are not required for the bankrupt and his dependants' reasonable domestic needs.³¹¹

5.4 Conclusion

In early English law a distinction was initially made between bankrupts and other debtors. Only traders, as debtors, could go bankrupt. Insolvency, as a debt enforcement procedure was an individualistic remedy generally applying only to traders.

During the twelfth and thirteenth centuries execution could be taken only against the assets of the debtor. Imprisonment of persons for debt was a relatively late development in England, developing in the late thirteenth century. As an improved debt collection procedure developed, exemption laws also developed to protect certain assets essential for the livelihood of the debtor, namely oxen and plough animals.

Execution on the person was introduced in the late thirteenth century, first to protect foreign merchants, later allowing for the imprisonment of debtors in most circumstances. Execution against the debtor's property was originally limited to personal property and profits, or rents of real property. Execution against the debtor's land was introduced much later. The leniency of English law towards debtors resulted in an abuse of the system by debtors. This, in turn, led to a more creditor-friendly system, with various writs eventually enabling creditors to bring their debtors into court upon imprisonment and to deprive them of their goods in payment of their debts.

The earliest debt collection remedies of a collective nature were introduced by legislation, essentially that of Henry VIII in 1542-1543. This legislation allowed for the imprisonment of the debtor and the sale of his property. The proceeds were divided proportionately among his creditors. Both personal and real property could now be collected. Real property could also be sold if it could be lawfully departed

³¹¹Fletcher *Insolvency law* at 232; Keay *Insolvency* at 322.

with at the moment of collection. Henry VIII's legislation laid the foundation in England for the principle that all the debtor's property be included in his insolvent estate. The principle of exempt property, which existed to some extent, then developed further over a period of time, always considering the debtor's future means of existence, and the rights of third parties and the Crown. So, over a lengthy period, the interpretation of the Statute of Henry VIII clarified, in a piecemeal fashion, what assets belonged in the bankrupt estate and what was excluded from it.

By the end of the seventeenth century the bankrupt estate included all the debtor's property, thereby putting creditor protection firmly in place, leaving the debtor with virtually nothing. But in the eighteenth century some respite came for the debtor when legislation passed by Anne and George II provided for specific exemptions to keep the debtor and his family clothed and working.

The Bankruptcy Act of 1883 finally developed the concept of personal bankruptcy along the lines of modern English bankruptcy. So, in the United Kingdom there was a very slow progression in the development of a collective debt collection procedure. Even slower to develop was the idea of including all the debtor's property in his insolvent estate, bar certain exempt property. These were concepts that had already developed in Roman law almost a thousand years before. From its earliest conception, however, a policy of debtor protection developed, as in Roman law, essentially espousing the idea of keeping the debtor and his dependants clothed and productive, thereby leaving him less vulnerable, and less of a burden on society and the state. As will be shown below, this policy of including the bulk of the property in the bankruptcy estate for the benefit of the creditors has remained firmly in place in modern English law, but the composition of that estate has been eroded by the development of a policy to treat the debtor in bankruptcy in a more humane fashion, founded on the idea of allowing the debtor a speedy recovery from bankruptcy so as to pursue a productive position in society.

The next important development in England that was to have an effect on policies

relating to assets of insolvent estates in English law, was the Cork Committee's proposal for reform.

Many of the reforms in the 1986 and later legislation have their origins in the *Cork Report* which was of the view that the English insolvency law system failed a modern society in which the utilisation of credit was indispensable for the well-being of that society.³¹² Proposals of the *Cork Report* espoused the idea, in accordance with the wider principle, as far as possible, of seeking the rehabilitation of the debtor.³¹³ Recognising the importance of the welfare of the debtor and the acceptance that the debtor must be treated in a more humane fashion is the underlying philosophy at the root of the lengthy and ongoing reform process regarding, among other things, assets in bankruptcy estates in England.³¹⁴

The Insolvency Act provides for the automatic vesting of the bankrupt's estate in the trustee as soon as he is appointed. This basically includes all the debtor's property at the commencement of the bankruptcy and *potentially* a substantial portion of property acquired by the debtor after the latter date and prior to his discharge from bankruptcy. The property that is so vested is defined extremely broadly in the Act, in a non-exclusive fashion, which will allow the courts to determine, should the need arise, whether a particular proprietary interest complies with the definition. But the Act also provides generously for exempt property, together with suitable provisions to determine the extent to which certain property should be exempt from, or included in, the bankrupt estate. These provisions are considerably supple and can be adequately manipulated to apply to the different circumstances of different debtors, while not ignoring the interests of the creditors. This is why, in respect of after-acquired property being included

³¹²*Cork Report* at 9 and further. Since the 1980s there has been a substantial increase in credit granting, in turn resulting in increasing numbers of over-burdened debtors in the United Kingdom. See Ford J and Wilson M "Personal debt and insolvency" in: Rajak H (1993) *Insolvency law theory and practice* at 93.

³¹³*Cork Report* at 53.

³¹⁴Particularly in the nineteenth century the notion took root that in a civilised society a debtor deserved more consideration, and perhaps compassion, than he had in the past. In considering the changing approach to the imprisonment for debt during that century, Jacob at 296 comments that "During the course of the nineteenth century, it became apparent that the approach indicated above was not quite right, if indeed it was civilised at all, and that in a civilised society the debtor, including a judgment debtor ought to be treated with some consideration, if not some compassion".

in the estate, the word “*potential*” was used above. On the one hand, the trustee is given extensive powers, but limited time, to claim the lion’s share of the bankrupt’s after-acquired property (and excess exempt property), of which the bankrupt must notify the trustee. On the other hand, the bankrupt is certain that a substantial share, and possibly all his after-acquired assets, can contribute to a new healthy estate and a fresh financial start. At worst, the bankrupt and his dependants retain a considerable estate and, where relevant, a home. This legislation appears to have achieved an acceptable balance between all stakeholders.

The *Cork Report* points out that insolvency law is not a mechanism to serve only creditors in the division of the debtor’s assets, but an important instrument in the entire debt collection procedure, which includes the interests of debtors.³¹⁵ The progressive changes that were introduced to the 1986 Act are evidence of this. The new arrangements regarding the family dwelling and the changes in respect of exempt assets are to a great extent debtor-orientated,³¹⁶ but not, it seems, at the expense of the creditors in the bankruptcy estate. The new measures are well thought out along the lines of an equitable arrangement for all the parties concerned. For example, the idea is that the debtor and his dependants be treated in a more humane way by putting an end to the automatic vesting of after-acquired assets in the trustee, but simultaneously keeping them available for the benefit of creditors if claimed under circumstances considered reasonable towards all the stakeholders involved. By abolishing the automatic vesting of income of the bankrupt, it is hoped that the debtor will not become a “debt slave” to his creditors.³¹⁷ Although safeguards are included in the legislation, allowing the trustee always to protect the interest of creditors, these safeguards appear to be reasonable towards the debtor, for example, by placing time limits by which to claim certain assets. Added to this, the relaxing of the requirements for the automatic discharge of the debtor after only a year seems to be a liberal measure

³¹⁵Cork *Report* at 62.

³¹⁶Flynn D “Are the institutions of insolvency achieving their purpose? Bankruptcy and individual voluntary arrangements (IVAs) in England and Wales” in: Rajak H *Insolvency law theory and practice* (1993) at 110.

³¹⁷This idea is now also espoused in art 3 of the European Convention on Human Rights.

aimed at allowing the debtor a fresh start quickly, and probably with some assets of his own that have accrued as after-acquired assets that were not claimed by the trustee during bankruptcy.³¹⁸

This change in the underlying philosophy of bankruptcy law appears to be appropriate and well timed considering the substantial impact that human rights jurisprudence now has in Europe, and consequently in England, as well as an acceptance that credit granting is a reality that is here to stay and is inextricably linked to the entire debt collection regime. From a human rights stance, failing to change course in insolvency law would inevitably have resulted in much uncertainty and probably fruitless litigation stemming from bankruptcy instruments that may be considered, in modern society, excessively harsh. In respect of credit granting, it has to be accepted that societies will probably not survive without a well-regulated credit system, but when parties using that system fail in their commitments, a well-regulated and fair debt collection process that fits into a modern world must be in place to deal with the consequences of failed debtor creditor relationships.

The modern English bankruptcy system, at least in respect of its treatment of assets in individuals' insolvent estates, appears to be relatively successful. South African law reform can borrow fruitfully from the material already existing in English legislation. It is submitted that, adapted to South African circumstances, aspects of the English system may assist in eradicating many problem areas regarding assets in the estates of insolvent South African individuals.

³¹⁸If a debtor was adjudged bankrupt prior to the Insolvency Act 1986 coming into force he was granted an automatic discharge on 29 December 1989. If he was adjudged after December 1986 on a petition presented under the old law, he is entitled to an automatic discharge three years after his adjudication. In cases presented on or after 1 April 2004, automatic discharge is granted after one year from the date of the bankruptcy order (s 279(1)), and under certain circumstances the discharge may be granted before the lapsing of one year (s 279). The new provision in s 279 was introduced by the Enterprise Act 2002 with effect from 1 April 2004.

Chapter 6: United States Bankruptcy

6.1 Introduction

Bankruptcy law in the United States is unique in the world. Perhaps most startling to outsiders is that individuals and business in the United States do not seem to view bankruptcy as the absolute last resort, as an outcome to be avoided at all costs. No one wants to wind up in bankruptcy, of course, but many US debtors treat it as a means to another, healthier end, not as the End.¹

This quote partly illustrates the reason for electing to include the American bankruptcy system in a comparative study in this thesis. The American bankruptcy regime is indeed unique, being founded on policies and principles that appear to be extremely liberal if compared with the South African insolvency law system and that of most other countries. While the basic fabric of American bankruptcy is essentially the same as that of most insolvency laws the world over, that fabric is intertwined and held together with threads of a nature very different from its international counterparts. As with most bankruptcy systems, American law attempts to regulate the position of the bankrupt person in relation to his creditors and the position among those creditors *inter se*.

From this point on, however, the golden threads that hold together the fabric of the different systems differ considerably. In most systems the golden thread in insolvency law, from its commencement to its end, is that of “advantage to creditors”.² In South Africa, a policy on which insolvency law hinges is that of the advantage to the creditors as a group, with very little sympathy for the position of the debtor. The word “unfortunate” in relation to the debtor is foreign to South African insolvency law policy.³ In America, however, the golden thread in consumer bankruptcy has traditionally been the idea of a “fresh start” for the “unfortunate” debtor. Although some commentators are predicting the death of this consumer bankruptcy policy in the United States,⁴ and despite

¹Skeel DA *Debts Dominion: A history of Bankruptcy law in America* (2001) at 1 (hereafter Skeel).

²De la Rey EM *Mars The law of insolvency in South Africa* (8th ed) (1988) at 52, 108 (hereafter Mars (1988)); Smith CH *The Law of Insolvency* (3rd ed) (1988) at 26, 50 (hereafter Smith *Insolvency law*).

³Mars (1988) at 52, 108; Smith *The law of insolvency* at 26, 50; Bertelsmann E, Evans RG, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L and Steyn L *Mars The law of insolvency in South Africa* (9th ed) (2008) (hereafter Mars (2008)) at 48 and further; see ss 6 and 10 and 12 of the South African Insolvency Act 24 of 1936 and, eg, *Van Rooyen v Van Rooyen* [2000] 2 All SA 485 SE.

⁴Klein G “Consumer bankruptcy in balance: The national bankruptcy commission’s recommendations tilt towards creditors” (1997) 5 *AM Bankr Inst L Rev* at 293; see Tabb CJ “The death of consumer bankruptcy in the United States?” (2001) *Bankruptcy Developments Journal* at 1.

recent creditor-driven legislative amendments, it remains a debtor-friendly system compared to other bankruptcy systems. By comparison with other systems internationally, debtors in America are treated relatively kindly, particularly in respect of the assets that they may keep out of the estate, or exempt from the reach of their creditors.

Today American bankruptcy is governed by federal legislation embodied in the Bankruptcy Reform Act of 1978 which came into effect on 1 October 1979.⁵ It is generally referred to as the “Bankruptcy Code”, found in Title 11 of the United States Code. Apart from the code, bankruptcy is also influenced by state law and a variety of non-bankruptcy legislation. The code was the first radical reassessment of bankruptcy legislation in America in almost a century. Before the code, bankruptcy was regulated primarily by the Bankruptcy Act of 1898, the first comprehensive bankruptcy legislation in America.⁶ Bankruptcy legislation in America is rooted in the United States Constitution, which empowered Congress to establish uniform bankruptcy law throughout the United States.⁷

The 1978 amendments were supposed to simplify the complex nature of the 1898 Act, but failed to do so. The code was, in fact, just a somewhat different complex statute that required several amendments to cure its flaws.⁸ However, for the purpose of the bankruptcy estate, the 1978 amendments were important because they introduced a small degree of clarity in respect of property included in the bankruptcy estate, and that which is excluded and exempt from the estate. Although the provisions in respect of exempt property in the code resulted from a compromise between various interested parties, and they were hurriedly formulated, they (and the provisions regarding estate assets) surprisingly survived the several amendments virtually unscathed. The bankruptcy estate, excluded property and exempt property are identified in the text of this chapter, so as to allow for comparison with similar

⁵Pub L No 95-598, 92 Stat 2459 as amended (1978).

⁶Woodard LE *The practitioner's guide to consumer bankruptcy* (1996) at 6 (hereafter Woodard).

⁷Art I, s VIII of the United States Constitution. A brief history of the development of bankruptcy law in America follows in para 6.2 below.

⁸The most notable problems related to the jurisdiction of the Bankruptcy Court and to the Bankruptcy Court judge. These problems were alleviated by amendments in 1984. The recession of the late 1980s early 1990s affected the values of assets, and debtors' liabilities rose dramatically, prompting further amendments to the Code in 1994 – see Woodard at 6.

provisions in South African law, and to consider the possible compatibility of American policy regarding estate property with that proposed in law reform in South Africa. The most radical changes in respect of exempt property are embodied in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,⁹ which places domiciliary and dollar limits on some categories of exempt property.

There has been a steady movement to steer bankruptcy policy in America away from the debtor-friendly approach, towards a creditor-friendly policy. In doing so, methods have been created to make the entry into the bankruptcy process burdensome for the debtor, as well as for insolvency practitioners.¹⁰ This thesis essentially concerns itself with the position of the assets of the bankruptcy estate *vis-à-vis* the debtor and the creditors at the point where bankruptcy has already formally commenced and the debtor or creditors are utilising the procedures available to them. Here too policy changes favouring creditors are slowly whittling away the traditionally debtor-friendly policies upon which American bankruptcy law rested. In this chapter various aspects relating to assets in bankrupt estates, or those excluded from them, will be considered, and in later chapters, compared with the position in South African insolvency law, bearing in mind the lessons that may be learnt from this comparison for the purpose of the proposed reform of insolvency law in South Africa.

The code applies to both juristic persons and natural persons, and it offers different methods of debt alleviation.¹¹ In the present chapter of this thesis only individual consumer bankruptcy is considered. More specifically, the position of estate property in the Code's chapter 7 and chapter 13 proceedings is assessed.

6.2 A brief history of bankruptcy law in the United States of America

6.2.1 Introduction

Early American bankruptcy procedures found their origins in the older English practices of debt slavery and imprisonment.¹² The earliest English bankruptcy Acts

⁹Discussed in para 6.4.5 below. Hereafter also referred to as BAPCPA.

¹⁰See para 6.4.5 below.

¹¹See chs 7, 11, 12 and 13 of the code.

¹²Warren E and Westbrook JL *The law of debtors and creditors: Text, cases and problems* (3rd ed) (1996) at 207 (hereafter Warren and Westbrook); White JJ and Nimmer TR *Cases and materials*

from the thirteenth century permitted creditors to levy on and sell, a debtor's possessions, while imprisonment eventually was also a remedy. All bankruptcy proceedings, from the original bankruptcy statute from the reign of the first Elizabeth, until the time of the American Revolution, were involuntary or creditor-initiated; a creditor's collection device whereby all property of the debtor was attached for equal division among creditors.¹³ Generally, it could be used only against traders.¹⁴ Concessions to the debtor developed slowly in English law. A bankruptcy law of 1705 permitted the debtor to retain a few necessary clothes. Further concessions in English law followed painfully slowly over a lengthy number of years.¹⁵ American colonies adopted the English system of debtor imprisonment and few states had insolvency laws giving a debtor release from imprisonment or discharge of his debts.¹⁶ Initially, the American system followed the English practice which distinguished between "insolvent laws" and "bankrupt laws". Insolvent laws were applicable to non-traders while bankrupt laws applied only to traders.¹⁷

6.2.2 Early insolvency law

American "insolvency" law was a separate and later development, designed for relief of debtors. Insolvency was always voluntary, allowing debtors to place all their possession in the hands of their creditors and the court, thereby being

on bankruptcy (3rd ed) (1996) at 53 (hereafter *White Cases*); Ferriell J and Janger EJ *Understanding bankruptcy* (2007) at 135 and further (hereafter Ferriell); Tabb CJ "The history of bankruptcy laws in the United States" (1995) *ABI Law Review* at 6. For further literature on the background of American bankruptcy law, see also Warren C *Bankruptcy in the United States history* (1935) (hereafter *Warren History*), which is an assimilation of all the congressional debates on bankruptcy from the late eighteenth to the early twentieth century. There was a geographical split between northeastern lawmakers who tended to favour federal bankruptcy legislation and the southern and western lawmakers who opposed it. This is emphasised by Warren who submits that American bankruptcy law evolved through creditor centered and debtor centered stages, eventually achieving a more balanced approach; Countryman V "A history of American bankruptcy law" (1976) *Com LJ* 226 at 228; Cohen J "The history of imprisonment for debt and its relation to the development of discharge in bankruptcy" (1982) *Journal of legal history* 153 at 157 and further. Tabb CJ "The historical evolution of the bankruptcy discharge" (1991) *Am Bankr LJ* 325 at 326.

¹³Skeel at 6; Tabb CJ "The historical evolution of the bankruptcy discharge" (1991) *Am Bankr LJ* 325 at 327-328.

¹⁴Warren and Westbrook at 207.

¹⁵White at 53; See ch 5 *above* for a more detailed discussion of the history of bankruptcy in the United Kingdom.

¹⁶Warren and Westbrook at 207; Tabb CJ "The historical evolution of the bankruptcy discharge" (1991) *Am Bankr LJ* at 340.

¹⁷See Plank TE "The constitutional limits of bankruptcy" (1996) *Tennessee Law Review* 487 at 534.

“discharged” from the debtor’s prison, but not being released from their debts.¹⁸ This significant development occurred in the early nineteenth century when certain states enacted constitutional provisions prohibiting imprisonment for debt.¹⁹ However, combining discharge and bankruptcy elements into a unified debtor-creditor statute was a process that took time and was marred by several unsuccessful attempts. Although the United States Constitution²⁰ provides for the recognition of a unified bankruptcy Act, it took more than a century to create a bankruptcy statute that satisfied competing constituencies.²¹ There were periodic struggles between mercantile and debtor interests over the enactment of “bankruptcy” or “insolvency” laws. Certain farmers detested the idea of involuntary bankruptcy, while certain merchants wanted a discharge to be contingent on creditor agreement by specified majorities. Many believed that the “bankruptcy” and “insolvency” could not stand together, being a Bill to serve both God and Mammon.²²

6.2.3 Spirit of change

The first American Bankruptcy Act of 1800²³ largely followed its English counterpart, but the spirit of change brought together “insolvency” and “bankruptcy”, although the Act’s main purpose was to assist creditors.²⁴ Among other things, it provided for only involuntary bankruptcy, for a form of discharge of a co-operative debtor, and for exemption of the necessary wearing apparel, bed and bedding of the debtor and his spouse and children. The importance of this Act was that it was the first actual federal legislation in American bankruptcy.²⁵ This Act was meant to be a temporary measure for five years and was actually repealed after only three. This paved the way for the

¹⁸Bankrupt traders could however forfeit their assets in return for a discharge of their debts; Warren and Westbrook at 207.

¹⁹White at 54; For further literature on the background of American bankruptcy law, see Coleman PJ *Debtors and creditors in America: Insolvency, imprisonment for debt, and bankruptcy, 1607-1900* 1974 and Warren *History* as in para 6.2.1 above.

²⁰United State Constitution art I para 8 cl 4. See Tabb “The historical evolution of the bankruptcy discharge” (1991) *Am Bankr LJ* at 344.

²¹Warren and Westbrook at 208.

²²Warren and Westbrook at 208.

²³Bankruptcy Act of 1800, ch 19, 2 Stat 19 (1800).

²⁴See Tabb “The historical evolution of the bankruptcy discharge” (1991) *Am Bankr LJ* 325 at 327-328.

²⁵Tabb “The historical evolution of the bankruptcy discharge” (1991) *Am Bankr LJ* 325 at 345.

American Bankruptcy Act of 1841,²⁶ the next watershed event in the American bankruptcy arena. This Act aimed to protect debtors directly.²⁷

This 1841 Act featured *voluntary* proceedings, for the first time in American law, for *both* merchants and non-merchants whose debts totalled less than US\$2 000. A more debtor-friendly approach was now adopted by ending debtor imprisonment in the absence of fraud. It also extended further exemptions to debtors, thereby permitting them furniture and other necessary items, as well as clothes, but limited to US\$300 in value, irrespective of the dividend received by creditors.²⁸ Generally, discharge was permitted unless opposed by a majority of creditors.²⁹ By its simple innovations of introducing voluntary bankruptcy for all people, this Act achieved a fundamental transformation in the underlying policies of American bankruptcy law.³⁰ But its radical nature made it unpopular among creditors and it was repealed within a year. Its effect on policy, however, endured.³¹

In 1867 America's third Bankruptcy Act³² provided for both voluntary and involuntary proceedings for merchants, non-merchants and corporate debtors. It was a compromise between debtor and creditor interests.³³ This Act granted further exemptions in respect of the debtor's personal property. However, it also allowed the debtor to keep certain property exempted by federal non-bankruptcy law and by the law of the state in which he was domiciled in 1864.³⁴ Discharge could be denied a debtor who acted illegally or dishonestly. Consent of the majority of creditors was still a requirement for a discharge. Creditor opposition and administrative problems led to the repeal of this legislation.³⁵

²⁶Bankruptcy Act of 1841, ch 9 5 Stat 440 (1841).

²⁷Tabb "The historical evolution of the bankruptcy discharge" (1991) *Am Bankr LJ* 325 325 at 349.

²⁸Countryman V "Bankruptcy and the individual debtor – and a modest proposal to return to the seventeenth century" (1983) *Catholic University Law Revue* 809 at 815.

²⁹White JJ at 54.

³⁰Tabb "The historical evolution of the bankruptcy discharge" (1991) *Am Bankr LJ* 325 at 350.

³¹Tabb "The historical evolution of the bankruptcy discharge" (1991) *Am Bankr LJ* 325 at 350-351, 353.

³²Bankruptcy Act of 1867, ch 176, 14 Stat 517 (1867).

³³Tabb "The historical evolution of the bankruptcy discharge" (1991) *Am Bankr LJ* 325 at 355.

³⁴Countryman V "Bankruptcy and the individual debtor – and a modest proposal to return to the seventeenth century" (1983) *Catholic University Law Revue* 809 at 815; Tabb "The historical evolution of the bankruptcy discharge" (1991) *Am Bankr LJ* 325 at 355.

³⁵White JJ at 54

The Bankruptcy Act of 1898 followed and with various amendments remained in effect until 1978. Property of the estate under the Bankruptcy Act of 1898 was construed by the courts as only the assets owned by the debtor at the time of the filing of the bankruptcy petition, at which time it vested in the trustee.³⁶ “Property”, as envisaged in section 70 of the Bankruptcy Act was to enjoy a broad interpretation. But the courts excluded any property that was not transferable under relevant non-bankruptcy law,³⁷ property exempted under state law,³⁸ certain causes of action and some property encumbered by liens.³⁹ The 1898 legislation provided for exemptions to be based on state law, and creditor consent or a minimum dividend was no longer a requirement for discharge.⁴⁰ The debtor was therefore entitled to any exemptions provided by federal non-bankruptcy law and by the laws of the state of domicile at the time of the filing of the petition.⁴¹ This was all aimed at providing the debtor with sufficient assets to survive in the future and the courts often assisted in this endeavour by excluding assets from the bankruptcy estate to ensure that no obstacles would be in the way of the debtor’s fresh start.⁴² This 1898 Act was amended a number of times, and as a result of the Great Depression, was extensively revised by the Chandler Act of 1938, which added chapters on corporate reorganisation,⁴³

³⁶Dickerson AM “From jeans to genes: The evolving nature of property of the estate”(1999) *Bankr Dev J* 285 at 292.

³⁷See Countryman V “The use of state law in bankruptcy cases (Part I)”(1972) *NYU L Rev* 407 at 432.

³⁸See *Lockwood v Exchange Bank* 190 US 294 (1903) and *In re Lamb* 272 F Supp 393 (ED La 1967).

³⁹Dickerson “From jeans to genes: The evolving nature of property of the estate”(1999) *Bankr Dev J* 285 at 292.

⁴⁰Countryman V “Bankruptcy and the individual debtor – and a modest proposal to return to the seventeenth century” (1983) *Catholic University Law Revue* 809 at 817; Tabb “The historical evolution of the bankruptcy discharge” (1991) *Am Bankr LJ* 32 at 364.

⁴¹Countryman Modest Proposal at Countryman V “Bankruptcy and the individual debtor – and a modest proposal to return to the seventeenth century” (1983) *Catholic University Law Revue* 809 at 817. The 1898 Act’s incorporation of state exemption laws resulted in much dissatisfaction because the exemption policy, as an element of the fresh start principle, differed from state to state, as did the many different exemption laws. Thus, when the bankruptcy laws were to be revised in the 1970s, it was suggested that a new bankruptcy Code itself should include a uniform list of exemptions for bankruptcy cases. But the version eventually accepted in the new Code gave the debtor a choice between exemptions specified in the Code, on the one hand, or, on the other, those in other federal law and in the law of the state of the debtor’s domicile. But it contained the qualification that the respective state legislatures could “opt out” of the choice by excluding debtor’s domiciled in the respective states from electing to use the bankruptcy list of exemptions specified in the Code – see Countryman V “Bankruptcy and the individual debtor – and a modest proposal to return to the seventeenth century” (1983) *Catholic University Law Revue* 809 at 818.

⁴²Dickerson “From jeans to genes: The evolving nature of property of the estate”(1999) *Bankr Dev J* 285 at 292-293.

⁴³Ch X.

arrangements,⁴⁴ real property arrangements⁴⁵ and wage earners' plans.⁴⁶ But an important consequence of the 1898 Act was to deny the creditors the control over the debtor's access to a discharge. The only remaining check on discharges were the statutory limitations, and this contributed greatly to the "modern" American pro-debtor discharge policy.⁴⁷

In the 1970s Congress appointed a Federal Commission on Bankruptcy Laws of the United States which presented a proposed draft of a new bankruptcy Act to Congress in 1973.⁴⁸ The Senate and the House of Representatives worked with the draft for a number of years⁴⁹ and an amalgam of the commission's proposals and the versions of the House and the Senate led to the enactment of the Bankruptcy Reform Act of 1978.⁵⁰ Until 1978 the federal bankruptcy law was referred to as the Bankruptcy Act, or the 1898 Act, but the current bankruptcy law, originally formulated in 1978, is referred to as the "Bankruptcy Code". This new code was soon attacked by various creditor groups who condemned its provisions. So, for example, the consumer credit industry urged the adoption of stricter consumer bankruptcy provisions, while grain farmers, shopping centre landlords and others also complained.⁵¹

What must be mentioned for the purpose of this thesis, is that the code was the first complete revision of the bankruptcy law since 1898. It substantially expanded, among other things, the rights of the consumer debtor, making chapter 13 thereof a more desirable option for debtors, and expanding the number and variety of assets exempt from the creditors' reach. The incorporation of state exemption laws into the federal bankruptcy case had always been criticised,⁵² so it was eventually amended by

⁴⁴Ch XI.

⁴⁵Ch XII.

⁴⁶Ch XIII; See Warren and Westbrook at 210-211; White at 54.

⁴⁷Tabb "The historical evolution of the bankruptcy discharge" (1991) *Am Bankr LJ* 325 at 364.

⁴⁸Report of the Commission on the Bankruptcy Laws of the United States, HR Doc No 93-137, parts I and II 93d Cong 1st Sess (1973).

⁴⁹See H Rep NO 595, 95th Cong, 1st Sess, reprinted in 1978 US Code Cong & Ad News 5963: S Rep No 598, 95th Cong, 2nd Sess, reprinted in 1978 US Code Cong & Ad News 5787.

⁵⁰Hereafter referred to as the Code. Warren and Westbrook at 210-211; White at 54-55; Ferriell at 138; Moss DA and Johnson GA "The rise of consumer bankruptcy: Evolution, revolution or both?"(1999) *Am Bankr LJ* at 311.

⁵¹Warren and Westbrook at 211.

⁵²See, eg, Bartell LB "The peripatetic debtor: Choice of law and choice of exemptions"(2006) *Emory Bankruptcy Developments Journal* at 405 note 28 and Vukowich WT "The bankruptcy commission's

including federal exemptions in the new code, but giving the debtor the option to elect either the federal exemptions or the relevant state exemptions, but also permitting the respective states to exclude this choice of exemptions by legislation that provides exclusively for state exemptions, meaning that federal exemptions are then unavailable to that state's residents.⁵³ The result is section 522(b)(2) of the code allowing the debtor to choose between federal or state exemptions, unless state law does not authorise this (the opt-out clause). This arrangement remained intact in the 2005 amendments to the code,⁵⁴ despite criticism and calls for uniformity of state exemptions in bankruptcy.⁵⁵ But the legislation in respect of exemptions in the Code was hastily drafted, leading to interpretational problems as to what is meant by the provision that exempt property is "any property that is exempt under ... State or local law that is applicable on the date of the filing of the petition".⁵⁶ However, an analysis of this interpretational problem is beyond the scope of this thesis.⁵⁷

In the corporate field, the code melted down chapters X, XI and XII of the Bankruptcy Act into a chapter 11 proceeding. It also altered the avoidance provisions and, most significantly, it extended the power of the trustee in bankruptcy to use and inhibit the creditors' control of property that was subject to a preferred security interest. White and Nimmer submit that history may tell that the code subtly, but significantly, shifted power from secured creditors to others in bankruptcy proceedings.⁵⁸

After the enactment of the code there was a sharp increase in the number of business and bankruptcy filings. From 1977 to 1981 the total number of bankruptcies increased

proposals regarding bankrupt's exemption rights" (1975) *Cal L Rev* 1439 at 1441- 1446.

⁵³Bartell LB "The peripatetic debtor: Choice of law and choice of exemptions" (2006) *Emory Bankruptcy Developments Journal* at 406.

⁵⁴See para 6.4.5 below.

⁵⁵Brown WH "Political and ethical considerations of exemption limitations: The 'opt-out' as child of the first and parent of the second" (1997) *Am Bankr LJ* at 149; Engledow WM "Cleaning up the pigsty: Approaching a consensus on exemption laws (2000) *Am Bankr LJ* 275 at 276-78; Ponoroff L "Exemption limitations: A tale of two solutions" (1997) *Am Bankr LJ* at 221. It should be noted that there are actually two classes of exemptions, being those under s 522 and then exemptions under certain non-bankruptcy federal laws, eg, such as certain social security payments to the elderly. For present purposes only those under s 522 will be considered.

⁵⁶S 522(b)(3)(A) and see Bartell "The peripatetic debtor: Choice of law and choice of exemptions"(2006) *Emory Bankruptcy Developments Journal* at 407.

⁵⁷For a comprehensive discussion hereof see Bartell as referred to in this paragraph.

⁵⁸White at 55.

from 214 000 to more than 500 000. By June 1991 the rate of filings, of which the vast majority (approximately 75%) were chapter 7 filings,⁵⁹ had risen to more than 800 000. Fewer than 2 000 of these were involuntary bankruptcies (ie initiated by creditors against debtors). The rate of chapter 11 cases doubled from 1977 to 1981 and doubled again in 1982 to over 16 000. By 1994 the total number of cases annually had grown to 832 829. Of those, 567 240 were chapter 7 cases, 249 877 were chapter 13 and 14 773 were chapter 11.⁶⁰ Whether the increase in filing has resulted from the generosity of the code, to the change in society's notions about the morality of avoiding one's debt or to the wider availability of lawyers is uncertain and much disputed.⁶¹

Be that as it may, several amendments to the code inevitably followed, the most substantial being the Bankruptcy Abuse Prevention Consumer Protection Act of 2005.⁶² It must be taken into account that American bankruptcy law originates not only from the code, but also from analogous sections of the Act of 1898, federal and state consumer legislation and the Bankruptcy Rules.⁶³ American bankruptcy law is further derived from state common law and statutory law. For example, the law pertaining to garnishments, attachments and executions tends to be state common law. In a similar vein, certain traditional creditors' rights are found primarily in state case law and in state statutory law.⁶⁴

6.3 Policies of American bankruptcy law

6.3.1 General

The primary concern of all insolvency law systems relates to the conflicting positions that debtors and creditors find themselves in when the economic activity that they have entered into with each other has not resulted in its intended consequences, when the financially overburdened debtor is unable to service his debts.⁶⁵ Then the purpose of insolvency legislation should essentially be to

⁵⁹A brief explanation of the Code and its Chapters is given in para 6.4.2 below and further.

⁶⁰White at 56.

⁶¹White at 56.

⁶²Hereafter BAPCPA, discussed in para 6.4.5 below.

⁶³White at 57.

⁶⁴White at 57.

⁶⁵Jackson TH *The logic and limits of bankruptcy law* (1986) at 1 (hereafter Jackson).

balance and satisfy the needs of all the stakeholders, who include the insolvent debtor, the creditors, insolvency practitioners, the government and the commercial community in general.⁶⁶ In respect of American law Jackson states:⁶⁷

It is likewise fashionable to see bankruptcy law as embodying substantive goals of its own that need to be “balanced” with (among others) labor law, with environmental law, or with the rights of secured creditors or other property claimants.

But in the United States the purpose, or underlying theory of insolvency law was traditionally twofold, namely the equal treatment of creditors and the rehabilitation of the debtor, allowing for a “fresh start”.⁶⁸ In recent years, however, varying economic and social theories have been formulated to serve as the basis or purpose of an insolvency law system in the United States.⁶⁹ These theories will not be considered in detail, but will be referred to if relevant in this brief analysis of American bankruptcy policy, which policy, it would appear, is completely and inextricably linked to the bankruptcy estate and the assets relating to that estate. This policy underlies the substantive law governing, among other issues, estate assets.⁷⁰ American bankruptcy policy largely stems from the ideals of bankruptcy law expressed by Congress’s legislative history and court opinion. Academic debate is often divided in assessing what bankruptcy policy is or ought to be.⁷¹ However, the most glaring dichotomy in the policy debate is probably between those who believe the purpose of bankruptcy procedure is to maximise creditor returns with the least interference with creditor rights under non-bankruptcy law,⁷² and those who believe a wider social policy is to be served by bankruptcy law.⁷³ Generally, it would appear that bankruptcy policy espoused by Congress and the courts has been more “traditionalist” in nature.⁷⁴ Thus American bankruptcy policy

⁶⁶South African Law Commission *Review of the law of insolvency* Project 63 (2000) Report, Vol 1 Explanatory Memorandum, and vol 2 Draft Bill at 10. See also Jackson at 1.

⁶⁷Jackson at 1. See also, generally, Ferriell J at 7 and further.

⁶⁸Jackson TH and Scott RE “On the nature of bankruptcy: An essay on bankruptcy sharing and the creditors’ bargain” (1989) *Virginia Law Review* at 155; Blum BA *Bankruptcy and debtor/creditor – examples and explanations* (3rd ed) (2004) at para 5.1 (hereafter Blum).

⁶⁹Jackson TH and Scott RE “On the nature of bankruptcy: An essay on bankruptcy sharing and the creditors’ bargain” (1989) *Virginia Law Review* 155 at 155; see also Ferriell at 1.

⁷⁰Blum at 5.5.1.

⁷¹Blum at 5.5.1.

⁷²The “law and economics” movement.

⁷³The “traditionalists”; Blum at 5.5.1.

⁷⁴Blum at 5.5.1.

concerns itself both with a system that efficiently protects creditor's rights under non-bankruptcy law, and with a striving for social goals that account for vulnerable debtors, workers and the community in general.⁷⁵

The result is a complex interaction of the policies.⁷⁶ A particularly apt example of this has been the introduction of exempt property in the code in 1978, a tug of war that had to be reconciled and prioritised.⁷⁷ To complicate matters further, Congress is routinely lobbied by varying interest groups that may influence legislation, or amending legislation, from faithfully achieving the intended policy goals.⁷⁸ The perceived policy of bankruptcy law, probably in any system, would therefore rather reflect its ideals and possibly not the realities of bankruptcy law.⁷⁹ A further important consideration is the fact that bankruptcy law does not exist in a vacuum. It rubs shoulders and clashes with many other legal and socio-political disciplines and problems, thereby being influenced by public policy issues and legal policies of a much broader nature. So, for example, policies upon which common law rules or other statutes have been founded may have to be weighed up against and reconciled with bankruptcy law.⁸⁰

The discussion of policy issues that follows will attempt to restrict itself to themes relating to the bankrupt estate and the entitlement regarding assets that comprise that estate. These, of course, are not entirely self-contained, so they overlap with one another and with other bankruptcy policy themes. The more difficult debate in this respect will concern the question whether American bankruptcy law is succeeding in achieving the policies envisaged by all the role players in the bankruptcy arena, and more specifically, by the code.

⁷⁵Blum at 5.5.1.

⁷⁶Blum at 5.5.1.

⁷⁷Brown WH "Political and ethical considerations of exemption limitations: The 'opt-out' as child of the first and parent of the second" (1997) *Am Bankr LJ* at 149; Engledow WM "Cleaning up the pigsty: Approaching a consensus on exemption laws (2000) *Am Bankr LJ* 275 at 276-78; Ponoroff L "Exemption limitations: A tale of two solutions" (1997) *Am Bankr LJ* at 221.

⁷⁸Blum at 5.5.1.

⁷⁹Blum at 5.5.1.

⁸⁰Blum at 5.5.1.

6.3.2 Bankruptcy as a remedial mechanism

As in most bankruptcy law systems, bankruptcy in America is a remedial mechanism.⁸¹ As Blum⁸² puts it, bankruptcy relief is often sought at the point when the debtor's financial affairs are near collapse and therefore the aims of bankruptcy are essentially modest. It is not a vehicle that will give parties their full recourse under non-bankruptcy law. The aim is rather to manage economic strain and to preserve whatever may be available for the parties involved.⁸³ Gross⁸⁴ states that the policies underlying American bankruptcy law can be understood by a much wider audience than only the legal fraternity, and should interest a wide spectrum of people, including educators, economists, historians, business people, sociologists and philosophers, to mention only a few.

6.3.3 Protecting debtor and creditor interests

In previous discussions of the early development of this field of law it was shown that bankruptcy was initially a remedy only for the benefit of creditors *vis-à-vis* their debtors, where the parties were traders. All property of the debtor could be taken by the creditors to satisfy their debts, while imprisonment of the debtor pending payment of outstanding debts was also an option at various points in history.⁸⁵ Protection of the interests of the honest debtor is a relatively modern concept in bankruptcy law history.⁸⁶

Today, however, the policy that bankruptcy must serve to protect both debtors and creditors is well accepted.⁸⁷ It assists creditors in the collection and distribution of the debtor's assets in a controlled and regulated environment, but simultaneously allowing the debtor a form of respite from relentless creditors and the opportunity of starting over.⁸⁸ But this policy is an ideal. A perfect balance of diverse interests is an ideal which in reality will differ from one situation to another. Therefore, the more

⁸¹Blum at 5.5.2; Ferriell at 3.

⁸²Blum at 5.5.2.

⁸³Blum at 5.5.2.

⁸⁴Gross *K Failure and forgiveness: Rebalancing the bankruptcy system* (1997) at 4 (hereafter *Gross Failure*).

⁸⁵See para 6.2 above.

⁸⁶See para 6.2 above.

⁸⁷See para 6.2.3 above. See also Ferriell at 3 and further.

⁸⁸Blum at 5.5.1.

flexible these bankruptcy rules are, the more likely they will be to suit the varying interests of the different players. A perfect balance, however, seems unlikely.⁸⁹

The code adequately reflects this dual purpose of bankruptcy law in providing, for example, for voluntary and involuntary petitions,⁹⁰ the regulation of estate property in the interest of both debtors and creditors by the inclusion, the exclusion and the exemption of estate property, to mention but a few. But reality has also shown that the extent to which the interests of the various interested parties will be protected may be swayed by a variety of societal and economic interests and role-players. This has been witnessed by the many amendments of bankruptcy legislation over the years.⁹¹ But even after the creditor-friendly amendments in BAPCPA, this policy of protecting both debtors and creditors, it seems, essentially remained intact.

6.3.4 Equal treatment of creditors

Bankruptcy law in the United States regulates the mandatory collective debt collection procedure that the creditors as a group depend on. It is based on the policy of equal treatment of creditors in the repayment of the maximum amount possible.⁹² Filing of a petition puts an end to individual actions against the debtor, thereby avoiding the unequal distribution of the debtor's assets.⁹³

However, most bankruptcy estates produce very little or no assets for the benefit of the creditors, and Herbert questions the efficacy of insolvency law as a debt collection mechanism. Mainly secured creditors benefit by depending on their security, and to do so they do not need the support of the judiciary.⁹⁴ Gross points out that one of the problems with the collectivisation model, which some say espouses maximum creditor recovery, is that it explains bankruptcy only from a creditor point of view. Bankruptcy, she says, is much more than maximising creditors' recovery only in dollars and cents, as it also concerns the debtor's rehabilitation, which may not benefit creditors' short-

⁸⁹Blum at 5.5.1.

⁹⁰Blum at 5.5.1.

⁹¹Blum at 5.5.1.

⁹²Gross *Failure* at 142.

⁹³Gross *Failure* at 137.

⁹⁴Herbert MJ *Understanding bankruptcy* (1995) at 6 (hereafter Herbert).

term recovery.⁹⁵ Although Gross finds the equal treatment of creditors model flawed, she considers it a good starting point. But she feels that notions of equality of *outcome* need to be introduced.⁹⁶

But at this point one is reminded that bankruptcy policy overlaps, and while Herbert's and Gross's observations are valid, it is also true, as mentioned, that the bankruptcy is a remedial tool with modest aims.⁹⁷ So, although creditors as a group are treated in accordance with their respective ranking, this differentiation is based on existing legal rights of respective creditors.

6.3.5 Preserving the estate

The idea that bankruptcy must preserve what is left of the debtor's estate by preventing the debtor from further diminishing it is linked to all the other policies of bankruptcy law. Bankruptcy is meant to be advantageous to creditors not only because it protects their interests *inter se*, but also because it provides otherwise unavailable tools for the preservation and possible enhancement of the estate.⁹⁸

But preservation of the estate also assists the debtor. In both chapter 7 liquidation cases and chapter 13 rehabilitation, preservation of the estate possibly increases, or at least provides a pool of excluded assets, exempt assets and assets that the debtor may keep under a reorganisation.⁹⁹ These assets are then the foundation upon which the fresh start policy in American bankruptcy is based.¹⁰⁰

6.3.6 Fresh Start

One of the fundamental principles upon which American bankruptcy law rests is the policy of providing the honest debtor with an opportunity to shed his debts and

⁹⁵Gross *Failure* at 138.

⁹⁶Gross *Failure* at 144.

⁹⁷See para 6.3.2 above.

⁹⁸Blum at 5.5.1.

⁹⁹Blum at 5.5.1.

¹⁰⁰Blum at 5.5.1 – preservation of the estate also serves a social purpose where the estate of a business is preserved and that business is rescued, thereby helping employees, customers and the general community. Also in respect of individuals, by allowing the debtor to keep some assets the state is released of social responsibilities towards the debtor and his dependants.

thereby giving him a fresh start.¹⁰¹ Inextricably linked to the fresh start principle are the policies to preserve the estate, and to exclude and exempt part of the debtor's property from the bankruptcy estate so as to assist him in achieving the fresh start.¹⁰² In the often cited case of *Local Loan Co v Hunt*¹⁰³ the court stated that

One of the primary purposes of the bankruptcy act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes".

Various commentators have different ideas regarding the rationale behind the fresh start policy. For example, Jackson approaches it as a form of limited liability of individuals, with the creditors being in a dominant position when transacting with debtors, thus placing the risk of non-payment upon the creditors.¹⁰⁴ This encourages better monitoring of credit granting by creditors.¹⁰⁵ He says the discharge system thus contains a built-in checking system.¹⁰⁶ But Jackson states that a discharge should always be available at some cost so as to avoid its abuse in a credit-orientated society. Obtaining a discharge should entail some sacrifice on the debtor's part, such as the forfeiture of assets in favour of creditors, and possible negative consequences regarding credit worthiness in the future.¹⁰⁷ Gross, however, is of the opinion that the fresh start principle is based on the idea of society's willingness, by way of bankruptcy procedure, to forgive non-paying debtors and thereby allowing for their rehabilitation.¹⁰⁸ But Gross's reasoning is questionable. Perhaps she is losing sight of the fact that society has no other choice than to use bankruptcy as the only possible workable debt collection procedure, bar taking the law into one's own hands, a practice that is perhaps not so uncommon. It is doubtful whether forgiveness is on the mind of the creditor or society in respect of debt collection. If the rationale were forgiveness, then why go through the laborious bankruptcy procedure at all? Is one forgiving if one continues to question or curtail the debtor's credit-worthiness in the future? The rationale behind the fresh start policy is linked, it appears, rather to the policy to

¹⁰¹Waxman NW *Gilbert law summaries – bankruptcy* (4th ed) (2001) at 1; Woodard at 184; Gross *Failure* at 91.

¹⁰²See the discussion hereof in para 6.3.5 below.

¹⁰³292 US 234, 244 (1934).

¹⁰⁴Jackson at 229.

¹⁰⁵Jackson at 231.

¹⁰⁶Jackson at 231.

¹⁰⁷Jackson at 249.

¹⁰⁸Gross *Failure* at 93.

consider bankruptcy as remedial, the aim being to manage the debtor's financial distress in the interest of all the role-players. This, of course, is aside from the idea that the debtor who has a fresh start is less of a burden on society.

Of course the fresh start policy may also have unfortunate consequences, such as creditors increasing the cost of lending to cover the risk of bankruptcy consequences, while creditors actually carry the burden of the fresh start policy when the exempt assets in fact diminish the debtor's estate.¹⁰⁹ But, it would appear, the fresh start policy, with its advantages and disadvantages, is saved by the over-riding policy in bankruptcy law to find a suitable balance that protects or satisfies the interests of not only debtors and creditors, but also society in general and the government.

6.4 United States bankruptcy law today

6.4.1 General

As a result of the developments described above, United States bankruptcy laws today, in fact, address two different kinds of bankruptcy, namely individual debtor bankruptcy (also referred to as consumer bankruptcy) and the financial distress of corporations.¹¹⁰ Although these two fields overlap to some extent, they do raise different policy issues. This thesis concentrates primarily on the insolvency of individuals and, more specifically, on the effect that bankruptcy has on the assets of the bankrupt individual in America, but if relevant, issues relating to corporate bankruptcies will also be referred to. The central concept in personal bankruptcy in the American framework is the discharge.¹¹¹ When a debtor receives a discharge, his existing obligations end and creditors can no longer look to the debtor to collect the discharged obligation.¹¹²

Before proceeding to discuss the issues governing the assets of the bankrupt estate when the bankruptcy of an individual debtor ensues, it may at this point be

¹⁰⁹Blum at 5.5.1.

¹¹⁰See generally, Gross K *Failure*; Warren and Westbrook; White; Whitford WC "The ideal of individualized justice: Consumer bankruptcy as consumer protection and consumer protection in consumer bankruptcy" (1994) *Am Bankr LJ* at 397.

¹¹¹Skeel at 6; Whaley DJ and Morris JW *Problems and materials on debtor and creditor law* (1998) at 4.

¹¹²Skeel at 6.

appropriate to give a brief overview of the structure of the Bankruptcy Code, in order to place the position of consumer bankruptcy in perspective.

6.4.2 A brief explanation of the structure of the Bankruptcy Code

The Code,¹¹³ in Title 11 of the United States Code, is divided into chapters, designated as such in Arabic numerals (for example chapter 11) to distinguish it from the 1898 Act which used Roman numerals (for example chapter XI). The Code is numbered in uneven numbers, for example, chapters 1, 3, 5, 7 and so on. The even numerals have been reserved for additions to the code, with chapter 12, included in 1986 for family farmers, currently taking up the only even number.¹¹⁴

The sections in the first three chapters of the Code are of general application to the chapters that follow. Chapter 1, for example, is devoted to definitions, rules of construction, general powers of the bankruptcy court and the qualification of debtors who are eligible for each of the types of proceedings available. Chapter 3 governs the most important administrative and procedural sections in the Code. Sub-chapter I of chapter 3 governs the commencement of a case, describing how a voluntary and involuntary procedure commences. “Officers” are dealt with in sub-chapter II, which provides, among other things, who may serve as trustees. Sub-chapter III deals with a variety of procedural rules. Sub-chapter IV is one of the more significant provisions of the Code, containing provisions on adequate protection, the automatic stay, executory contracts and unexpired leases.

Chapter 5, entitled “Creditors, the Debtor, and the Estate” contains provisions relating to creditors, their claims and administrative expenses. Section 522, dealing with property excluded from the estate, establishes a set of federal exemptions which a debtor may choose in lieu of any state exemptions available. This is a radical departure from the American tradition and from the Bankruptcy Act of 1898, because prior to the code a debtor was limited to state exemptions, no federal set

¹¹³Bankruptcy Reform Act of 1978.

¹¹⁴See, generally, Scott MD and King LP 2002 *Collier pamphlet edition: Part 1 Bankruptcy code* (2001); King LP 2002 *Collier portable pamphlet: Full text of the bankruptcy code and rules* (2001); Warren and Westbrook at 215; White at 58; Gross *Failure* at 25.

of exemptions existed. These federal exemptions are considerably more generous than the exemptions accorded a debtor under the laws of many states.¹¹⁵ Discharge is dealt with in sections 523 and 524, and includes issues in respect of the reaffirmation of a particular debt and whether it can or should be excepted from the discharge. Section 541 defines the property of the estate and the trustee's avoiding powers are also provided for in chapter 5.

Chapter 7 is entitled "Liquidation" and is the first chapter providing for a specific form of bankruptcy, previously known as a "straight" bankruptcy. In a nutshell, the trustee simply collects the debtor's assets, sells them and distributes the proceeds to the creditors.¹¹⁶ Chapter 7 can be distinguished from a chapter 11 plan of reorganisation which may keep a business in operation, and from a chapter 13 wage earners' plan whereby an individual can propose certain periodic payments. Most bankruptcy proceedings in the United States are commenced under chapter 7, and many of the chapter 11 and 13 proceedings end up as chapter 7 proceedings.¹¹⁷ Section 727, read together with sections 523 and 524, sets out the rules denying a debtor any right to a discharge under certain circumstances.

Chapter 9 makes special provision for the bankruptcy of a municipality and other governmental unit.

Chapter 11 is central to reorganisation in business bankruptcies, making provision for "a plan" for failing businesses which attempt to remain in operation and work out their difficulties.

Chapter 12 was enacted by Congress in 1986 and is a specialised version of chapter 13, modelled exclusively for farmers. Chapter 12 developed because most farmers had too large a debt to be eligible for chapter 13 relief, while they were

¹¹⁵Scott MD and King LP 2002 *Collier Pamphlet edition: Part 1 Bankruptcy code* (2001) at 434-462; King LP 2002 *Collier portable pamphlet: Full text of the bankruptcy code and rules* section 112 to section 121; Warren and Westbrook at 215; White at 58. Exemptions in other non-bankruptcy federal laws also exist, such as social security payments to the ill or elderly, but these will not be considered any further at this point.

¹¹⁶White at 59. *Gross Failure* at 25.

¹¹⁷White at 59. See, generally, *Gross Failure* at 25 and further.

often adversely affected by chapter 11 proceedings.¹¹⁸ Chapter 12 enables the farmer to keep his farm after reorganisation under circumstances where he probably could not keep it under a chapter 11 proceeding.

Chapter 13 is a new development in the Code which provides for the adjustment of debts of an individual with regular income. It is used by most consumers wishing to keep their non-exempt property and try to pay back some part of their debts over time.¹¹⁹

Chapter 15 deals with ancillary and other cross-border cases. It was inserted by BAPCPA.

The jurisdictional and procedural provisions governing bankruptcy are dealt with in Title 28 of the United States Code, while Title 18 thereof defines and establishes criminal sanctions and offences in bankruptcy.

6.4.3 *The paths of personal bankruptcy*

It has already been noted above that the central concept in personal bankruptcy in the American framework is the discharge. From the above exposition of the structure of the code it can be seen that debtors may follow one of two paths to obtain a discharge. The first path is the straight liquidation envisaged in chapter 7 of the code. In summary, the debtor's assets are handed over to a bankruptcy court, the assets are then sold by the trustee and the proceeds distributed first, amongst the debtor's secured creditors, and if assets remain, pro rata among the unsecured creditors. In practice, these individual debtors filing for bankruptcy under chapter 7, in fact, have no non-exempt assets, leaving no need to conduct a sale and the debtor receives a discharge very quickly.¹²⁰

The second path that the debtor may follow is the proposal of a rehabilitation plan under chapter 13. Here the debtor retains his assets and proposes the repayment

¹¹⁸White at 60.

¹¹⁹Warren and Westbrook at 216. For a comprehensive discussion of the impact of BAPCPA on chapter 13 cases, see Hildebrand III HE "Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on chapter 13 Trustees" (2005) *The Am Bankr LJ* at 373.

¹²⁰Skeel at 5-6. Gross *Failure* at 25 and further.

of a portion of his debts over a period of three to five years. This is an attractive option for a debtor who has property that he wishes to retain.¹²¹

The core of personal bankruptcy in the United States therefore lies in three concepts, namely, the straight liquidation, the rehabilitation plan, and the discharge offered under both, and the third, an important concept, exemptions. Exempt property is not available to creditors. Exemptions are intended to protect enough of the debtor's assets to allow him to recover from his financial quagmire and to achieve a "fresh start". Exemptions have been, and still are, the cause of contention between state and federal legislators.¹²² As mentioned above,¹²³ Congress simply incorporated exemptions into bankruptcy under the old Bankruptcy Act, thereby allowing different states to provide for their own, different exemptions. The Code currently allows a debtor to choose between his state exemptions and a set of federal exemptions, unless the debtor's state requires all debtors to use the state alternative.¹²⁴ Exempt property will be discussed in more detail below.¹²⁵

Under the Code either a debtor or his creditors may invoke the bankruptcy laws, but BAPCPA has introduced certain limitations or obstacles to the pathways into bankruptcy.¹²⁶ In the past most debtors filed for bankruptcy voluntarily as creditors had little incentive to file for an involuntary proceeding due to the fact that the law was rather generous to debtors. Creditors therefore rather tried to collect their debts outside of bankruptcy.¹²⁷ BAPCPA has attempted to alter this situation.

6.4.4 A brief description of the pathway through a chapter 7 or a chapter 13 proceeding

What follows here is a brief description of the different procedures under the Code to attain bankruptcy of an individual debtor, and where relevant, the amendments

¹²¹See the discussion in para 6.4.5. below regarding the amendments to the Code by BAPCPA.

¹²²Skeel at 6.

¹²³See para 6.2.3 above.

¹²⁴The majority of states appear to have opted out. Countryman V "Bankruptcy and the individual debtor – and a modest proposal to return to the seventeenth century" (1983) *Catholic University Law Review* 809 at 819; Skeel at 7.

¹²⁵See para 6.6 below.

¹²⁶See para 6.4.5 below.

¹²⁷Skeel at 7.

introduced by BAPCPA will be mentioned. Both consumer and business bankruptcy may proceed by what is known as liquidations and payout plans.

Chapter 7, entitled “Liquidation”, contemplates an orderly, court-supervised procedure by which a trustee takes over the assets of the debtor’s estate, reduces them to cash, and makes distributions to creditors, subject to the debtor’s right to retain certain exempt property and the rights of secured creditors. The advantage here for the debtor is that he receives a discharge, leaving him free of all pre-existing debts. Thus, liquidation “achieves the two classic objectives of bankruptcy: fair distribution of the debtor’s assets for the benefit of all creditors and a ‘fresh start’ for the debtor”.¹²⁸

Amendments to the Bankruptcy Code enacted into the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 require the application of a “means test” to determine whether individual consumer debtors qualify for relief under chapter 7. If such a debtor’s income is in excess of certain thresholds, the debtor may not be eligible for chapter 7 relief. BAPCPA has also created further restrictions on the use of the chapter 7 procedure by adding to the duties of the trustee and the debtor, and the dismissal of cases that prove to be an abuse of the provisions of chapter 7.¹²⁹

The alternative to chapter 7 is the payout plan for consumers under chapter 13 and for business (and some consumers with very large debt) under chapter 11. Here the debtor can propose to keep his assets in return for payments of his debt over a period of time in the future. The advantage here is that the debtor need not liquidate his assets, often at reduced prices, and it may grant creditors higher returns. Particularly in consumer bankruptcy, where most cases tend to be “no asset” cases, this procedure may be advantageous to creditors.¹³⁰ However, as in the chapter 7 cases, BAPCPA has imposed certain burdensome requirements on debtors and practitioners before relief will be forthcoming.¹³¹

¹²⁸ Warren and Westbrook at 219.

¹²⁹See, eg, ss 704(10)-(12) and 707(b)(2)(A), and the discussion of BAPCPA in para 6.4.5 below.

¹³⁰ Warren and Westbrook at 219.

¹³¹See Hildebrand III HE “Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on chapter 13 Trustees” (2005) *The American Bankruptcy Law Journal* at 373 for a full

Proceedings by way of chapter 7 or chapter 13 commence by filing a petition and paying a filing fee.¹³² While foreclosure actions by a creditor could be the motivation behind a chapter 13 proceeding, creditor action is less likely to be the direct reason for the institution of a chapter 7 proceeding. The petition is usually filed by the debtor, and it is rare for a creditor to file an involuntary petition against a debtor.¹³³ The filing of the petition constitutes the commencement of the case and an automatic stay¹³⁴ is imposed and, most significantly, it creates the “bankruptcy estate”¹³⁵. After the filing there will be a first meeting of creditors which will probably be attended by the debtor, his lawyer and the court-appointed trustee. Creditors rarely attend this meeting, knowing that the typical consumer will have no unsecured or non-exempt assets. The trustee may, after the meeting of creditors, attempt to recover assets that have been conveyed to others for the benefit of the creditors.¹³⁶ In ordinary consumer cases this is, however, rare. It is also rare for an individual creditor to challenge the discharge of the debtor, or to claim that a particular debt be excepted from the discharge, or that particular property should not qualify as exempt property. The case is concluded by a discharge months after the filing of the petition and the debtor can continue with life, free of most debts.¹³⁷

In a chapter 13 consumer case the debtor must file a petition and propose a plan for the payment of his creditors. The premise here is that the debtor has a regular income and more assets than the chapter 7 debtor, thereby attracting the attention of the creditors. Here the need for negotiation and for the proposal of a plan may require more effort from the trustee, and the creditors too may be more involved.¹³⁸

discussion of the impact of BAPCPA on ch 13 cases.

¹³²A proceeding may be voluntary (BC s 301) when a debtor files a petition under ch 7, 11,12 or 13, while an involuntary petition (BC s 303(a)) may be filed only under ch 7 or 11 against a person who qualifies as a debtor under the applicable chapter.

¹³³ Whaley at 49.

¹³⁴BC s 362.

¹³⁵BC s 541.

¹³⁶BC s 544 or 547.

¹³⁷See Scott MD and King LP 2002 *Collier pamphlet edition: Part 1 Bankruptcy code* (2001) at 105 and further; Whaley at 49 and further; Warren and Westbrook at 219 and further; and White at 69.

¹³⁸White at 70.

6.4.5 **Bankruptcy Abuse Prevention and Consumer Protection Act of 2005**

This Act brought about fundamental changes to the bankruptcy law affecting consumers. It was signed by the then President, George Bush on 20 April 2005, but it generally applies to cases filed on or after 17 October 2005, because most of the BAPCPA amendments take effect only in respect of cases filed 180 days after enactment.¹³⁹ With respect to consumer debtors, Congress apparently intended with this legislation to force debtors to make substantial lifestyle changes in cases where their income exceeded state median income before they could receive the benefits of bankruptcy.¹⁴⁰ BAPCPA's consumer provisions restrict methods of asset protection and state by state shopping for advantageous exemptions.¹⁴¹ It has made it difficult to establish domicile for pre-bankruptcy exemption planning unless it is long-range planning, particularly in respect of homestead exemptions.¹⁴² But this Act has been criticised by many. So, for example, Sommer¹⁴³ said the following about this Act shortly before its enactment:

From its Orwellian title, an example of deceptive advertising if ever there was one, to the last of its 512 pages, the bankruptcy bill recently passed by Congress presents numerous challenges to attorneys who represent consumer debtors. How such terrible legislation came to be passed by Congress is a story of money, political mean-spiritedness, and intellectual dishonesty, but that is a story for another article.

However, this Act came about because of the long-held perception that the integrity of the bankruptcy process in the United States was being tarnished by shrewd and unscrupulous debtors who were exploiting the system. So, for example, the National Bankruptcy Review Commission¹⁴⁴ in its report criticised the opt-out exemption system when stating:

¹³⁹USC s 101.

¹⁴⁰See Tabb CJ "The death of consumer bankruptcy in the United States?" (2001) *Bankruptcy Developments Journal* at 1.

¹⁴¹Ahern III LR "Homestead and other exemptions under the bankruptcy Abuse Prevention and Consumer Protection Act: Observations on 'asset protection' after 2005" (2005) *Am Bankr Inst L Rev* 585 at 586; See also Hildebrand III HE "Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on chapter 13 Trustees" (2005) *Am Bankr LJ* 373 at 373.

¹⁴²Ahern III LR "Homestead and other exemptions under the bankruptcy Abuse Prevention and Consumer Protection Act: Observations on 'asset protection' after 2005" (2005) *Am Bankr Inst L Rev* at 586.

¹⁴³Sommer HJ "Trying to make sense out of nonsense: Representing consumers under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (2005) *Am Bankr LJ* at 191. See generally also Jacoby MB "Ripple or revolution? The indeterminacy of statutory bankruptcy reform" (2005) *Am Bankr LJ* 169 at 169; Vance CE "Nine traps and one slap: Attorney liability under the new bankruptcy law" (2005) *Am Bankr LJ* at 283; Howard M "Exemptions under the 2005 bankruptcy amendments: A tale of opportunity lost" (2005) *Am Bankr LJ* at 397.

¹⁴⁴Created by Congress in the Bankruptcy Reform Act of 1994.

The opportunities for pre-bankruptcy planning created by the exemption opt-out have called the integrity of the bankruptcy system into question, particularly in the context of a small handful of high-visibility debtors. People with no other familiarity with the bankruptcy system can cite celebrities who have shielded millions of dollars in an expensive homestead in certain states, a behaviour that is erroneously attributed to federal law, even though the federal exemptions would not have allowed this shielding to occur.¹⁴⁵

Ahern states that debtors were perceived to be exploiting the system by paying cash for houses in states with unlimited homestead exemptions, then moving 180 days before filing for bankruptcy, the sole purpose being to utilise these liberal exemptions.¹⁴⁶ Some states have homestead exemptions without dollar limits, which is considered by some to be too generous.¹⁴⁷ This situation was abused because residents in these states could exempt vast amounts of their estates by investing everything in their homes, or they would convert non-exempt assets on the eve of bankruptcy by selling them and using the cash to buy a homestead, or paying down the mortgage on an existing home.¹⁴⁸

Continued criticism of the abuses of the exemption system was heard by Congress in 2005, then leading to the enactment of BAPCPA, through which it was hoped to end the abuses so that the bankruptcy process would be used by persons needing it, and not those hoping to exploit it.¹⁴⁹

The following discussion of the relevant provisions relating to the bankruptcy estate, its content, and the exclusions and exemptions from it includes the BAPCPA amendments, and if relevant, it will be indicated whether, and to what extent, particular provisions have been affected by BAPCPA.

¹⁴⁵As cited in Ahern, III LR "Homestead and other exemptions under the bankruptcy Abuse Prevention and Consumer Protection Act: Observations on 'asset protection' after 2005" (2005) *Am Bankr Inst L Rev* 585 at 590; See Hildebrand III HE "Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on chapter 13 Trustees" (2005) *Am Bankr LJ* 373 at 373 and further.

¹⁴⁶Ahern, III LR "Homestead and other exemptions under the bankruptcy Abuse Prevention and Consumer Protection Act: Observations on 'asset protection' after 2005" (2005) *Am Bankr Inst L Rev* 585 at 590.

¹⁴⁷Blum at 13.2.

¹⁴⁸See Blum at 13.2.

¹⁴⁹Ahern, III LR "Homestead and other exemptions under the bankruptcy Abuse Prevention and Consumer Protection Act: Observations on 'asset protection' after 2005" (2005) *Am Bankr Inst L Rev* 585 at 591.

6.5 The bankruptcy estate

6.5.1 General

In the United States the filing of a bankruptcy petition by a debtor establishes an estate,¹⁵⁰ a separate legal entity, which holds and controls all assets owned by the debtor.¹⁵¹ Simultaneously with the creation of the bankruptcy estate, a chapter 7 individual debtor starts accumulating a new estate.¹⁵² If an individual debtor wants to file a single petition together with his spouse, he may file a joint case.¹⁵³ For a joint case, debtors must be legally married, as mere cohabitation does not qualify¹⁵⁴ and a joint petition may be used only in a voluntary case.¹⁵⁵ The debtors' estates in a joint case may be consolidated by the court. This entails the pooling of their assets and liabilities, particularly if their assets and liabilities are held together.¹⁵⁶ Here the court will consider whether there is a substantial identity between the property and debts, and dealing of financial affairs between the debtor and spouses, and whether consolidation, or the denial thereof, will have harmful consequences.¹⁵⁷

Section 541 in sub-chapter III of the code provides for the property that is included in the bankruptcy estate. It is a broad and all-encompassing provision that includes "all legal and equitable interests of the debtor in property as of the commencement of the case" including "property, wherever located and by whomever held".¹⁵⁸ The code does not define what constitutes property, but the courts construe property broadly to encompass everything of value, even if the property, or the debtor's interest in the property is "novel".¹⁵⁹

¹⁵⁰A case is commenced under section 301, 302, or 303, being a voluntary case, joint cases and an involuntary case respectively.

¹⁵¹See s 541(a) "[T]he commencement of a case ... creates an estate"; See generally Ferriell at 223 and further. See also Dickerson "From jeans to genes: The evolving nature of property of the estate" (1999) *Bankr Dev J* at 285; Blum at 12.1.

¹⁵²Blum at 12.1.

¹⁵³S 302(a). See Ferriell at 224 and 228.

¹⁵⁴*In re Malone* 50 BR 2 (Bankr ED Mich 1985).

¹⁵⁵*In re Benny* 842 F 2d 1147 (9th Cir 1988).

¹⁵⁶S 302(b); see Waxman para 149.

¹⁵⁷*In re Reider* 31 F 3d 1102 (11th Cir 1994).

¹⁵⁸S 541(a)(1). See, generally, Gross at 44.

¹⁵⁹See Dickerson at 293. It must be noted that determining the bankruptcy estate may be affected by the interplay between federal bankruptcy law (the Code), and non-bankruptcy law. Eg, entitlements granted to a party under non-bankruptcy law may exclude an asset from an estate, or

For the purpose of consumer bankruptcy, the content of the bankruptcy estate may differ, depending on whether it is a chapter 7 estate, or a chapter 13 estate.

6.5.2 *The chapter 7 and chapter 13 estate*

A chapter 7 estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case.¹⁶⁰ This includes the proceeds, product, offspring, rentals, or profits of, or from, property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.¹⁶¹ Also included is every interest of the debtor and the debtor's spouse in community property as of the commencement of the case that is under the sole, equal, or joint management and control of the debtor.¹⁶² Any interest in property that the trustee recovers under the trustee's avoidance power¹⁶³ is also included.¹⁶⁴ Also included is any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date by bequest, devise or inheritance, or as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree, or as a beneficiary of a life insurance policy or of a death benefit plan.¹⁶⁵

All the property included in a chapter 7 estate under section 541 is also part of a chapter 13 estate.¹⁶⁶ Here too, bankruptcy filing creates a bankruptcy estate as a legal entity distinct from the debtor. However, chapter 13 also includes all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapters 7, 11, or 12 of this title, whichever occurs first.¹⁶⁷ Here rehabilitation is aimed at the

the Code may disallow such exclusion, depending on the correct and relevant analysis. However, this aspect will not be considered in further detail – see in this respect Jackson at 93.

¹⁶⁰S 541(a)(1).

¹⁶¹S 541(a)(6). See Dickerson at 285 and further.

¹⁶²S 541(a)(2). Community property is defined under applicable state law. See the further discussion of community property in para 6.5.4 below

¹⁶³See ss 329(b) , 363(n) , 543 , 550 , 553 or 723.

¹⁶⁴S 541(a)(3).

¹⁶⁵S 541(a)(5).

¹⁶⁶Chapters 11, 12 and 13 are referred to as "rehabilitation" chapters, whereas ch 7 is entitled "liquidation". S 541 applies to all the rehabilitation chapters as well.

¹⁶⁷S 1306(a)(1).

preservation of the estate for the debtor. Its liquidation is not the goal as in the chapter 7 estate, and the break between the debtor's bankruptcy estate and his fresh start estate is not as final.¹⁶⁸ Earnings from services performed by the debtor after the commencement of the case, but before the case is closed, dismissed, or converted to a case under chapters 7, 11, or 12 of this title, whichever occurs first, are therefore also included in the chapter 13 estate.¹⁶⁹ The debtor is able to re-acquire pre-petition property from the estate by committing post-petition acquisitions, for example, future earnings, to the payment of claims.¹⁷⁰ Thus, the debtor in chapter 13 effectively uses property or post-petition income that would have been excluded or exempt from a chapter 7 estate, and thereby saves property that would have been liquidated under chapter 7.¹⁷¹ Pending the confirmation of a chapter 13 plan, the debtor can usually keep and use estate property. Once the plan has been confirmed, the debtor is re-vested with all property that has not been disposed of in the plan.¹⁷² Should the plan ultimately succeed, this becomes the debtor's property in his new estate. But if the plan fails and is converted to chapter 7, the property is surrendered to the trustee for liquidation.¹⁷³

6.5.3 Legal and equitable interests of the debtor as estate property

All legal and equitable interests in property at the time when the petition is filed are included in the bankruptcy estate. These include real or personal, and tangible or intangible interests.¹⁷⁴ Some of these legal interests that may form part of the estate include bank deposits, personal injury claims,¹⁷⁵ rights to compensation for pre-petition employment services and licences, copyrights and patents, to mention only a few.¹⁷⁶ Examples of equitable interests that may be included in the estate are a beneficial interest in the corpus of a non-spendthrift trust¹⁷⁷ and an equitable right to redeem foreclosed property.¹⁷⁸

¹⁶⁸Blum at 12.1.

¹⁶⁹S 1306(a)(2).

¹⁷⁰Blum at 12.1.

¹⁷¹Blum at 12.1.

¹⁷²S 1306(b).

¹⁷³Blum at 12.1.

¹⁷⁴S 541(a)(1).

¹⁷⁵*Tignor v Parkinson* 729 F 2d 977 4th Cir 1984.

¹⁷⁶Waxman para 295.

¹⁷⁷*In re Dias* 37 BR 584 (Bankr D Idaho 1984).

¹⁷⁸*In re Sapphire Investments* 19 BR 492 (Bankr D Ariz 1982).

6.5.4 Other estate property

Apart from the legal and equitable interests in property at the time the petition is filed, the following may also be included in the bankruptcy estate:

(1) Community property

Community property is defined by applicable state law. All such community property of the debtor and his spouse at the date of bankruptcy forms part of the bankrupt estate if that property is under the debtor's sole or joint control or is liable for a claim against the debtor and his spouse.¹⁷⁹ Community property forming part of the estate must be segregated from other estate property. In the distribution of such property special rules apply. Payments of claims for administrative expenses under section 503 are made either from community property, or from other estate property, depending on the requirements of justice.¹⁸⁰ Other than these administrative expenses, other claims and claims in respect of section 507¹⁸¹ must be paid by the distribution of the community property or the proceeds thereof (and other property). With respect to claims specified in section 507 or in section 726(a), being certain priority claims, the community property or its proceeds must be applied as follows:

- (A) Community claims against the debtor or his spouse must be paid from the community property, except to the extent that the community property is solely liable for the debts of the debtor.¹⁸²
- (B) The part of the community claims against the debtor that is not paid under Subsection (A) above, must be paid from the community property that is solely liable for the debts of the debtor.¹⁸³
- (C) To the extent that all claims against the debtor including community claims against him are not paid under subparagraph (A) or (B) above such claims must be paid from estate property other than community property.¹⁸⁴
- (D) To the extent that community claims against the debtor or his spouse are not

¹⁷⁹S 541(a)(2).

¹⁸⁰See s 726(c) and *In re Merlino* 62 BR 836 (Bankr WD Wash 1986).

¹⁸¹These claims relate amongst other things to allowed unsecured claims for domestic support obligations owing to or recoverable by certain spouses and children, wages and salaries, and so forth – see s 507 for the complete list.

¹⁸²S 726(c)(2)(A).

¹⁸³S 726(c)(2)(B).

¹⁸⁴S 726(c)(2)(C).

paid under subparagraph (A) to (C) above, those claims must be paid from the remaining property of the estate.¹⁸⁵

(2) Property recovered by the trustee

If the trustee recovers or preserves for the benefit of the estate any interest in property, it may be included in the estate. An avoidance of a preferential or fraudulent transfer of a debtor's interest in property is an example.¹⁸⁶

(3) Property acquired after the filing of the petition

Property acquired within 180¹⁸⁷ days after the bankruptcy date by way of an inheritance, bequest, devise, property settlement, divorce decree or beneficial interest in a life insurance policy or death benefit plan is included in the estate.¹⁸⁸

In the *Chenoweth* case,¹⁸⁹ where a testator died five months after bankruptcy filing, but the will was probated 196 days after the date of bankruptcy, the inheritance constituted property in the bankruptcy estate.

(4) Proceeds of estate property

Offspring, product, profits, rental or proceeds derived from estate property become property of the bankruptcy estate. In this respect, however, an individual debtor's post-petition earnings are not included in the estate.¹⁹⁰

(5) Post-bankruptcy acquisitions

Property acquired by the *estate* after the date of bankruptcy is included in the estate.¹⁹¹ For example, a contract entered into after bankruptcy by the trustee or a debtor in possession constitutes property of the estate.

¹⁸⁵S 726 (c) (2)(D).

¹⁸⁶S 541(a)(3) and (4); *In re First Capital Mortgage Loan Corporation* 917 F 2d 424 (10th Cir 1990).

¹⁸⁷Or becomes entitled to acquire within 180 days.

¹⁸⁸S 541(a)(5).

¹⁸⁹*In re Chenoweth* 3 F3d 1111 (7th Cir 1993).

¹⁹⁰This will be discussed further in para 6.6 below.

¹⁹¹S 541(a)(7).

6.5.5 *Invalid ipso facto or “bankruptcy” clauses*

The debtor’s property that is included in, or becomes part of, the bankruptcy estate is not affected by “bankruptcy” clauses. These are clauses in a contract or a deed, or in non-bankruptcy law placing conditions or restrictions on the debtor’s transfer of the property.¹⁹² In the same vein, provisions intending to modify, terminate or forfeit the debtor’s interest in property due to, among other things, the debtor’s insolvency will not exclude the property from the bankruptcy estate. Under section 541(c)(1) these clauses are unenforceable.¹⁹³

However, in respect of certain trusts there is an exception to this principle relating to “bankruptcy” clauses. A restriction on the transfer of a debtor’s beneficial interest in a trust is enforceable, if such restriction is enforceable under applicable non-bankruptcy law.¹⁹⁴ This exception applies to traditional spendthrift trusts and Employment Retirement Income Security Act of 1986 qualified pension plans.¹⁹⁵

But the income from a testamentary spendthrift trust that is *paid or owing* to a debtor-beneficiary within 180 days of the date of bankruptcy is included in the estate despite the corpus of the trust being excluded from the bankruptcy estate.¹⁹⁶

6.6 Excluded and exempt property

6.6.1 *General*

From its inception, the policy in American law of excluding certain property from the bankruptcy estate has been justified on two grounds.¹⁹⁷ First it provides for financial rehabilitation because it allows the debtor to keep some property in order to assist him to continue to be productive within his society. Second, as economies grew, exemptions fulfilled a wider humanitarian goal of saving debtors and their

¹⁹²Waxman para 306.

¹⁹³See Waxman para 306.

¹⁹⁴S 541(c)(2). See Waxman para 307.

¹⁹⁵*Patterson v Shumate* 504 US 753 (1992); see also para 6.6.2.5 below.

¹⁹⁶S 541(a)(5); *In re Hecht* 54 BR 379 (Bankr SDNY 1985).

¹⁹⁷Bartell LB “The peripatetic debtor: Choice of law and choice of exemptions”(2006) *Emory Bankruptcy Developments Journal* at 402; Sedler RA “Functionally restrictive substantive rules in American conflicts law” (1976) *S Cal L Rev* 27 at 30.

dependants from destitution.¹⁹⁸ But an economic justification is inextricably linked to this humanitarian policy. A destitute debtor would require state financial assistance. Exemptions, however, allow the debtor to withhold some property from his creditors, thereby placing the cost of maintaining the debtor on the creditor, instead of the state.¹⁹⁹

Resnick²⁰⁰ has gone further, suggesting that the following policies play a role in the development of exemption law:

- allowing the debtor enough property for his physical survival;
- protecting the dignity and the cultural and religious identity of the debtor;
- financial rehabilitation of the debtor earning a future income;
- protecting the debtor's family from destitution; and
- moving the burden of minimal financial support of the debtor and his family from society to the creditors of the debtor.

The earliest bankruptcy laws in the United States did contain limited uniform exemptions, but state law exemptions were not recognised.²⁰¹ The Act of 1867,²⁰² however, approached the matter differently by including the aforementioned federal exemptions, but going further by allowing the bankrupt to exempt any other property that was considered exempt property under the exemption laws of the state where the debtor was domiciled at the time when the proceedings started, but not exceeding the maximum exemption allowed under such state's law.²⁰³

¹⁹⁸Bartell LB "The peripatetic debtor: Choice of law and choice of exemptions"(2006) *Emory Bankruptcy Developments Journal* at 402; Yablon M "Why Annie gets to keep her gun: An analysis of firearm exemption in bankruptcy proceedings" (2005) *Emory Bankruptcy Developments Journal* 553 at 554.

¹⁹⁹Bartell LB "The peripatetic debtor: Choice of law and choice of exemptions"(2006) *Emory Bankruptcy Developments Journal* at 402; Deutsch DE "Exemption reform: Examining the proposals" (1995) *Am Bankr Inst L Rev* 207 at 207; Engledow WM "Cleaning up the pigsty: Approaching a consensus on exemption laws (2000) *Am Bankr LJ* 275 at 279.

²⁰⁰Resnick AN "Prudent planning or fraudulent transfer? The use of nonexempt assets to purchase or improve exempt property on the eve of bankruptcy" (1978) *Rutgers L Rev* 615 at 621.

²⁰¹Bartell LB "The peripatetic debtor: Choice of law and choice of exemptions"(2006) *Emory Bankruptcy Developments Journal* at 404.

²⁰²Act of 2 March 1867 ch 176 14 Stat 517 (establishing a uniform system of bankruptcy throughout the United States).

²⁰³Bartell LB "The peripatetic debtor: Choice of law and choice of exemptions"(2006) *Emory Bankruptcy Developments Journal* at 404.

The Bankruptcy Act of 1898²⁰⁴ was the first permanent United States bankruptcy law, and it eliminated federal exemptions entirely. It provided that it (the 1898 Act) would not affect the allowance to bankrupts of the exemptions prescribed by the state laws of the state in which the debtor was domiciled for the six months or the greater portion thereof immediately prior to the filing of the petition.²⁰⁵ This controversial approach resulted in the United States Supreme Court, in *Hanover National Bank v Moyses*²⁰⁶ rejecting the claim that the failure to provide uniform federal exemptions constituted Congress acting beyond its power to enact a “uniform” system of bankruptcy law under the Bankruptcy Clause to the United States Constitution.²⁰⁷ The court found that creditors were not disadvantaged as they “contracted with reference to the rights of the parties thereto under existing [state] exemption laws”,²⁰⁸ and the constitutional uniformity that was required was “geographical, and not personal”.²⁰⁹ It held that Congress’s incorporation of state exemption law was constitutionally permissible since it allowed all creditors access to exactly that property they could have reached outside of bankruptcy.²¹⁰

This incorporation of state exemption laws into the federal bankruptcy case was criticised by many commentators.²¹¹ It was eventually amended by including federal exemptions in a new Bankruptcy Code, but giving the debtor the option to elect either the federal exemptions or the relevant state exemptions. But it also permits the respective states to exclude this choice of exemptions by legislation that provides exclusively for state exemptions, meaning that federal exemptions are then unavailable to that state’s residents.²¹² The result is section 522(b)(2) of

²⁰⁴Bankruptcy Act of 1898 ch 541 30 Stat 544.

²⁰⁵See Bartell LB “The peripatetic debtor: Choice of law and choice of exemptions”(2006) *Emory Bankruptcy Developments Journal* at 404; Tabb “The historical evolution of the bankruptcy discharge” (1991) *Am Bankr LJ* 325 at 363.

²⁰⁶186 US 181 1902.

²⁰⁷US Const art 1 para 8 cl 4; Bartell LB “The peripatetic debtor: Choice of law and choice of exemptions”(2006) *Emory Bankruptcy Developments Journal* at 404.

²⁰⁸186 US at 189; Bartell LB “The peripatetic debtor: Choice of law and choice of exemptions”(2006) *Emory Bankruptcy Developments Journal* at 404.

²⁰⁹186 US at 188; Bartell LB “The peripatetic debtor: Choice of law and choice of exemptions”(2006) *Emory Bankruptcy Developments Journal* at 404.

²¹⁰At 189.

²¹¹See, eg, Bartell LB “The peripatetic debtor: Choice of law and choice of exemptions”(2006) *Emory Bankruptcy Developments Journal* at 405 note 28 and Vukowich WT “The bankruptcy commission’s proposals regarding bankrupt’s exemption rights” (1975) *Cal L Rev* 1439 at 1441-1446.

²¹²Bartell LB “The peripatetic debtor: Choice of law and choice of exemptions”(2006) *Emory Bankruptcy Developments Journal* at 406.

the code allowing the debtor to choose between federal or state exemptions, unless state law does not authorise this (the opt-out clause). This arrangement remained intact in the 2005 amendments to the code, despite criticism and calls for uniformity of state exemptions in bankruptcy.²¹³

In the United States the definition of “exempt property” has generally included apparel, bedding, cookware, dishes and stoves. But some states are more generous than others when defining exempt property. So, for example, also musical instruments, bicycles, fuel for six months, typewriters and wedding rings, to mention only a handful, have in some states been regarded as essential items available for exemption in bankruptcy.²¹⁴ Section 522 provides for a list of federal exemptions,²¹⁵ but most states have elected to opt out of these exemptions, replacing them with state exemptions. The result is a vast array of exempt property in the various states, with many states construing their exemption legislation liberally. All this has resulted in considerable uncertainty concerning the boundaries of exempt property.²¹⁶ This, in turn, has resulted in much litigation.²¹⁷

²¹³Brown WH “Political and ethical considerations of exemption limitations: The ‘opt-out’ as child of the first and parent of the second” (1997) *Am Bankr LJ* at 149; Engledow WM “Cleaning up the pigsty: Approaching a consensus on exemption laws (2000) *Am Bankr LJ* 275 at 275, 276-78; Ponoroff L “Exemption limitations: A tale of two solutions” (1997) *Am Bankr LJ* at 221. The exemptions that were introduced in the Bankruptcy Reform Act of 1978 were born from conflicting opinion on whether or not to include in the code a uniform set of exemptions applicable to all individuals, no matter where the individual may be domiciled. S 522(d) is a compromise between those advocating uniform bankruptcy laws, and those in favour of non-bankruptcy exemption laws – Blum at 13.2. As stated above, the legislation in respect of exemptions in the Code was however hastily drafted, leading to interpretational problems as to what is meant by the provision that exempt property is “any property that is exempt under ... State or local law that is applicable on the date of the filing of the petition”.

²¹⁴Yablon M “Why Annie gets to keep her gun: An analysis of firearm exemption in bankruptcy proceedings” (2005) *Emory Bankruptcy Developments Journal* 553 at 555.

²¹⁵S 522(d)(1)-(11).

²¹⁶Yablon M “Why Annie gets to keep her gun: An analysis of firearm exemption in bankruptcy proceedings” (2005) *Emory Bankruptcy Developments Journal* 553 at 556. See also Blum at 13.2, who points out that the 1997 National Bankruptcy Review Commission’s majority recommendation of the non-uniform system of exemptions, noting, *inter alia*, that deference to state law resulted in unnecessarily generous treatment of some debtors, and poor protection of others. The majority called for the repeal of the “opt-out” provision and the replacement thereof with a standardised provision in the Code. To date hereof Congress has ignored the Commission’s attempts at reforming the exemption system – see Blum at 13.2. Only in respect of homestead exemptions, were provisions provided by BAPCPA in respect of domiciliary limits on that exemption – see the discussion hereof in para 6.6.3.2.1 below.

²¹⁷See, eg, *In re Erickson* 815 F 2d 1090 (7th Cir 1987) concerning inconsistencies in the meaning of a baler and a haybine as exempt property in Wisconsin legislation; *In re Tiberia* 227 BR 26 (Bankr WDNY 1998) regarding the uncertainty as to the meaning of a “wedding ring” as exempt property under New York legislation.

Because of this diversity of material in respect of bankruptcy estate property and exemptions, some aspects thereof will be considered in more detail than others. The idea is to enquire and discover the system in place in the United States, and to learn from that system what may be useful for law reform in South Africa.

It was stated above what property is generally included in the bankruptcy estate.²¹⁸ However, it was previously stated that a chapter 7 debtor begins creating a new estate at the same time as the bankruptcy estate is created.²¹⁹ Included in the new estate are earnings, post-petition acquisitions and exempt property that has been released to the debtor. These assets form the foundation of the debtor's fresh start. They cannot be touched by pre-petition creditors who are stayed from reaching them pending the debtor's discharge and, after discharge are permanently prevented from collecting pre-petition debts.²²⁰

So it is important to note that certain property is excluded from that bankruptcy estate from the date of the filing of the bankruptcy petition and is therefore beyond the reach of the creditors. Exempt property does not form part of this category of property. Once it has been established what property is included in the estate of the individual debtor, it is possible to consider what part of the bankrupt estate may be subject to exemptions to which the individual may be entitled.²²¹ It is therefore necessary first to identify property that is excluded from the bankruptcy estate before discussing exempt estate property.

6.6.2 Excluded property

6.6.2.1 General

The most important categories of property that are excluded from the bankruptcy estate relate generally to future earnings, education savings accounts, employee

²¹⁸See also Scott MD and King LP 2002 *Collier pamphlet edition: Part 1 bankruptcy Code* (2001) at 531 where it is stated that s 541(1) includes as property of the estate all the debtor's property, even exempt property needed for a fresh start. After the property has come into the estate the debtor may exempt property if permitted to do so under s 522.

²¹⁹See para 6.4 and further above.

²²⁰Blum at 12.1.

²²¹Exemptions in terms of s 522 (b); see also Waxman para 316.

benefit plans, spendthrift trusts and pawned property. The most important of these categories that relate to individual debtors will now be considered in more detail.

6.6.2.2 Future earnings

The debtor's ability to work, thereby producing a future source of income is arguably his most valuable asset, but it is generally excluded from the bankruptcy estate.²²²

Apart from chapter 12 or 13 cases, earnings from personal services performed by an individual debtor after the commencement of the bankruptcy are excluded from the bankruptcy estate.²²³ The aspect of future earnings is inextricably linked to the "fresh start" policy in American law. This, together with the exemptions at the disposal of the debtor, determines the extent of the debtor's "fresh start".²²⁴ In *Local Loan Co v Hunt* the Supreme Court held that quite apart from exemption law, a creditor could not collect his claim that had been discharged in bankruptcy, out of post-bankruptcy earnings of the debtor. This applied even if before bankruptcy such future earnings had been validly assigned under state law to the creditor. To permit this would be in conflict with the bankruptcy policy to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh".²²⁵ In *In re Clark*²²⁶ a football player's salary that would correspond to nine month's post-petition games was excluded from the bankruptcy estate.

6.6.2.3 Certain powers

When the debtor can exercise a power solely for the benefit of another entity, that power is excluded from the estate. But if the power can be exercised for the debtor's own benefit, it is not excluded.²²⁷

²²²See Jackson at 90.

²²³S 541(a)(6).

²²⁴Countryman V "Bankruptcy and the individual debtor – and a modest proposal to return to the seventeenth century" (1983) *Catholic University Law Review* vol 809 at 817-818.

²²⁵292 US 234 at 244 (1934).

²²⁶*In re Clark* 891 F 2d 111 (5th Cir 1989).

²²⁷S 541(b)(1).

6.6.2.4 Certain leases

An interest of a debtor as a lessee under a lease of non-residential real property is excluded from estate property if that interest has terminated because of the expiration of the stated term of the lease either before the date of bankruptcy, or during the case.²²⁸

6.6.2.5 Education savings accounts

Funds placed in an education individual retirement account²²⁹ or a qualified state tuition programme²³⁰ more than 365 days before the filing of the bankruptcy petition are excluded, provided the designated beneficiary of such account is a child, step-child, grandchild or step-grandchild of the debtor. Further, to be included, the funds must not be pledged as collateral, the deposits must not exceed the amounts permitted by the Internal Revenue Code, and for any single beneficiary, deposits made within 720 days of the filing of the petition must not exceed US\$5 000.²³¹

6.6.2.6 Employee benefit plans

If an employer withholds or receives certain amounts from wages for payment of contributions to certain benefit plans, these are excluded.²³² These are payments as contributions to an employee benefit plan that is subject to Title I of the Employee Retirement Income Security Act of 1974²³³ or to a governmental plan under section 414(d) of the Internal Revenue Code of 1986,²³⁴ as well as contributions to a deferred compensation plan under section 457 of the latter code. Also excluded are payments of contributions to a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986 and to a health insurance plan regulated by state law.²³⁵

²²⁸S 541(b)(2), and see *In re Neville* 118 BR 14 (Bankr EDNY). This is however not an exclusion for the benefit of the debtor and does not create an exemption in favour of the debtor, but rather frees the lessor from the automatic stay and from other bankruptcy provisions that could interfere with the enforcement of rights against the debtor.

²²⁹Defined in s 530(b)(1) Internal Revenue Code 1986.

²³⁰Defined in s 26 USC s 529(b).

²³¹S 541(b)(5) and (6) – inserted by BAPCPA. See Yerbich JT *Consumer Bankruptcy – Fundamentals of chapter 7 and chapter 13 of the US Bankruptcy Code* (2nd ed) (2005) at 26 (hereafter Yerbich).

²³²S 541(b)(7) – inserted by BAPCPA.

²³³29 USC s 1001 and further.

²³⁴26 USC.

²³⁵See Yerbich at 26.

6.6.2.7 Spendthrift trusts

A beneficial interest of a debtor in a “spendthrift” trust²³⁶ is excluded from the bankruptcy estate. This includes a beneficial interest in pension or profit sharing trusts containing an anti-alienation provision.²³⁷

As stated above, the debtor’s property that is included in, or becomes part of, the bankruptcy estate is not affected by “bankruptcy” clauses. These are clauses in a contract or a deed, or in non-bankruptcy law placing conditions or restrictions on the debtor’s transfer of the property. So too, provisions intending to modify, terminate or forfeit the debtor’s interest in property due to, among other things, the debtor’s insolvency will not exclude the property from the from the bankruptcy estate. Under section 541(c)(1) these clauses are unenforceable.

However, in respect of certain trusts there is an exception to this principle relating to “bankruptcy” clauses. A restriction on the transfer of a debtor’s beneficial interest in a trust is enforceable, if such restriction is enforceable under applicable non-bankruptcy law.²³⁸ This exception applies to traditional spendthrift trusts and Employment Retirement Income Security Act qualified pension plans.²³⁹

But the income from a testamentary spendthrift trust that is *paid or owing* to a debtor-beneficiary within 180 days of the date of bankruptcy is included in the estate despite the corpus of the trust being excluded from the bankruptcy estate.²⁴⁰

6.6.2.8 Pawned property

Also excluded from the bankruptcy estate is tangible personal property sold or pledged as collateral for a loan or advanced by a person licensed under state law.

²³⁶11 USC s 541(c)(2).

²³⁷This included those established under Employment Retirement Income Security Act (26 USC s 401 and further), Civil Service Retirement (5 USC s 8346(a)), Federal Employees Retirement System (5 USC s 8470(a)), Federal Thrift Plan (5 USC s 8437(e)(2)), Retired Serviceman’s Family Protection Plan Annuities (10 USC s 1440) and qualified pension plans of the state or a political subdivision of the state, such as a municipality or a city (26 USC s 457). See Yerbich at 26.

²³⁸S 541(c)(2).

²³⁹*Patterson v Shumate* 504 US 753 (1992).

²⁴⁰S 541(a)(5); *In re Hecht* 54 BR 379 (Bankr SDNY 1985).

But this applies only if the property is in the possession of the pledgee or transferee, there is no obligation on the debtor to repay the advance, redeem the collateral or buy the property back at a stipulated price, and neither the debtor or the trustee has taken any measures to redeem under the contract or state law in a timely manner under state law and section 108(b).²⁴¹

6.6.3 Exempt property

6.6.3.1 General

Individual debtors are entitled to certain property exemptions which generally allow the debtor to survive bankruptcy with some assets which, in turn, assist him in gaining a “fresh start”.²⁴² Generally, exemptions are provided for, or regulated by, the Bankruptcy Code, or under the relevant state law and non-bankruptcy federal law. These exemptions do not apply to partnerships and corporations. They apply only to individual debtors in cases under Chapters 7, 11, 12 and 13, and may not be waived in favour of an unsecured creditor.²⁴³

Exempt property is considered part of the bankruptcy estate, but except in certain circumstances, is exempt from liquidation.²⁴⁴ The debtor therefore retains this property at the end of the case free from the claims of creditors, other than secured creditors and certain specified debts such as tax obligations and domestic support obligations.²⁴⁵ Generally, an exemption in property cannot trump a valid consensual security interest in that exempt property. A debtor effectively waives his right to the exemption when granting such security interest to the consensual lienholder. Statutory liens, conferred by legislation to protect persons who have enhanced or preserved the value of the relevant property are generally also immune from exemption claims.²⁴⁶ However, certain judicial liens that attach to exempt property can be avoided by the

²⁴¹S 541(b)(8) – inserted by BAPCPA. This is, however, not an exclusion for the benefit of the debtor and does not create an exemption in favour of the debtor, but rather frees the pawnbroker from the automatic stay and from other bankruptcy provisions that could interfere with the enforcement of rights against the debtor.

²⁴²See Waxman at para 609 and further.

²⁴³Ss 103(a) and 522(e).

²⁴⁴See Ferriell at 415.

²⁴⁵S 522(c). Yerbich at 27.

²⁴⁶See Blum at 13.5.1.

debtor. Judicial liens, Blum states, “are acquired by the very process of seizure or judgment against which exemptions are meant to protect the property”.²⁴⁷ This is regulated by the code in order to effectuate the primacy of the debtor’s exemptions over judicial liens. The debtor is therefore empowered to avoid such lien to the extent that it impairs the debtor’s exemption.²⁴⁸

But a debtor can no longer avoid a lien if such lien favours support obligations, since section 522(f)(1)(A), which allows for the avoidance of certain liens, has been amended to favour the protection support obligations to spouses and dependents.²⁴⁹ This is because public policy favours such support obligations, prompting Congress to bar debtors from avoiding maintenance and support obligations by filing for bankruptcy. Consequently, the Bankruptcy Reform Act of 1994 and BAPCPA²⁵⁰ provided for amendments giving such interests special status and preventing debtors from avoiding their responsibilities. So, a judicial lien securing a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of, such child or spouse, in connection with a separation agreement, divorce decree or other order of a court or administrative determination can no longer be avoided.²⁵¹

State exemption laws apply mostly only to individuals. They typically exempt a personal residence, personal clothing, household goods and furnishings, health aids, government-furnished aid and benefits, tools of the trade, vehicles and jewellery. Some exemption laws also cover life insurance policies, support payments, retirement plans (if not excluded from the estate or otherwise exempt under federal law) and personal injury claims. Most of these exemptions have a value limitation placed on them.²⁵²

The debtor does not have an automatic right to claim exemptions. He must file an inventory of exempt property, failing which, a dependant of the debtor may do so.²⁵³

²⁴⁷See Blum at 13.5.1.

²⁴⁸ S 522(f)(1)(A) and see Blum at 13.5.1.

²⁴⁹See s 522(f)(1)(A) and see Blum at 13.5.2.

²⁵⁰See American Bankruptcy Institute *Mini Code 2006 Edition with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (issued October 2005) at 94 (hereafter *Mini Code*).

²⁵¹*Mini Code* at 94 and Blum at 13.5.2.

²⁵²See, generally, s 522 as amended by BAPCPA.

²⁵³S 522(l). The schedule of claim of exemptions must be filed with the bankruptcy petition or within 15 days after the order for relief. Rules 1007 and 4003(a) require this, and the claim of exemptions

Some states allow the debtor a choice between two exemption schemes, namely federal or state.²⁵⁴ But in the “opt-out states”, only state exemptions and federal non-bankruptcy laws may be used by the debtor.²⁵⁵ Certain domiciliary requirements at the time that the bankruptcy petition is filed must be consulted to determine whether the exemptions are available under the particular state’s exemption laws.²⁵⁶ If the debtor chooses state exemptions, he must have been domiciled in the state for a minimum of 730 days before the filing date of the petition. If he has not been so domiciled in the current state for that period, the exemption laws of the state in which the debtor resided for 180 days, or the greater portion of the 180 days preceding the 730-day period apply. If neither of these domiciliary requirements are met, and the debtor would be ineligible for any exemption, the debtor can elect to use the section 522(d) federal exemptions.²⁵⁷ So, for example, if the debtor resided in State A for the past 12 months, in State B for the preceding 12 months, and State C for the year before that, the exemption laws of State C would apply. But only the exemptions of State C could be used if State C is an opt-out state.²⁵⁸

Thus, if a choice is permitted, both options should be considered to determine the most advantageous option for the debtor. Exemptions are meant to benefit the debtor and electing the law most beneficial to the debtor is a requirement.²⁵⁹ Also, the state in which the debtor is domiciled must see to it that its citizens retain the exemptions to which they are legally entitled to under its exemption laws so that the debtor may emerge from bankruptcy without the need for state welfare and may continue as productive citizens.²⁶⁰ Having said this, it must also be noted that exemptions are not meant to provide the debtor with a windfall, but to protect the public from having to support a destitute family.²⁶¹

is found in Schedule C of official form 6.

²⁵⁴S 522(b) as amended by BAPCPA.

²⁵⁵Ahern, III LR “Homestead and other exemptions under the bankruptcy Abuse Prevention and Consumer Protection Act: Observations on ‘asset protection’ after 2005” (2005) *Am Bankr Inst L Rev* 585 at 587.

²⁵⁶ See also Howard M “Exemptions under the 2005 bankruptcy amendments: A tale of opportunity lost” (2005) *Am Bankr LJ* at 398; Hildebrand III HE “Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on chapter 13 Trustees” (2005) *Am Bankr LJ* 373 at 383-384 and Rivera BP “State homestead exemptions and their effect on federal bankruptcy laws”(2004) *Real Property, Probate and Trust Journal* at 71.

²⁵⁷S 522(b)(3)(A) as amended or inserted by BAPCPA; Yerbich at 28.

²⁵⁸Yerbich at 28.

²⁵⁹Yerbich at 28.

²⁶⁰*In re O’Hara* 162 F 325 at 327 (MD Pa 1908).

²⁶¹*In re Hill*, 163 BR 598, 601 (Bankr ND Fla 1994); *Brown v Swartz (In re Swartz)* 18 BR 454, 456 Bankr Mass 1982.

It should also be noted that although the creditors in effect carry the burden of the welfare of the bankrupt via the exempt property of the debtor, the relevant state must also protect the expectations of the creditors by limiting the debtor's exempt property to that provided by the state's laws.²⁶²

As stated above, the exemptions may emanate from various different legislative sources. Some of these exemptions will now be considered.

6.6.3.2 Federal bankruptcy exemptions

If a state has not opted out, the Bankruptcy Code allows the following maximum exemptions of a debtor's interest in property:²⁶³

6.6.3.2.1 Homestead

The debtor may exempt his aggregate interest to a maximum of US\$18 450 in value, in real or personal property that the debtor or a dependant uses as a residence.²⁶⁴ A homestead exemption usually applies only to the principal dwelling of the debtor or one of his dependants.²⁶⁵ The 2005 amendments to the Bankruptcy Code have created certain limits on pre-bankruptcy transfers which would otherwise have drastically increased a debtor's exemption rights.²⁶⁶ The value of the homestead exemption is reduced to the extent that the value is attributable to non-exempt property that was transferred by the debtor with the intention of delaying, hindering or defrauding a creditor within the ten-year period prior to the filing of the petition.²⁶⁷ Prior

²⁶²*Bassin v Stopher (In re Bassin)* 637 F 2d 668 at 670 (9th Cir 1980); *In re Morzella* 171 BR 485 at 488 (Bankr D Conn 1994); *In re Sticha* 60 BR 717 at 719 (Bankr D Mn 1986).

²⁶³S 522(d). There was no fluctuation in the value limits of the exemptions in s 522(d) for almost twenty years since their enactment in 1978. Thus inflationary pressure made them increasingly worthless. They were, however, updated in the Bankruptcy Reform Act of 1994 which added s 104(b) to the Code. This section delegates to the Judicial Conference of the United States the responsibility of adjusting the dollar amounts of the exemptions every three years. This adjustment is based on the Consumer Price Index. However, the dollar amounts of these exemptions in the Code are deliberately set at a modest level. So, eg, the debtor's federal homestead exemption is relatively small at just over US\$18 000. The exemption will therefore not cover the debtor's entire interest therein, unless his equity in the homestead (or other exempt assets) is very small. If property is partially exempt, the non-exempt portion of the debtor's interest goes to the estate. The property itself will not be returned to the debtor, only the value of the exemption will be paid to the debtor from the proceeds of the property – see Blum at 13.3.

²⁶⁴S 522(d)(1) as amended by BAPCPA.

²⁶⁵*Ferriell* at 103.

²⁶⁶See the new ss 522(o) and 522(p), which then also affect the different state homestead exemptions.

²⁶⁷S 522 (o). *Yerbich* at 29; *Ferriell* at 428. See also *In re Agnew* 355 BR 276 (Bankr D Kan 2006).

to the amendments, a court could feel constrained to allow an exemption despite evidence of apparent fraud by the debtor because the debtor's state exemption law contained no provision to prevent such fraudulent action.²⁶⁸ The amendment should now prevent this from happening. What follows are the further relevant amendments in the 2005 legislation.

(a) Amendments by BAPCPA of state homestead exemptions²⁶⁹

Various interested parties and commentators were of the opinion that the homestead exemption and asset protection schemes were abused prior to the enactment of BAPCPA, and that one of the objectives of BAPCPA was to eradicate this abuse.²⁷⁰ So, for example, in the past debtors exploited the system by buying houses for cash in states with unlimited homestead exemptions, then moving to these states 180 days before filing for bankruptcy to use these unlimited exemptions.²⁷¹

Certain limitations on state homestead exemptions came into effect upon the enactment of the BAPCPA on 20 April 2005. These can be divided into monetary limits and domiciliary limits.

Domiciliary limits

BAPCPA altered the previous domiciliary limits specific to homestead exemptions to put an end to the exploitation of lenient state laws. Prior to BAPCPA the applicable state law was that of the state where the debtor was domiciled 180 days immediately prior to the date of the filing of the petition, or the state where the

²⁶⁸See, eg, *In re Reed* 12 BR 41 (Bankr ND Tex 1981).

²⁶⁹What follows in respect of these amendments must also be read into the paragraph in respect of state homestead exemptions in para 6.6.3.3 on state exemptions.

²⁷⁰See Howard M "Exemptions under the 2005 bankruptcy amendments: A tale of opportunity lost" (2005) *Am Bankr LJ* at 397-400; Tabb CJ "The death of consumer bankruptcy in the United States?" (2001) *Bankruptcy Developments Journal* 1 at 42-42; Norwood JM and Jennings MM "Before declaring bankruptcy, move to Florida and buy a house: The ethics and judicial inconsistencies of debtors' conversions and exemptions" (1999) *SW UL Rev* at 439; Engledow WM "Cleaning up the pigsty: Approaching a consensus on exemption laws (2000) *Am Bankr LJ* 275 at 276-278.

²⁷¹Ahern, III LR "Homestead and other exemptions under the bankruptcy Abuse Prevention and Consumer Protection Act: Observations on 'asset protection' after 2005" (2005) *Am Bankr Inst L Rev* 585 at 590; see also Barstow W "In Florida, Simpson may find a financial haven" (1995) *St Petersburg Times* at A1; Klein G "Consumer bankruptcy in balance: The National Bankruptcy Commission's recommendations tilt towards creditors" (1997) *AM Bankr Inst L Rev* 293 at 309.

debtor resided for the greater part of such 180 days. BAPCPA has extended this period to a window of at least 730 days.²⁷² If that domicile period was not continuous, the law to be applied will be the place where the debtor was domiciled for the 180-day period preceding the 730-day period, or where the debtor was domiciled for a longer portion of that 180-day period than any other place.²⁷³ If a debtor finds himself ineligible for any exemption under the above provisions of section 522(b)(3)(A), as a default result under section 522(b)(3), the federal exemptions under section 522(d) may be applied and the debtor can elect to exempt the property specified under that section.²⁷⁴

Monetary Limits

Under state law the value of the debtor's interest in the homestead exemption is capped at US\$125 000 if the residence in which a homestead exemption is claimed was acquired within 1 215 days preceding the filing date of the petition.²⁷⁵ But any amount of such interest does not include any interest transferred from a debtor's previous principle residence (acquired before the start of the 1 215-day period) into the current principal residence of the debtor, if the previous and current residences are situated in the same state.²⁷⁶

Furthermore, such cap of US\$125 000 on the debtor's interest also applies if he has been convicted of a felony²⁷⁷ and the filing would be an abuse under the Bankruptcy Code. The cap also applies if the debt originated from a violation of federal or state securities law, or fraud, deceit or manipulation in a fiduciary capacity or in connection with the purchase or sale of a registered security, or civil penalty under RICO, or any criminal act, international tort, or willful or reckless

²⁷²S 522(b)(3)(A); Ahern, III LR "Homestead and other exemptions under the bankruptcy Abuse Prevention and Consumer Protection Act: Observations on 'asset protection' after 2005" (2005) *Am Bankr Inst L Rev* 585 at 591.

²⁷³S 522(b)(3); Ahern, III LR "Homestead and other exemptions under the bankruptcy Abuse Prevention and Consumer Protection Act: Observations on 'asset protection' after 2005" (2005) *Am Bankr Inst L Rev* 585 at 592.

²⁷⁴See Ahern, III LR "Homestead and other exemptions under the bankruptcy Abuse Prevention and Consumer Protection Act: Observations on 'asset protection' after 2005" (2005) *Am Bankr Inst L Rev* 585 at 592.

²⁷⁵11 USC s 522(p)(1).

²⁷⁶S 522(p)(2)(B).

²⁷⁷A crime punishable by confinement of a period of more than one year (see 18 USC s 3156).

misconduct that caused serious physical injury or death to another individual in the preceding 5 years.²⁷⁸

The cap does not apply to the extent that the interest in the residence is reasonably necessary to the support of the debtor and or his dependents.²⁷⁹

6.6.3.2.2 Motor vehicle

A maximum exemption of US\$2 950 is allowed for one motor vehicle.²⁸⁰

6.6.3.2.3 Household goods and other items

The debtor's interest to a maximum value of US\$475 in any specific item, or US\$9 850 in aggregate value, in wearing apparel, household goods and furnishings, appliances, books animals, crops or musical instruments. These items must be held primarily for the personal, family or household use of the debtor or his dependants.²⁸¹

6.6.3.2.4 Jewellery

A maximum exemption of US\$1 225 in value in jewellery held primarily for the personal, family or household use of the debtor or his dependants.²⁸²

6.6.3.2.5 Wildcard exemption

An exemption in a debtor's interest in any property to the maximum value of US\$975, plus up to US\$9 250 of any unused amount of the homestead exemption.²⁸³ The purpose of this exemption is primarily to benefit non-homeowner debtors.²⁸⁴

²⁷⁸S 522(q).

²⁷⁹S 522(q)(2).

²⁸⁰S 522(d)(2). A debtor's exemption rights are limited in that they do not affect creditors' consensual liens. They apply only to the debtors equity in his property – see, eg, *In re Galvan* 110 BR 446 (BAP 9th Cir 1990). This means that a debtor with a home valued at US\$150 000 but which is mortgaged for US\$150 000 will be deprived of his exemption over that home because he has no equity in it – see Yerbich at 28 and Ferriell at 97.

²⁸¹S 522(d)(3).

²⁸²S 522(d)(4).

²⁸³S 522(d)(5).

²⁸⁴Waxman para 618.

6.6.3.2.6 Tools of the trade

An exemption is given to the maximum of US\$1 850 in value in any implements, professional books, or tools of the trade of the debtor or the trade of the debtor's dependants.²⁸⁵

6.6.3.2.7 Life insurance

Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract may be exempt.²⁸⁶

6.6.3.2.8 Loan value – life insurance

An exemption to a maximum of US\$9 850 in the loan value or in accrued interest or dividends of any unmatured life insurance contract owned by the debtor. For the purpose of this exemption, the insured must be either the debtor or an individual of whom the debtor is an independent.²⁸⁷ For the purpose of this section a dependant includes (but is not limited to) a spouse, regardless of whether the spouse is actually dependent.

6.6.3.2.9 Health aids

Health aids prescribed by a professional for the debtor or a dependant are exempted.²⁸⁸

6.6.3.2.10 Government benefits

The debtor's right to receive social security benefits, veteran's benefits, local public assistance, unemployment benefits or compensation, or disability or illness benefits are exempted.²⁸⁹

²⁸⁵S 522(d)(6).

²⁸⁶S 522(d)(7).

²⁸⁷S 522(d)(8); Waxman para 622.

²⁸⁸S 522(d)(9).

²⁸⁹S 522(d)(10)(A)-(C).

6.6.3.2.11 Maintenance

To the extent that it is reasonably necessary for the support of the debtor and any dependant, the debtor's right to receive alimony, support or maintenance, is exempted.²⁹⁰

6.6.3.2.12 Pension plans

Rights to receive payments under an eligible pension plan, or a similar contract based on length of service, age, illness, disability or death is exempt to the extent that it is reasonably necessary for the support of the debtor and any dependants.²⁹¹

6.6.3.2.13 Crime victim award

An award under a law for a crime victim's reparation is exempted.²⁹²

6.6.3.2.14 Wrongful death award

The debtor's right to receive payment arising from the wrongful death of an individual upon whom the debtor was dependent, is exempted to the extent that such payment is reasonable necessary to support the debtor and any of his dependants.²⁹³

6.6.3.2.15 Life insurance – dependant

The right to receive payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependant at the time when that individual died, is exempt to the extent that it is reasonably necessary for the support of the debtor or any of his dependants.²⁹⁴

6.6.3.2.16 Personal injury

A payment to the maximum of US\$15 000 arising from personal bodily injury of the debtor or an individual of whom the debtor is a dependant, is exempted. This

²⁹⁰S 522(d)(10)(D).

²⁹¹S 522(d)(10)(E).

²⁹²S 522(d)(11)(A).

²⁹³S 522(d)(11)(B).

²⁹⁴S 522(d)(11)(C).

payment does not include compensation for pain and suffering, or compensation for actual pecuniary loss.²⁹⁵

6.6.3.2.17 Loss of future earnings

A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependant, is exempted to the extent that it is reasonably necessary for the support of the debtor and any of his dependants.²⁹⁶

6.6.3.2.18 Retirement accounts

Notwithstanding whether state or federal exemptions are taken, retirement funds in a tax-exempt fund or account under any of the relevant sections²⁹⁷ of Title 26 of the United States Code are exempt.²⁹⁸

Some of these exemptions are capped at a certain value. Exemption of Individual Retirement Accounts and Simplified Employee Plans²⁹⁹ is capped at US\$1 000 000.³⁰⁰ But rollovers into certain accounts under 26 United States Code,³⁰¹ and earnings on those rollovers are excluded from the cap.³⁰²

6.6.3.3 State exemptions and non-bankruptcy federal exemptions

In all states debtors may use both the state and the federal non-bankruptcy exemptions, while in some states debtors have a choice. They may elect to apply either their state exemptions and the federal non-bankruptcy exemptions, or they can use *only* the federal bankruptcy exemptions. Choosing the federal bankruptcy exemptions thus excludes a resident in these states from using either the state exemptions or the federal non-bankruptcy exemptions.³⁰³

²⁹⁵S 522(d)(11)(D); *In re Harris* 50 BR 157 (Bankr ED Wis 1985).

²⁹⁶S 522(d)(11)(E); *In re Harris* 50 BR 157 (Bankr ED Wis 1985).

²⁹⁷26 USC ss 401, 403, 408, 408A, 414, 457, or 501(a).

²⁹⁸11 USC s 522(b)(3)(C), (d)(12).

²⁹⁹26 USC ss 408 and 408A.

³⁰⁰11 USC s 522(n).

³⁰¹Those under ss 402(c), 402(e)(6), 403(a)(4), 403(a)(5) and 403(b)(8).

³⁰²11 USC s 522(n).

³⁰³Sitarz D *Quick reference law series – laws of the United States – Bankruptcy exemptions* (2000) at 5 (hereafter Sitarz)

So, if the state where the debtor is domiciled has opted out of the federal bankruptcy exemptions, the only exemptions at the debtor's disposal are those available under the relevant state law and under federal non-bankruptcy law.³⁰⁴

It is not possible to consider all such exemptions here. Certain exemptions in certain states will, however, be mentioned briefly.

(1) State law exemptions

State law exemptions are those in effect from the date of bankruptcy in the state where the debtor has been domiciled for the 730 days immediately preceding the date of the filing of the petition. But if the debtor has not been domiciled in a single state for this 730-day period, the place in which he was domiciled for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place applies.³⁰⁵

The state bankruptcy exemptions that have been legislated for the various different states in the United States are too numerous and too varied to include in this thesis. However, a general trend in respect of exempt assets can be identified in respect of all the states that have provided for exempt property. Generally, certain categories of exemptions are provided for in these states. These categories will be considered next, with examples of these categories of exempt assets in three different states, namely Alaska,³⁰⁶ Florida³⁰⁷ and Texas.³⁰⁸

(a) Benefits

Various governmental benefits that are excluded from bankruptcy form part of this category. These may include unemployment benefits, worker's compensation and welfare benefits.³⁰⁹

³⁰⁴S 522(b)(2).

³⁰⁵S 522(b)(3)(A).

³⁰⁶Alaskan residents are excluded from using federal bankruptcy exemptions, but may use the federal non-bankruptcy exemptions and their state exemptions. In even numbered years the state may revise the amounts relating to exemptions; see Sitarz at 11.

³⁰⁷Residents of Florida may not use federal bankruptcy exemptions, but can apply federal non-bankruptcy exemptions and the state exemptions; see Sitarz at 30.

³⁰⁸In Texas *either* federal bankruptcy exemptions may be used, or the state exemptions may be applied. If the state exemptions are chosen, then the federal non-bankruptcy exemptions may also be used; see Sitarz 107.

³⁰⁹Sitarz at 5.

In Alaska some of these benefits include aid to the aged, blind and disabled, and to families with dependent children, in unlimited amount.³¹⁰ Federally exempt benefits³¹¹ and unemployment compensation,³¹² both in unlimited amounts, and several more aid related benefits are also exempt.

In Florida these benefits also generally relate to aid and compensation. Some of these benefits include an unlimited amount in public assistance,³¹³ unemployment compensation³¹⁴ and worker's compensation.³¹⁵

Texas state benefits that are exempt include an unlimited amount in medical assistance,³¹⁶ unemployment compensation³¹⁷ and worker's compensation.³¹⁸

(b) Insurance

This category includes any insurance-related property, including private annuity and disability-related proceeds, cash value on insurance policies, and various other insurance-based assets.

Exempt insurance benefits in Alaska include unlimited amounts in:

- disability benefits;³¹⁹
- fraternal society benefits;³²⁰
- medical, surgical or hospital benefits;³²¹
- insurance proceeds or recoveries for personal injury or wrongful death, up to the wage exemption amount;³²²
- life insurance or annuity contract loan to a maximum of US\$10 000;³²³ and

³¹⁰Alaska Statutes 47.25.210, 47.25.550 as in Sitarz at 11.

³¹¹Alaska Statutes 9.38.015 (a)(6) as in Sitarz at 11.

³¹²Alaska Statutes 9.38.015(b), 23.20.405 as in Starz at 11.

³¹³Florida Statutes Annotated 222.201 as in Sitarz at 30.

³¹⁴Florida Statutes Annotated 222.201 and 443.051(2), (3) as in Sitarz at 30.

³¹⁵Florida Statutes Annotated 440.22.

³¹⁶Texas Revised Civil Statutes Annotated, Human Resources 32.036as in Sitarz at 107.

³¹⁷Texas Revised Civil Statutes Annotated, Human Resources 5221b-13 as in Sitarz at 107.

³¹⁸Texas Revised Civil Statutes Annotated, Human Resources 8308-4.07as in Sitarz at 107.

³¹⁹Alaska Statutes 9.38.015(b), 9.38.030(e)(1),(5) as in Sitarz at 11.

³²⁰Alaska Statutes 21.84.240 as in Sitarz.at 11.

³²¹Alaska Statutes 9.38.015(b), 9.38.015(a)(3) as in Sitarz at 11.

³²²Alaska Statutes 9.38.015(b), 9.38.030(e)(3), 9.38.050(a) as in Sitarz at 11.

³²³Alaska Statutes 9.38.017, 9.38.025 as in Sitarz at 11.

- life insurance proceeds if the beneficiary is the insured's spouse or dependent, limited to the wage exemption amount³²⁴

In Florida insurance exemptions include the following, all in unlimited amounts:

- annuity contract proceeds;³²⁵
- death benefits if not payable to the deceased's estate;³²⁶
- disability or illness benefits;³²⁷
- fraternal society benefits;³²⁸ and
- life insurance cash surrender value³²⁹

In Texas insurance exemptions include the following unlimited amounts in:

- fraternal society benefits;³³⁰
- life insurance if the beneficiary is the debtor or a dependent of the debtor;³³¹
- retired public school employees group insurance,³³²
- Texas employee uniform group insurance,³³³
- Texas state college or university employee benefits;³³⁴ and
- limited life, health, accident or annuity benefits, cash value, or proceeds³³⁵ – this exemption is capped at a certain maximum amount, with a larger exempt sum being allowed if the debtor is a head of a family.³³⁶

(c) Pensions

This is retirement-related property. Various pensions and retirement plans are included in this exemption.

³²⁴Alaska Statutes 9.38.030(e)(4) as in Sitarz at 11.

³²⁵Florida Statutes Annotated 222.14 as in Sitarz at 30.

³²⁶Florida Statutes Annotated 222.13 as in Sitarz at 30.

³²⁷Florida Statutes Annotated 222.18 as in Sitarz at 30

³²⁸Florida Statutes Annotated 632.619 as in Sitarz at 30

³²⁹Florida Statutes Annotated 222.14 as in Sitarz at 30

³³⁰Texas Revised Civil Statutes Annotated, Insurance 10.28 as in Sitarz at 107.

³³¹Texas Revised Civil Statutes Annotated, Insurance 42.002(a)(12) as in Sitarz at 107.

³³²Texas Revised Civil Statutes Annotated, Insurance 3.50-4(11)(a) as in Sitarz at 107.

³³³Texas Revised Civil Statutes Annotated, Insurance 3.50-2(10)(a) as in Sitarz at 107.

³³⁴Texas Revised Civil Statutes Annotated, Insurance 3.50-3(9)(a) as in Sitarz at 107.

³³⁵Texas Revised Civil Statutes Annotated, Insurance 21.22 as in Sitarz at 107.

³³⁶Texas Revised Civil Statutes Annotated, Property 42.001, 42.002 as in Sitarz at 108.

In Alaska, Florida and Texas pension exemptions relate mainly to civil service, armed forces or police-type pensions, some of which may be limited, while others enjoy unlimited exemption.³³⁷ For example, in Alaska exemption on some pensions apply only to unpaid benefits on that pension, while retirement benefits deposited more than a specified number of days before the bankruptcy date enjoy unlimited exemption.³³⁸

In Florida and Texas most pension exemptions are in an unlimited amount.³³⁹

(d) Miscellaneous

Items included here relate to property of business partnerships and exempt amounts that may in one way or another be applied to any property, be it personal property or real estate. Alaska, Florida and Texas all exempt alimony up to an amount needed for support or up to a wage exemption amount. They also all exempt property of a business partnership in an unlimited amount. Alaska also exempts liquor licences and fisheries permits in an unlimited amount.³⁴⁰

(e) Personal property

This is all personal property specifically exempt from bankruptcy that debtors probably keep after bankruptcy.

In all three states, Alaska, Florida and Texas, these exemptions relate to items such as books, clothing, implements, tools of the trade, health aids, heirlooms and jewellery. Each state specifically exempts a motor vehicle. Mostly, the exemption on these items is capped at a specific maximum amount.³⁴¹

(f) Real estate

Generally, these exemptions, also called “homestead exemptions”, allow a fixed maximum value of a personal residence. As with most categories of exemptions,

³³⁷See Sitarz at 12, 31 and 108.

³³⁸See, eg, Alaska Statutes 9.38.015(b), 9.38.017 as in Sitarz at 11.

³³⁹See Sitarz at 31 and 108.

³⁴⁰See Sitarz at 12, 31 and 108.

³⁴¹See Sitarz at 12, 31 and 108.

this exemption differs from state to state, but note the changes regarding homestead exemptions that were introduced by BAPCPA.³⁴²

In Alaska real property that is used as a residence is exempted to the amount of US\$54 000.³⁴³

Real estate in Florida enjoys unlimited exemption if the property is used as a residence and does not exceed 160 contiguous acres. The exemption must be filed in the Circuit Court.³⁴⁴

In Texas real property carries exemption of unlimited value up to one acre in a town, village or city, and 200 acres elsewhere (100 for a single person). The exemption must be filed with the county.³⁴⁵

(g) Wages

This exemption refers to general wage exemptions and specific wage exemptions for specific professions. This item also differs from state to state, but generally 75 percent of wages are exempt from creditors.

In Alaska the wage exemption is capped at a maximum amount which varies, depending on whether or not the debtor is the sole wage earner, and whether the wage is paid weekly, monthly or over other periods.³⁴⁶ In Florida there is an exemption of 100 percent of wages for heads of family, up to US\$500 per week either unpaid or paid and deposited into a bank account for up to six months.³⁴⁷ In Texas wages earned, but unpaid, are exempted in an unlimited amount, while unpaid commission up to 75 percent is exempt, but capped at a specific amount, which differs depending on whether the debtor is the head of a family, in which case the cap is a higher amount.³⁴⁸

³⁴²See para 6.4.5 above

³⁴³Alaska Statutes 9.38.010 as in Sitarz at 12.

³⁴⁴See Sitarz at 31.

³⁴⁵See Sitarz at 108.

³⁴⁶See Sitarz at 12.

³⁴⁷Florida Statutes Annotated 222. 11 as in Sitarz at 31.

³⁴⁸Texas Revised Civil Statutes Annotated, Property 42.001(b)(1), 42.001 (d) and 42.002 as in Sitarz at 108.

(h) Spouses

It has already been mentioned that joint bankruptcy filings by spouses allow each spouse to claim separately for exemptions. However, there are some exceptions and some uncertainty in this regard, and the position in each state must be considered to obtain clarity in this respect.³⁴⁹

(2) Non-bankruptcy federal law

Exemptions may be provided by federal law other than the Bankruptcy Code, and may be claimed under the provisions of section 522(b)(3)(A) of the Bankruptcy Code. These exemptions may be used only if a debtor has chosen to use the relevant state law exemptions. If the debtor has chosen to use the federal bankruptcy exemptions, the federal non-bankruptcy exemptions are not available to him.³⁵⁰

These federal non-bankruptcy exemptions relate mostly to various benefits that are provided for under different United States Codes. The exemption in respect of such benefits, insurance, pensions, personal property or wages may be exempted in an unlimited amount, or it may be capped at a specified value. Examples of these exemptions are social security payments,³⁵¹ civil service retirement benefits,³⁵² government employee death and disability benefits,³⁵³ railroad workers unemployment insurance,³⁵⁴ and a certain percentage of earned, but unpaid, wages,³⁵⁵ to mention only a few.

6.6.3.4 Exemptions in joint cases

Each debtor in a joint case is entitled to any available exemptions.³⁵⁶ If joint debtors elect the federal exemptions, they may “stack” their exemptions, meaning that *each* debtor may claim the maximum homestead exemption, the maximum

³⁴⁹See par. 6.5.4 above.

³⁵⁰Sitarz at 127.

³⁵¹See 42 USC s 407.

³⁵²See 5 USC s 8346(a).

³⁵³See 5 USC s 8130.

³⁵⁴See 45 USC 352(e).

³⁵⁵See 15 USC 1673.

³⁵⁶S 522(m).

vehicle exemption and so forth.³⁵⁷ But it must be remembered that the Code prohibits stacking federal and state exemptions. Thus *both* debtors must choose either the federal exemptions or the state exemptions.³⁵⁸

In respect of state exemptions, the courts are split in deciding whether section 522(m), which allows joint debtors separate exemptions, applies to states that have opted out of the federal exemption system. On the one side the opinion is that section 522(m) applies only to the federal exemptions. It does not bind opt-out states. This means that such states may provide one set of exemptions that must be shared by both debtors in the joint case.³⁵⁹ The other line of thought is that section 522(m) entitles each debtor in a joint case “to take some exemptions, whether the amount is determined by state or federal law”.³⁶⁰ This means that an opt-out state must still allow each debtor in a joint case to claim separate exemptions.³⁶¹

6.6.3.5 Objections to exemptions

Interested parties can file objections to claimed exemptions. The person objecting carries the burden to prove that the exemption may not be claimed.³⁶² These objections to exemptions by interested parties must be filed not later than 30 days after the conclusion of the meeting of creditors held under section 341.³⁶³ If no such objection is filed, the property claimed as exempt by the debtor is exempt from the bankruptcy estate.³⁶⁴ The debtor may therefore acquire an excessive exemption if the trustee and creditors are not vigilant. This issue came before the Supreme Court in *Taylor v Freedland & Kronz*,³⁶⁵ which held that the failure by the creditor or trustee to file the objection within the 30-day period (or the period extended by the court) barred the right to object, and the exemption stood, irrespective of the debtor’s right to the exemption being questionable.

³⁵⁷S 522(m) and see *In re Gallo* 49 BR 28 (Bankr ND Tex 1985).

³⁵⁸S 522(b); See Waxman para 640 and further.

³⁵⁹*In re Granger* 754 F 2d 1490 (9th Cir 1985).

³⁶⁰*Cheeseman v Nachman* 656 F 2d 60 (4th Cir 1981).

³⁶¹See Waxman para 642.

³⁶²Rule 4003(c).

³⁶³Rule 4003(b); see Yerbich at 30.

³⁶⁴S 522(l).

³⁶⁵503 US 638 (1992).

6.6.3.6 Effect of exemptions

Property exempted by the debtor is not liable during or after the case for any debt that arose or is deemed to have arisen before the date of bankruptcy.³⁶⁶

But there are exceptions to this rule, so some types of debts may be satisfied from the exempt property of the debtor. These debts of an individual debtor generally relate to certain non-dischargeable taxes, non-dischargeable alimony, maintenance or spousal or child support, debt secured by certain liens, debts owed by institution-affiliated party of an insured financial institution for fraud and related (criminal or illegal) acts, and certain student loans.³⁶⁷

These debts therefore survive a discharge granted to an individual who received a discharge under chapter 7, 11 or 12, or (a hardship discharge under) chapter 13.³⁶⁸ All the debtor's exempt assets may be consumed by these non-dischargeable debts if such debts are large enough.³⁶⁹

6.7 Conclusion

The historical survey of bankruptcy law in the United states shows that it had its origins in the older English practices of debt slavery and imprisonment.³⁷⁰ From that earliest time property of the debtor was at the disposal of creditors for the satisfaction of their debts, while imprisonment was a later remedy. The bankruptcy procedure was initially creditor-driven, available only against traders. Concessions to the debtor regarding property excluded from a bankrupt estate began to develop in the early eighteenth century, but further relief to debtors developed slowly. American colonies adopted the English system with few states giving a debtor release from imprisonment or discharge from his debts.³⁷¹

³⁶⁶S 522(c).

³⁶⁷See eg ss 522(c)(1), 523(a)(1), 523(a)(5), 522(c)(2)(A) and (B), 522(c)(3), 523(a)(4) and 523(a)(6).

³⁶⁸Many of the exceptions to a discharge under s 523(a) are not applicable to a standard discharge under chapter 13. Generally, all debts included in the debtor's chapter 13 plan of repayment are discharged, except alimony, maintenance and spousal or child support, student loans, liability for certain kinds of illegal acts and certain kinds of long-term indebtedness – see s 1328(a) and Waxman para 678.

³⁶⁹See Waxman para 647.

³⁷⁰See para 6.2.1 above.

³⁷¹See para 6.2.1 above.

American “insolvency” law, which was designed for the relief of debtors, developed in the early nineteenth century when states enacted constitutional provisions prohibiting imprisonment for debt, but the creation of a unified debtor creditor statute, combining discharge and bankruptcy elements took long to achieve.³⁷² The Act of 1800, although creditor-orientated, brought together “insolvency” and “bankruptcy”, and made specific provision for limited exempt property.³⁷³

The first direct attempt to protect debtors was found in the Bankruptcy Act of 1841 which introduced voluntary proceedings for both merchants and non-merchants, and extending provisions regarding exempt property. This Act’s provision of voluntary bankruptcy for all achieved a fundamental policy change in American bankruptcy law and although it was soon repealed at the insistence of creditors, the policy change endured.³⁷⁴ This policy change was further witnessed in the Bankruptcy Act of 1867, which was a compromise between debtor and creditor interests. Exemptions were extended to include certain federal non-bankruptcy law exemptions and state exemptions.³⁷⁵

The Bankruptcy Act of 1898, which remained in force until the promulgation of the Bankruptcy Code in 1978, provided for a broad definition of property of the bankruptcy estate and extensive reform in favour of debtors regarding exempt property.³⁷⁶ The courts also construed this legislation to favour certain exemptions for debtors, all with the intention of removing unnecessary obstacles in the way of the debtor’s fresh start.³⁷⁷ The 1898 Act was extensively amended by the Chandler Act of 1938. But the most important effect of the 1898 Act regarding debtor-friendly policy considerations was its denying creditors the control of the debtor’s access to a discharge.

³⁷²See para 6.2.2 above.

³⁷³See para 6.2.3 above.

³⁷⁴Tabb “The historical evolution of the bankruptcy discharge” (1991) *Am Bankr LJ* at 350 and further.

³⁷⁵See para 1.2.3 above

³⁷⁶Countryman V “Bankruptcy and the individual debtor – and a modest proposal to return to the seventeenth century” (1983) *Catholic University Law Revue* 809 at 817.

³⁷⁷Dickerson “From jeans to genes: The evolving nature of property of the estate”(1999) *Bankr Dev J* at 292-293.

The Bankruptcy Code of 1978 was the first thorough revision of bankruptcy law since the 1898 Act, generally continuing the policy of a debtor-friendly approach to bankruptcy. It substantially expanded, among other things, the rights of the consumer debtor, making chapter 13 thereof a more desirable option for debtors, and expanding the number and variety of assets exempt from the creditors' reach. Because the incorporation of state exemption laws into the federal bankruptcy case had always been criticised,³⁷⁸ it was eventually amended by including federal exemptions in the new Code. But it also provided for the "opt-out" model, giving the debtor the option to elect either the federal exemptions or the relevant state exemptions, but also permitting the respective states to exclude this choice of exemptions by legislation that provides exclusively for state exemptions, meaning that federal exemptions are then unavailable to that state's residents.³⁷⁹ The result is section 522(b)(2) of the Code allowing the debtor to choose between federal or state exemptions, unless state law does not authorise this (the opt-out clause). This arrangement remained intact in the 2005 amendments to the Code, despite criticism and calls for uniformity of state exemptions in bankruptcy.³⁸⁰

After the enactment of the code there was a sharp increase in the number of business and bankruptcy filings, particularly chapter 7 filings. Whether the increase in filing has resulted from the generosity of the Code, to the change in society's notions about the morality of avoiding one's debt or to the wider availability of lawyers is uncertain and much disputed.³⁸¹

Be that as it may, several amendments to the Code inevitably followed, perhaps the most substantial being the Bankruptcy Abuse Prevention Consumer Protection Act of 2005. However, none of these amendments drastically changed the existing

³⁷⁸See, eg, Bartell LB "The peripatetic debtor: Choice of law and choice of exemptions"(2006) *Emory Bankruptcy Developments Journal* at 405 note 28 and Vukowich WT "The bankruptcy commission's proposals regarding bankrupt's exemption rights" (1975) *Cal L Rev* 1439 at 1441-1446.

³⁷⁹Bartell LB "The peripatetic debtor: Choice of law and choice of exemptions"(2006) *Emory Bankruptcy Developments Journal* at 406.

³⁸⁰Brown WH "Political and ethical considerations of exemption limitations: The 'opt-out' as child of the first and parent of the second" (1997) *Am Bankr LJ* at 149; Engledow WM "Cleaning up the pigsty: Approaching a consensus on exemption laws (2000) *Am Bankr LJ* at 276-78; Ponoroff L "Exemption limitations: A tale of two solutions" (1997) *Am Bankr LJ* at 221.

³⁸¹White at 56.

provisions, basically since the 1898 Act, regarding estate property and excluded or exempt property. Although access to bankruptcy has been made more labourious, once the debtor does gain access to the system, he gains access to certain property to assist him in finding a fresh start and this is a fundamental policy in American bankruptcy law that has remained constant.³⁸² The provisions relating to the property in the bankruptcy estate and to exemptions have progressed or developed in the debtor's favour over the centuries, and in recent years have not been interfered with, despite pressure from creditor groups. This appears to confirm that the debtor-centred approach in American bankruptcy policy is firmly entrenched, thereby also confirming the traditional underlying policy of equal treatment of creditors and the rehabilitation of the debtor. But as has been indicated above, more recent ideas, or perhaps one should say ideals, of a social or economic nature regarding American bankruptcy policy have developed, usually taking the side of either the debtor or the creditor. But American bankruptcy policy, it would appear, remains entrenched in the ideal of treating the creditors equally and giving the debtor a chance at a fresh start. This fundamental policy is overlapped by the policies of treating bankruptcy as a remedial mechanism with modest aims, protection of debtor and creditor interests, and the preservation of the bankruptcy estate. These policies, where or when necessary are, in turn, trumped, overlapped or co-mingled with policy considerations from other sectors of society. Thus American bankruptcy policy, as with most policy issues, is dynamic and does not sit in a vacuum. This is a lesson to be learnt by the important role-players in the formulation policy in the South African insolvency law arena. While South African insolvency policy is by no means static, it has been particularly creditor-motivated, with little interest in the well-being of the honest, but unfortunate, debtor. Movement in the direction of some form of respite for the debtor is at snail's pace and, at times, perhaps in reverse gear.³⁸³

Although there has been a definite policy shift towards a more creditor-friendly system in American bankruptcy law, the provisions regarding the bankruptcy estate and exempt property may be considered liberal compared with that of South

³⁸²See para 6.2.3 above.

³⁸³Consider, eg, the treatment of spouses in South Africa, whether married in community of property or out of community of property, as well as their position in former insurance legislation – see chs 9 and 10 below.

Africa. That system also has more clarity or certainty in respect of the content of the bankruptcy estate, and the extent of excluded and exempt property. Its provisions, for example, maintain a consistency in the categories of property included in the estate, as well as the categories and the maximum sums of assets included or excluded from the estate. In respect of estate assets, South African law may do well to follow this example, thereby reducing uncalled-for litigation in respect of estate assets. Poorly drafted and inconsistent legislation leads to litigation that may otherwise be avoided.³⁸⁴

While it will probably always be difficult, if not impossible, to formulate a perfect definition of “estate property”, or “insolvent estate”, one should attempt to provide for a broad, all-inclusive definition, as has been done in the United States Bankruptcy Code. If this has been achieved, excluded and exempt property may be defined in detailed and consistent legislation. The Code, however, seems inelegant in its language and riddled with excessive use of cross-referencing. But in respect of the assets of the bankruptcy estate, it has achieved considerable clarity and consistency. For example, the provisions in respect of community property may serve as an example for South African law reform on this topic.³⁸⁵

Most of the provisions in the Code that relate to excluded or exempt property are clear and certain, and are based on the long-established socio-economic policy of assisting the debtor in achieving a fresh start, but simultaneously respecting the creditors’ rights. The further policy of accepting bankruptcy to be remedial in nature must then be leaned on when questioning the efficacy of these socially orientated policies that encapsulate the exemption provisions. Here the homestead exemption comes to mind. Although the homestead provision is clear and certain in its drafting in both federal and state legislation, and is cradled by very old policy favouring the protection of the homestead, its efficacy in practice appears questionable. First, inconsistent state homestead legislation flaws the policy upon

³⁸⁴See, eg, all the South African litigation that has resulted from s 21 of the Insolvency Act 24 of 1936 discussed in ch 10, the litigation in respect of insurance policies in paragraph and that in respect of inherited property in chs 8 and 9 below, and in fact, the multitude of litigation relating to all the problem areas concerning assets of the insolvent estate in South Africa.

³⁸⁵See para 6.5.4 above and ch 10 below.

which the homestead idea is founded. Some debtors in America will benefit handsomely from this legislation, while others will benefit very little, depending on the legislation in a particular state. But this is a problem that comes with federalism. The real problem with the homestead legislation is that it may really hold little value for the debtor when the homestead is mortgaged. The secured creditor has preference over the homestead equity, to the exclusion of other creditors and the debtor. In South Africa, where probably the majority of homeowners are mortgagors, a homestead exemption may hold little value, unless a provision may be formulated whereby the homestead is excluded from the insolvent estate for a particular period during which the debtor can attempt to come to a payment arrangement with his creditor.

Apart from the homestead exemption, other federal and state exemptions, and non-bankruptcy law exemptions are perhaps broad and comprehensive enough to serve as a form of social security, albeit limited, and funded primarily by creditors. But in comparison with many other systems, it is generous. For South African purposes, it is interesting to note that American law recognises exemptions of motor vehicles, crime victim awards and firearms, to mention only some. Furthermore, a good degree of clarity has been achieved in respect of the exemption, and the maximum exempt amounts of, for example, insurance policies, pensions, personal injury, maintenance and future earnings.

But the intention with exempt and excluded property is not for the debtor to receive a windfall or to abuse the system, as has been the case particularly in respect of homestead exemptions in some states. An attempt to put an end to this problem in the BAPCPA, it would appear, really only affects short-term estate planning and an abuse of the system in the short term. But an effective homestead exemption for the honest, but unfortunate, debtor remains available. Creditors interests in respect of exemptions are also protected in that interested parties can file objections to claimed exemptions.

One aspect of American law that appears unsatisfactory is the uncertainty, or perhaps the inequality, created by state law, particularly in respect of exemptions.

This was, however, considered by the American courts and found to be constitutional.³⁸⁶ It would appear that both debtors and creditors either gain or lose one or more benefits regarding, among other things, exemptions, all depending on the state in which they are living. But this appears to be a problem that will always be inextricably linked to a federal system of government. In this respect the distinction between state law exemptions and federal exemptions seems to be an acceptable compromise in those circumstances.

Generally, however, it may be argued that American bankruptcy law policy in respect of estate property and exemptions is succeeding in its aim of striking a balance between debtor and creditor interests, and the interests of the various other stakeholders. This is so because these provisions relating to estate property have remained more or less constant, despite numerous amendments to the bankruptcy legislation over the past century or so.

Catherine Smith³⁸⁷ referred to the golden thread in South African insolvency law which is woven through insolvency proceedings, being advantage to creditors. One wonders whether one will not be forced to enquire whether or not that thread has, through time and modern changes, been tarnished, therefore calling for fresh ideas to be sewn together with a new, but stronger, thread which may hold together the ideas and principles embodied in the South African Constitution, particularly the possibility of a more debtor-friendly policy in helping the debtor on his road towards a fresh start. On this journey through insolvency law reform in South Africa and in reconsidering some of the policies upon which one hopes to venture into the future, it may be useful to consider some of the policies underpinning American bankruptcy law.

³⁸⁶See para 6.6.1 above.

³⁸⁷See para 6.1 above.

PART IV: SOUTH AFRICAN LAW AND LAW REFORM

Chapter 7: The effect of sequestration on the property of the insolvent

7.1 Introduction

In an analysis of problem areas in respect of assets in insolvent estates, it is necessary to consider briefly how those assets are come by and how they are protected to the maximum advantage of the creditors and, to a lesser extent, for the benefit of the insolvent debtor. To comply with a policy of the collection of the maximum assets for the advantage of the creditors of the insolvent estate, adequate procedural measures must be guaranteed in legislation.¹

Closely linked to this collection policy is the policy of granting the insolvent debtor a fresh start during his sequestration and upon his rehabilitation. The more assets have been collected, the greater the chance of excluded or exempt assets being available to assist the debtor in his endeavour to attain a fresh start, and the greater the possibility that a residue of the insolvent estate may be available for the debtor at the moment of rehabilitation. As Jackson puts it:²

The determination of liabilities is only half of what the basic bankruptcy process needs to concern itself with. The assets of the debtor as well as its liabilities must be fixed in order to determine the estate of a debtor available for distribution to particular claimants.

Thus, in between the two aforementioned policies is the policy of providing for excluded assets and exempt assets in an insolvent estate. Indirectly, the latter policy can aid the procedural aspect of the collection of assets, because if provision is made for fairly generous exclusions or exemptions, the insolvent debtor will be less likely to hide his assets from his creditors. Although these policies are actually, or should be, inextricably linked to each other, it will be shown

¹The UNCITRAL *Legislative guide on insolvency law* states that for an efficient insolvency regime several key objectives must be identified in a balanced manner, two of these being the maximisation of the value of assets, and the preservation of the insolvency estate to facilitate the equitable distribution of assets to creditors – See United Nations Commission on International Trade Law *Legislative guide on insolvency law* at 10 (hereafter UNCITRAL Guide).

²Jackson TH *The logic and limits of bankruptcy law* (1986) at 89 (hereafter Jackson).

here and in other chapters that the policy of the collection of maximum assets for the advantage of creditors actually overwhelms all other policies in South African insolvency law.

For a debtor, the granting of a sequestration order³ holds severe and far-reaching consequences. By the granting of a provisional order for sequestration the mechanisms of the law of insolvency are set in motion, thereby working towards the Insolvency Act's⁴ objective of achieving the liquidation of the sequestrated debtor's estate and the distribution of his assets among his creditors.⁵ Sequestration results in a *concursum creditorum*.⁶ This is the legal relationship that arise between the different creditors, on the one hand and, on the other, between the creditors and their insolvent debtor.⁷ The establishment of the *concursum creditorum* replaces the individual creditor remedies with a collective execution procedure.⁸ Creditors are no longer, from this point on, allowed to have recourse to the debtor's estate individually, but must do so in terms of the relevant rules of insolvency law. A *concursum creditorum* has as its main purpose the satisfying of, as far as possible, creditors' claims against the estate. In order to achieve this objective, the insolvent debtor's estate is vested first in the Master of the High Court and, upon his appointment, in the trustee of the insolvent estate.⁹ The trustee must collect the estate assets, realise them and distribute the proceeds among the creditors according to their order of preference that is determined by the Act. The principles of a *concursum creditorum* require that the

³A "sequestration order" is defined in s 2 of the Insolvency Act as any order of court whereby an estate is sequestrated, and includes a provisional order. The effects of sequestration which are discussed in this chapter therefore already come into play when a provisional order is granted in the case of compulsory sequestration, unless the Act expressly states that they come into operation only if a final order is granted.

⁴24 of 1936 (hereafter the Act or the Insolvency Act).

⁵See generally De la Rey Mars *The Law of insolvency in South Africa* (1988) at 128 and further (hereafter Mars (1988)); Smith CH *The law of insolvency* (3rd ed) (1988) at 81 (hereafter Smith *The law of insolvency*); Meskin PM *Insolvency law and its operation in winding-up* (1990) at 4.16 and further (hereafter Meskin); Bertelsmann E, Evans RG, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L and Steyn L Mars *The law of insolvency in South Africa* (9th ed) (ed C Nagel) (2008) at 102 and further (hereafter Mars (2008)).

⁶See *Walker v Syfret* 1911 AD 141.

⁷Swart BH *Die rol van 'n concursum creditorium in die Suid-Afrikaanse insolvensie reg* LLD Thesis University Pretoria (1990) at 264 (hereafter Swart *Thesis*).

⁸Swart *Thesis* at 267.

⁹S 20(1) of the Insolvency Act provides that the effects of sequestration will be "to divest the insolvent of his estate". In this context there is a dispute as to whether or not the insolvent loses the right of ownership of his estate. In the South African law of insolvency it is apparently accepted that he does lose his right of ownership – see *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A).

respective positions of creditors be established at the moment of sequestration and that they be compensated from the proceeds of the estate in the order of preference that existed at that moment.¹⁰

7.2 Collection and protection of assets

To assist the trustee in his initial duty to identify and to preserve the assets of the insolvent debtor, the Act provides for the divesting of the insolvent debtor of his estate and the vesting thereof in the Master and, upon his appointment, in the trustee.¹¹ This divestiture deprives the insolvent of control over all his property immediately after the sequestration order has been granted. The Court of Appeal has ruled that a sequestration order causes the insolvent debtor's estate to pass in ownership first to the Master and ultimately to the trustee.¹² However, it is debatable whether the divestiture of his estate deprives the insolvent of all his rights thereto. In *Mears v Rissik*,¹³ for example, it was said that:

The law provides that if there is any residue after paying the debts it is to be handed to the insolvent. Not only so, but it is to his interest that as many assets as possible shall be brought into the estate, and the debts reduced to their proper limits. He has an interest in seeing that it is done. An asset may suddenly become valuable which has been considered worthless, or he may have a legacy left to him which may enable him to clear off all his liabilities. Apart from that it is to the interest of the insolvent that his assets should be increased and his liabilities reduced, because in that way the stigma of insolvency rests less heavily upon him; and when he applies for his rehabilitation he is in a better position than if he had a very large margin of unpaid debts. Therefore from whatever standpoint we regard it the insolvent has a very real interest in the administration of his estate.

On this point Smith stated that the insolvent retained a vital reversionary interest in his insolvent estate.¹⁴

The Act contains a number of provisions that serve to facilitate the trustee in his task of collecting the assets of the insolvent debtor and administering the insolvent estate. To begin with, a copy of the final sequestration order is served on the

¹⁰*Walker v Syfret* 1911 AD 141.

¹¹S 20(1) of the Act.

¹²*De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A).

¹³1905 TS 303 at 305.

¹⁴Smith *Law of insolvency* at 81.

insolvent, and if he is married out of community of property, also on his spouse.¹⁵ Furthermore, the Act directs the Registrar of the Court who granted the sequestration order to provide a copy of the order to the Master, to the deputy sheriff of every district in which the insolvent resides or owns property, to every officer charged with the registration of immovable property in the Republic of South Africa, to an officer in charge of a register of ships, and to every sheriff of the court who holds under attachment any property of the insolvent.¹⁶ When receiving such an order, such officer must register it and note on it the day and hour when it was received in his office.¹⁷ As soon as any officer charged with the registration of title to any immovable property in the Republic receives such an order or certificate, he must enter a caveat against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of, or belonging to, the insolvent. If the sequestration order or the certificate also contains the name of the spouse of the insolvent, he must also enter such caveat in respect of the spouse.¹⁸ This section of the Act serves to prevent the improper transfer of immovable property out of an insolvent estate or the cancellation or cession of any bond.

As soon as the sheriff has received a sequestration order, he must attach and make an inventory of the movable property of the insolvent estate that is in his district, which can be manually delivered and which is not in the possession of a person who claims to be entitled thereto under a right of pledge, a right of retention or under attachment by a messenger.¹⁹ The sheriff's duties include his taking into custody all documentation and records relating to the affairs of the insolvent, as well as cash, share certificates, bonds, bills of exchange, promissory notes and other securities, and remit all such cash to the Master.²⁰ Movable property other than animals must be left by the sheriff in a suitable place, properly sealed up, or he must appoint a suitable person to hold any movable property in his custody.²¹ He must hand to the person appointed a copy of the inventory, with a notice that the property has been attached by virtue of a sequestration order. This

¹⁵S 16(1). The constitutionality of this procedure is considered in ch 11 below.

¹⁶S 17(1).

¹⁷S 17(2).

¹⁸S 17(3).

¹⁹S 19(1).

²⁰S 19(1)(a).

²¹S 19(1)(b).

notice must contain a statement that it is an offence under section 142 of the Act to remove, conceal or dispose of property to defeat an attachment.²² The sheriff must make a detailed list of all the books and records attached, and note thereon any explanation given by the insolvent in respect thereof or in respect of any books or records relating to his affairs that the insolvent is unable to produce.²³ If the insolvent is present, the sheriff must ask him whether this list is a complete list of the books and records relating to his affairs and his reply must be recorded.²⁴

Immediately after effecting the attachment, the sheriff must report so to the Master in writing. In this report he must mention any property that is in the lawful possession of a pledgee or of someone who is entitled to retain such property by virtue of a right of retention. With this report he must submit a copy of the inventory that was made by him, while such copy must also be submitted to the trustee as soon as possible after his appointment.²⁵ A messenger who holds property attached by him which he knows belongs to the insolvent estate must provide the Master with an inventory of all such property.²⁶

These provisions of the Act enable the trustee, once appointed, to be thoroughly informed in respect of the estate's assets and to take possession thereof. The estate will remain vested in the trustee until the debtor is reinvested therewith pursuant to a composition or until his rehabilitation.²⁷ It is therefore clear that the Act makes adequate provision for the actual *procedure* of collection, control and protection of assets of the insolvent estate. So at this point the stage has been set by the Act to comply with the policy in South African insolvency law of the collection of the maximum assets for the advantage of the creditors of the insolvent estate.

With the procedure for collection of assets in place, one must consider the nature of the assets or the property that forms part of an insolvent estate, or property that can

²²S 19(1)(c). S 142 creates an offence punishable by imprisonment not exceeding three years.

²³S 19(1)(d).

²⁴S 19(1)(e).

²⁵S 19(3) (a)-(b).

²⁶S 19(4).

²⁷S 25(1).

be excluded or exempted from that estate. In this respect it will also be necessary to identify and analyse the policies that underpin the inclusion or exclusion or exemption of property from insolvent estates in South African insolvency law.

Unlike the Act's provisions regarding the procedure for the collection of assets described above, its provisions regarding the actual property that may be collected on behalf of the creditors of the insolvent estate, or that which is excluded or exempted from that estate, as well as the policy considerations upon which these legislative provisions hinge, are not always clear. Uncertainty in this respect has led to considerable litigation and academic writing relating to these problem areas concerning assets in insolvent estates of individuals. Some of these problem areas will be considered throughout this thesis.

7.3 The meaning of the term “property”

“Property” in the context of the administration of an insolvent estate has a relatively broad meaning. It includes movable or immovable property wherever situated within the Republic, including contingent interests in property other than the contingent interest of a *fideicommissary* heir or legatee.²⁸ It is a wider definition of property than that under the common law.²⁹ In respect of property in insolvent estates, the Constitution of the Republic of South Africa³⁰ may also have an important impact; possibly broadening the meaning of property even further. Should this happen, it may mean that greater quantities of assets of different classes find their way into insolvent estates. Then, depending on the class of asset, the presence thereof in the insolvent estate could be advantageous to either the creditors, by swelling the estate, or to the debtor, as an asset in the guise of an excluded or an exempt asset for the benefit of the debtor.

For example, to determine whether a constitutional right to property in an insolvent estate has been infringed, the meaning of “property” as envisaged by section 25

²⁸S 2 of the Act.

²⁹See Smith *Law of insolvency* at 96; Meskin *Insolvency law* at 5.1; Mars(2008) at 182 and further; *Meyer v Transvaalse Lewendehawe Koöperasie Bpk* 1982 (4) SA 746 (A) at 767; *Van Zyl and Others NNO v Turner and Another* 1998 (2) SA 236 (C) at 242.

³⁰108 of 1996.

of the Constitution must be considered. This will determine the scope of the rights protected by that section, after which one can enquire whether a particular class of property in the insolvent estate will be afforded constitutional protection. Here Currie³¹ says there are at least three possible meanings to the term “property”. The constitutional property clause may, firstly, refer to physical property, such as land, houses and cars. Secondly, he says it may be the set of legal rules that regulate relationships between individuals and physical property, in other words, the common law property rights. So, he says, property rights such as ownership, and the elements that make up ownership, such as the right to dispose of property, is the property protected by the clause. Currie says a third possibility is that the term could pertain to any relationship or interest having an exchange value.³² The courts, Currie states, will be guided by the existing scope of property law when interpreting the term, thus property is what is accepted as such in existing law. So property in section 25 appears to fall within the second meaning above, being property as rights.³³ But Currie says that accepting that property means rights in property does not eliminate the difficulty in determining the scope of the term,³⁴ and that property envisaged by section 25 should be seen as “those resources that are generally taken to constitute a person’s wealth, and that are recognised and protected by law”.³⁵ They are protected by private law rights, namely real rights in respect of physical things, contractual rights for performances and intellectual property rights in respect of intellectual property.³⁶ It is not inconceivable, it is submitted, that property of a new or unidentified character can emerge. Related to this idea, for example, is Currie’s observation that in the modern state an important channel of wealth is “interests in government largesse”, which includes

³¹Currie I and De Waal J *The Bill of Rights handbook* (5th ed) (2005) at 537 (hereafter Currie).

³²Currie at 537. See also Cheadle NH, Davis DM and Haysom NRL *South African Constitutional law: The bill of rights* (2002) at 20.3 (hereafter Cheadle) and Woolman S *Constitutional law of South Africa* (2nd ed) (2004) at 46.3 (hereafter Woolman).

³³Currie at 357-358. See also Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 349 (hereafter Van der Walt). This is also the approach that is followed in the definition of “property” in s 2 of the Insolvency Act. This approach has also been used in an attempt in ch 8 below to find the reasoning behind the judgment of *Wessels NO v De Jager en ’n ander NNO* 2000 (4) SA 924 (SCA) which ruled that a repudiated insurance benefit or inheritance does not form part of an insolvent estate.

³⁴This difficulty is also encountered in insolvency law – see, eg, the difficulties and uncertainty concerning a repudiated inheritance in insolvency as discussed in ch 8 below.

³⁵Currie at 539; Cheadle at 20.3.

³⁶Currie at 539.

a right to medical aid schemes, and to state pensions, jobs and contracts. Most of these public law rights, he says, should receive property clause protection as they have the character of property.³⁷ If these rights of the individual are taken over without compensation, or arbitrarily interfered with, the individual can rely on section 25 for protection.³⁸

Van der Walt³⁹ states that a wide interpretation will be given to the property concept in section 25, wider than in private law, but not without limits. Thus a right must be a vested right in order⁴⁰ to constitute property, meaning that it must have accrued in accordance with the relevant common law principles or statute.⁴¹ Thus a “vested” right must be more than a mere expectation that may or may not accrue in the future. So, if an individual did not have a right in the first place, he cannot complain that his rights under section 25 of the Constitution have been infringed.⁴² It is submitted that this reasoning is the same line of reasoning that is followed in assessing whether or not property, or a right to property, forms part of an insolvent estate, or where a disposition has occurred, whether it is a disposition of *property*.

Be that as it may, “immovable property” is defined in the Act as land and every right or interest in land or minerals which is registerable in any office in the Republic intended for the registration of title to land or the right to mine.⁴³ “Movable” property means every kind of property and every right or interest that is not immovable property.⁴⁴ Within the context of this definition a “contingent interest” means an interest that may mature into a vested interest on the happening of an event, but the happening of the event, without more, must give the vested interest. One cannot be said to have a contingent interest in something

³⁷Currie at 539-540. For a further analysis of the meaning of property see Cheadle at 20.3.

³⁸Currie at 540. In the United States of America some of these public law rights are excluded or exempted from bankrupt estates, usually in non-bankruptcy exemption legislation – see ch 6 above for a further discussion of this aspect of estate property.

³⁹Van der Walt at 353.

⁴⁰Van der Walt at 357.

⁴¹Van der Walt at 353; Currie at 540.

⁴²Currie at 540. See generally also Badenhorst PJ, Pienaar MP and Mostert H *Silberberg and Schoeman's The Law of Property* (2006) at 2 and generally at 9 and further. For a comprehensive discussion of the effect of the Constitution on property in insolvent estates, see ch 11 below.

⁴³S 2.

⁴⁴S 2.

that another may or may not choose to give him in the future. A bare possibility of getting something in the future is not a contingent interest.⁴⁵ A question that is related to this issue is whether or not a testamentary right to inherit should form part of the insolvent estate. This has been long disputed and its status if repudiated. It has been a particular problem area which is therefore dealt with in a separate chapter.⁴⁶

The interest of a *fideicommissary* heir or legatee may be vested or contingent, depending on the interpretation of a particular will.⁴⁷ Where it is not vested in him on the date of sequestration, the interest of the insolvent *fideicommissary* is not “property” within the context of the Act and does not form part of his insolvent estate. However, if the actual right of inheritance accrued before rehabilitation, such right immediately vests in the trustee and may be realised by him for the benefit of the creditors.⁴⁸ The rights of a *fiduciary* under a will or *fideicommissum inter vivos* vest in the trustee of his insolvent estate.⁴⁹

The Act applies to property wherever it is situated in the Republic.⁵⁰ However, property situated outside the Republic may also be subject to administration by a trustee administering an estate sequestrated within the Republic.⁵¹ At common law neither movable nor immovable property owned by the insolvent on the date of sequestration of his estate or acquired by him thereafter, but during, sequestration and situated in a foreign jurisdiction vests in the trustee of his estate unless, in the case of movable property, on either such date the insolvent is domiciled in the area of jurisdiction of the sequestrating Court. In order to

⁴⁵See Meskin at 5.1; *Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (W) at 805.

⁴⁶See ch 8 below.

⁴⁷See Smith *Law of insolvency* at 96; Mars 2008 at 182; *Wasserman v Sackstein NO* 1980 (2) SA 536 (O) at 540; Meskin at 5.1.

⁴⁸See Smith *Law of insolvency* at 96; Meskin at 5.1; Mars 2008 at 182 and 197; *Wasserman v Sackstein NO* 1980 (2) SA 536 (O) at 545.

⁴⁹See Meskin at 5.2; *Van Der Vyfer v Estate van der Vyver* 1932 CPD 45 at 48; *Engelbrecht v Mundell's Trustee* 1934 CPD 111; *Ex Parte Wessels NO* [1999] 2 All SA 22 (O) at 24.

⁵⁰Since the deletion of the definition of “Republic” in s 2 by s 1 of Act 49 of 1996, “Republic” no longer includes “the mandated territory of South West Africa”. See generally Smith A and Boraine A “Crossing borders into South African insolvency law: From the Roman-Dutch jurists to the UNCITRAL Model Law” (2002) *American Bankruptcy Institute Law Review* at 135; Smith AD and Ailola DA “Cross-border insolvencies: An overview of some recent legal developments” (1999) SA *Merc LJ* at 192.

⁵¹See Meskin at 5.1 and see generally, the Cross-Border Insolvency Act 42 of 2000.

administer any such property, whether or not vested in him, the trustee ordinarily would require recognition as such under the relevant foreign law.⁵²

Any monies in the sense of cash are included in the definition of movable property, as are personal rights of action irrespective of their source.⁵³ Such rights are movable incorporeal property.⁵⁴

A share in a company is movable property within the context of the definition in that it is a conglomeration of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends.⁵⁵ Meskin submits that the interest of a member of a close corporation, which is a single interest expressed as a percentage in the founding statement, is also movable property within the meaning of the Act.⁵⁶

The status of property that belongs to spouses in a marriage, or to partners living together as “spouses”, has provided for one of the most complex problem areas in respect of assets in insolvent estates of individuals in South African insolvency law. A separate chapter has been devoted to this particular problem area and a further discussion in this regard at this point is superfluous.

On the face of it, the term “property” appears to be broadly defined in a legislative attempt at finding a catch-all definition that may assist with a water-tight method of collecting of maximum assets for the creditors of the insolvent estate, thereby implementing the insolvency law policy to this effect. The definition of the term “disposition”, which relates closely to the definition of “property”,⁵⁷ is a further attempt by the legislature to provide for maximum recovery of insolvency assets.

⁵²See Meskin at 5.2; Mars (2008) at 660 and further. See also the Cross-Border Insolvency Act 42 of 2000 and generally Steyn L “A reflection on the need for cross-border insolvency legislation in South Africa” (1997) *SA Merc LJ* at 225. See generally, Smith A and Boraine A “Crossing borders into South African insolvency law: from the Roman-Dutch jurists to the UNCITRAL Model Law” (2002) *American Bankruptcy Institute Law Review* at 135; Smith AD and Ailola DA “Cross-border insolvencies: An overview of some recent legal developments” (1999) *SA Merc LJ* at 192.

⁵³*De Villiers NO v Kaplan* 1960 (4) SA 476 (C) at 479.

⁵⁴*Ormerod v Deputy Sheriff Durban* 1965 (4) SA 670 (D) at 673.

⁵⁵See Meskin at 5.1; *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (AD) at 288.

⁵⁶See Meskin at 5.1.

⁵⁷See s 2 of the Act.

However, it will be shown throughout this thesis that these definitions have not always succeeded in providing a satisfactory method for the identification or collection of all assets, being partly responsible for creating problems that have resulted in much uncertainty concerning certain assets and the policies relating to the status of such assets. As a corollary to this, the policy on exclusion of assets or the exemption of assets has been neglected or ignored by the legislature and, consequently, it is veiled in uncertainty

7.4 The proprietary status of the assets of the insolvent estate

It has already been pointed out that granting a sequestration order has the immediate result that the insolvent's property vests in the Master and later in the trustee of the estate. A question that must be considered in respect of both sections 20 and 21⁵⁸ of the Act is the nature of the vesting of the property of the insolvent and of the solvent spouse, first in the Master and, upon his appointment, in the trustee. The question is whether the Master and, upon his appointment, the trustee, become the owners of the insolvent estate, or whether they are merely the administrators thereof? One may also question whether it is at all necessary for ownership to pass before the purpose of sections 20 and 21 can be achieved. The answer to these questions is of importance in respect of the trustee's election to proceed with, or to repudiate, executory contracts, and in respect of the ranking of creditors, while it may also determine the proprietary status of assets that ostensibly belong to the spouse of the insolvent, where the marriage is one by antenuptial contract. This question is of further practical importance because it may guide the actions of debtors, creditors and trustees in insolvent estates. It will be shown that the question of ownership of assets in insolvent estates can determine whether or not a creditor holds security for a claim in respect of a debt owing by an insolvent or his spouse. The question of ownership of assets was decided upon by the Appellate Division in *De Villiers NO v Delta Cables (Pty) Ltd.*⁵⁹ In view of the fact that this judgment related also to a spouse of an insolvent, the

⁵⁸In terms of s 21 of the Act the property of the solvent spouse of an insolvent debtor vests in the trustee of the insolvent spouse's estate upon the sequestration of the estate of the insolvent spouse. See ch 10 below.

⁵⁹1992 (1) SA 9 (A).

discussion that follows will be conducted also within the context of the effect of sequestration on the assets of the insolvent debtor's spouse, which situation is governed by section 21 of the Act.⁶⁰

Spouses who are married out of community of property are generally not liable for each other's debts, but the sequestration of the estate of one of the spouses can affect the property of the other spouse. This is because section 21 of the Act provides, as an additional effect of the sequestration of an estate, for the vesting of the solvent spouse's estate first in the Master and, upon his appointment, in the trustee.⁶¹

Case law and academic opinion regarding the nature of the vesting of the property of an insolvent, or a solvent spouse, in the Master and/or the trustee, is inconsistent. In *De Villiers NO v Delta Cables (Pty) Ltd Van Heerden JA*,⁶² however, held that:

It has always been accepted that a trustee becomes the owner of the property of the insolvent. The legislature did not say so in so many words, but the transfer of *dominium* is clearly inherent in the terminology employed in section 20 (1) (a) which provides that a sequestration order shall divest the insolvent of his estate and vest it first in the Master and later in the trustee ... Section 21 (1) employs very much the same terminology.

This ruling of the Appellate Division concentrated on the meaning and effect of section 21 of the Act. As already stated in respect of the passing of ownership of property of an insolvent, the judgment applies with equal force to section 20 of the Act. To place this dispute in context, the following summary of the facts of this case is required:

Mr and Mrs Mathews (M), were married out of community of property. They entered into a contract of suretyship in favour of the respondent, Delta Cables, on 22 February 1986. This deed of suretyship secured debts which one VH Cables (Pty) Ltd owed to the respondent. Five days later Mrs M signed a power of attorney to register a surety mortgage bond over immovable property that was to be

⁶⁰But see ch 10 below for a detailed discussion of the effect of sequestration on the spouse of the insolvent.

⁶¹See ch 10 below.

⁶²*Obiter* at 15 G-H. This view was accepted by the Constitutional Court in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

purchased by her at a later date. Delta Cables, the respondent, was the prospective mortgagee. This property was subsequently registered in Mrs M's name on 21 May 1986. On 17 June 1986 the estate of Mr M was provisionally sequestrated and a final order was granted on 29 June 1986. On 24 September 1986 the appellant was appointed trustee in the insolvent estate.

By virtue of the aforementioned power of attorney, the respondent caused a surety mortgage bond to be registered over the property on 1 October 1986. Judgment, which was founded on the deed of suretyship, was later taken against Mrs M. But the trustee was unaware of the above facts until shortly before the sale in execution was to occur. Agreement was reached by the parties that after satisfying the claim of a first mortgage bond holder, the net proceeds would be paid to the appellant. The respondent then proved a claim as a secured creditor in the insolvent estate. This claim was based on the aforementioned judgment against Mrs M. The respondent relied on the surety mortgage bond as security for its claim.

But the trustee then disputed Delta Cables' status as a secured creditor. He applied to the Witwatersrand Local Division for an order declaring it a concurrent creditor, founded on the argument that the bond had been registered after the sequestration of Mr M's estate without his consent. Consequently, it conferred no preference on Delta Cables in respect of its claim. The lower court rejected this argument. It ruled that despite the provisions of section 21, the trustee would have been obliged to allow the registration of the bond because of the power of attorney that had been validly executed prior to the sequestration.

In the Appellate Division, Delta Cables (respondent) submitted that in terms of section 21, ownership of the insolvent spouse's assets did not pass to the trustee. To support this contention it relied on certain provisions in the Act which indicate that an insolvent's property should be treated differently from that of the solvent spouse. For example, section 20 (1)(b) stays civil proceedings regarding the insolvent, until the appointment of a trustee. No such provision exists in respect of the solvent spouse's property. Furthermore, the execution of judgments against the insolvent spouse are

stayed, but not so regarding the solvent spouse.⁶³ Lastly, the contractual capacity of the solvent spouse is not limited by section 23(2) of the Act.

Van Heerden JA rejected these arguments. He found that one must distinguish between assets that fell within the meaning of section 21 and those that fell outside thereof. He ruled that the solvent spouse could obtain an estate consisting of released (revested) assets⁶⁴ and assets acquired after the sequestration order. The solvent spouse maintained contractual capacity in respect of these two categories of assets only. The argument that *dominium* had not passed, he said, was valid only in respect of the latter two categories of assets that fell outside the ambit of the limitations of section 21. Nothing militated against the intention that *dominium* in assets of the solvent spouse that are included within the limitations set by section 21 vested in the trustee. The court held further⁶⁵ that the provisions or the absence thereof upon which the respondent relied, simply showed that some of the provisions of the Act pertaining to an insolvent and his or her assets were not applicable to the solvent spouse and his or her assets. As a result, the court held that these provisions had no bearing on the question whether the appellant (trustee) became owner of Mrs M's property. None of these provisions militated against a construction that *dominium* in the assets of the solvent spouse vests in the trustee.

One may, however, question this interpretation. The provisions upon which the respondent relied (eg, the lack of contractual capacity) are an indication that such provisions apply to an *insolvent* person only. The absence of such provisions relating to the *solvent* spouse perhaps do militate against a construction that *dominium* in his or her assets vests in the trustee. In respect of the vesting of the assets of the solvent spouse, section 21(1) does not distinguish between vested and released assets. Section 21(1) states:

The additional effect of the sequestration of the separate estate of one of two spouses ... shall be to vest in the Master ... and upon the appointment of the trustee, to vest in him all the property ... of the spouse whose estate has not been sequestrated ... as if it were property of the sequestrated estate ...

⁶³S 20(1)(c)

⁶⁴See s 21(2).

⁶⁵At 15 B-D.

Under the Act, it is only *after* such vesting has taken place that the solvent spouse can apply for the release thereof. During the period between vesting and the subsequent application for the release of the assets, there appears to be a period of uncertainty concerning the precise status (proprietary rights) of such assets over which the solvent spouse has apparently retained his or her contractual capacity. Perhaps this does, in fact, militate against the construction that *dominium* vests in the trustee. A vital interest over his or her assets that can be released in his or her favour in terms of section 21(2) is retained by the solvent spouse.⁶⁶ Therefore, although such property vested in the trustee, the *dominium* in that property could have remained with the solvent spouse.

Van der Merwe⁶⁷ states that the Master automatically becomes the owner of the insolvent estate without the requirements of delivery or registration. He calls it a statutory method of derivative acquisition of ownership. But there is case law and academic opinion that appears to differ from this point of view. In *Stand 382 Saxonwold CC v Kruger NO*,⁶⁸ for example, it was submitted that ownership of immovable property of the solvent spouse had passed to the insolvent estate and that it should be dealt with in accordance with section 20 of the Act. Kirk Cohen J, however, held that *dominium* over such property did not pass to the trustee, and that.⁶⁹

By no stretch of the imagination does section 20(1)(c) include the property of the insolvent's spouse to whom he is married out of community of property. Her property is dealt with in terms of the provisions of section 21

Kirk Cohen J ruled that the solvent spouse did not lose his or her rights of ownership. This was so because of the system of registration of immoveable property. If this was its intention, the judge ruled, the legislature would expressly have stated that ownership passed to the trustee. One would expect the latter reasoning to apply equally to the property of the insolvent estate. But in *De Villiers NO v Delta Cables (Pty) Ltd Van Heerden JA*⁷⁰ rejected this reasoning because also in respect of the *insolvent* no express provision is made:

⁶⁶In this respect, see Smith's comment regarding the interest of an *insolvent* person – Smith *Law of Insolvency* at 81.

⁶⁷Van der Merwe C G *Sakereg* (2nd ed) (1989) at 215.

⁶⁸1990 (4) SA 317 (T) 323; see also *Estate Phillips v Commissioner for Inland Revenue* 1942 AD 35 at 45.

⁶⁹At 321I-J and 323D.

⁷⁰At 15 G-H.

but a transfer of dominium is clearly inherent in the terminology employed in section 20(1)(a) which provides that a sequestration order shall divest the insolvent of his estate and vest it first in the Master and later in the trustee ... Section 21(1) employs very much the same terminology.

The court did concede that section 21(1), unlike section 20(1) (a), did not use the term “divest”, but it would appear that the court failed to take into account that section 21 has a more limited purpose than that of section 20, and, to avoid further uncertainty and uncalled-for complication, that it is unnecessary to ascribe to section 21 the interpretation that ownership passes to the trustee. The argument in the *Saxonwold* case regarding the method of registration of ownership of immovable property also provides reason to debate whether or not ownership of the *insolvent* estate passes to the trustee. On this point Smith⁷¹ says that the divesting of the insolvent of his estate does not necessarily mean that he is deprived of all his rights thereto. She maintains that he does, in fact, retain a vital reversionary interest in his insolvent estate.⁷² Indications hereof can be found in various provisions of the Act. For example, in respect of an appeal being noted against a final order of sequestration, section 150(3)⁷³ states that the provisions of the Act will be applied as if no appeal had been noted, provided

that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned.

Section 20 does state that the insolvent estate vests in the trustee upon his appointment, but it does not refer to the passing of ownership, or to the manner in which the trustee may deal with the property in such an estate. In other sections the Act does however regulate the manner in which the trustee must deal with the property of the insolvent estate.⁷⁴ In fact, the trustee is required to deal with the property of the insolvent estate in accordance with the wishes and to the advantage of the creditors, and not as an owner would deal with his assets. On this point Stander⁷⁵ says that the insolvent estate is administered by the trustee, but:

⁷¹Smith CH *Law of insolvency* at 81.

⁷²See also *Mears v Rissik* 1905 TS 303 at 305.

⁷³See also ss 25, 120 and 122.

⁷⁴See ss 40-53 and 69.

⁷⁵Stander *Die vernietigbare regshandelinge in die insolvensiereg* LLM Thesis University Pretoria (1985) at 26 (hereafter *Stander Thesis*).

hy doen dit egter volgens die aanwysings of besluite van die *concursum creditorum*.⁷⁶

In *Mookrey v Smith NO and Another*⁷⁷ the court found that a consequence of section 82 of the Act is that the trustee requires the authority of either the Master or of the creditors to sell the property of the insolvent estate. He is not empowered to take matters into his own hands. The court emphasised that the creditors of the insolvent estate are in control of the liquidation thereof. In that case, the court also considered the trustee to be a “statutory agent”.

The words “vest”, “dominium” and “ownership” are not defined in the Insolvency Act. However, in the *Delta Cables* case Van Heerden JA⁷⁸ held that the ordinary meaning of the word “vests” connotes the acquisition of ownership. This meaning was cited from *Jewish Colonial Trust Ltd v Estate Nathan*.⁷⁹ But a further perusal of that case indicates that although the word “vests” may carry such connotation, it does not necessarily mean the acquisition of “ownership” as defined in South African law, and that “vest” should always be considered in the context in which it is being used. On this point Watermeyer JA said the following in the *Jewish Colonial Trust Ltd* case:⁸⁰

Unfortunately the word “vest” bears different meanings according to its context. When it is said that a right is vested in a person, what is usually meant is that such person is the owner of that right, – that he has all the rights of ownership in such right including the right of enjoyment. If the word vested were used always in that sense, then to say that a man owned a vested right would mean no more than a man owned a right. But the word is also used in another sense, to draw a distinction between what is certain and what is conditional...

and later in the same case.⁸¹

The right of a fideicommissary, though vested, is something less than ownership.

The most influential definitions of ownership appear to emanate from those put forward by Hugo De Groot and Bartolus de Saxoferrato. These can be linked to

⁷⁶“He does it in accordance with the directions and decisions of the *concursum creditorum*” (author’s translation of Stander *Thesis*).

⁷⁷1989 (2) SA 707 (C) at 711.

⁷⁸At 16 E-G.

⁷⁹1940 AD 163.

⁸⁰At 175.

⁸¹At 181.

modern South African legal theory. Ownership in South Africa is regarded as a real right potentially conferring complete and comprehensive control over a thing.⁸² Kleyn and Boraine⁸³ state that the right of ownership empowers the owner to do with his thing as he deems fit, subject to the limitations imposed by public and private law.⁸⁴ Ownership, they say, is therefore usually regarded as an “absolute” and “individualistic” right. “Absoluteness” implies an unrestricted right while “individuality” denotes the idea that the owner has exclusive control over the thing which he can enforce against the whole world, and the fact that there exists but one kind of ownership that can be exercised either by a sole owner or by co-owners. These authors further point out that the above two characteristics of ownership can be traced to Roman and Roman-Dutch law. In this sense, they say, the modern South African concept of ownership is equated with that of Roman and Roman-Dutch law.⁸⁵ The position of the trustee in an insolvent estate appears to differ from this definition of ownership. Although it is not really necessary to regard the trustee as an owner in the present context,⁸⁶ it would appear that this position has been accepted as the correct one in South African insolvency law.⁸⁷

7.5 Conclusion

The Act appears to make adequate provision for the collection procedure in insolvency, and for the control and protection of assets of the insolvent estate, thereby bolstering the present policy of the collection of the maximum assets to the advantage of the creditors of the insolvent estate. With the procedure for collection of assets in place, analysing the nature and the meaning of property, as envisaged by the Act, is important, because this will identify what property is included in the estate in the first place. But unlike the Act's provisions regarding the procedure for the collection of assets described above, its

⁸²Kleyn DG and Boraine A *The law of property* (1992) at 161 and see Badenhorst PJ, Pienaar MP and Mostert H *Silberberg and Schoeman's The law of property*(2006) at 2 and generally 9 and further.

⁸³Above.

⁸⁴See *Regal Hastings v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A); *Gien v Gien* 1979 (2) SA 1113 (T).

⁸⁵See para 7.3 above where Currie and Van der Walt respectively convey similar opinions in respect of the meaning of property, which opinions, it is submitted, can be linked to ownership in the context of the discussion in this paragraph. See also the discussion of the different rights to property, which include ownership, in the discussion of the repudiation of an inheritance or an insurance benefit in ch 8 below.

⁸⁶See the position of company assets when the company is liquidated, and see Joubert N 'Artikel 21 van die Insolvensiewet' Tyd vir 'n nuwe benadering?' (1992) *TSAR* at 705.

⁸⁷See *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

provisions regarding the actual property that may be collected on behalf of the creditors of the insolvent estate, or that which is excluded or exempt from that estate, and the definition of such property, are not always clear. While “property” is broadly defined in the Act, in the sense that it describes what is included in the insolvent estate as an asset, it does not consider the possible wider meanings attached to the term property, particularly in respect of the different classes of rights that may attach to property. This lacuna in the definition of property has a direct effect on the definition of “disposition” in the Act, and this has created a considerable number of problem areas in respect of assets in the insolvent estates of individuals.

It has now apparently been accepted that the trustee becomes the owner of the insolvent estate.⁸⁸ An understanding of ownership as an element of a right is important because it will assist one in identifying whether the trustee of an insolvent estate possesses the required right that affords him ownership of a particular asset, and therefore a right to particular *property*, thereby including that property in the insolvent estate. “Property” and “ownership” are closely linked in the context of insolvent estates of individuals, yet only “property” is defined in the Act. The courts found it necessary to consider whether or not ownership passes before the purpose of sections 20 (and 21) can be achieved. The courts’ conclusion, however, has invariably had adverse consequences for certain interested parties, and advantages for, usually, the general body of creditors. But the decision in the *De Villiers* case⁸⁹ seems to have dealt inequitably in respect of the appropriate “secured creditor” in that case. Perhaps Joubert⁹⁰ is correct when saying that even with regard to the “vesting” of the *insolvent’s* assets in the trustee, it is unnecessary for the ownership thereof to pass to the trustee. Only the control and the *ius disponendi* are required by the trustee. This is similar to the position regarding company liquidations where it is accepted that ownership of the company assets does not pass to the liquidator.⁹¹

⁸⁸See *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) and *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

⁸⁹Above.

⁹⁰Joubert N “‘Artikel 21 van die Insolvensiewet’ Tyd vir ’n nuwe benadering?” (1992) *TSAR* 705.

⁹¹Joubert N “‘Artikel 21 van die Insolvensiewet’ Tyd vir ’n nuwe benadering?” (1992) *TSAR* 705 and see also Cilliers HS, Benade ML, Henning JJ, Du Plessis JJ, Delport PA, De Koker L and Pretorius JT *Celliers and Benade corporate law* (2000) at 27.08 and 27.62.

So, because ownership of assets of an insolvent estate, including those assets of a solvent spouse, does pass to the trustee of the insolvent estate, it can adversely affect the position of one or more interested parties in the insolvent estates of individuals. Together with this, the consequence of the Act's inadequate defining clauses relating to property, or the complete failure to define important concepts such as ownership, has created considerable problem areas in respect of property in the insolvent estates of individuals.

Chapter 8: Property acquired during sequestration

8.1 Introduction

Property that is acquired by, or which accrues to, an insolvent during sequestration is included in the insolvent estate.¹ Section 23(1) confirms that all property acquired by an insolvent, unless it is specifically excluded, forms part of his insolvent estate. Consequently, all assets that an insolvent acquires after sequestration and before rehabilitation can be applied for the payment of debts. However, as will be seen below, certain property is specifically excluded from the insolvent estate by the Act and by a multitude of legislation from other spheres of the law that overlap with insolvency law. But despite these legislative provisions, precisely what comprises the insolvent estate is not always clear. So too, policy considerations² that have dictated principles regarding such property are not always clear or consistent. It will therefore be shown below that the provisions of the Insolvency Act and other legislation have sometimes failed to regulate certain problem areas regarding property in respect of insolvent estates adequately.

The Act defines “property” as movable or immovable property wherever situated in the Republic and includes contingent interests in property other than the contingent interests of a *fideicommissary* heir or legatee.³ The term ‘contingent interest’ means something that may become a vested interest on the happening of an event.⁴ “Property” is further defined in the Act as “immovable property” and “movable property”. “Immovable property” means land and every right or interest in land or minerals that is registrable in any office in the Republic intended for the registration of title to land or the

¹S 20(2)(b).

²The principle of advantage to creditors, the so called “golden thread”, appears to be the root of the policy in South African insolvency law which favours the collection of the maximum assets for the benefit of the creditors of the insolvent estate, thereby giving support to an all inclusive, and broad meaning to what the definition of property, and the notion of the insolvent estate, should be. Inextricably linked to this policy, however, has been the development of a policy to treat the insolvent debtor in a more humane manner, thereby allowing the debtor to hold certain of his assets for his own use, to the exclusion of his insolvent estate. The policy or policies upon which the exclusion of assets hinges is however not always clear and consistent, and this in turn has led to confusion as to whether or not certain assets should form part of an insolvent estate, or the extent to which such assets should be protected in favour of the debtor, and therefore excluded or exempted from the estate.

³S 2. Property as intended by the Act thus bears a wide meaning. See *Meyer v Transvaalse Lewendehawe Koöperasie Bpk* 1982 (2) SA 746(A).

⁴*Stern and Ruskin v Appleson* 1951 (3) SA 800 (W); *Wasserman v Sackstein* 1980 (2) SA 536(O).

right to mine. “Movable property” means every kind of property and every right or interest that is not immovable property.⁵ These definitions are of vital importance in the quest to decide what property must be included in the insolvent estate and what property is excluded, or exempted from the insolvent estate. Linked to these definitions is the definition of the word “disposition”.⁶ Certain dispositions entered into either before the insolvency of the debtor, or thereafter, can under certain circumstances be set aside by the trustee of the insolvent estate.⁷ To be set aside, however, this disposition must relate to *rights to property* of the insolvent estate. But if set aside, the relevant property that is the subject of such disposition takes its place as property that belongs to the insolvent estate. If uncertainty prevails in this respect, the position of not only the creditors, but also third parties who transacted with the debtor either before or during the sequestration may be adversely affected, and the policy of collecting the maximum assets to the advantage of creditors fails. “Disposition”, as defined in the Act, carries a relatively broad meaning, including virtually every type of transaction commercially possible. But this definition too, has created problems. In respect of transactions relating particularly to the law of succession and insurance law, these problem areas have been identified. These and others have presented themselves as obstacles in the way of achieving a policy of maximum collection of assets for the creditors of the insolvent estate. This chapter will consider these problem areas and critically analyse the legal issues surrounding these issues.

8.2 Property that may accrue to the insolvent during his sequestration in the nature of inheritances and insurance benefits

8.2.1 Disputed rights

When an inheritance or legacy⁸ accrues to an heir during his insolvency, it may form part of his insolvent estate, depending on whether or not it has been accepted by the insolvent heir. Generally, a testator cannot bequeath property in such a manner that

⁵S 2.

⁶S 2 of the Act defines “disposition” as any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation, or any contract therefor, but does not include a transaction in compliance with an order of the court; and “dispose” has a corresponding meaning.

⁷See ss 26, 29, 30 and 31 of the Insolvency Act 24 of 1936, and at common law, the *actio Pauliana*.

⁸Hereafter, for the sake of convenience, reference will be made only to an inheritance and an heir, but this may also include a legacy and a legatee.

it will not form part of the insolvent estate of his heir. A provision in a will, for example, that the heir may not inherit if he is an unrehabilitated insolvent at the testator's death and that the bequeathed property must be held in trust for that heir until such time that he has been rehabilitated is not legally valid.⁹ The property may, however, be bequeathed to an heir on condition that, should he be an unrehabilitated insolvent at the time of the vesting of the inheritance, it goes to another heir, or to a discretionary trust established by the testator's executor.¹⁰

Whether or not an inheritance can be excluded from an insolvent estate by the repudiation thereof is a question that has been debated for a long time.¹¹ On the face of it, an inheritance appears to be an example of property that will automatically accrue to the insolvent during insolvency, if the testator dies before the rehabilitation of his heir. But an inheritance, as "property", or as a "disposition" repudiated, is conspicuous in its absence from the vesting provisions of the Act and, for that matter, from virtually all other provisions of the Act. Consequently, a disputed issue which has come before the courts on a number of occasions over many years is the question of whether an inheritance repudiated by an insolvent (either shortly before insolvency or during insolvency) must be regarded as property that forms part of the insolvent estate, which may be claimed by the trustee for the benefit of the creditors of the estate.

The question has left trustees, practitioners and insolvent debtors at odds as to the status of such bequeathed property *vis-à-vis* the insolvent estate due to conflicting court decisions.¹² It is important to clarify this issue because it will be decisive in resolving, firstly, whether or not a repudiation of the inheritance (before insolvency)

⁹*Vorster v Steyn* 1981 (2) SA 831 (O).

¹⁰See in this context *Van der Vyver v Van der Vyver's Estate* EDL 1933 12; Nagel CJ and Borraine A "*Badenhorst v Bekker en Andere* (Ongerapporteerde Saaknr 3259 (N)): Gevolge van sekwestrasie van gemeenskaplike boedel op testamentêre uitgeslote bates" (1993) 2 *De Jure* at 457; *Badenhorst v Bekker NO en Andere* 1994 (2) SA 155 (N). See also Evans RG "Can an inheritance evade an insolvent communal estate?" (2003) *SA Merc LJ* at 228.

¹¹*Wessels NO v De Jager en 'n Ander* 2000 (4) SA 924 SCA.

¹²See *Kellerman NO v Van Vuuren and Others* 1994 (4) SA 336 (T); *Boland Bank Bpk v Du Plessis* 1995 (4) SA 113 (T); *Klerck and Scharges NNO v Lee and Others* 1995 (3) SA 340 (SE); *Simon and Others v Mitsui and Co Ltd and Others* 1997 (2) SA 475 (W) and *Durandt NO v Pienaar NO and Others* 2000 (4) SA 869 (C); Sonnekus JC "Adiasie, insolvensie en historiese perke aan die logiese" (1996) 2 *TSAR* 240; Sonnekus JC "*Dellatio en fallacia* in die Hoogste Hof" (2000) 4 *TSAR* 793 and Stevens Richard "R I P TESTATOR: *Wessels NO v De Jager en 'n Ander NNO*" (2001) *SALJ* at 230.

may amount to an act of insolvency, for example in terms of section 8(c) of the Act,¹³ and secondly, it will settle the question as to whether a repudiated inheritance would amount to a disposition without value that can be set aside under section 26 of the Act,¹⁴ or another form of impeachable disposition, or whether it may be a disposition in fraud of creditors. It will also confirm whether the trustee may or may not abdicate or accept the inheritance on behalf of the insolvent beneficiary when such benefit accrues to the insolvent during sequestration. In *Wessels NO v De Jager en 'n Ander*¹⁵ the Supreme Court of Appeal handed down a judgment that has apparently resolved some of these issues. But the reasoning behind the judgment, or the brevity thereof, has possibly resulted in further confusion.

Within this chapter some of the court cases and academic writings that have passed judgment and commentary on this subject will be considered. It will attempt to provide an answer as to whether or not a repudiated inheritance or legacy should be regarded as property that forms part of the insolvent estate. In an attempt to resolve this issue, the definitions in section 2 of the Act of the words “disposition”, “property”, “immovable property”, and “movable property”, which have already been described above, must again be considered, and they are restated here for ease of reference.¹⁶ In view of the definitions that have been attributed to these words it will also be necessary to consider the meaning of the word “right” or “rights” within the context of an inheritance. The nature of the vesting of an inheritance, the legal status of a deceased estate and

¹³S 8(c) provides that a debtor commits an act of insolvency “... if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another”.

¹⁴S 26(1) states that “Every disposition of property not made for value may be set aside by the court if such disposition was made by the insolvent –

- (a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
- (b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities”.

¹⁵2000 (4) SA 924 SCA.

¹⁶In s 2 of the Act “disposition” means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and “dispose” has a corresponding meaning. “Property” means movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a *fideicommissary* heir or legatee. “Movable property” means every kind of property and every right or interest which is not immovable property and “immovable property” is defined as land and every right or interest in land or minerals which is registrable in any office in the republic intended for the registration of title to land or the right to mine.

the consequences of an act of adiation or repudiation in the law of succession will also be considered. The terms “vest”, “vests” or “vested”, which are not defined in legislation, must therefore also be scrutinised. Some of these definitions were considered in the various court cases that gave judgment on this issue, but little attention has been given to the phrase “abandonment of rights to property” in the definition of “disposition”, or to the effect of the “vesting” of an inheritance. But the various judgments of the courts in this respect will first be considered, thereby illustrating the problems that arise in respect of the repudiation of an inheritance or legacy under insolvent or imminently insolvent circumstances.

8.2.2 Conflicting court judgments

In *Kellerman NO v Van Vuuren and Others*¹⁷ the insolvent debtor repudiated an inheritance shortly before the sequestration of his estate. The trustee of the debtor’s insolvent estate (the applicant) applied to set aside the repudiation by the insolvent debtor “of certain *rights which he acquired* in the estate of his late father” (emphasis added).¹⁸ The question before the court was whether the repudiation was a disposition of property, which could be set aside as a disposition without value under section 26 of the Act. The trustee argued that on the death of the insolvent’s father *dies cedit* took place. The right to the inheritance vested in the insolvent at that point, and the right could only be lost to the debtor’s estate if he repudiated the inheritance, and that would therefore constitute a disposition in terms of section 26, read with the definition of “disposition” in section 2 of the Act.

Citing *Van Schoor’s Trustees v Executors of Muller*,¹⁹ the court rejected this proposition. In *Van Schoor’s* case Watermeyer J held that:²⁰

A child may decline to adiate an inheritance, or may repudiate it, with the very object that the amount which would otherwise go into his estate should be lost to his creditors. This is not considered in law an alienation in fraud of creditors; as there can be no alienation of what is omitted to be acquired (*Voet* 42.8.16). If the child on the brink of insolvency may decline to adiate absolutely, he may decline, where he has an election between the acceptance of the “legitimate” free, and of the whole inheritance burdened, to accept the

¹⁷See para 8.2.1 above.

¹⁸*Kellerman’s* case para 8.2.1 above at 337 A-C.

¹⁹(1858) 3 Searle 131.

²⁰Above at 137.

latter instead of the former, although the acceptance of the “legitimate” might be more in accordance with the interests of his creditors.

Goldblatt J also cited, among other things, the following passages from *Voet* in *Kellerman’s* case:²¹

This is so even though the debtor who rejects the inheritance was such that a legitimate portion was due to him according to the laws out of that inheritance. The reason for this is that it is quite certain that the legitimate portion is no more accrued than did the rest of the inheritance to the son or other person like him during the lifetime of him out of whose goods it was to be furnished. Thus, when conferred after the death of the father, it could also have been rejected just as much as the rest of the inheritance, and he who rejects is not in that way cutting down anything out of his estate, but is acting for the sole purpose that he may not acquire a thing which in accord of what has already been said, is not forbidden to him.

and

Thus, although a legacy is retrospectively the property of the legatee unless it is rejected, still when it is rejected it is clear that retrospectively it never belonged to him.

Therefore, Goldblatt J concluded that adiation and repudiation were the two options that were available to a legatee. The legacy was retrospectively rejected and never belonged to the heir when repudiated, so the right did not form part of the insolvent estate. This, he said, was the law that appeared to be settled more than 100 years ago in this country, and it would be wrong for him, sitting as a single judge, to disturb this law.

In *Boland Bank Bpk v Du Plessis*²² judgment was handed down in 1991, but it was reported only in 1995. Goldblatt J may therefore have been unaware of this case when he delivered judgment in the *Kellerman* case. The *Boland Bank* case was an opposed application for a provisional order of sequestration. Under insolvent circumstances, the respondent repudiated any inheritance that might come to her from her late father’s estate before her sequestration. De Klerk J found that this constituted an act of insolvency under section 8(c) of the Act. The definition of “property” in the Act and its inclusion of “contingent interests” in property other than the contingent interests of a *fideicommissary* heir or legatee were considered. The court reasoned that the contingent interest of an ordinary heir was included in the

²¹At 338 A-E of the *Kellerman* decision, para 8.2.1 above.

²²Para 8.2.1 above.

definition of property. It was intentionally included by the legislator, De Klerk J said, bearing in mind that a *fideicommissary* heir had been expressly excluded from the definition. After the death of a testator, the court ruled, the heir obtained a contingent right (*voorwaardelike reg*) from the consequences that arose. These were a will in favour of the heir and assets destined to go to the heir on condition only that he or she should adiate. This appeared to be a contingent interest in property as envisaged by the definition of “property”. A disposition of such a right brought it within the ambit of section 8(c) of the Act.²³ De Klerk J ruled that it was his duty to interpret the Insolvency Act of 1936, and he found that the respondent had committed an act of insolvency under section 8(c). He observed that references to authority from the previous century and conflicting opinion in textbooks²⁴ were not relevant here, and he did not accept that there was a conflict between the law of succession and insolvency law. He agreed that an heir could never be forced to adiate. But this did not exclude creditors from utilising the Insolvency Act to avoid the effect of the refusal to adiate and to bring the inheritance into the estate for the benefit of the creditors.

*Klerck and Scharges NNO v Lee and Others*²⁵ also related to the question whether an insolvent’s repudiation amounted to a disposition in terms of section 26 of the Act. The court supported *Kellerman’s* decision. It accepted *Voet’s* opinion that “not to acquire is not to alienate”. Melunsky J further stated:²⁶

In my view it is untenable to hold that a person who refuses to accept a benefit – whether it be a donation or an inheritance – thereby disposes of his property. And the definition of “disposition” in the Insolvency Act, wide as it is, does not cover the instant case. Counsel for the plaintiffs submitted that renunciation of an inheritance was an abandonment of rights to property in terms of the aforementioned definition. It appears to me, however, that a repudiation of an inheritance is merely a refusal to *accept* a right to property (emphasis added).

This question was again considered in *Simon NO and Others v Mitsui and Co Ltd and Others*²⁷ where the *Boland Bank* decision was followed. In *Durandt NO v*

²³*Boland Bank Bpk v Du Plessis* at 115 A-E.

²⁴The judgment does not state which of this authority has been referred to.

²⁵*Klerck and Scharges NNO v Lee and Others* 8.2.1 above.

²⁶Above at 343 C.

²⁷*Simon NO and Others v Mitsui and Co Ltd and Others* 8.2.1 above.

*Pienaar NO and Others*²⁸ an inheritance was repudiated within two years before the sequestration of an insolvent and the question was whether the repudiation could be set aside in terms of section 26 of the Act. The court considered all the aforementioned authority and concluded that the repudiation prior to sequestration under insolvent circumstances did not amount to a disposition of property and could not be set aside as a disposition without value. Counsel for the respondent emphasised the presumption of statutory interpretation that the legislature did not intend to alter the existing common law more than was necessary. *Du Plessis and Another NNO v Rolfes Ltd*²⁹ was referred to where Zulman AJA stated that the Insolvency Act was not a codification of South African common law of insolvency. The common law of insolvency still applied, except to the extent that it might have been changed by the Insolvency Act, or was inconsistent with it.³⁰

In the definition of “disposition”, Comrie J found, the word “abandonment” was wide enough to cover the repudiation of an inheritance. If the matter had been *res nova*, the court ruled, the view that a repudiation was an abandonment in the sense of relinquishing or renouncing such claim to the inheritance could have been considered. But the judge held that the matter was not *res nova*, nor had it been when Parliament enacted successive insolvency statutes. The word “abandonment” was inherently ambiguous in his view. He said:³¹

... if Parliament wished to change the settled law as received in *Van Schoor’s* case, it should have used clearer language to make its intention plain.

At this point one must distinguish between a renouncement of rights by a person prior to the date of sequestration and the renouncement of rights after the date of sequestration. In this respect *Van Schoor’s* case held:³²

By the 48th section of the Insolvent Law (Ord 6 of 1843), the insolvent’s power of adiation or repudiation or election passes to his trustees, as regards all inheritances, legacies etc, to which the insolvent may be entitled at and after his sequestration. But up to the moment of his sequestration he has the power, whatever his embarrassments,

²⁸*Durandt NO v Pienaar NO and Others* 8.2.1 *supra*.

²⁹1997 (2) SA 354 (A) at 363 B.

³⁰At 363 B.

³¹Para 8.2.2 at 874 I.

³²Para 8.2.2 above at 137 138.

of deciding whether he shall adiate a *fideicommissary* inheritance, or take the “legitimate” or repudiate entirely. If at the date of his sequestration, he have not made such decision, his trustees have the right of doing what until then he might have done; they may then, for him, adiate or repudiate or elect. In this respect the authorities cited by Mr Brand, which require, even after his insolvency, an exercise of will by the insolvent, in adiation, etc, before his creditors can enjoy property coming to him even after his sequestration, have been superseded and no longer apply.

All the more recent cases discussed in the preceding paragraphs dealt with the repudiation of an inheritance prior to the date of the sequestration of the debtor. The common law authorities and the *Van Schoor* case apparently support the notion of excluding the inheritance from an insolvent estate where repudiation occurred prior to sequestration, but the *Van Schoor* case clearly stated that where the inheritance accrued to a debtor after the date of sequestration, the trustee of his insolvent estate would be entitled to exercise the insolvent’s power of adiation or repudiation. The question that then arises is why the trustee, who is empowered to elect for the insolvent heir, should not under present legislation also be empowered to set aside, as an impeachable disposition, a repudiation that transpired prior to the date of sequestration. These questions were finally put to rest by the Supreme Court of Appeal in *Wessels NO v De Jager NO en ’n Ander*.³³

8.2.1.3 *Wessels NO v De Jager NO en ’n Ander*

The question in *Wessels NO v De Jager NO en ’n Ander*³⁴ was whether an inheritance and an insurance benefit repudiated by an insolvent during insolvency could be retrieved and utilised for the benefit of the creditors of the insolvent estate. The insolvent debtor was married by antenuptial contract. His wife took out an insurance policy on her own life after the sequestration of the insolvent, but before his rehabilitation. He was the nominated beneficiary in the event of her death. She died without leaving a will, so the insolvent was her intestate heir. But the insolvent refused to accept both the insurance benefit and the inheritance.

The court had to decide whether any part of these benefits vested in the trustee, thereby empowering him to accept the benefits. This would be the case if the

³³Para 8.2.1 above.

³⁴Para 8.2.1 above.

above *dicta* in *Van Schoor's* case was applied. Beckley J in the *court a quo* found that the two benefits did not vest in the trustee of the insolvent estate in the sense that the trustee acquired a right to accept the benefits.³⁵

On appeal the appellant argued that the “right” of an insolvent during insolvency to accept an offer of a donation was also a “right” that resided in the trustee. The appellant also argued that the “rights” that the insolvent had obtained in this instance constituted movable property as defined in the Act. Van Heerden ACJ pointed out that “movable property” was described in section 2 of the Act as every kind of property which is not immovable property, while “property” was defined to include movable property as well as contingent interests in property.³⁶ But the court rejected the appellants arguments as unsubstantiated. The appellant had conceded, the court found, that if his argument were well founded, the “right” to accept an offer of donation during insolvency would also be a right that vested in the trustee. The court, however, ruled that in legal terminology a right could not exist in the abstract. The right was only one of the poles to an agreement, the other being an obligation resulting, was among things, from a contractual relationship. When an offer was made to the insolvent, he or she obtained the *competence (bevoegdheid)* to accept it, but until then the offeror was not burdened with any obligation and could at any time before the acceptance revoke the offer.

So, the insolvent obtains a competence,³⁷ as opposed to a right to accept the offer before being revoked. In respect of the insurance policy, the court found that an obligation had arisen between the insurer and the insured, (the two contracting parties), but not towards non-contracting parties (eg, the insolvent). So, the insolvent obtained no right which became enforceable at the conclusion of the insurance contract, but merely a competence. The court also applied this reasoning to an inheritance, whether testate or intestate. Rights to an inheritance came into existence only once it had been accepted. This did not amount to a contingent interest in

³⁵See the reference in the *Wessels* case at para 927 H-I.

³⁶At 927 I-928 A-B.

³⁷Van Zyl DH and Van der Vyver JD in *Inleiding tot die regs wetenskap* (2nd ed) (1982) at 373 “[d]escribe a ‘competence’ or ‘ability’ as the ability to act as a subject in the legal circle ... So if one wants to express the idea that a legal subject has the ability to acquire rights and duties, or to commit legal acts, one can say that he has the *competence* or *ability* to acquire rights and duties, or that he is *competent* to act in law”.

property, as the appellant submitted, because the right did not survive the death of the offeror. The artificiality of the appellant's argument was illustrated by the court by way of the following examples. Firstly, a testator leaves an heir a legacy on condition that he may not leave Cape Town for the period of one year. If the bequest is accepted, the insolvent heir receives a contingent right, but prior to that he obtains a mere competence to adiate. A further example cited by the court was that of an insolvent heir inheriting a large sum of money on condition that he houses his younger brother in his home for a period of ten years.³⁸ If the trustee should accepted this "right", in who would the reciprocal obligation vest? Furthermore, if the appellant was correct, this "right", the court found, ought to survive the death of the offeror, which was not the case.³⁹ The court ruled that the *Kellerman* and *Scharges* cases above had been correctly decided, and that *Boland Bank* was incorrect.

The court proceeded to quote *De Wet* and *Van Wyk* whose opinion it was that an offer does not survive the death of an offeror, specifically because the offer had not yet become an obligation which, as a burden, formed part of the deceased estate.⁴⁰

8.2.2.3 What is the reasoning behind the *Wessels* decision ?

Further analysis of the nature of the insurance policy at issue may indicate that the Supreme Court of Appeal's approach in respect of the policy, which it applied also to the inheritance, may be correct. An insurance policy of this nature is a stipulation in favour of a third party, also known as a *stipulatio alteri*.⁴¹

This construction occurs where A, the *stipulans* or stipulator, contracts with B, the *promittens* or promisor, to make some performance to a third party C, the *tertius*. In the *Wessels* case the stipulator (A) was the now deceased wife, the promisor (B) the insurance company and the *tertius* (C) the insolvent husband. With a stipulation in favour of a third party, the promisor (B) agreed to pay a sum of money or to deliver a thing to the *tertius* (C). This was done either gratuitously or

³⁸Para 8.2.1 above at 928 I-J.

³⁹At 928 G-J; the court also cited De Groot 3.1.6 and Voet 5.1.73 as authority.

⁴⁰At 928 J.

⁴¹Reinecke MFB, Van der Merwe SWJ, Van Niekerk and Havenga P *General principles of insurance* (2002) at para 412 and further.

in exchange for a counter-performance from either the stipulator (A) or the third party himself (C). If the third party (C) were to give the counter-performance, the promisor (B) actually bound himself to a contract with the third party (C). However, as in the *Wessels* case, it may be (A), the stipulator who gave the counter-performance and then (C), who was to receive the performance from promisor (B), received only rights and no duties towards promisor (B) if he accepted the offer.⁴² So it is said that an insurer, as promisor, may agree with the insured, as stipulator, to pay the proceeds of the insured's life policy to the insured's wife, the beneficiary.

If this construction is applied to the present problem, and it would appear that it should be, then it is clear that the insolvent beneficiary, as the third party, has had rights created for his benefit in respect of the insurance contract, although they have not yet been acquired.⁴³ The object of these rights is the insurance benefit and this falls within the ambit of the definition of "movable property" in terms of the Act. At this stage, however, the beneficiary has not yet acquired rights to this property. In this respect the view of the courts is that the third party *acquires* a right only when he accepts the stipulation in his favour. The courts accept that *stipulatio alteri* does not in itself create a right for the beneficiary, but is intended to enable the beneficiary eventually to *step in as a party* to a contract with one of the original contracting parties.⁴⁴ The right of the third party beneficiary vests only after he has accepted such right.⁴⁵ The position of the courts⁴⁶ is that prior to acceptance there is only a contractual relationship between the stipulator and the promisor. When the third party accepts the stipulation in his favour the relationship between the stipulator and the promisor falls away, leaving only a legal relationship between the promisor and the third party. Joubert's analysis of the court decisions provides the

⁴²See Joubert DJ *General principles of the law of contract* (1987) at 187 (hereafter Joubert *General principles*); Lubbe GF and Murray CM *Farlam and Hathaway: Contract cases, materials and commentary* (3rd ed) (1988) reprinted (2000) at 407; Kerr AJ *The principles of the law of contract* (6th ed) (2002) at 88 and further.

⁴³For the other party, this is a burden.

⁴⁴See Van der Merwe S, Van Huyssteen LF, Reinecke MFB and Lubbe GF *Contract – general principles* (2007) at 264 and further (hereafter Van der Merwe *et al*) and see Joubert *General principles* at 188 and 189 and the many cases cited in note 24 on page 188.

⁴⁵See *Mutual Life Insurance Co of New York v Hotz* 1911 AD 556.

⁴⁶See Joubert *General principles* at 188 and 189.

construction that the stipulator and the promisor contract that the promisor (automatically) makes an offer to the third party, and by accepting this offer, the third party can create an obligation between himself and the promisor. This offer cannot be revoked by the promisor (the offeror) and will not fall away at the death of either the offeror or the offeree (ie, the third party). It resembles an option.⁴⁷

Thus it appears that rights to property are created and that these rights do actually exist, but unless the offeree accepts them, he has no rights in respect of the property that is the object of the rights that have been so created. His ability or competence to accept them is not a right to property, but only the competence to acquire a personal right in respect of that property. What vests in him prior to acceptance, is only a competence. A competence, one may argue, is not transmissible upon insolvency, because it is not “property” as envisaged by the Act, and it therefore cannot vest in the insolvent estate. The (potential) rights to property or in respect of property are not yet part of his estate. A corollary to this would be that what one has not yet acquired, cannot be abandoned.

It is unclear what the beneficiary stands to accept in a stipulation in favour of a third party. One interpretation is the aforementioned explanation of Joubert, namely that the courts require the beneficiary to accept an offer. It has also been said that the beneficiary must accept the “benefit” of the contract in his favour.⁴⁸ Van der Merwe *et al* comment that “benefit” probably refers to the right which the stipulator and the promisor intended to create for the beneficiary. They submit that the reference in certain decisions that the beneficiary must accept (adopt or ratify) the contract or stipulation in his favour is compatible with the construction that the beneficiary must accept the rights that the contracting parties intended to create for him.⁴⁹

Van der Merwe *et al* further comment that under the construction favoured by the courts the beneficiary’s position prior to acceptance is similar to that of the holder of

⁴⁷See Joubert *General principles* at 188 and 189.

⁴⁸See *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) 172 and *Nine Hundred Umgeni Road (Pty) Ltd v Bali* 1986 (1) SA 1 (A) 5A, 7D.

⁴⁹See Van der Merwe *et al* at 264 and further.

a right subject to a suspensive condition. Acceptance is necessary, they say, not to conclude a distinct contract, but to “complete” or “stabilise” the right so that it cannot be revoked or altered by the will of the original contracting parties alone. The origin of the beneficiary’s right is thus the original contract between the promisor and the stipulator, thus excluding the argument that upon acceptance the beneficiary replaces the stipulator. They state that the original contract can convincingly be called a stipulation in favour of a third party because the beneficiary derives his right from the original contract and not from a contract of his own making.⁵⁰ This would appear to be wrong, because a contract, in the sense of an offer and acceptance, must be concluded and completed in order to create that right which is subject to the suspensive condition. Prior to the acceptance the “beneficiary” will not yet be a party to the contract and may, in fact, not even be aware of it. If their construction is accepted, the beneficiary’s executor will be entitled to accept the benefit if the beneficiary dies before doing so.⁵¹ Acceptance by the executor would not be possible if the beneficiary is regarded as an offeree to whom a simple offer is made.⁵²

It would therefore appear that irrespective of the construction that is adhered to, rights are created by a stipulation in favour of the third party, be they named an “offer” or a “benefit” or a “right”, and all that is required for the completion of the stipulation is the acceptance thereof by the beneficiary. Thus the rights have not yet vested in the third party, and therefore there is no right to property which can be abandoned by the (insolvent) third party. This surely cannot be a contingent right or interest in property because the third party would first have to become one of the contracting parties in order to create the contingent right.

On this point the court in the *Wessels* case said the following:⁵³

⁵⁰Van der Merwe *et al* 264 and further.

⁵¹Cf *Mutual Life Insurance Co of New York v Hotz* above.

⁵²See Van der Merwe *et al* at 264 and further. Joubert *General principles* at 188 and 189 confirms that an offer is terminated by the death of the offeror or offeree since the offer only creates the opportunity for completing a contract and on the death of the offeror there is no duty which can pass to his estate, and on the death of the offeree there is no right which can pass to his estate either. He finds support for this approach in the fact that an offer cannot be transferred *inter vivos* and that the offer must be exercised by the offeree personally and not by his estate or heir. The position will be different, he says, when the offer is in itself capable of transfer, as in the case of an option, or when it is intended to be exercised only after the death of the offeror.

⁵³At 928 B-E. Author’s translation: “The appellant ...”.

The appellant conceded that if his argument was firm, the “right” to accept an offer during insolvency would also be a “right” that vests in the trustee. But a right in jurisprudence cannot exist in the abstract. It is but one pole of an agreement of which the other is an obligation, among other things, as a result of a contract. If the above offer is made to the insolvent, he obtains the ability [capacity/competence] to accept it. Until then there is no obligation upon the offeror. In fact, except in the case of an option, he can revoke the offer at any time before it is accepted. Thus, the insolvent obtains only a competence, as opposed to a right, to accept the offer before revocation.

Thus, if the construction of the stipulation in favour of a third party is accepted, it would appear that the ability of the insolvent to accept the offer of the benefit can be regarded as a competence, as described by the Supreme Court of Appeal in the *Wesse/s* case. Although, as will be illustrated later, a competence may be regarded as a category of a “right”, one must not lose sight of the fact that within the context of insolvency law, the “right” that one is concerned with, is a “right to property” which must be abandoned before it can be regarded as a “disposition”. A competence, it would appear, is not property or a right to property and it is therefore of no concern of the insolvent estate.

8.2.2.4 “Vesting”, adiation and repudiation

It would appear that the courts in the aforementioned decisions failed to analyse the principles relating to the vesting of an inheritance in the law of succession adequately. The meaning of the term “vest” requires some scrutiny, both for the purpose of the law of insolvency and for the law of succession. For the purpose of insolvency law it is of crucial importance to identify the nature of whatever it is that vests in the heir at the death of the testator, so that the question may finally be resolved as to whether or not a repudiation is, in terms of the Act, an “abandonment of rights to property” within the definition of “disposition”.⁵⁴

Section 20(1)(a) of the Act states that the effect of the sequestration of the estate of an insolvent shall be to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest it in him. Section 20(2)(b) then provides that:⁵⁵

⁵⁴See paras 8.1 and 8.2 above.

⁵⁵S 23 of the Act describes *inter alia* what property may be excluded from the insolvent estate. An inheritance or legacy is not mentioned therein as an excluded asset, nor is it excluded in any other

For the purposes of subsection (1) the estate of an insolvent shall include –

- (a) all property at the date of the sequestration ...
- (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in *section twenty three*.

The Appellate Division has ruled that for the purposes of insolvency law the vesting of the insolvent estate in the Master and then in the trustee is a transfer of ownership of the assets of the insolvent estate.⁵⁶ For the purpose of the law of succession, however, the word “vest” is usually not used to describe the transfer of the ownership of the assets from a deceased estate to an heir. Succession is not recognised in South African law as a method of acquisition of ownership, but is only the *causa* for the acquisition of ownership which is achieved by way of delivery or registration.⁵⁷ In *Greenberg & Others v Estate Greenberg*⁵⁸ Centlivres CJ observed as follows:

It seems to me inaccurate to suggest ... that in ascertaining whether a legatee has acquired a vested right to his legacy as at the death of the testator one must enquire where the *dominium* in the property resides immediately after the testator’s death. The futility of such an enquiry can, perhaps, best be illustrated by taking as an example a bequest of a sum of money. When a testator bequests, say, £1,000 to A the *dominium* in that sum of money does not vest in A as at the death of the testator but A acquires a vested right to claim that sum from the executor at the future date I have indicated, provided that the estate is solvent. The test seems to me to be whether, on a true interpretation of a will, the testator intended that a legatee should acquire as at his death a vested right to his legacy. It may be said that the legatee, if such was the testator’s intention, then acquires the *dominium* of the right but it cannot be said that he then acquires the *dominium* in the subject matter of the legacy ... under our modern law system a legatee or an heir never acquires the *dominium* in the legacy or inheritance immediately on the death of the testator: all that he acquires is a right to claim the legacy or the inheritance.

Corbett confirms that the heir no longer succeeds automatically to the assets and liabilities of the estate. Though the inheritance vests in him, Corbett says, he does not acquire *dominium* of individual assets. He acquires a right against the executor to his share in the residue after the liquidation and distribution account has been settled. He confirms that in *Estate Smith v Estate Follet*⁵⁹ (referred to with approval

provisions of the Act.

⁵⁶See *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A).

⁵⁷*Greenberg & Others v Estate Greenberg* 1955 (3) SA 361 (A) 364 F-365 A; Van der Merwe CG *Sakereg* (2nd ed) (1989) at 216.

⁵⁸Above 365 A-C and 366; see also *Estate Smith v Estate Follet* 1942 AD 364 at 383 and *Commissioner of Inland Revenue v Estate Crewe and Another* 1943 AD 656 at 669 and 692.

⁵⁹1942 AD 364 at 367.

in *SIR v Estate Roadknight*⁶⁰) Schreiner J in the trial court “inclined to the view that the right of an heir in modern law is a *jus in personam ad rem acquirendam*”. In the Appellate Division in the same case it was said that:⁶¹

Under our system ... an heir is in effect a residuary legatee, ... and when we speak of his “inheritance” we mean either the property which he is entitled to claim from the executors of the estate of the deceased, or his legal right to claim such property derived from the will.

If one therefore concedes that vesting of a right does occur at the time of the death of the testator, it would appear to be either a competence, as a category of a right, or a personal right, which so vests. Further consideration will be given to the nature of this “right” hereafter.⁶²

Thus, with respect to the abandonment of rights for the purpose of insolvency law, it is clear that at the time of the testator’s death the heir has no vested right to the *dominium* of the property that makes up the inheritance which can be abandoned by the debtor. At this stage this *dominium* is vested elsewhere. For the heir to acquire a vested right in the *dominium* of the property of the inheritance, delivery or transfer thereof to the heir is required if he has adiated. Until this transpires, the right to the *dominium* (and any other concomitant rights) must presumably vest somewhere. With respect to the question as to where or in whom or what these rights vest from the moment of death until the appointment of the executor (and therefore also the enquiry as to the status or nature of the deceased estate) there are different schools of thought, but a definitive answer remains elusive.⁶³

Corbett thus points out that the answers to these questions cannot be regarded as settled. He submits that it may well be that, until the executor takes over, the

⁶⁰1974 (1) SA 253 AD at 259.

⁶¹See Corbett MM, Hahlo HR (gen ed), Hofmeyer G and Kahn E *Law of succession in South Africa* (1980) at 133 as supplemented by Kahn Ellison(1994) at 10-11 (hereafter Corbett). The Supreme Court of Appeal decision in *Wessels NO v De Jager en 'n ander NNO* 2000 (4) SA 924 (SCA) is not discussed in the latest edition of Corbett MM Hofmeyr G and Kahn E (gen ed) *The law of succession in South Africa* (2nd ed) (2001) (hereafter Corbett (2nd ed)), but in the latter edition see pages 8 and 17 to 20 for the similar discussion on adiation and repudiation of an inheritance.

⁶²See para 8.2.2.5 and further below.

⁶³See Corbett at 13 and 163. Van der Merwe NJ, Rowland CJ and Cronje MB *Die Suid-Afrikaanse erfreg* (6th ed) (1990) at 7 and further (hereafter Van der Merwe and Rowland).

estate forms a complex of rights and duties without an owner. Corbett further states that it has been suggested that once an executor has been appointed, ownership of the assets vests in him, but this would be for the purpose of winding up only and the estate of the deceased remains separate from his own.⁶⁴ Therefore, for the purpose of insolvency law, if there is in fact an abandonment of rights resulting from a repudiation of an inheritance, it would be an abandonment of either a competence or a personal right to property, and not an abandonment of the right to the *dominium* of the property that comprises the inheritance. If it is a personal right that is abandoned, this would be sufficient to bring the repudiation within the meaning of the Act's definition of a "disposition", and it would therefore be difficult to argue that the inheritance should not be regarded as property that forms part of the insolvent estate. However, the Supreme Court of Appeal may be correct in denying that this is an abandonment of a personal right. Prior to the *Wessels* decision there was mostly only speculation as to the nature of the "right" that exists prior to the adiation or repudiation of an inheritance. For the purpose of insolvency law this judgment has now provided clarity in ruling that it is a *competence* to adiate or repudiate that vests at the death of the testator. It would therefore appear that repudiation is an abandonment of an opportunity or ability to create personal rights, but it is not an abandonment of rights to *property*. What, however, may the court's deeper reasoning have been in this judgment?

In South African law an heir is obliged to accept or to repudiate an inheritance. Corbett states that there can be no adiation or repudiation before the benefit vests.⁶⁵ Thus, where the inheritance is conditional, therefore postponing the vesting thereof, also adiation or repudiation should be postponed. Adiation can be express or implied and because it generally carries no risk, it is generally assumed that a beneficiary has adiated, unless he repudiates the inheritance. The enquiry remains, however, as to the nature of the benefit that vests in an heir, whether vesting occurs at the death of the testator or at a date thereafter. As stated above, in *Estate Smith v Estate Follett Schreiner*

⁶⁴Corbett at 13; see also *Van den Bergh v Coetzee* 2001 (4) SA 93 on the position of the executor of a deceased estate; and Van Zyl FJ "Universele opvolging in die Suid-Afrikaanse erfreg" (1983) 5 reeks B/1 *Annale* at 232-233.

⁶⁵Above at 14 he cites Voet 29. 2 . 12 and *Estate Bazley v Estate Arnott* 1931 NPD 481.

J was of the opinion that the right of an heir in modern law is a *jus in personam ad rem acquirendam*.⁶⁶ In *Commissioner for Inland Revenue v Estate Crew*⁶⁷ it was said that:

In cases on interpretation of wills, South African courts frequently say that when bequests are made to a legatee the legatee acquires a real right in respect of such a bequest or that the bequeathed property would pass under the will which takes effect on death ... Again, where heirs are appointed, the *dominium* of the deceased's estate is said to vest on death of the deceased in the heirs. In such case it seems to have been assumed that the effect of the will is that on the death of the deceased the *dominium* of the deceased's estate becomes vested in the heirs... But this cannot mean that the heirs are vested with the ownership of specific assets in the estate, for what is vested in the heirs is the right to claim from the deceased's executors at some future time, after confirmation of the liquidation and distribution account, satisfaction of their claims under that account. The right to make such a claim no doubt vests in the heirs on the death of the deceased, and they may be said to have *dominium* of this right, although it is not immediately enforceable.

But what is the nature of “the right to make such a claim” that the court here considers to vest in the heirs on the death of the deceased? If one considers the definition of a “competence” as a category of a right, it seems more plausible to accept that it is a competence, as opposed to a right to property, which vests at death. The heir then acquires the *dominium* of this competence which, if exercised positively, will ultimately be the source of the heir's personal right to claim the inheritance “at some future time”. Only this latter right is a right to property, the abandonment of which may be considered a “disposition” as defined in the Act. It would therefore appear that what vests at death is either, as the court said in *Wessels*, a mere competence to acquire rights or, alternatively, it must be a conditional right, as suggested in the *Boland Bank* case.⁶⁸ This competence must be exercised or the condition must be fulfilled before the rights of the heir towards the executor can come into existence or become complete. A possible solution to this enquiry as to the nature of the “vested rights” is to place the emphasis on the act of repudiation instead of adiation, thereby making the heir the immediate recipient of rights unless he repudiates. By this argument adiation is not regarded as a suspensive condition which will have retroactive effect if fulfilled, but rather, repudiation is considered a resolutive condition. This is the approach which is found in *Crooks NO and Another v Watson and Others*⁶⁹ where the court said that:

⁶⁶See *Estate Smith v Estate Follet* 1942 AD 364 at 367 and further.

⁶⁷1943 AD 656 at 692.

⁶⁸Para 8.2.1 and 8.2.2 above.

⁶⁹1956 (1) SA 277 (A) at 296; see also Van der Merwe and Rowland at 9.

The oft-repeated saying that a legatee does not acquire a legacy unless he accepts it, misplaces the stress; it would be more correct to say that he acquires a right to the subject-matter of the bequest unless he repudiates it.

Van der Merwe, however, points out that succession does not result merely in the transfer of the testator's rights, but is also a fact by which an obligation is created, as is apparent from positive law which dictates that the heir has a legal claim (*vorderingsreg*) against the executor for the transfer of the bequeathed assets. This legal claim, he says, must be clearly distinguished from the rights that are transferred. During the testator's lifetime he was the carrier of the latter rights, but never of the legal claim. This proposition of Van der Merwe may strengthen my proposal that this legal claim or personal right is not in existence and does not vest at the death of the testator. The rights to the *dominium* of the inheritance which vested in the testator during his lifetime do in fact immediately at death devolve upon someone or something: they do exist. The personal right to claim the inheritance, however, will arise only, it would appear, once the heir has been positively identified through his acceptance of the inheritance and therewith the personal right to claim it. Van der Merwe continues:⁷⁰

Where the rights acquired from the testator, at his death, as already explained, must pass to someone or something, there exists no similar need regarding the personal right personal right of an heir. Now the question of when the heir acquires his personal right becomes real. A testate or intestate heir obtains his personal right⁷¹ as soon as the estate of the deceased regarding that inheritance opens. The opening of the estate is known as *delatio* ... The moment of *delatio* is known as *dies cedit*, while the moment at which the personal right becomes enforceable is known as *dies venit*.

Is this "vested right" or "vested interest" to which Van der Merwe refers not the competence that vests at death, and which may or may not, depending on the choice of the heir, become a vested personal right. The moment of *delatio* may be at the time of the death of the testator, or at a later date, depending on the validity or the provisions of the will. Where there is no valid will, the rights of the intestate heirs arise at the moment of death of the testator. Surely the above obligation to which Van der Merwe refers (which cannot be forced upon the heir against his will) is created only when the heir consents to be a party thereto and this occurs at adiation. Prior to this there is only an ability or opportunity to create rights that will originate from this obligation.

⁷⁰Van der Merwe and Rowland at 11-12. Author's translation of Van der Merwe: "Where ...".

⁷¹"Vested interest" or "vested right" it is called ...

Therefore, it is submitted, as an alternative proposal, that if one is in agreement that rights do vest at *delatio*, these are not rights in the sense of a personal right, but are “rights” in the sense of a *competence* as a category of a “right” (compare the definition of “right” below). There is not as yet, at *delatio*, any object or third party towards which or towards whom the personal right can relate, as no executor has been appointed and a definite heir has not yet been identified prior to adiation. The estate with all its rights, and possibly duties, is perhaps vested in an ownerless entity or in the Master or elsewhere, but not yet in the heir or in the executor. Only when adiation occurs (expressly or impliedly) will a relationship arise in respect of which a personal right can exist, namely, first, *legal subjects*, one of whom being the executor against who performance (the object of the personal right) can be claimed, another being the heir who has been definitely identified. Second, the *object* of that right, which is the performance that may be claimed from the executor. This viewpoint, if sound, will also find support in the legal principle in the law of succession which excludes a person from being forced to accept an inheritance.⁷² In this respect Van der Merwe says that because *delatio* usually arises at the moment of death of the testator, an heir can obtain a personal right to an inheritance even against his will. However, he qualifies this by saying that because the heir cannot under South African law be forced to accept the inheritance, he has the competence to repudiate the inheritance. Adiation, he says, creates no rights for the heir because the rights were already created at *delatio*. He then says:⁷³

But if he repudiates the rights he already acquired, they expire through forfeiture.

Is this not a contradiction or a negation of the principle that an heir cannot be forced to accept an inheritance? If repudiation should be construed as an “abandonment of rights” by an insolvent heir and that the latter’s trustee may claim the inheritance for the creditors of the insolvent estate, it would effectively mean that the heir has against his will and contrary to the aforesaid legal principles been obliged to accept an inheritance that he did not want, thereby forcing it into an

⁷²See Van der Merwe and Rowland at 8 and 16.

⁷³Van der Merwe and Rowland at 16. Author’s translation of Van der Merwe and Rowland: “But ...”.

insolvent estate. However, if it is accepted that it is a competence that vests at *delatio*, and not a personal right, then this anomaly will be avoided. This proposal will also create a measure of certainty in insolvency law as it will exclude the inheritance from the heir's insolvent (or imminently insolvent) estate because the competence cannot yet be considered a "right or interest to property" which must be abandoned if it is to comply with the Act's definition of "disposition".

Thus, although there appears to be some clarity as to the nature of the rights that vest in a trustee of an insolvent estate, it is clear that confusion has in the past arisen, and still exists, as to what it is that "vests" in an heir upon the death of a testator. At this point it is therefore appropriate to consider the meaning of the term "vested right".

8.2.2.5 Attempting to describe a "vested right"?

Attempting to describe the term "vest" or "vested right" is a complex issue. This is confirmed by BA van der Merwe when she says that "although the classification of legal rights as vested or otherwise is well known, it is not easy to provide a definitive statement on the meaning of the phrase".⁷⁴ She cites Cowen for confirmation of her observation when he says, "This is due in part to some difficulty inherent in the subject, but the main source of trouble is the fact that the words 'vested' and 'contingent', as applied to legal rights, bear different meanings according to their context in both popular and legal parlance".⁷⁵ The terms "vest", "vests" or "vested" are of particular importance in the law of insolvency and in taxation matters, yet none of the relevant legislation defines them.⁷⁶ In the law of succession it is said that in respect of rights of succession, these terms indicate what is fixed and certain as distinct from that which is conditional or contingent.⁷⁷ In a similar vein, Cowen says when all of the investive facts required for the creation of the right have occurred, then, in a strictly technical sense, the right is said to be "vested". A vested right in this technical sense,

⁷⁴Van der Merwe BA "The meaning and relevance of the phrase 'vested right' in income tax law" (2000) *SA Merc LJ* at 319.

⁷⁵Van der Merwe BA "The meaning and relevance of the phrase 'vested right' in income tax law" (2000) *SA Merc LJ* at 319.

⁷⁶See the Insolvency Act 24 of 1936 and the Income Tax Act 58 of 1962.

⁷⁷See *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 175; *CIR v Sive's Estate* 1955 (1) SA 249 (AD) at 258; *Konyn v Viedge Bros (Pty) Ltd* 1961 (2) SA 816 (E) at 823.

he says, is one the title of which is complete and unconditional. However, where one or more of the investive facts have already occurred, but one or more have not yet happened, and may never happen, in a technical sense the prospective right is contingent. He quotes Austin who said that the contingent rights that were the subject of legal rules, were those that are inchoate, meaning, the title of which has begun, although it was not consummate, and may never be.⁷⁸ If these descriptions should be applied to the law of succession, and if the above proposal of Van der Merwe and the *Crooks* case,⁷⁹ which places the stress on the repudiation in place of the adiation, were accepted,⁸⁰ it would appear that the “right” that arises upon the death of the testator is either a contingent right to enforce or abandon the personal right to the inheritance, or it is a competence. Vesting of the personal right to the inheritance would occur only when adiation has become certain, be it a tacit or express adiation. Even if it is accepted that adiation occurs automatically,⁸¹ there must be a moment at which it becomes certain that repudiation will not be the choice of the heir, thereby making the (contingent) right to the inheritance complete. Thus Corbett says that:

An inheritance, bequest or other interest in a deceased estate is said to ‘vest’ in the heir, legatee or other beneficiary concerned if and when the right thereto has become unconditionally fixed and established in such person. A vested interest of this nature is normally transmissible to the heirs or representatives of the beneficiary upon his death or insolvency and forms an asset in his estate.

Assuming that a right does vest at the death of the testator, what is the nature of this “right” that vests in an heir. Is this a conditional right to create or abandon a personal right to enforce a transfer or delivery of property, or is it a competence as described by the Supreme Court of Appeal in the *Wessels* case? In this respect Corbett⁸² further states that the vesting of an interest in a deceased estate must be distinguished from the accrual of the right to enjoy or exercise that interest. Vesting of the interest and the accrual of the right to enjoy the interest may in some cases coincide, or the right of enjoyment may be postponed to a point after the vesting. *Dies cedit* is the phrase used to indicate that such an interest has vested, while *dies venit* indicates that the

⁷⁸Cowen DV “Vested and contingent rights” (1949) *SALJ* at 406 and 409.

⁷⁹Above note 54.

⁸⁰Above note 51.

⁸¹See generally Sonnekus “Adiasie, insolvensie en historiese perke aan die logiese” (1996) *TSAR* and “*Dellatio* en *fallacia* in die Hoogste Hof” (2000) *TSAR*.

⁸²Corbett (2nd ed) at 8 and 17-20.

time for enjoyment has arrived. What is it that vests at *dies cedit*? Surely, where adiation is required, the time of enjoyment of *any part* of the inheritance (including the personal right to delivery thereof) must be postponed at least until the moment of adiation, which moment is usually not at the time of death of the testator, but at least a short while thereafter. Is it not first just a competence that vests? The exercising of this competence, through adiation, then creates the personal right to performance. Vesting of the inheritance does not, however, always occur at the death of a testator.

For example, in respect of a conditional inheritance Corbett says that the right thereto will generally not vest in the beneficiary concerned unless and until the condition is fulfilled.⁸³ This, he says, follows *ex hypothesi* from the definition of a vested right as being one that has become unconditionally fixed and established in the person entitled thereto, and an inheritance is conditional where the right thereto is made dependent upon the occurrence of some future, uncertain event.⁸⁴

One must first, one would think, consider whether the heir is competent to succeed before the existence of rights of any nature can be considered. Where, for example, an heir, through his own doing has become unworthy to succeed, he will be incompetent to succeed and the inheritance will not vest in him. Is this an abandonment of rights or is it an abandonment of the competence to succeed? One would argue that a competence is the only “right” that is unconditionally fixed at *dies cedit*, while a personal right to any part of the inheritance is conditional, at least until adiation is certain. The right to succession is, firstly, conditional upon the heir being competent to succeed. If it is certain that the heir is competent, then it is the competence that vests and thereafter the creation of any rights to property is conditional upon the heir exercising his competence to either adiate or repudiate.

⁸³He cites Voet 36.2.3 ; *Savory v Savory* (1903) 24 NLR 315 at 321 and *In re: Will of Thomas Cass* (1906) 27 NLR 262 at 271.

⁸⁴See Corbett (2nd ed) 158 who cites *inter alia* Voet 28. 7. 1.at 145. How does adiation however differ from this situation? Even if one assumes that adiation occurs automatically, unless repudiated, there will still be a moment of uncertainty, a lapse of time, before automatic adiation can be assumed. The personal right to the inheritance is not unconditionally fixed until adiation is certain.

The decision whether to adiate or repudiate can be of crucial importance. This is because by adiating, the beneficiary may assume a burden together with a benefit he may derive from the will. The examples cited by the court in *Wessels*⁸⁵ come to mind. Corbett points out that even where an heir can adiate without having to pay a price, he may for any number of reasons prefer to repudiate, if only in order that the estate devolves upon the person next in line of succession. As an example of a reason why an heir should not adiate, Corbett cites the instance where the heir may be hopelessly insolvent.⁸⁶ Although Corbett gives no comment on the consequences of the refusal to adiate under insolvent circumstances, must one not infer that the repudiation keeps the inheritance outside the insolvent estate, allowing it to devolve upon the heir who is next in line of succession? Corbett then proceeds to say that there can be no adiation or repudiation before the benefit vests.⁸⁷ It is submitted, if this benefit which vests is regarded as a right to property, this would clearly place the inheritance within the reach of the creditors of an insolvent heir's estate, because the repudiation, whether shortly before sequestration or thereafter, would fall within the definition of a "disposition" under the Act. Corbett apparently resolves the dispute in question by stating that if the estate of a beneficiary is sequestrated before he has declared himself, the right of election passes to his trustee. As authority for this he cites, among others, *Van Schoor's Trustees v Muller's Executors*.⁸⁸

Meskin is of the opinion that a repudiation of an inheritance is not a disposition within the relevant meaning. He says that the right to elect to adiate or repudiate is itself movable property for purposes of the Act, but the election to repudiate is not an abandonment of such right or of any right or interest in the bequeathed property. He sees this merely as the exercise of such right which results in the non-acquisition of the bequeathed property.⁸⁹ It is submitted, if one considers the meaning of the word "competence",⁹⁰ it would appear that Meskin is in fact describing a "competence" to which he refers as movable property for purposes

⁸⁵*Wessels NO v De Jager en 'n Ander NNO* 2000 (4) SA 924 (SCA) at 928 G-I.

⁸⁶See Corbett (2nd ed) at 18.

⁸⁷Corbett (2nd ed) at 7 and further.

⁸⁸See (1858) 3 Searle 131.

⁸⁹Meskin at para 5.31.2 and footnote 12B.

⁹⁰See para 8.2.2.6 below.

of the Act. As a competence, this right to succession is not yet, in my opinion, a right or interest to property, as defined by the Act. Only if the heir elects to adiate, are rights to *property* created that are capable of being abandoned. Prior to this there are no rights to property in existence and in this sense one can agree with Meskin that a repudiation is a non-acquisition of rights to the bequeathed property.

It is therefore apparent that something does vest in the heir upon the death of the testator, but it appears that the only thing that is fixed and unconditional at death, and which therefore complies with the meaning of the term “vest”, is the relationship in which the heir stands towards the inheritance, namely, as holder of a legal competence that will enable him to become the holder of property rights to the bequeathed property, but not yet the holder of a right or interest to or in that property. This may be more clearly understood if one considers the meaning of the terms “right” and “competence”.

8.2.2.6 What is meant by the words “right” and “competence”?

If one should agree that it is either a personal right or competence to exercise a choice, that vests in the heir at the time of death of the testator, the next question to be considered is the nature of the personal right or competence. For the purposes of insolvency law, and bearing in mind the *Wesse/s* decision, the further questions arise whether a competence is, in fact, a right and, if so, whether it is a right to property. If the right that vests is a personal right, as opposed to a competence, then it will probably be considered a right to property. To answer these questions one must consider the nature of a “right” in jurisprudence.

Van Zyl⁹¹ states that there are different juristic meanings that can be attributed to the word “right”. For present purposes the following three meanings are important:

- (1) A “right” as a *unit of relationships* within which a legal subject stands in relation to his legal object and in relation to other persons in respect of the legal object, for example, in the sense that “I have a right (eg, an ownership (proprietary) right) to a horse”.

⁹¹Van Zyl FJ and Van der Vyver JD *Inleiding tot die regs wetenskap* (2nd ed) (1982) at 412 and further (hereafter Van Zyl); see also Van der Vyver JD ‘The doctrine of private law rights’ *Huldigingsbundel vir WA Joubert* (1988) at 201 (Hereafter Van der Vyver).

- (2) A right as a *permissiveness* of a legal subject to interact with his legal object in a particular manner (to use and enjoy it); for example: “An owner has the right to ride his horse”.
- (3) A “right” as a *juridical ability*, for example: “A 16-year-old person has the right to make a will” (such person is *legally capable* of making a will, he *can* make a valid will).

These three meanings of the word “right”, Van Zyl states, can easily be confused with each other. Therefore, to distinguish these three descriptions from each other, the following terminology is used:

- (1) For the first meaning of the word “right”; subjective right (this term is generally used in jurisprudence); often only the term “a right” or the plural, “rights” is spoken of;
- (2) for the second meaning; capacity (*bevoegdheid*) (also this term is generally used);
- (3) for the third meaning; competence (this term is not generally used, and usually in this respect the term “capacity” is used, thereby creating the possibility of confusing the second and third meaning of the word “right”).

Van Zyl describes the core differences between a competence and a capacity (*bevoegdheid*) as follows:

- A “*competence*”, on the one hand, is a *juristic ability*; in other words, the ability (*vermoë*) to participate in legal intercourse in a specific manner. The carrier of a competence *can* participate in legal intercourse in a specific manner. Unlike an animal, a person has the ability (*vermoë*) or *competence* to acquire other competencies, rights and obligations (this competence is known as “*legal capacity*”⁹²), to conclude juristic acts (this competence is known as “*contractual capacity*”) and so forth. On the other hand, in respect of a *capacity* one is dealing with the fact that it is *lawful (geoorloof)* for the legal subject to interact with his or her legal object in a particular manner. The carrier of a capacity may interact with his or her legal object in a particular way.⁹³
- A “*competence*” bears no relationship to a legal object, while a “*capacity*” does bear such a relationship.
Stated negatively, if someone is lacking a specific competence, he or she cannot participate in legal intercourse in the same manner as a person who does possess

⁹²Hiemstra VG and Gonin HL *Trilingual legal dictionary* (1981) at 446 state in their definition of “legal capacity” that it is a wider term than “contractual capacity” because besides contractual capacity it includes the capacity to acquire rights and to incur obligations.

⁹³See at 414 where Van Zyl says in this respect: “Unlike the legally incapacitated, the legal subject *may* use and enjoy his legal object” (author’s translation of Van Zyl).

such a competence. For example, a child under the age of 16 is not capable of making a will, even if he or she does comply with all the testamentary formalities.⁹⁴ By comparison, if one lacks the capacity to interact with a legal object in a particular manner, one may so react, but then one is acting illegally. So, for example, if John does not have the capacity to ride one's horse, he may in fact ride the horse, but then he is acting illegally in that he is violating one's subjective right.⁹⁵

The distinction between a *subjective right* and a *capacity* (*bevoegdheid*) lies mainly in the fact that a capacity is a component of a subjective right.

The most important difference between a *subjective right* and a *competence* is that a subjective right consists of a unit of relationships, while in respect of a competence such relationships are absent.⁹⁶

It is submitted that the ability to adiate or repudiate appears to comply with Van Zyl's description of a competence. Thus, if, on the one hand, one is not designated as an heir in a will or through intestacy, one will not have the competence to enter into a specific legal intercourse by means of the act of adiation. On the other hand, if one is so designated, until adiation occurs, there will be no legal object in respect of which another may have the capacity, for example, to act illegally *vis-à-vis* the heir.

For the purpose of distinguishing between "rights" in the sense of "rights" and "competencies" Van der Vyver⁹⁷ states that in private law three distinct meanings of the word "right" must be clearly separated, namely;

- (a) "right" in the sense of a *competence*;
- (b) "right" in the sense of a claim of a legal subject as against other persons to a legal object. One should reserve the term *right* in this sense, which is commonly classified into categories of real rights, immaterial property rights, personality rights and creditor's rights, in relation to the nature of the object concerned; and
- (c) "right" in the sense of *entitlement*. This constitutes the contents of a right (in the second sense above) and denotes what a person, by virtue of having a right to a particular legal object, may lawfully do with the object of his right.

A *legal competence* (in (a) above), he says pertains to what a person can be or do (without reference to a legal object) by reason of his being a legal subject with certain personal attributes and while being resigned to particular contingencies

⁹⁴Van Zyl at 414.

⁹⁵Van Zyl at 414.

⁹⁶Van Zyl at 415.

⁹⁷ Van der Vyver at 209.

which in the eyes of the law have a bearing on his status.⁹⁸ He states that the *legal competence* of a person includes, among other things, the following two capacities;

First, *legal capacity*, (*regsbevoegdheid*) being;

- (i) the competence to occupy the offices of a legal subject, for example, the juridical ability to be *inter alia*, a testator, owner of property, executor of an estate and so forth; (I would assume that this includes the ability to be an heir); and
- (ii) the competence to exercise the functions and to be the bearer of the rights and obligations emanating from such offices.⁹⁹

Thus, if this is applied to the rights of succession, one would think that both prior to and after the death of the testator, a legal subject may have the competence to occupy the offices of an (intestate or testate) heir, but he does not yet have any rights to any legal object which forms part of the inheritance. Only when it is clear that the heir is competent to occupy that office can the opportunity arise to exercise the functions (by *adiating*) of that office and thereby to become the bearer of rights and obligations emanating from such office. Prior to this moment of clarity, the testator may decide to exclude the otherwise competent heir (perhaps because he has been sequestered) from his will or at the moment of death of the testator it may become apparent that the insolvent heir has been disqualified from being an heir (through one of a number of reasons), thereby making him incompetent to inherit from the testator.

Corbett says that where a beneficiary is disqualified, no right vests in him and the bequest is not transmitted to his heirs.¹⁰⁰ This principle strengthens the argument that it is a competence that vests at death, and not a right to property. At death one must therefore first ascertain whether a beneficiary is competent to accept an inheritance before the vesting of rights to property may be considered. After it has been ascertained that the heir is competent to be an heir, that this competence

⁹⁸Van der Vyver at 209.

⁹⁹Van der Vyver at 209.

¹⁰⁰Corbett above at 72.

has vested, then he is competent to accept the inheritance, or to abandon it. If, however, he is disqualified, because he lacks the competence to be an heir, the question of the existence of rights to property never arises because the competence to create such rights never vested in the disqualified heir.

Secondly, the *legal competence* of a person includes the competence to perform a particular category of legal acts (contractual capacity) (*handelingsbevoegdheid*) that comply with three basic requirements, namely:

- (i) the act must be lawful;
- (ii) the act constitutes the source, or results in the extinction, of rights and/or obligations; and
- (iii) the legal consequences of the act are determined in conformity with the maxim, *plus valet quod agitur quam quod simulate concipitur*, meaning, the law will attach to the act the particular consequences which the party to the act is, or the parties to the act are, taken to have contemplated.¹⁰¹

A *right* (in (b) above) is composed of two inherent relationships, namely, the subject-object relationship, and the subject-third parties relationship.¹⁰² With succession, it would appear that prior to adiation, these two relationships are absent.

A right, in its subject-object relationship, is made up of a number of *entitlements* (*bevoegdhede*) ((c) above). The word “entitlement” here denotes the lawfulness or legal permissibility of dealing in a particular way with a legal object, that is, by reason of the person performing the act having a right to that object. Entitlements in this sense, Van der Vyver points out, must be distinguished from legal competencies.¹⁰³ Although these concepts have in common the performance of an act, they are fundamentally different in that a competence never directly involves a legal object and denotes what a person *can* do (as a legal subject with a particular status); an entitlement always involves a legal object and denotes what a person *may* do with the object (by reason of his having a right to the object

¹⁰¹Van der Vyver at 209 and further.

¹⁰²Van der Vyver at 209 and further.

¹⁰³Van der Vyver at 209 and further.

concerned). A person's legal competencies thus derive from his legal subjectivity, while entitlements derive from a person's rights.¹⁰⁴ Therefore, it seems that prior to adiation, there are no entitlements in respect of any part of the inheritance precisely because no rights thereto exist. There is not yet a legal object to which such rights can relate.

8.3 Conclusion

The disputes that have arisen in respect of an inheritance *vis-à-vis* an insolvent estate stem mainly from legislative failure to deal specifically with the question as to whether an inheritance should be included or excluded from an insolvent estate. This is evident not only from the dispute concerning the repudiation of an inheritance by an insolvent or imminently insolvent heir, but also in case law concerning the methods by which an inheritance may be excluded from an insolvent estate through the will of the testator.¹⁰⁵

Although section 20 of the Act broadly describes what property the insolvent estate is comprised of, it fails to define specifically what is included in it, thereby forcing one to depend, among other things, on the Act's definition of the words "property" and "disposition" to unravel whether or not a repudiated inheritance forms part of an insolvent estate. Section 23 of the Act, however, does describe what property is excluded from an insolvent estate, but here too it is silent on the position of property that may emanate from an inheritance. It may be argued that the Act, by implication, considers a repudiated inheritance to be included in an insolvent estate because, firstly, it is not excluded by the provisions of section 23 of the Act.¹⁰⁶ Secondly, it may be argued that the *fideicommissary* interest of a *fideicommissary* heir is expressly excluded from the definition of "property", thereby distinguishing it from the contingent interests of the ordinary heirs, which are included in that definition.¹⁰⁷ However, a counter-argument may be that, firstly, the legislator simply never considered a repudiated inheritance, being property never acquired, to be included within the

¹⁰⁴Van der Vyver at 209 and further.

¹⁰⁵See, eg *Vorster v Steyn NO en Andere* 1981 (2) SA 831 (O) and *Badenhorst v Bekker NO en Andere* 1994 (2) SA 155 (N).

¹⁰⁶See, eg, *Brown v Oosthuizen en 'n Ander* 1980 (2) SA 155 at 158 B-D.

¹⁰⁷See *Boland Bank Bpk v Du Plessis* in notes 14 and 15 supra.

definition of “property”, thereby making it superfluous to exclude it in section 23 of the Act. Secondly, the reasoning behind the exclusion of a contingent interest of a *fideicommissary* heir is not clear. Is it not, however, because the inheritance from which it originated was considered excluded. The legislature consequently considered it necessary also to exclude this contingent interest of a *fideicommissary* heir, which is inextricably linked to the excluded inheritance from which it emanates. Furthermore, it may have been excluded to distinguish it from other types of contingent interests that are included in the Act’s definition of “property”. It is, however, interesting to note that the exclusion of the contingent interest of a *fideicommissary* heir or legatee in the present definition of “property” has been omitted from that definition in the Draft Insolvency Bill.¹⁰⁸ The Law Commission’s explanation for this omission is that before the vesting of the interest, the interest of a *fideicommissary* heir is not a contingent interest that has any monetary value. Whether or not this explanation is correct is debatable. It is submitted that it does have a value,¹⁰⁹ and if it was the Legislature’s intention to include a repudiated inheritance as property in an insolvent estate, a contingent interest of a *fideicommissary* heir should never have been excluded from the definition of “property” in the present Act. However, a complete analysis of this may be more suited to a separate essay.

Whatever the reasoning of the legislature may have been, the fact is that the pitfalls in the Act have left academics, practitioners and the courts drifting in uncertain waters as to the status of a repudiated inheritance *vis-à-vis* an insolvent estate. The Supreme Court of Appeal appears to have resolved the problem in the judgment of *Wessels No v De Jager en ’n Ander NNO*.¹¹⁰ A testator’s death gave rise to a competence, the court found, but not to any rights. The rights arose, the court found, only if the inheritance was accepted. It is clear that something does, in fact, vest at the death of the testator. In view of the meaning that may be attached to the word “competence”, as a category of a right, it would appear that there is a right which vests in an heir upon the death of a testator, but it is a right in the image of a “competence”, and not

¹⁰⁸See the South African Law Commission Report Project 63 *Review of the law of insolvency* vol 1 *Explanatory Memorandum on the Draft Bill* (2000) at 39 and vol 2 *Draft Bill* (2000) at 14.

¹⁰⁹See Corbett at 326 and *Barnhoorn NO v Duvenhage and Others* 1964 (2) SA 486 (AD) at 494 D-H.

¹¹⁰*Wessels NO v De Jager en ’n Ander NNO* 2000 (4) SA 924 (SCA) at 928 G-I.

yet a right to “property”. Within the context of the Act, therefore, the repudiation of an inheritance cannot be considered to be a “disposition” because it is not a “transfer or abandonment of rights to ‘property’”.

Thus, in view of this decision of the Supreme Court of Appeal, and consequently because one is not concerned with a right to property, a repudiated inheritance forms no part of an insolvent estate, it cannot be regarded as an act of insolvency, it is not a disposition that can be set aside, nor can the trustee of an insolvent estate elect to adiate or repudiate on the part of an insolvent beneficiary. An implication of this is that a debtor who is approaching insolvency or who has already been sequestrated may prevent his creditors from claiming his potential inheritance merely by repudiating it. If, however, the beneficiary has already exercised his competence by adiating, rights to property will have been created and the inheritance will therefore form part of the insolvent estate. Where a testator has failed to make specific provisions in his will providing for substitution if a designated beneficiary should be insolvent when the inheritance vests in him, the heir may still achieve the same result by simply repudiating that inheritance. The *Wessels* judgment leaves one with a feeling of ambivalence in respect of a repudiated inheritance *vis-à-vis* an insolvent estate. It is suggested that the Law Commission, which failed to consider this matter in its Draft Bill, should lay this matter to rest once and for all by either including or excluding a repudiated inheritance from an insolvent estate.¹¹¹ Further consideration will be given to this aspect in chapter 12 which deals with law reform.

¹¹¹See ch 12 below.

Chapter 9: Property excluded or exempted from the insolvent estate

9.1 Introduction

From the discussion above it would appear, as a general rule, that all property that is owned by an insolvent at the date of sequestration, as well as all property which he acquires prior to his rehabilitation, will form part of his insolvent estate and can be realised for the benefit of his creditors. This is fundamental to the general policy in South African insolvency law that the maximum assets must be recovered and included in the insolvent estate to the advantage of the creditors. There are, however, several exceptions to this rule and an asset that is the subject of such an exception may not form part of the insolvent estate.¹ The Insolvency Act, however, does not expressly distinguish between excluded and exempt assets,² so various problem areas have consequently arisen in this regard. The result is that uncertainty concerning such assets existed in the past and gave rise to litigation, and will probably continue to do so in the future. The fundamental difference between the two is that excluded assets should never form part of an insolvent estate. They should be beyond the reach of the creditors of the insolvent estate. Exempt assets, however, initially form part of the insolvent estate, but under certain circumstances those assets, or a portion thereof, may be exempted from the estate for the benefit of the insolvent debtor.³ Both excluded assets and exempt assets may also carry that status because they may belong to a third party.⁴ With these excluded or exempt assets it is therefore possible for an insolvent to build up a (new) solvent personal estate which cannot be applied for the payment of his debts in his insolvent estate.⁵

¹Bertelsmann E, Evans RG, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L and Steyn *Mars The law of insolvency in South Africa* (ed C Nagel) (9th ed) (2008) (hereafter Mars (2008)) at 192.

²See, generally, Ferriell J and Janger EJ *Understanding bankruptcy* (2007) (hereafter Ferriell); Mars (2008) at 97, 239, and 415.

³See Ferriell above.

⁴See Mackenzie-Skene D "Proposal for a comparative study on determining the debtor's estate: Shrinking the debtor's estate" unpublished paper delivered at the Insol Conference Cape Town (2007) on file with the author of this thesis.

⁵*Miller v Janks* 1944 TPD 127; Roestoff M 'n *Kritiese evaluasie van skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg* LLD Thesis University of Pretoria (2002) (hereafter Roestoff Thesis) at 368; Mars 2008 at 36 and 186.

Although South African insolvency law is based on the policy of the collection of maximum assets to the advantage of creditors of the insolvent estate, a further policy, of allowing a debtor to keep a part of his estate has also been entrenched, originally through the common law.⁶ It would appear that originally the rationale behind this policy, as it developed through the common law, was to ensure that the insolvent and his family were not deprived of their dignity and basic life necessities.⁷ It is submitted that this remains the cornerstone upon which this policy rests, but that requirements of modern society, socio-political developments in most societies, and human rights requirements have necessitated a broadening of the classes of assets that should be excluded or exempted from insolvent estates. To give but one example, the development of official pension funds, a relatively modern concept in law, necessitated legislating the exclusion of such funds from insolvent estates.

This entire policy is also wrapped up in a small element of forgiveness, which is perhaps apt in a modern, human rights-orientated world, that has a greater understanding and a greater sense of compassion for fellow human beings.⁸ But, of course, the various stakeholders may not all find it in themselves to be equally compassionate and understanding, and those who are compassionate in their attempts at reform, may find that they are scorned.

A truly compassionate man will do his utmost to prevent anyone at all from being hurt ... "If someone argued that the people suffered from their own sins [wrote Gandhi], he would ask what drove them to sin". In the logical mind of Rajchandra, there was not a single hurt, a single cry of pain, which could not be prevented if men were compassionate enough. But there was a price to be paid for these victories: a man of true compassion would inevitably suffer unendurable torment.⁹

Thus the idea of the exclusion or exemption of assets from insolvent estates is an ancient policy which is found in most insolvency or bankruptcy systems around the world, with its origins in Roman law,¹⁰ but the concept of exemption law demands a price from the various stakeholders in insolvency. To arrive at the destination where

⁶See ch 2 Roman law above; Ferriell at 97.

⁷See part II of this thesis. Ferriell at 97 states that the fundamental reason for exemptions is the "belief that even the most hopelessly insolvent debtors should not be deprived of the basic necessities of life".

⁸See Gross M *Failure and forgiveness: Rebalancing the bankruptcy system* (1997) at 4

⁹Payne R *The life and death of Mahatma Gandhi* (1999) at 125

¹⁰See ch 2 above.

excluded assets are today has apparently been a journey of unendurable torment and remains so in South African law to this day. Originally, a debtor's life could be at risk when the person of the debtor was at the disposal of his creditors, and during the existence of these primitive principles there was obviously no possibility of leniency to a debtor. The question of allowing the debtor to take back any part of his property was not even a consideration. But as countries developed into more civilised societies, it would appear that the social and economic reality,¹¹ humanity, and the dignity of the debtor called for a more lenient approach to debtors.¹² Under certain circumstances, the interest of third parties was also taken into account by protecting their property if it was in the possession of the debtor. But strictly speaking this would have been property that never belonged to the debtor.¹³ However, generally these were, and still are, the policies upon which exemption law hinges.

The idea of allowing the debtor and his family to hold on to basic needs that would allow them to survive took root and developed over a lengthy period and, to this day, is still developing.¹⁴ It would appear that the pendulum that swings to and fro between a debtor-friendly and a creditor-friendly insolvency system is guided primarily by socio-economic consideration, prevailing politics and, more recently, by constitutional scrutiny of fundamental rights that may be excessively eroded by too harsh an insolvency law regime. But a detailed tracking of the reasons for the progression of leniency to debtors, or the lack thereof in different insolvency regimes, is probably a subject for an independent thesis, and no further consideration will be given to this particular topic.

Suffice to say that in South Africa these exemptions are regulated by the Insolvency Act,¹⁵ legislation in other fields of law, the common law and the decisions of the courts. In a thesis that investigates problem areas relating to property in insolvent estates, it is of crucial importance that the property that must

¹¹See Ferriell at 97.

¹²See Kaser M *Roman private law* (1965), translated by R Dannenbring at 330 (hereafter Kaser *Roman private law*); Dalhuisen JH *Dalhuisen on international insolvency and bankruptcy* vol 1 (1986) at 1-2.

¹³See ch 2 above.

¹⁴See, eg, part II of this thesis above; Ferriell at 97.

¹⁵24 of 1936 (hereafter the Insolvency Act or the Act, which in some cases codified the common law).

be excluded or exempted from the reach of creditors in insolvent estates be scrutinised . As will be shown below, many problems concerning excluded or exempt assets have been encountered and still exist. This creates uncertainty in the law, and excessive and unnecessary litigation. Ultimately, it contributes towards the negation of the fundamental policy governing the regulated collection of assets for the advantage of creditors in insolvent estates. At the same time, lack of clarity is an obstacle to a sound policy of allowing the debtor his basic means of subsistence, so that he can recover from his malaise.

As societies develop and change, it is often necessary for the policies upon which the law of countries hinges to change. Adding fuel to such policy changes, particularly in a young constitutional democracy such as South Africa, has been the scrutiny of insolvency law issues by the Constitutional Court, since that court's inception. It is submitted that the future will see a further erosion by the Constitutional Court of the policy of collection of maximum assets for the advantage of creditors. This is because this excessively strict policy in South Africa is slowly being considered out of proportion with the hardship it creates for the debtor.¹⁶

In this chapter the property that is excluded or exempted from the insolvent estate by the Insolvency Act will first be considered and thereafter the exemptions provided for by other legislative provisions will be discussed. The Insolvency Act expressly provides for the exclusion or exemption of assets from an insolvent estate in favour of a debtor in sections 23, 79 and 82(6).¹⁷ Apart from the Act there is a considerable package of legislation regulating mostly social security issues, but which also provides for exclusion or exemption of property from insolvent estates. In this chapter, however,

¹⁶See Roestoff *Thesis* at 357, 365, 367 and 370; Evans RG and Haskins ML "Friendly sequestrations and the advantage of creditors" (1990) *SA MercLJ* at 246; O'Brien P and Boraine A "Review of case law and publications" (2001) *SALR* at 1; Evans RG "Friendly sequestrations, the abuse of the process of the court, and possible solutions for overburdened debtors" (2001) *SA MercLJ* at 485; Evans RG "The abuse of the process of the court in friendly sequestration proceedings" (2002) *International insolvency review* at 13; Evans RG "Unfriendly consequences of a friendly sequestration" (2003) *SA MercLJ* at 437. See also *Van Rooyen v Van Rooyen (Automated Investments (EC) (Pty) Ltd, Intervening Creditor)* 2000 (2) All SA 485 (SOK).

¹⁷Exclusion of property belonging to third parties is also regulated by s 24 of the Act, and in certain other legislation as well, but this thesis will concentrate mostly on exclusions or exemptions for the benefit of the debtor and or his dependants.

only such property, or categories of property that appear to have become particularly problematic in the insolvency law regime, will be analysed in depth. Non-problematic excluded or exempt property will be referred to only briefly.

9.2 Property excluded or exempted by the Insolvency Act

As stated above, the general rule is that all movable and immovable property of the debtor located within the Republic of South Africa forms part of the debtor's insolvent estate.¹⁸ The definition of property in the Insolvency Act¹⁹ and the description in section 20 of what the insolvent estate is comprised of are, however, very broad. To complicate matters further, sections 23, 79 and 82 provide for exclusions or exemptions of property from the insolvent estate, but none of these provisions expressly states whether that property is excluded or exempted from an insolvent estate. In fact, the Act never uses the words "excluded" or "exempted", but in only one section uses the word "excepted" to indicate property of the insolvent debtor that may be exempted from the insolvent estate under certain circumstances.²⁰ This has created uncertainty in respect of property that forms part of the insolvent estate and regarding property excluded or exempted therefrom, thereby creating several problem areas regarding assets in insolvent estates of individuals. For example, uncertainty prevails in respect of insurance policies, an inheritance, property of spouses of debtors, and the debtor's income, to mention only a few such instances. This has resulted in much litigation and academic debate.²¹

¹⁸S 20 of the Insolvency Act 24 of 1936 read with the definition of "property" in s 2 of the Act.

¹⁹24 of 1936.

²⁰See s 82(6) of the Insolvency Act.

²¹See, eg, in respect of spouses *Badenhorst v Bekker NO* 1994 (2) SA 155 (N) and *Du Plessis v Pienaar NO* 2003 (1) SA 671 (SCA). See also Nagel CJ and Borraine A "Badenhorst v Bekker NO en Andere (Ongerapporteerde Saaknr 3259/92 (N))" (1993) *De Jure* at 457; Sonnekus JC "Privé bates en sekwestrasie in huwelik in gemeenskap van goed" (1994) *TSAR* at 143; and *Cothill and Another v Cornelius* 2000 (4) SA 163 (T) and in respect of an inheritance or legacy *Kellerman v Van Vuuren* 1994 (4) SA 336 (T); *Boland Bank Bpk v Du Plessis* 1995 (4) SA 113 (T); *Klerck and Scharges v Lee* 1995 (3) SA 340 (SE); *Simon v Mitsui and Co Ltd* 1997 (2) SA 475 (W); *Durandt v Pienaar* 2000 (4) SA 869 (C); *Wessels v De Jager* 2000 (4) SA 924 (SCA); Sonnekus JC "Adiasie, insolvensie en historiese perke aan die logiese" (1996) *TSAR* at 240; Sonnekus JC "Dellatio en fallacia in die hoogste hof" (2000) *TSAR*; Stevens R "RIP TESTATOR: *Wessels v De Jager*" (2001) *SALJ* at 118; Evans RG "Should a repudiated inheritance or legacy be regarded as property of an insolvent estate?" (2002) *SA Merc LJ* at 688; Evans RG "Can an inheritance evade and insolvent communal estate?" (2003) *SA Merc LJ* at 228 and in respect of life insurance policies *Warricker v Liberty Life Association of Africa Ltd* 2003 (6) SA 272 (W); *Shrosbree v Van Rooyen* 2004 (1) SA 226 (SE); *Love v Santam Life Insurance Ltd* 2004 (3) SA 445 (SE); *Pieterse v Shrosbree*; *Shrosbree v* 2005 (1) SA 309 (SCA); Evans RG and Borraine A "Considerations regarding a policy for the treatment of certain beneficiaries of life insurance policies in the law of insolvency" (2005) *De Jure* at 266; Muller M "Life

Future law reform must not simply review these problem areas. They must be critically analysed and remoulded into workable legislation based on accepted exemption law policy. However, when considering a workable policy upon which to formulate future exemption legislation, the rationale for providing for exemption law, which includes preparing the way for the debtor to attain a fresh start, must be taken into account. Policy on exemption law therefore ought to be closely linked, and in line with policy on rehabilitation and the possibility of attaining a fresh financial start. It has been said that:²²

There is considerable social interest in preserving the viability of debtors so that their continued maintenance does not fall to society. This is over and above the humane considerations of permitting a debtor sufficient assets so that he or she may independently maintain themselves and their families at a reasonable standard of living.

The present provisions of the Insolvency Act that provide for excluded or exempt property will now be considered.

9.2.1 *The insolvent's wearing apparel and other means of subsistence*

Although the insolvent's wearing apparel, bedding, household furniture, tools and other essential means of subsistence or such part thereof as the creditors may determine²³ are not expressly excluded from his insolvent estate by the Act, the Act does provide that these items may not be sold by the trustee, thereby effectively *excluding* them from the estate.²⁴ There does, however, appear to be a degree of uncertainty in respect of assets that may be *exempted* under this heading since the creditors have a discretion as to what items may be exempted. These assets therefore are included in the insolvent estate, until exempted. So, for example, a construction based on the Afrikaans version of the Act may mean that there is no absolute exclusion of even the insolvent's wearing apparel and bedding.²⁵

insurance benefits: The setting aside of cessions and nominations in terms of the insolvency law and other related aspects" (2005) *De Jure* at 361.

²²*Re: Pearson* (1997) 46 CBR (3d) 257 (Alta QB) at 264.

²³Or the Master, if no creditors proved claims against the estate.

²⁴S 82(6). Mars (2008) at 193.

²⁵See Meskin PM *Insolvency law and its operation in winding-up* Service Issue 17 (of 2001) (1990) *Insolvency law* at 5.3.7 note 2 (hereafter Meskin).

Section 79 of the Act also makes provision for an exemption in the form of a subsistence allowance for the insolvent and his family. If the creditors or the Master grants his consent, the trustee may at any time before the second meeting of creditors allow the insolvent a moderate sum of money or a moderate quantity of goods from the insolvent estate if needed for the support of the insolvent and his family.²⁶ The property regulated by sections 79 and 82 of the Act clearly is exempt property because it initially forms part of the insolvent estate at the date of sequestration. But it is submitted that this is all very much within the discretion of the creditors or the administrator of the estate, leaving the debtor with very little say in the matter.

Smith points out that in execution the debtor is afforded a greater degree of protection by the Supreme Court Act²⁷ than is afforded the insolvent under section 82(6) of the Act.²⁸ The Supreme Court Act prohibits the sheriff from seizing not only bedding and wearing apparel, but also stock, tools and agricultural implements of a farmer, tools and implements of trade, professional books and implements in so far as each class of exempted property does not exceed R1 000 in value. But for an insolvent debtor, the release of similar property under the Insolvency Act depends to a large extent on the will of his creditors.²⁹ Furthermore, the insolvent may renounce these benefits in favour of the creditors of his estate, and Meskin submits, he may also renounce any other like benefits accorded by other provisions of the Act.³⁰ Strictly speaking, however, the insolvent debtor will have no claim to property regulated by sections 79 and 86(2) unless the creditors have determined that the property in question may be “excepted” from the sale of the movable estate property. So if it is correct to state that these rights can be waived by the debtor, the rights will relate to property that has already been “excepted” from the insolvent estate by the creditors.³¹ The debtor will then be waiving his rights to property already exempted and therefore property that at this point is excluded from his insolvent estate. The use of the word “excepted” in the Act is a further indication that very little attention has been given to the formulation of

²⁶S 79.

²⁷S 39 of Act 59 of 1959 as amended.

²⁸See Roestoff *Thesis* at 403 and further.

²⁹Smith CH *The law of insolvency* (3rd ed) (1988) at 92; Mars 2008 at 192 and further.

³⁰Meskin at 5.3.7. See also *Ex parte Anthony en Ses Soortgelyke Aansoek* 2000 (4) SA 116 (C) at 125.

³¹Or the trustee or the Master, depending on the circumstances.

a policy on exemption law in South Africa. The word “exemption law” is well known internationally in insolvency law. Nowhere in the South African Insolvency Act is there any reference to the word “exemption”. So a modern formulation of this concept, based on a revised policy in this respect, is required in South African insolvency law. A fresh policy in this respect must also seriously consider whether an insolvent debtor should be allowed to waive his rights to certain categories of excluded or exempt property. It is submitted that such basic property as that described in sections 79 and 86(2) must be solely at the disposal of the debtor, and he should not be allowed to waive such rights under any circumstances.

Further, sections 79 and 82(6), relating to exempt property as they do, should be restated more eloquently in one section of the Act, together with the other provisions of the Act that regulate excluded and exempt property. As these provision stand at the moment, these items of “exempt property” vest in the trustee together with all other property of the estate, and the debtor is entirely at the mercy of his creditors regarding these basic assets. The assets exempted by sections 79 and 82(6) of the Act, it is submitted, should never vest in a trustee of an insolvent estate. They should be excluded assets and the debtor should not be allowed to renounce in favour of the creditors any of these basic assets that may be excluded from the estate. This issue must be formally regulated by the Act. A debtor who renounces these basic assets that would normally be required as basic requirements for him and his dependants, is interfering with the well-established policy that allows for the survival of the debtor and encourages him to work towards a fresh start.³²

Consideration must also be given to the possibility of allowing an exemption of some form of transport for an insolvent debtor and his dependants, and if circumstances warrant it, a temporary exemption of housing for the debtor and his family in order to subsist. The challenge relating to this entire issue lies in finding a way of identifying what basic assets should be excluded from insolvent estates, and under what circumstances. The same assets that fall into this category of excluded property must also be excluded from the individual debt collection

³²See ch 6 above.

process, failing which, it will be meaningless to consider them for exclusion from an insolvent estate because by the time sequestration intervenes, such assets would probably already have been attached and sold off in the pre-sequestration debt collection process. Further consideration will be given to law reform in respect of these exclusions or exemptions, in chapter 12 below.

9.2.2 Compensation for any loss or damage suffered by reason of defamation or personal injury

Where the insolvent has received compensation for loss or damage suffered as at, or after the date of sequestration, emanating from defamation or personal injury, the compensation is excluded from the insolvent estate.³³ The Appellate Division settled the question of the nature of the damages envisaged by this section of the Act when ruling that “compensation for any loss or damage” includes general damages, meaning compensation for pain and suffering, loss of amenities and the like, as well as special damages, which in the case of bodily injury includes special damages such as loss of earnings and medical expenses.³⁴ Not only physical injury, but any injury affecting the rights of personality, such as insult or adultery, fall within the context of “personal injury”.³⁵ In *De Wet NO v Jurgens*³⁶ the court ruled that personal injury included mental injury suffered by an innocent spouse as a result of the other spouse’s adultery. It was further held that since the marriage was in community of property, the innocent spouse was an insolvent for the purpose of section 23(8) of the Act.

In *Santam Ltd v Norman and Another*³⁷ the underlying purpose of section 23(8) and the other provisions in section 23 was considered. The court quoted Steyn J in *Kruger v Santam Versekeringsmaatskappy Bpk*³⁸ where he stated, among other things, that:

³³S 23(8) of the Act; *Santam Ltd v Norman and Another* 1996 (3) SA 502 (C) at 508; Meskin at 5.3.10; Smith *Law of insolvency* at 90; *Mars* (2008) at 192.

³⁴*Santam Versekeringsmaatskappy Bpk v Kruger* 1978 (3) SA 656 (AD); and the Court *a quo*’s judgment: 1977 (3) SA 314 (O).

³⁵*De Wet NO v Jurgens* 1970 (3) SA 38 (AD) at 49.

³⁶1970 (3) SA 38 (AD) at 49.

³⁷1996 (3) SA 502 (C).

³⁸1977 (3) SA 314 (O) at 317 C-F.

Die Wetgewer is deur middel van die Insolvensiewet primêr daarop ingestel om die insolvent en sy bates van mekaar te skei, beheer van die boedel aan die kurator oor te dra en die bates na die krediteure op 'n sekere rangorde van voorkeur oor te skuif. Die liggaam van die insolvent word egter nie so oorgeskuif nie. Sy persoonlike integriteit bly onaangetas en sy status gedeeltelik ook ... In daardie sin is die insolvent se liggaam 'n "bate" wat hy tot voordeel van homself en sy familie na sekwestrasie kan aanwend ... Skade aan sy vlees of gees berokken, is gevolglik sy skade en vergoeding daarvoor kom hom persoonlik en vir sy eie voordeel toe.³⁹

This exposition of the underlying purpose of these provisions was adopted with approval by the appellate division in *Santam Versekeringsmaatskappy Bpk v Kruger*.⁴⁰

In the *Norman* case the court also confirmed that section 23(8) does not only apply to compensation recovered after sequestration. The section applies to damages suffered before or after the sequestration of the insolvent's estate. Traverso J said the following:⁴¹

I can find no reason in logic to distinguish between a case where *litis contestation* occurred prior to sequestration and where an award was made prior to sequestration. The underlying purpose of the legislation remains the same, namely to protect that which is attached to the person of the insolvent, and to enable the insolvent to retain it for his own benefit to the exclusion of his creditors. To demonstrate the inequity that will result if I had to uphold Mr Kirk-Cohen's argument, I will give the following hypothetical examples.

If X receives an award prior to sequestration which includes a component for future loss of earning capacity, will this award vest in the trustee? If X receives an award which is earmarked to enable him to purchase a new wheelchair at regular intervals for the rest of his life, could the Legislature ever have intended that such an award would vest in the trustee? The answer to this question is self-evident.

Meskin submits that compensation here would include loss of income by the insolvent that resulted from an attack on his business, constituting an injury to him, but then it must be shown that such loss was the direct result of such injury.⁴²

Mars⁴³ and Smith⁴⁴ seem to oppose this view. It is their opinion that the loss or damage must be personal to the insolvent, and he cannot sue for damages

³⁹Through the Insolvency Act the Legislature is primarily concerned with divorcing the insolvent from his assets, transferring control of the insolvent estate to the trustee and moving the assets to the creditors in a specific order of preference. His personal integrity remains intact, and to an extent also his status ... In that sense the insolvent's body is an "asset" that he can utilise for the advantage of himself and his family after sequestration ... Damage to his flesh or soul is consequently his damage and compensation for such damage accrues to him personally for his own advantage" (author's translation).

⁴⁰1978 (3) SA 656 (A).

⁴¹Above at 508 E-H.

⁴²Meskin at 5.3.10.

⁴³Mars (2008) at 193.

⁴⁴Smith *The law of insolvency* at 91.

allegedly suffered by him in his business as such right of action vests in the trustee. This is not part of this exclusion or exemption.⁴⁵ If one considers the rationale behind this exclusion or exemption,⁴⁶ then Mars and Smith may be correct. In *Santam Ltd v Norman and Another*⁴⁷ the court pointed out that the compensation in question is literally attached to the person of the compensated debtor. But to achieve clarity on this point, to avoid possible litigation in the future, it is suggested that section 23(8) should expressly state that damages of this nature are either included or excluded from the insolvent estate. It will also have to be decided whether an award for loss of earnings should be treated in the same manner as income earned by the insolvent.⁴⁸ There is really no difference between such an award and income earned. The problem arises when an all-inclusive award for general and special damages is made by the court. The loss of earnings portion will have to be identified and extracted for the insolvent estate, if there is an excess which is not needed for the insolvent and his dependents. Further problems may be avoided by taking a policy decision based on interests of humanity to exclude this category of property from the insolvent estate entirely.

9.2.3 Pensions that the insolvent may be entitled to for services rendered by him

The Act provides that the insolvent may for his own benefit recover any pension to which he may be entitled for services rendered by him.⁴⁹ However, the word “pension” is not defined in the Act and it would appear that any benefit is included which qualifies as a pension within the ordinary meaning of the word, as well as any pension having a statutory source.⁵⁰ There is other legislation, apart from the Act, that excludes from the insolvent estate pensions and similar benefits.⁵¹ If the estate of any person entitled to a benefit payable in terms of the rules of a

⁴⁵See *Ex Parte Wood* 1930 SWA 117 at 122 and *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W) at 79.

⁴⁶It is submitted that this is excluded property.

⁴⁷1996 (3) SA 502 (C).

⁴⁸See ch 12 below.

⁴⁹S 23(7).

⁵⁰Meskin at 5.14.2.

⁵¹See, eg, Railways and Harbours Service Act of 1912, s 79(1); Aged Persons Act 81 of 1967, s 14(3); Blind Persons Act 26 of 1968, s 11(3); Occupational Diseases in Mines and Works Act 78 of 1973, s 131(1); General Pensions Act 29 of 1979, s 3.

registered fund is sequestrated or surrendered, the benefit is not deemed to form part of the assets of the insolvent estate of that person. It may not be attached or appropriated by his trustee or by his creditors, notwithstanding anything to the contrary in any law relating to insolvency.⁵² The General Pensions Act⁵³ provides that any benefit received under any pension law by any person whose estate is sequestrated does not form part of the assets in his insolvent estate.⁵⁴ Pension funds can therefore be regarded as excluded assets that never form part of the insolvent estate.

In *Matanzima v Minister of Welfare and Pensions and Others*⁵⁵ the court ruled that the Commissioner of Inland Revenue's rights of recovery of tax due by the insolvent as at the date of sequestration, and interest thereon, are exclusively those accorded to him by the Insolvency Act.⁵⁶ Consequently, section 99 of the Income Tax Act⁵⁷ does not allow the Commissioner for Inland Revenue to seize any pension envisaged by section 23 (7) of the Insolvency Act for the purpose of recovering tax that was due by the insolvent at the date of sequestration.

Meskin⁵⁸ correctly submits that a pension received by the insolvent which stems from services unlawfully rendered by him⁵⁹ belongs to his insolvent estate in terms of the general provision of section 23(1) of the Insolvency Act. This also fits in with the decision in *Singer NO v Weiss & Another*⁶⁰ which ruled that income illegally acquired forms part of an insolvent estate.⁶¹

⁵²S 37B of the Pension Funds Act 24 of 1956, substituted by s 13 of Act 94 of 1977 and s 12 of Act 80 of 1978; Smith CH *Law of insolvency* at 90. See also Mars (2008) at 202.

⁵³29 of 1979.

⁵⁴S 3 of Act 29 of 1979. Mars (2008) at 202.

⁵⁵1990 4 SA 1 (Tk, AD) at 4-6.

⁵⁶As provided in s 101(a) and (a) *bis*.

⁵⁷58 of 1962.

⁵⁸At 5.14.2.

⁵⁹This will include services rendered in the course of unlawfully carrying on, or being employed in, the business of a trader who is a general dealer or manufacturer, or having a direct or indirect interest in such a business, as envisaged by s 23 (3) of the Insolvency Act. See also para 9.5 below.

⁶⁰1992 (4) SA 362 (T).

⁶¹This may, however, result in inequitable consequences for the person who, eg, may have been defrauded when paying such income to an insolvent, but who is probably not a creditor of the insolvent estate. However, this subject will not be pursued any further for present purposes.

At present the pension recoverable by the insolvent for his own account is not limited to any particular amount. In the Draft Insolvency Bill the South African Law Commission suggested that the protected amount be limited to R200 000 as exempt (or excluded) property.⁶² However, it is submitted that the capping of any amount relating to assets simply leads to problems later on when such capped amounts are not regularly revised. Furthermore, if pension funds are to be included in an insolvent estate, such funds will no longer be excluded property of the insolvent and only a portion thereof will be exempted. It is further suggested that the behaviour of the debtor should be considered when deciding on the amount that should be included in the insolvent estate, so that fraudulent behaviour on the part of the insolvent debtor must result in a reduction in the exempt portion of the pension. So forfeiting the entire pension, or only parts thereof should depend on the behaviour of the debtor. In many instances pensions, as with many insurance policies,⁶³ may have been provided for or effected long before insolvency, under circumstances when insolvency of the debtor could not have been foreseen. So, in respect of pensions, a blanket capping of all pensions in insolvency will lead to inequitable results. With pensions, as with insurance benefits to some extent, factors must be taken into account such as the age of the pension, circumstances under which it was arranged and fraudulent or dishonest behaviour by the insolvent in respect of such pension.

However, a more practical solution will be to consider the pension, together with certain other social security benefits, insurance benefits and income from remuneration for work done by the debtor, as part of the debtor's income. A portion of this lump sum should then be at the disposal of the creditors if such income is not required for the survival of the debtor and his dependants. However, taking too large a percentage of the debtor's income may result in his failure to enter into formal employment and to hide any earned income.⁶⁴ A formula must therefore be devised

⁶²South African Law Commission *Review of the law of insolvency* Project 63 (2000) Report, Vol 1 Explanatory Memorandum, and vol 2 Draft Bill at 38.

⁶³See the discussion of insurance benefits in para 9.3 below.

⁶⁴In this respect the UNCITRAL Guide states insolvency law must provide for adequate information in respect of the debtor's situation. It must provide incentives to encourage the debtor to be honest and open, and sanctions for failing to do so – United Nations Commission on International Trade Law *Legislative guide on insolvency law* at 13 (hereafter UNCITRAL Guide).

by which to calculate precisely what percentage of a debtor's income will be forfeited to his creditors. In this respect the Master or a Judge of the High Court must establish the minimum income required to maintain a reasonable standard of living by the average person. This amount must be the minimum amount that should be excluded from any insolvent estate for the support of the debtor and his dependants, and it must be automatically revised according to yearly inflationary figures. To this sum, any form of income received by the insolvent should be added. Depending on the total that has been calculated in this way, a certain percentage of the income that exceeds the minimum excluded amount must be forfeited to the insolvent estate. For example, if the minimum income is exceeded by R2 000, then one tenth of the R2 000 must be forfeited to the creditors in the estate. If there is an excess of R10 000 or more, fifty percent of that excess must go to the creditors and so forth.⁶⁵

A formula of this nature will initially require fine tuning, but once in place, one will have perpetual clarity in respect of all the income that is received by the insolvent debtor.⁶⁶ It is submitted that this will also encourage the debtor to continue to earn an income. It will be a meaningful incentive towards attaining a fresh start.

9.2.4 Remuneration for work done

An insolvent may follow any profession or occupation or enter into any employment.⁶⁷ But he may not, without his trustee's consent, carry on or be employed or have any interest in the business of a trader who is a general dealer or a manufacturer.⁶⁸ Remuneration for work done or for professional services rendered by, or on behalf of, the insolvent after sequestration may be recovered by the insolvent for his own benefit.⁶⁹ But any surplus, which in the opinion of the

⁶⁵See ch 12 for a more complete explanation.

⁶⁶This idea is based on a similar system applied by the Canadian bankruptcy regime, but the formula in that system appears to relate only to the income for work done by the debtor, and not also pension and related income. See Boraine A, Kruger J and Evans RG "Policy considerations regarding exempt property: A South African-Canadian comparison" (2008) *Annual review of insolvency law 2007* (ed JP Sarra) 637 at 682 (hereafter Boraine, Kruger and Evans).

⁶⁷S 23(3).

⁶⁸S 23(3).

⁶⁹S 23(9). It appears from case law as if it may be accepted that profits from the business of a general dealer or manufacturer which an insolvent carries on with permission of his trustee, are included – see the authority referred to in Swart BH *Die rol van 'n concursus creditorium in die Suid-Afrikaanse insolvensie reg* LLD Thesis University Pretoria (1990) (hereafter Swart *Thesis*) at 309 note 23. This

Master will not be necessary for the support of the insolvent and his dependants, may be applied for the payment of debts.⁷⁰ However, until such time as the Master makes a decision in this regard, this income vests in the insolvent for his own benefit.⁷¹ Smith states that there is, however, uncertainty regarding property purchased by the insolvent with his earnings.⁷² But until an assessment is made, this income must be regarded as an excluded asset and, logically, one would think, anything purchased by the insolvent with such income should also be excluded from the insolvent estate. If the Master does, however, make an assessment, such assessed earnings then vest in the trustee.⁷³ But this question has been the subject of judicial debate. In *Hicks v Hicks' Trustee*⁷⁴ an order was sought that the insolvent was not entitled to retain for his own benefit furniture that he had purchased from his earnings. The court found that it was not sure that if the matter were to be thoroughly considered, the court would have the power to make an *ex post facto* order, or that, even if the court was empowered to do so, it ought to make such an order. In *Ex Parte Fowler*⁷⁵ the court found that:

... the position is that *prima facie* the wages of the [insolvent] are his property and equally (to follow the principle which was laid down in this Court in *Hicks v Hicks' Trustee* 1909 TS 727), the property acquired with such wages is *prima facie* the property of the insolvent ... Unless the Master has directed his attention to the question as to whether there is a surplus of wages above the amount necessary for the support of the insolvent and his dependents, then that *prima facie* position would, I think, continue.

Also in *Ex Parte Van Rensburg*⁷⁶ the court ruled that *prima facie* the wages of an insolvent belonged to him and therefore the erf that he had purchased with such wages was his property.

exclusion, as envisaged by the Insolvency Act, applies only in respect of work lawfully done and services lawfully rendered – see *Singer NO v Weiss & Another* 1992 (4) SA 362 (T) at 366-367.

⁷⁰S 23(5). Mars (2008) at 200; *Ex parte Dryden* 1937 TPD 83.

⁷¹It is submitted that the same applies to property bought with excluded income.

⁷²Smith CH *Law of insolvency* at 99.

⁷³S 23(5) and (9) Insolvency Act 24 of 1936.

⁷⁴1909 TS 727.

⁷⁵1937 TPD 353 at 358.

⁷⁶1946 OPD 64; see also *Ex Parte Roos* 1955 (1) SA 572 (o) at 574; *Ponammal NO v Taylor NO and Another* 1963 (2) SA 656 (N) at 660, 662; *De Beer v Olivier en 'n Ander* 1966 (1) SA 684 (O) at 689; *Ex Parte Potgieter* 1967 (2) SA 310 (T) at 311-312; *S v Moll* 1988 (3) SA 236 (T) at 241-242; *Ex Parte Theron en 'n Ander*; *Ex Parte Smit*; *Ex Parte Webster* 1999 (4) SA 136 (O).

As stated above, it seems logical that any portion of the insolvent's income, or property acquired with it, can form part of the insolvent estate only from the date upon which the required assessment by the Master has been made. Prior to that, the income is treated as an excluded asset by the Act, although the Act does not use the word "excluded". It does not vest in the insolvent estate. Despite the uncertainty in this respect, the Act, the courts and the authors in this field appear to support this position.⁷⁷ But this is another problem area that must be properly regulated in any future legislation in order to provide clarity. This uncertainty took root precisely because no proper policy on excluded and exempt property has ever been formulated in South African insolvency law. If any thought had been given to this subject, the distinction between excluded assets and exempt assets would have been provided for in legislation. Excluded assets would then be beyond the creditors' reach. At present the collection of the debtor's earnings seems arbitrary. If the trustee is not enthusiastic about collecting assets such as earnings, the insolvent estate can shrink, but if too zealous, the debtor may be deprived of his earnings. If, however, the debtor is not forthcoming with the correct information concerning his salary, the creditors could lose out if the trustee is not vigilant. It is submitted that the same formula suggested for pension funds must be applied to calculate what portion of the debtor's income should be available to the insolvent estate.⁷⁸ This formula will apply from the date of sequestration, thereby providing absolute clarity regarding the income available to the creditors and no assets will be purchased with such income because it will be part of the insolvent estate.

A case that currently illustrates the importance of the Master's assessment in respect of the insolvent's earnings is *Ex Parte Theron en 'n Ander; Ex Parte Smit; Ex Parte Webster*.⁷⁹ This decision relates to applications for the rehabilitation of the applicants' estates where the Master made a ruling in terms of section 23(5) of the Insolvency Act. Section 23(5) reads as follows:

The trustee shall be entitled to any moneys received or to be received by the insolvent in the course of his profession, occupation or other employment which in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependent upon him, and if the trustee has notified the employer of the insolvent that

⁷⁷See Meskin at 5.14.4; Mars (2008) at 200.

⁷⁸See par 9.2.3 above.

⁷⁹1999 (4) SA 136 (O) at 145.

the trustee is entitled, in terms of this subsection, to any part of the insolvent's remuneration due to him at the same time of such notification, or which will become due to him thereafter, the employer shall pay over that part to the trustee.

In the application for rehabilitation, the Master requested the court to make the rehabilitation subject to such a ruling. But the court held that the granting of such a request would mean that the court acted merely as a rubber stamp. Before sanctioning such an order the Master would have to inform the court about the factors that were considered before arriving at the particular decision and the extent to which the principle of natural justice, such as *audi alteram partem*, were taken into account.⁸⁰ The court found that it would be unfair, if an obviously incorrect procedure had been followed, to leave it to the insolvent to approach the court for relief at great expense.⁸¹ The court stated that the Master exercised a *quasi-judicial* or administrative discretion by deciding an issue in terms of section 23(5), and such decision was subject to review in terms of section 151 of the Act.⁸² To legitimise the imposition of conditions upon a rehabilitation, the court held, required the existence of exceptional reasons. Without complete information on how the Master had come to a decision, the court could not be expected to ratify the Master's ruling automatically. This would frustrate the exercise of the courts discretion in terms of section 127 of the Act⁸³. The applicants' were consequently rehabilitated free of any conditions.

This exclusion in respect of income is an important and indispensable piece of insolvency legislation. If properly applied, it successfully utilises the policies of maximum collection of assets for the advantage of creditors and that of allowing the insolvent person a breathing space to recover from his debts. But this legislation is unclear in some respects. If there is one piece of legislation that can successfully encapsulate the whole rationale behind exemption law, it is this one. It should state clearly, in express terms, how the vesting of the debtor's income and the surplus income will be regulated. The present provision that only the surplus income vests at a given moment creates uncertainty, and requires a

⁸⁰At 145 A-B.

⁸¹At 145 A-B.

⁸²At 139 C-D.

⁸³At 145 I-J.

thorough re-examination and overhaul. Property acquired with this source of income must also be specifically regulated.

Apart from the suggested formula above, another possibility would be to vest any income and property acquired with it in the trustee until such time as the Master has made an assessment as to the portion of the income that will be exempt from the insolvent estate. In other words, the earnings will be regarded as *potentially* exempt assets. Such assessment must be made within a given period after the date of sequestration, and must be open to periodic reassessment. Although this suggestion will comply with the policy of collection of assets for the advantage of creditors, it may have the opposite effect by encouraging the debtor to avoid earning an income, or to act fraudulently in respect of such income.

It is submitted that the proposed formula suggested above will balance the interests of all concerned while also maintaining the insolvency law policies relating to collection of assets, support for the debtor and the possibility of a meaningful fresh start for the debtor.⁸⁴

9.3 Exclusion or exemption of property by insurance legislation

In the past insurance policies proved to be particularly problematic in the context of insurance benefits as property in insolvent estates of individuals, and currently, under recent legislation, they continue to be problematic. A thorough analysis of insurance policies *vis-à-vis* insolvent estates is therefore required.

The Insurance Act⁸⁵ has been repealed by new insurance legislation in the form of the Long-term Insurance Act⁸⁶ and the Short-term Insurance Act,⁸⁷ both of which commenced operation on 1 January 1999. For present purposes the new Long-term Insurance Act is of importance in respect of protected life policies. Although the Insurance Act has been repealed by the new legislation, there appears to be

⁸⁴See ch 12 below for a more complete explanation of the formula.

⁸⁵27 of 1943.

⁸⁶52 of 1998.

⁸⁷53 of 1998.

uncertainty as to whether the new legislation has retro-active effect, or whether the provisions of the previous Act continue to apply to policies that existed prior to the commencement of the new legislation, namely 1 January 1999.⁸⁸ For this reason, and to place all the problems relating to the present legislation in context, the position under the old legislation will be briefly discussed. Thereafter the new legislative provisions will be considered.

9.3.1 The Insurance Act 27 of 1943 (prior to 1 January 1999)

The Insurance Act 27 of 1943 provided that subject to certain conditions, life policies were excluded from an insolvent estate to the extent stated in that Act. Life policies that qualified for protection included ordinary life assurance and endowment policies, industrial policies and funeral policies. If several policies qualified for an exemption, the trustee could choose which policy would be released.⁸⁹ If only a portion of a policy did not form part of the insolvent estate, the trustee had the capacity to hand the policy to the insurer, who then had to pay the estate that portion of the value that was owing.⁹⁰ The insolvent could then request the insurer to issue him with a new policy in respect of the protected amount.⁹¹

There were three main categories of protection under the Insurance Act, namely:

- (a) protection of policies taken out by a person on his own life;
- (b) protection of policies taken out by a married woman;
- (c) protection of policies that a man had ceded to his wife or that he took out in favour of his wife or child.

(a) Protection of policies taken out by a person on his own life⁹²

The surrender value of a life policy taken out by someone on his own life and that had been in force for a period of at least three years did not form part of the person's

⁸⁸See s 74 of the Long-term Insurance Act.

⁸⁹S 45 of the Insurance Act.

⁹⁰S 46 of the Insurance Act.

⁹¹S 46 of the Insurance Act.

⁹²The relevant statutory provisions are phrased in the masculine, but the law is the same where the insolvent is an unmarried woman. In terms of s 6(a) of the Interpretation Act 33 of 1957 the masculine gender must be read with the feminine gender. In the context of insurance see Gordon G Gordon and Getz on the South African law of insurance (1993).

insolvent estate, except to the extent that the joint value of all such policies, together with the value of all monies and other property protected in terms of section 48A of the Friendly Societies Act,⁹³ and of which such a person was the owner, exceeded R30,000.⁹⁴ If the policy under discussion had been pledged, these provisions applied only to that part of the value of the policy that exceeded the amount of the debt pledged.⁹⁵ Money paid out in terms of the policy (except for money paid at the surrender of a policy), as well as property bought with that money, enjoyed the same protection for a period of *five years* from the date on which the money became payable.⁹⁶

(b) Protection of policies taken out by a married woman

If a woman took out a policy on her own life and then married, the policy, together with any money paid out in terms thereof, or any property into which such money had been converted, was excluded from any *community of property or of profit and loss* which may have existed between her and her spouse.⁹⁷ Thus, if the husband's estate or joint estate was sequestrated, the policy did not form part of the insolvent estate. If the husband paid the premiums on the policy at a stage when his liabilities exceeded his assets (or at a point in time during which the joint estate was insolvent, if the parties were married in community of property), the wife was obliged to repay all the premiums paid during this time to the insolvent estate.⁹⁸ The same principles applied if a woman took out a policy on her own or her husband's life *after* their marriage.⁹⁹

⁹³25 of 1956.

⁹⁴S 39(1) of the Insurance Act.

⁹⁵S 39(1) of the Insurance Act.

⁹⁶S 39(3) of the Insurance Act. S 39, as discussed here, was applicable where the insolvent was still alive when his estate was sequestrated. S 40 of the Insurance Act applied the provisions of s 39 *mutatis mutandis* to deceased estates. The maximum protected sum (R30 000) was protected from creditors against the claims of the insured policy owners surviving spouse married to him in community of property to the extent of one half of the protected portion of policy money or assets that it was converted into, or his surviving spouse, parent, child or step-child under his will, or his surviving spouse, parent or child by right of succession *ab intestatio* – see s 40 (1)(a)-(c) of the Insurance Act.

⁹⁷S 41(1) and s 41(2) of the Insurance Act.

⁹⁸S 41(2) of the Insurance Act.

⁹⁹Various sections in the Insurance Act referred to the marital power of the husband. However, the marital power of the husband was abolished by the Matrimonial Property Act 88 of 1984, so the protection granted to a wife by ss 41 and 42 of the Insurance Act became irrelevant in respect of reference to marital power.

(c) Protection of policies that a man ceded to his wife or that he took out in favour of his wife or child

If a man took out a policy on his own life and thereafter ceded the policy to a woman whom he intended marrying and whom he thereafter married *in* community of property, or if a man took out a policy in favour of a woman whom he intended marrying and whom he later married in community of property, or in favour of their child, that policy was excluded from the joint estate.¹⁰⁰ The provisions in respect of the payment of premiums under insolvent circumstances as in (b) above also applied under these circumstances.¹⁰¹

If a man ceded a policy to an intended spouse, or took out a policy in her favour or in favour of their child, and then married the woman *out* of community of property, that policy did not form part of the woman's insolvent estate. The protection was limited to R30 000 of the joint value of that policy and of all other life policies of which the woman was the owner. It included all monies paid to her, or due to her, in terms of such policies, and the value of all other property that belonged to her and into which she converted any such money, together with the value of all other monies and all other property that was protected in terms of section 48A of the Friendly Societies Act¹⁰² and of which she was the owner.¹⁰³ The provisions with regard to pledged policies and to monies payable in terms of such policies, as discussed in (a) above, were also applicable in this case.¹⁰⁴

In respect of some of these policies that were either ceded or effected by a man in favour of his wife (or future wife), there was, by virtue of section 44 of the Insurance Act, a limitation to the exclusion of such policies from the husband's estate. So, if a man who had ceded or effected policies in favour of a spouse as envisaged in sections 42 or 43 of the Insurance Act, such policy or any money or assets arising therefrom were deemed to belong to the man's insolvent estate.¹⁰⁵ But if this transaction by the man in

¹⁰⁰S 42(1) of the Insurance Act.

¹⁰¹S 42(1) of the Insurance Act.

¹⁰²25 of 1956.

¹⁰³S 42(2) of the Insurance Act.

¹⁰⁴S 42(2) of the Insurance Act.

¹⁰⁵S 44(1) of the Insurance Act.

favour of the spouse was *bona fide* and completed not less than two years before sequestration by means of a duly registered antenuptial contract, then the entire policy was protected from the creditors of the insolvent estate.¹⁰⁶ However, if the transaction was so entered into otherwise than by such antenuptial contract, only R30 000 was protected from the creditors of the insolvent estate.¹⁰⁷

Section 44(3) provided a measure of protection to women married in community of property. It regulated life policies that a woman married in community of property owned, or money or assets derived from it, which was excluded from the community of property, but which could be attached by her husband's creditors. Such policy could not be attached by the husband's creditors unless the spouses joint assets were insufficient to satisfy the claim. But if the policy was so used to satisfy such claim, the woman would be entitled to be refunded for the relevant amount out of any policy or money belonging to her husband which was withheld from his creditors or the trustee of his insolvent estate in terms of section 39 of the Insurance Act.¹⁰⁸

9.3.1.1 The constitutionality of section 44 of the Insurance Act

Previously, where the *husband's* estate was sequestrated, but not the wife's, section 44(1) and (2) of the Insurance Act regulated the position where *he* ceded certain life policies to *his wife* or which he took out in her favour, whether before or after their marriage. However, section 44(1) and (2) was declared void by the Constitutional Court¹⁰⁹ because it discriminated unfairly on the basis of sex.

9.3.1.2 The purpose of section 44

Section 44 of the Insurance Act (and the repealed section 28 of the Insolvency Act) had the dual purpose of protecting both the wife of the insolvent husband as well as

¹⁰⁶S 44(1)(a) of the Insurance Act.

¹⁰⁷S 44(1)(b) of the Insurance Act. S 44(2) of the Insurance Act deals with these policies where the man's estate has not been sequestrated, in other words the position in the individual debt collection procedure. Then the policy is deemed to be his property as against any of his creditors so far as its value exceeds R30 000, if two years had passed since the cession or effecting of the policy had transpired (s 42(2)(a)). If less than two years had passed between the cession or effecting of the policy, and attachment thereof by a creditor, then the policy in its entirety was deemed to be his (s 44(2)(b)).

¹⁰⁸S 44(3) of the Insurance Act.

¹⁰⁹In *Brink v Kitshoff* NO 1996 (4) SA 197 (CC).

his creditors.¹¹⁰ Firstly, in view of the common law rule prohibiting donations between spouses, section 44 provided a married woman with a benefit which would otherwise have been denied her.¹¹¹ Secondly, the interest of the creditors was protected from the possibility of collusion and fraud between the husband and wife.¹¹² However, with the introduction of section 22 of the Matrimonial Property Act,¹¹³ which allowed for donations between spouses, the first purpose above became redundant, and it became a burden on a married woman affected by section 44. In the absence of section 44, the entire policy envisaged in section 44 could have amounted to a valid donation to the wife if the requirements of validity had been met and the suspicion of simulation had been removed. Furthermore, only a married woman was affected by the provisions of this section, not a married man in whose favour his wife had taken out a policy or ceded it to him. This situation inevitably led to the decision of the Constitutional Court in *Brink v Kitshoff*¹¹⁴ whereby section 44(1) and (2) was declared unconstitutional and therefore invalid.

9.3.1.3 *Brink v Kitshoff*¹¹⁵

In 1989 Mr Brink took out a life insurance policy valued at R2 million. He was reflected as the owner in the policy. In 1990 he ceded it to his wife, the applicant in this case. Mr Brink died insolvent in 1994. His estate was dealt with in terms of section 34 of the Administration of Estates Act.¹¹⁶ The executor demanded that the insurer, in terms of section 44 of the Insurance Act, pay into the estate all but R30 000 of the proceeds of this insurance policy. The insurer refused to do so and the matter eventually came before the Constitutional Court.

O'Regan J found that section 44(1) and (2) treated married women and married men differently, thereby disadvantaging married women but not married men.¹¹⁷ Section 44(1) and (2) was therefore discriminatory against women on the grounds

¹¹⁰*Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at 218 G/H-I/J.

¹¹¹The policies under discussion can be regarded as donations between spouses.

¹¹²*Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at 218 G/H-I/J.

¹¹³88 of 1984.

¹¹⁴See 9.3.1.3 below.

¹¹⁵1996 (4) SA 197 (CC)

¹¹⁶66 of 1965.

¹¹⁷At 217 F-G.

of both sex and marital status, thereby contravening section 8 of the interim Constitution.¹¹⁸ Section 44(1) and (2) next had to be weighed up against the limitation clause in the Constitution.¹¹⁹ To succeed, it would have to be shown that section 44 was reasonable and justifiable in an open and democratic society based on freedom and equality, and that it did not negate the essential content of section 8 of the interim Constitution. Consequently, one had to consider the purpose and effects of the infringing provision and weigh them against the nature and extent of the infringement caused.¹²⁰

O'Regan J held that the first purpose of section 44 of the Insurance Act was to provide married women with a benefit that they had been denied because of the common law prohibition of donations between spouses. This purpose had fallen away when the common law rule was abolished by section 22 of the Matrimonial Property Act.¹²¹ Section 44 of the Insurance Act thus became burdensome to married women. The second purpose of protecting creditors of insolvent estates was still achieved. Although the court considered the protection of creditors to be a valuable and important public purpose, and that the close relationship between spouses could lead to collusion or fraud, it was not persuaded that the distinction between married men and married women could be said to be reasonable and justifiable.¹²² Persuasive reasons were not advanced to show why section 44 should apply only to transactions in which husbands effected or ceded policies in favour of their wives, and not to similar transactions by wives in favour of their husbands. The court found that there seemed to be no reason why fraud or collusion did not occur when husbands, rather than wives, were the beneficiaries of insurance policies. Avoiding fraud or collusion, the court found, did not suggest a reason as to why a distinction should be drawn between married men and married women.¹²³ Further, the court held that there were sufficient other legislative

¹¹⁸Constitution of the Republic of South Africa Act 200 of 1993; s 9 of the present Constitution of the Republic of South Africa Act 108 of 1996.

¹¹⁹S 33 of the interim Constitution and s 36 of the present Constitution above.

¹²⁰At 218 F-H.

¹²¹ 88 of 1984.

¹²²At 218 I-J.

¹²³At 219 A-C.

provisions¹²⁴ that could reasonably serve the purpose of protecting the interests of creditors in a manner less invasive of constitutional rights. The discrimination caused by section 44(1) and (2) of the Insurance Act were therefore not considered to be reasonable or justifiable in the light of the purpose of the legislation and the court declared these provisions invalid.¹²⁵

The effect of the *Brink* decision is that the benefits of policies effected in favour of or ceded to one spouse by another would ostensibly belong to the estate of the recipient spouse without any limitation and irrespective of the insolvency of the other spouse. This, of course, is subject to the provisions of section 21 of the Act if the insolvent spouse is still alive.¹²⁶

9.3.2 The Long-term Insurance Act

As stated above, the Long-term Insurance Act,¹²⁷ which came into effect on 1 January 1999, repealed the Insurance Act.¹²⁸ In terms of the Long-term Insurance Act policy benefits¹²⁹ (or the assets acquired exclusively with those benefits) provided to a person (“the beneficiary” or the “protected person”) under one or more assistance, life, disability or health policies¹³⁰ are protected if such person or his spouse is the life insured¹³¹ and the policy has been in force for at least three years.¹³²

Other than for a debt secured by such policy, the policy benefits (or aforementioned assets) will not during his lifetime, not be liable to be attached or subjected to execution under a judgment of a court or form part of his insolvent estate, or upon his death, if he is survived by a spouse, child, stepchild or parent,

¹²⁴Such as ss 26, 29, 30 and 31, for impeaching transactions, and s 21 for vesting the solvent spouse’s assets in the trustee.

¹²⁵At 219 F-H.

¹²⁶This aspect relating to s 21 is discussed in ch 10 below.

¹²⁷Act 52 of 1998.

¹²⁸27 of 1943.

¹²⁹Long-term Insurance Act 52 of 1998 s 63(1) read with s 1 “policy benefits” being one or more sums of money, services or other benefits, including an annuity.

¹³⁰Long-term Insurance Act 52 of 1998 s 63(1) read with s 1.

¹³¹Long-term Insurance Act 52 of 1998 s 63(1) read with s 1 “life insured”.

¹³²Long-term Insurance Act 52 of 1998 s 63(1). Smith A “The difficulties of simplicity” (2000) 8 *JBL* at 85; Smith A “The protection of insurance policies from insolvency under section 63 of the Long-term Insurance Act 52 of 1998” (2000) 12 *SA Merc LJ* at 94.

not be available for the purpose of payment of his debts.¹³³ These policy benefits are only protected if they devolve upon the spouse, child, stepchild or parent of the beneficiary in the event of the beneficiary's death.¹³⁴

This protection is limited in that it applies to assets acquired solely with the policy benefits, for a date of five years from the date on which the policy benefits were provided, and policy benefits and assets so acquired (if any) to an aggregate amount of R50 000 or another amount prescribed by the Minister.¹³⁵ The onus is on the person claiming the protection afforded by the section to prove, on a balance of probabilities, that he is entitled thereto.¹³⁶

Provision is made for the selection for realisation of protected policies where two or more long-term policies exist, and for the partial realisation of protected policies.¹³⁷

9.3.2.1 Consequences of the Long-term Insurance Act in respect of the protected policy benefits and the protected assets

(a) During the lifetime of the protected person

The effect of section 63 of the Long-term Insurance Act during the lifetime of the protected person is that the policy benefits may not be attached or sold in execution under a judgment and they will be excluded from the insolvent estate of the protected person.¹³⁸ In respect of the protected assets, these may not be attached or sold under an execution judgment for a period of five years from the date on which the policy benefits with which they were purchased were provided and they will not form part of the protected person's insolvent estate, if, Meskin submits, that estate is sequestrated within such period of five years.¹³⁹

¹³³Long-term Insurance Act 52 of 1998 s 63(1)(a) and (b).

¹³⁴Long-term Insurance Act 52 of 1998 s 63(3)(a).

¹³⁵Long-term Insurance Act 52 of 1998 s 63(2)(a) and (b); s 1 "Minister".

¹³⁶Long-term Insurance Act 52 of 1998 s 63(1)(b).

¹³⁷See s 64 and s 65.

¹³⁸S 63(1)(a).

¹³⁹S 63(1)(a) read with s 63(2)(a); The protection of the policy benefits or assets above is of course subject to the prescribed limit. See Meskin at 5.3.2.1B; see generally also Mars (2008) at 194.

(b) After the death of the protected person

If the protected person dies and is survived by a spouse, child, step-child or parent the protected assets cannot be used in payment of debts of the deceased.¹⁴⁰ If, upon his death, the protected policy benefits devolve upon his or her spouse, child, step-child or parent, those benefits will not be used for the payment of the deceased's debts.¹⁴¹

(c) Upon the sequestration of the protected person's estate

Where at the date of sequestration the insolvent is entitled to receive protected policy benefits under only one protected policy, and he owns no protected assets, then such benefits are excluded from the insolvent estate, except to the extent that such benefits exceed the prescribed limit.¹⁴² If the insolvent is entitled to protected policy benefits under more than one protected policy at the date of sequestration, and he owns no protected assets, then such policy benefits are excluded from the insolvent estate, except to the extent that the aggregate realisable value of such policies exceeds the prescribed limit.¹⁴³ If the insolvent is not entitled to any protected policy benefits, but owns one or more protected assets at the date of sequestration and the value of such asset or assets cumulatively does not exceed the prescribed limit, then such asset or assets are excluded from the insolvent estate, if, Meskin submits, the sequestration occurred within the period of five years referred to in section 63(2)(a).¹⁴⁴ A situation that is not regulated by section 63, is where, at the date of sequestration the insolvent is not entitled to receive any protected policy benefits, but owns one or more protected assets and the value of such asset or assets cumulatively exceeds the prescribed limit. Meskin submits that in such a situation all such assets vest in the insolvent estate subject to the insolvent's right to receive from the proceeds of their realisation, the amount of the prescribed limit.¹⁴⁵ Where at the date of sequestration the insolvent is entitled to protected policy benefits under one or more than one protected policy, and the insolvent also owns one or more protected assets, then such policy benefit and

¹⁴⁰S 63(1)(b).

¹⁴¹The protection of the policy benefits or assets above is of course subject to the prescribed limit.

¹⁴²S 63(1)(a) read with s 63 (2)(b); Meskin at 5.3.2.1B; see generally also Mars (2008) at 194.

¹⁴³S 63(1)(a) read with ss 64 and 65.

¹⁴⁴Meskin at 5.3.2.1B; s 63 (1) (a) read with s 63 (2) (a) and (b);

¹⁴⁵ Meskin at 5.3.2.1B.

such asset or assets will be excluded from the insolvent estate up to an aggregate amount of R50 000.¹⁴⁶ In this situation there is, however, a lacuna in the Long-term Insurance Act in that neither section 63 nor 64 prescribes how this aggregate amount is to be determined or realised. Meskin is of the opinion that in such a situation the trustee may decide which policy or policies or asset is to be realised to provide for the amount to which the insolvent is entitled.¹⁴⁷

Meskin points out that the provisions of section 63, which operate after the death of the protected person,¹⁴⁸ do not in terms exclude the protected policy benefits or protected assets from the insolvent estate of the deceased where his deceased estate is insolvent. He submits that the intention is that whilst such protected policy benefits fall to be administered as part of the deceased estate, if the deceased is survived by a spouse, child, stepchild or parent and the protected policy benefits devolve upon any such person, then such policy benefits may not (up to the prescribed limit) be applied in payment of the deceased's creditors. The situation, Meskin says, is the same in relation to any protected asset if the deceased is survived by a spouse, child, stepchild or parent, but there is no requirement that such asset must also devolve upon any such person, for the protection to apply.¹⁴⁹

Section 63 applies only to those policy benefits envisaged by section 63(1) which are provided or are to be provided, to a person in terms of a policy under which that person or his spouse is the life insured. Thus, where such benefits are provided or to be provided to some other person, the section has no application. It would therefore appear that the section will not apply in relation to policy benefits that are payable to, for example, a beneficiary nominated under the policy, upon the death of the protected person where such beneficiary accepts the relevant benefits. This is, firstly, because such beneficiary is not the "person" envisaged by section 63(1) and secondly, because the right to claim the benefits vests in the beneficiary and, does not form part of the assets of the deceased estate.¹⁵⁰

¹⁴⁶S 63 (1) (a) read with s 63 (2) (b).

¹⁴⁷ Meskin at 5.3.2.1B.

¹⁴⁸Particularly the provisions of s 63(1)(b).

¹⁴⁹Meskin at 5.3.2.1B.

¹⁵⁰See Meskin at 5.3.2.1B and *Hugo NO v Lipkie* 1961 (3) SA 166 (O); *Ex Parte MacIntosh NO: In Re Estate Barton* 1963 (3) SA 51 (N); *Ex Parte Fitzpatrick* 1952 (4) SA 70 (SR); *Ex Parte*

The protection envisaged by section 63(1) (a) and (b) does not operate in respect of a debt that is “secured by the policy”.¹⁵¹

It thus appears that the policy benefits provided, or to be provided, under such a policy are protected (up to the prescribed limit) only to the extent that the policy benefits exceed the amount of the debt secured by the policy. The section does not refer to a debt that is secured by any protected asset, therefore such an asset is apparently protected only to the extent that the proceeds of the realisation thereof exceeds the amount of the secured liability, but only up to the prescribed limit.¹⁵²

The section refers to the protection of an asset purchased “solely” or “exclusively” with the relevant policy benefits.¹⁵³ It would therefore appear that an asset purchased partly with such benefits and partly with other monies is not protected.¹⁵⁴

9.3.2.2 Realisation of protected policies where more than one policy exists

Where there are two or more policies referred to in section 63 in existence and only a part of the aggregate realisable value of the policies is protected, the trustee of the insolvent estate of the policy holder must determine which policies must be realised, wholly or partially, in order to obtain the aggregate realisable value of such policies which is not protected.¹⁵⁵ If the trustee is in possession of a long-term policy of which he is entitled to a part of the realisable value, he must deliver it to the insurer who is liable under the policy, for the purpose of paying to the trustee the relevant sum to which he is entitled.¹⁵⁶ If the trustee is not in possession of such policy, he must request the possessor thereof to deliver it to the liable insurer for payment to the trustee of the relevant sum to which he is entitled.¹⁵⁷ The payment to which the trustee is entitled will, of course, exclude the relevant benefits protected by section 63 and, it would appear, any benefits that would otherwise be excluded from the insolvent

Caiderwood NO: In Re Estate Wixley 1981 (3) SA 727 (Z).

¹⁵¹Long-term Insurance Act 52 of 1998 s 63(1).

¹⁵²See Meskin at 5.3.2.1B.

¹⁵³Long-term Insurance Act 52 of 1998 s 63(1) read with s 63(2)(a).

¹⁵⁴See Meskin at 5.3.2.1B.

¹⁵⁵Long-term Insurance Act 52 of 1998 s 64.

¹⁵⁶Long-term Insurance Act 52 of 1998 s 65(1).

¹⁵⁷Long-term Insurance Act 52 of 1998 s 65(2).

estate; these may include benefits payable to a nominated beneficiary or may be protected or excluded under any other statute or law.¹⁵⁸

9.3.2.1.2 Pitfalls in the Long-term Insurance Act

This legislation is another example of insolvency law policy and its consequences in respect of estate assets that has been formulated in a piecemeal and disjointed fashion, and then unraveled by the courts and writers.¹⁵⁹ The Long-Term Insurance Act¹⁶⁰ is an example of “other legislation” that makes provision for the exclusion from the insolvent estate of portions of certain insurance policies. Over a period of more than a hundred years this legislation, which overlaps with insolvency law, has been tampered with, and mostly unsuccessfully.¹⁶¹

One of the duties of a trustee of an insolvent estate is to implement the policy in insolvency law of maximum collection of assets for the benefit of the creditors. The Long-term Insurance Act, by implication, can assist the trustee in collecting or identifying assets that belong to insolvent estates, while it also implements the principle of granting a measure of protection to the insolvent debtor or his family. A first attempt at the judicial interpretation of section 63 of this Act has been a source of confusion, and conflicting judicial decisions.

This judicial interpretation and the consequences that this legislation holds for insolvent estates will now be considered. In doing so, the position where a contract insures a life against an event that may arise in the future, such as the death or disability of such a person, will be considered. As will be seen, the manner in which the insurance contract is drafted may be of crucial importance if insolvency intervenes. So, for example, the person whose life is being insured, may also be the person to benefit therefrom, because the insurance benefit will accrue to him, or to such person's estate, in the event of death or disability. But a third party can also benefit from an insurance

¹⁵⁸See Meskin at 5.3.2.1C.

¹⁵⁹See, eg, Evans RG and Boraine A “Considerations regarding a policy for the treatment of certain beneficiaries of life insurance policies in the law of insolvency” (2005) *De Jure* 266.

¹⁶⁰52 of 1998.

¹⁶¹See part II above and *Brink v Kitshoff NO* 1996 (4) SA 197 (CC).

policy.¹⁶² But to illustrate a particular pitfall in the Long-term Insurance Act, insurance contracts structured as a nomination in favour of a third person will be dealt with.

The question is whether, or under what circumstances, such policies or the policy benefits from part of the insolvent estate of the policy owner and whether or under what circumstances section 63 of the Long-term Insurance Act applies when the estate of the policy owner is sequestrated. For a complete analysis of these questions and of the judicial decisions in this respect, one must again consider the Insolvency Act's definitions of the words "disposition" and "property".¹⁶³ For ease of reference the provisions of section 63 of the Long-term Insurance Act are also repeated here.¹⁶⁴

Subsection 63(1) clearly affords limited protection regarding policy benefits provided for by the section to a person who is the life insured or whose spouse is the life insured. The same protection is also extended to the limited category of persons referred to in subsection 63(3), to whom the benefits may devolve in the event of the death of such a (benefitting or protected) person. Whether or not it was the intention of the legislature to afford this limited protection only under the particular

¹⁶²See para 9.3.2.1.2.1 below and *Warricker and Another NNO v Liberty Life Association of Africa Ltd* 2003 (6) SA 272 (WLD).

¹⁶³See s 2 of the Act which defines a "disposition" as "any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefore, but does not include a disposition in compliance with an order of the court"; and "dispose" has a corresponding meaning. "Property" means movable or immovable property wherever situated in the Republic, and includes contingent interests in property other than the contingent interests of a *fidei commissary* heir or legatee. "Movable property" means every kind of property and every right or interest which is not immovable property.

¹⁶⁴63 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, not 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.
- (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.

circumstances provided for in section 63 of the Long-term Insurance Act will also be considered below.¹⁶⁵

Two hypothetical scenarios may be considered. Firstly, a contract where the owner of the life policy has insured his own life or the life of a spouse and the owner is also the designated beneficiary in the policy. Secondly, a contract where, as in the first example, the policy owner has insured his own life, or that of a spouse, but the designated beneficiary is the spouse or some other third party. Do the proceeds of each of the contracts in question form part of the insolvent estate when the estate of the policy owner is sequestrated. A further, and related question, is whether the substitution of beneficiaries in such contracts, shortly before, or during insolvency, can be considered a disposition that can be set aside by the trustee in terms of the Act or the common law.¹⁶⁶ These questions will be analysed in the course of this chapter.

9.3.2.1.2.1 Nature of the contracts in question

Contracts of insurance are entered into between an insurance company, on the one hand, and another person, usually the insured, on the other hand, and they usually include the terms and conditions of the policy. Usually the insured makes regular payments to the insurance company by way of premiums. In return, the insurance company will pay out a certain amount of money if the event that is being provided for, occurs. But many such policies build up a value over time and if the insured opts out of the policy before the event occurs, the policy has a monetary value (a surrender value) that may be paid out to the insured, if provided for in the contract.

If the payment of the insurance benefits to a third person is provided for, it is usually a stipulation in favour of a third party (*stipulatio alteri*).¹⁶⁷ This construction occurs where A (the *stipulans* or stipulator) contracts with B (the *promittens* or promissor) to perform to a third party C (the *tertius*). With a stipulation in favour of a third party, B agrees to pay a sum of money or deliver something to C. This is done either gratuitously, or in

¹⁶⁵See discussion in the ensuing paragraphs below.

¹⁶⁶See ss 26, 29, 30 and 31 of the Insolvency Act and the common law *actio Pauliana*.

¹⁶⁷Reinecke, Van der Merwe *et al General principles of insurance* (2002) para 406 and further. See also *Wessels NO v De Jager en 'n Ander NNO* 2000 (4) SA 924 (SCA).

exchange for performance from either A, or C himself. If C is to counter-perform, B actually binds himself to contract with C. However, it may be A who counter-performs. Then C, who stands to receive performance from B, receives only rights and incurs no duties towards B if he accepts the offer.¹⁶⁸ So, an insurer (as promissor) may agree with the insured (as stipulator) to pay the proceeds of a policy on the insured's life to his wife (the beneficiary). When applying this construction, it is clear that the beneficiary, as the third party, has had something created for his benefit in respect of the insurance contract, even though rights to property may not yet have been acquired. The object hereof is the insurance benefit, which, viewed independently, falls within the ambit of the Act's definition of "movable property". But rights to such property have at this moment not yet been acquired by the beneficiary – the third party acquires a right only when he accepts the stipulation in his favour. The courts accept that the *stipulatio alteri* does not in itself create a right for the beneficiary. It is, however, intended to enable the beneficiary eventually to step in as a party to a contract with one of the original contracting parties.¹⁶⁹ The right of the third party beneficiary vests only after he has accepted such right.¹⁷⁰ There is only a contractual relationship between the stipulator and the promissor prior to acceptance. The relationship between the stipulator and the promissor falls away when the third party accepts the stipulation in his favour, leaving only a legal relationship between the promissor and the third party.

Rights to property, or in respect of property,¹⁷¹ it would appear, are created. They do actually exist. But only if the offeree accepts them, does he obtain a right in respect of the property that is the object of the rights that have been so created. His ability or competence to accept them is not a right to property, but only a competence to acquire

¹⁶⁸Joubert *General principles of the law of contract* (1987) at 187 (hereafter Joubert *General principles*); Kerr *The principles of the law of contract* (5th ed) (1998) at 81; Lubbe GF and Murray CM *Farlam and Hathaway: Contract cases, materials and commentary* (3rd ed) (1988) at 407.

¹⁶⁹Joubert *General Principles* at 188 and 189, and the authority cited in 188 note 24. See further Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General principles* (2007) at 264 *et seq* (hereafter Van der Merwe *et al*).

¹⁷⁰*Mutual Life Insurance Co of New York v Hotz* 1911 AD 556. See also *Wessels NO v De Jager en 'n Ander NNO* (4) SA 924 (SCA).

¹⁷¹Perhaps it is only the personal right of the stipulator to enforce the promissor to abide by the agreement to pay the benefit to the third party, and not a right to the benefit, that is for the purposes of the Insolvency Act, the property itself. Usually the property forming the object of the benefit will be created only when the event that has been insured against, eg, death, occurs. At this point, if the third party exercises his competence to accept the benefit, the third party will acquire a personal right to enforce payment of the benefit by the promissor (insurer).

a personal right in respect of property.¹⁷² Only a competence thus vests in him prior to acceptance. But what happens to the rights that have so been created in favour of the third party beneficiary prior to their acceptance by that beneficiary and is there any chance of these rights forming part of an insolvent estate of a stipulator, also under circumstances where the stipulator has altered the beneficiary to the detriment of his insolvent estate? It would appear that the stipulator may possess one or more rights in respect of the benefits of the policy. Authority for this statement is that it is accepted in insurance law that if the third party beneficiary refuses to accept the benefit, the stipulator has a reversionary right in respect of such benefit.¹⁷³ But when does this reversionary right arise and is it a conditional reversionary right that arises only if the condition is fulfilled, namely the third party's refusal to accept the benefit?

So the stipulator may possess at least a conditional right that the property may revert to him, prior to the acceptance of the benefit by the third party. If this right, in fact, exists, it seems to fall within the Act's definition of property and an alteration of a beneficiary to that of a third person then looks like a disposition of property by an insolvent, as envisaged by the Act.¹⁷⁴

But uncertainty prevails as to what stands to be accepted by the beneficiary in a stipulation in favour of a third party. Joubert says the courts require the beneficiary to accept an offer. It has also been said that the beneficiary must accept the "benefit" of the contract in his favour.¹⁷⁵ Van der Merwe and his co-authors comment that the term "benefit" probably refers to the right that the stipulator and promisor intends¹⁷⁶ to create for the beneficiary.¹⁷⁷ They argue that the statement in certain decisions that the beneficiary must "accept" (or "adopt" or "ratify") the

¹⁷²*Cf Wessels NO v De Jager* (4) SA 924 (SCA).

¹⁷³Reinecke MFB, Van der Merwe SWJ, Van Niekerk and Havenga P *General principles of insurance* (2002) at para 406 and further.

¹⁷⁴See also the definition of property in this paragraph.

¹⁷⁵*Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vornor Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 172; *Nine Hundred Umgeni Road (Pty) Ltd v Bali* 1986 (1) SA 1 (A) at 5A and 7D.

¹⁷⁶"Intends" ... does this mean, as suggested in the previous paragraph, that the right (and therefore also the reversionary right) arises only upon the happening of the ensured event, and not before that? If this is correct, then the benefit cannot be set aside unless it is repudiated, thereby creating the reversionary right at the moment of repudiation.

¹⁷⁷Van der Merwe *et al* at 248.

stipulation in his favour is compatible with the construction that the beneficiary must accept the rights that the contracting parties intend to create for him.¹⁷⁸

Under the construction favoured by the courts, the beneficiary's position before acceptance, these authors submit, is similar to that of the holder of a right subject to a suspensive condition.¹⁷⁹ They argue that acceptance is not required to conclude a distinct contract, but to "complete" or "stabilise" the right so that the original contracting parties on their own cannot revoke or alter it. So the origin of the beneficiary's right is the original contract between the promisor and the stipulator.¹⁸⁰ This defeats the argument that upon acceptance the beneficiary replaces the stipulator. They state that the original contract can convincingly be called a stipulation in favour of a third party, for the beneficiary derives his right from the original contract and not from a contract of his own making.¹⁸¹ So, irrespective of the construction that is adopted, a right is apparently created by a stipulation in favour of the third party (whether it be called an "offer", a "benefit", or a "right"). All that is required for the completion of the stipulation is its acceptance by the beneficiary.¹⁸²

To return to the position of policies in general, in the event of the estate of the policy owner becoming insolvent, such policy will become estate property and will therefore vest in the trustee of the insolvent estate of the policy owner. The trustee then becomes entitled to that portion of the surrender value of such policy that exceeds the amount that is protected, in favour of the insolvent, by virtue of section 63.¹⁸³ The position in respect of the surrender value will depend on the facts of each case. Where the event that would oblige the insurer to pay out the full value of the policy has not occurred, the trustee could nevertheless claim the surrender value (if any) of the policy to which he or she may be entitled.¹⁸⁴ But what is the position where the insured event has transpired at a time when the owner of the insurance policy is insolvent and

¹⁷⁸Van der Merwe *et al* at 264 and further.

¹⁷⁹Van der Merwe *et al* at 264 and further.

¹⁸⁰See Van der Merwe *et al* at 264 and further.

¹⁸¹Van der Merwe *et al* at 264 and further.

¹⁸²See the comprehensive discussion of *Wessels NO v De Jager en 'n Ander NNO* 2000 (4) SA 924 (SCA) in ch 8 above.

¹⁸³See *Warricker and Another NNO v Liberty Life Association of Africa Ltd* 2003 (6) SA 272 (WLD).

¹⁸⁴See the comprehensive discussion of *Wessels NO v De Jager en 'n ander NNO* 2000 (4) SA 924 (SCA) in ch 8 above.

when does section 63 of the Long-term Insurance Act apply? It will be shown below that the answer to this question differs, depending on whether or not the insurance contract has been structured as a contract in favour of a third party.

Questions relating to the interpretation of section 63 of the Long-term Insurance Act have now been considered in several court decisions. This judicial interpretation of this section will now be considered.

9.3.2.1.2.2 Judicial interpretation

(i) *Warricker and Another NNO v Liberty Life Association of Africa Ltd*¹⁸⁵

The joint provisional trustees of the insolvent estate of K (the insured) applied for an order in terms of section 18(3) of the Insolvency Act granting them permission to institute proceedings against Liberty Life Association of Africa Ltd (the respondent) to claim the death benefits of three life insurance policies issued to the insured by the respondent. The policies were taken out by the insured between 1986 and 1991. They all made provision for surrender values for a cash sum. Apart from the surrender values, they also contained the following provisions:

12 Settlement of claim

Any benefits due will be paid to the owner or his estate, provided that:

- if any beneficiary has been appointed and the contract is not ceded, payment will be made to the beneficiary ...

16 Rights of the owner

Subject to the rights of the cessionary [if any], all rights provided for by this contract may be exercised by the owner without the consent of the beneficiaries.

17 Beneficiary

The owner may appoint or remove a beneficiary at any time ... The beneficiary will not be entitled to any benefit during the lifetime of the principal life insured.

On 26 April 2002 K's estate was provisionally sequestrated. The provisional trustee of the insolvent estate was the first applicant. K's minor child was the designated beneficiary under the policies at that date. On 29 April 2002 the insured (K) changed the beneficiary under the policy to a trust, of which the minor child was a beneficiary. On 4 May 2002 the insured committed suicide. The applicants were appointed joint provisional trustees of the insolvent estate two

¹⁸⁵2003 (6) SA 272 (WLD).

days later. The trust accepted the benefits under the policies on 26 June 2002, and the respondent paid the proceeds of the policies to the trust. K's deceased estate was finally sequestrated on 9 July 2002.

The question before the court was whether the trust or the insolvent estate was entitled to the proceeds of the policies. The applicants argued that the proceeds of the policies formed part of the insolvent estate and that the respondent did not discharge its obligation under the policy when it paid the insurance benefits to the trust. The respondent submitted that the trustee of the insolvent estate could not acquire more rights to the benefits of the policies than the insolvent himself. At the date of sequestration the insured was entitled to only the surrender value of the policies and the trustee would therefore have become entitled to the surrender value. The provisional trustee did nothing to surrender the policies. The nomination of the beneficiary by the insolvent functioned as a benefit in favour of a third party. So the beneficiary could accept or reject the benefit upon the death of the insured. The respondent argued that the trust had become the owner of the benefit after it had accepted it, and the applicants therefore failed to establish an enforceable cause of action.

The court found that generally the insolvent insured's right to the benefits under a life insurance contract formed part of his estate, except to the extent that the right was protected by section 63 of the Long-term Insurance Act. The trustee, the court pointed out, effectively stepped into the shoes of the insolvent and therefore could not acquire greater benefits to the rights of the policies than the insolvent.¹⁸⁶

The court said that the policies in question functioned as a benefit in favour of a third party. So, before the death of the insured, the provisional trustee had become entitled to the right to surrender the policies in question. Upon the insured's death (leaving the effect of sequestration aside), the court held, the policies themselves would not have formed part of the deceased estate. Upon acceptance of the benefits by the designated beneficiary, the proceeds of the policies would have been payable to that beneficiary.¹⁸⁷

¹⁸⁶At 278A-A/B and D/E-F.

¹⁸⁷At 278 F-F/G and GH-I.

But before the acceptance of the benefits, it would appear that the beneficiary has no rights, but only a competence. So who possesses the rights in the period between, for example, death and acceptance by the beneficiary? Could the trustee regard this as an uncompleted contract prior to acceptance, and therefore choose to avoid the contract. This would possibly give the beneficiary a concurrent claim to the benefits.

The court further found that the insured could amend the designated beneficiary after sequestration without infringing the provisions of section 23(2) of the Act. The amendment, the court said, vested a contingent right for the beneficiary which was not affected by insolvency.¹⁸⁸ Strictly speaking, this is incorrect. But it may be more accurate to say that prior to beneficiary's acceptance of the benefit by the beneficiary, only a contingent *competence*, or the contingent interest in a *competence* vests for the beneficiary.¹⁸⁹ If it is considered a contingent right to *property*, it would fall within the Act's definition of property. The amendment of the contract would consequently also fall within the definition of a "disposition" that can be set aside by the trustee of the insolvent estate.

Section 23(2) provides that if an insolvent enters into a contract, his insolvency does not affect the validity of that contract. But this is subject to two provisos. Firstly, the insolvent cannot thereby dispose of any property of his insolvent estate. Secondly, without the consent in writing of the trustee of his insolvent estate, the insolvent cannot enter into any contract that will, or is likely to, affect his insolvent estate or any contribution towards his insolvent estate adversely. But if the court had been required to interpret section 63 in *Warricker's* case, it would have been unnecessary to consider this issue, because section 63 (on the correct interpretation)¹⁹⁰ would in any event not have applied. This is because prior to installing the trust as the beneficiary, with the minor still as the beneficiary, one was still faced with the *stipulatio alteri* construction.

¹⁸⁸At 279 B-C.

¹⁸⁹See the *Wessels* judgment in discussed in ch 8 above.

¹⁹⁰See the discussion of *Love and Another v Santam Life Insurance Ltd and Another* in sub-par (iii) below.

An insured's right to payment of the sum insured in a life insurance contract, the court held, vested on the conclusion thereof, though it only became payable on death. The court said this was a time clause and in the instant matter, the insured's rights to the proceeds of the policies, *subject to* the fulfillment of the time stipulation and the rights of the beneficiary, vested in the insolvent estate on sequestration. The option open to the trustee was therefore to surrender the policies or await the fulfillment of the time clause. The proceeds of the policies would have vested in the insolvent estate, the court found, if the beneficiary had not intervened.¹⁹¹

On the sequestration of K's estate and prior to his death, the court held, the provisional trustee acquired the right to surrender the policies and to demand payment from the respondent of the surrender value provided for in the policies. But the provisional trustee failed to avail himself of that right. So upon the death of the insured, the trust, as designated beneficiary, accepted the policy benefits and became entitled to payment thereof. The applicants consequently failed to establish a *prima facie* cause of action¹⁹² and the application was dismissed.

But what will the position be where the insolvent (before or after insolvency) replaces *himself* as beneficiary with a third party as a beneficiary, before the date of payment of the benefit? Can one argue that by doing so he is excluding the application of section 63, thereby depriving the estate of the insurance benefits?

The court appears to be correct in stating that the appointment of a third party beneficiary is a contract created for the benefit of a third person (*stipulatio alteri*).¹⁹³ The court is also correct in saying that with a revocable nomination there can be no acceptance by the beneficiary, unless and until the insured dies without having changed the nomination. While he is alive, the court stated, the policy remained

¹⁹¹At (279 F/G-I/J). If the right to the benefit, upon death, is a contingent right, then s 23(2) would probably apply, and the trustees consent would be required to amend the contract in cases where the insolvent (owner) replaces himself as beneficiary, with a third party beneficiary. Disposition includes "any transfer or abandonment of rights to property ...", while property includes "... contingent interests in property ...", and movable property includes "... every right or interest [in property] ..."; see s 2 of the Act.

¹⁹²At 279 J-280B/C.

¹⁹³At 278 F.

the property of the insured and he could deal with it as he liked (subject to the terms of the policy).¹⁹⁴ This observation of the court is in accordance with the *Wessels*¹⁹⁵ judgment, even though the court in *Warricker* made no reference whatsoever to *Wessels*.

This appears to be correct if the insured person is *solvent*. However, under *insolvent* circumstances the trustee of the insolvent estate steps into the shoes of the insolvent as owner of the policy. Surely the trustee will then be in a position either to claim the surrender value of the policy (without forfeiting the R50 000 under section 63, because this section does not apply if the insolvent is not the beneficiary) or, alternatively, if the contract is considered to be an unexecuted contract the trustee must make the insolvent the beneficiary so that he can invoke section 63, and then let the policy run its course. If, on the one hand, he invokes section 63 in this way and then claims the surrender value, the trustee will forfeit the R50 000 (in favour of the insolvent) in terms of section 63. On the other hand, if he invokes section 63 in this manner and lets the policy run its course, the insolvent estate will be entitled to the benefits of the policy if, for instance, the insolvent dies during insolvency. But, it is submitted, that either way this asset will be of little value to the insolvent estate. This is because, on the one hand, the event (eg, death) insured against may not occur during insolvency of the insured, and on the other, it is unlikely that the surrender value of the policy will exceed the protected R50 000 portion of the policy.

The court further stated that upon the insured's death, and assuming for the moment that he was *solvent*, the policies themselves would not have formed part of the deceased estate and the proceeds thereof would, upon acceptance of the benefits, have been payable to the designated beneficiary.¹⁹⁶

The implication of this (or corollary to this) may be that where a third person is beneficiary, because of the *stipulatio alteri* construction, the benefits of the policy

¹⁹⁴At 278 F-G.

¹⁹⁵ See the comprehensive discussion thereof in ch 8 above.

¹⁹⁶At 278 H-J.

would never have belonged to the insured owner's estate. Thus, if the condition for payment of the benefit (eg, death) is fulfilled, the benefits then arise (or originate) as property of the *insurer*, to be transferred in payment to the third party beneficiary, provided he has accepted the benefit. The position (in the above example of the court) would remain the same if the insured person was *insolvent*. Just as the benefit would not have formed part of the deceased estate, so it would not form part of the insolvent estate. However, if a reversionary right arises in favour of the *stipulator* (owner) and vests at the conclusion of the contract, the latter argument would not hold.

(ii) *Shrosbree and Others NNO v Van Rooyen NO and Others*¹⁹⁷

The applicants in this case were the trustees of P's insolvent deceased estate. They sought an order declaring that they owned three insurance policies on P's life. The respondent, at all relevant times an unrehabilitated insolvent, was the spouse of P, and beneficiary under the relevant policies. The court was prepared to agree that the respondent had accepted the benefits of the policies before the sequestration of the wife's deceased estate.

The court in this case found that section 63(1)(b) of the Long-term Insurance Act applied and that although insolvency was not mentioned as a requirement under that subsection, it was broad enough also to apply to insolvent circumstances. It found that section 63(1)(b) "contemplates that the benefit under a life policy does fall within the insolvent estate of the insured save to the extent of R50 000 in the hands of a nominated beneficiary being a spouse or other defined family member, if the policy had been in force for the requisite time".¹⁹⁸

The respondent's focus on the acceptance of the benefits of the policies, the court said, was fallacious on two grounds. The court, firstly, found that acceptance was a necessary condition to allow him to enforce the policy, but this was not a sufficient condition to claim all the benefits it conferred.¹⁹⁹ But the court seems to

¹⁹⁷2004 (1) SA 223 SECLD.

¹⁹⁸At 228 C-D.

¹⁹⁹At 228 C-E.

have erred. As in *Warricker*, (and only if section 63 does, in fact, apply, which it does not) the trustee of the insolvent (deceased) estate could only have enforced the *surrender value* (if any) of the policy, and then only before the death (and consequently usually before the acceptance of the benefits by the third party beneficiary) of the insured. Upon death, the condition (time clause) for payment of the benefits was fulfilled and after that moment the trustee could no longer claim the surrender value because it no longer existed. But whether or not, and when, the beneficiary accepted, probably does not really matter, because at death the trustee's right to the surrender value was extinguished.

The court said that the second fallacy was the respondent's suggestion that his rights accrued before those of the creditors of the insolvent. The court found the contrary true. The creditor's rights came before. They existed when P died. The subsequent sequestration (of the deceased estate) the court said, was only a particular mechanism for enforcement of those claims. Therefore the applicants had succeeded in their arguments and all that was left to be decided was whether the respondent was entitled to the protected R50 000. The court refused this because none of the policies were older than the three years required by section 63, thus the respondent was not afforded the protection of section 63.

But since the court erred in the first place in applying section 63 to the case before it, this finding too, was incorrect. The respondent was entitled to the full benefits in terms of the policies in question.²⁰⁰

(iii) *Love and Another v Santam Life Insurance Ltd and Another*²⁰¹

Here the deceased committed suicide in February 2001. His widow and his mother were the applicants. They were his nominated beneficiaries to the proceeds of a life insurance policy, which they were claiming. This life insurance policy in dispute was taken out by the deceased in 1996 and insured his own life.

²⁰⁰See the discussion of the *Love* case in sub-para (iii) below.

²⁰¹2004 (3) SA 445 (SE).

The deceased died insolvent and the estate was finally sequestrated in April 2001. The respondent was the trustee of the insolvent deceased estate who opposed this application, claiming that the insolvent estate was entitled to the full proceeds of the relevant life insurance policy. Shortly before his death the deceased nominated his widow as a beneficiary in the policy in the place of another person. The respondent challenged this as a substitution of beneficiaries and therefore a voidable disposition. It was the respondent's contention that the nomination of the beneficiary was a voidable disposition preferring one creditor above another, as envisaged by section 29(1) of the Act,²⁰² or that it should be set aside as a disposition without value within the ambit of section 26 of the Act. As will be seen, the crux of this decision is the interpretation of section 63 of the Long-term Insurance Act .

The applicants' argument that the substitution of beneficiaries was not a "disposition" as contemplated by section 2 of the Act found the favour of the court. It ruled that the nomination of beneficiaries was not a transfer or abandonment of a right vested in the deceased because the policy expressly provided that beneficiaries had no rights in terms of the policy prior to the death of the proposer. The latter could deal freely with the policy. The court thus agreed that the benefits under the policy were not assets in the estate of the deceased prior to his death and so could not be the subject matter of a transfer or abandonment of rights.²⁰³ The court said this was in harmony with *Wessels v De Jager*²⁰⁴ which held that a beneficiary in an insurance contract acquired only a competence, not a right, to accept the benefit. Consequently, the argument in respect of a voidable disposition had to fail.²⁰⁵

The court agreed with the applicants' submission that Pillay AJ's judgment in *Shroobree v Van Rooyen* was wrong in that it said that section 63(1)(b) contemplated that the benefits fell within the insolvent estate of the insured, leaving only the R50 000 protected in the hands of the requisite nominated

²⁰²S 29 relates to voidable preferences made to creditors. Therefore invoking this section appears to be incorrect because the beneficiaries were not creditors of the insolvent.

²⁰³At 448 H/I-449A and see *Ex Parte MacIntosh* 1963 (3) SA 51 (N) 56B.

²⁰⁴See the comprehensive discussion thereof in ch 8 above.

²⁰⁵At 449 C.

beneficiary, if the policy had been in force for the requisite period.²⁰⁶ Section 63, the court said, applied to benefits provided or to be provided “to a person” under one or more of the defined policies in which “that person or the spouse of that person” was the life insured.²⁰⁷ In this instance, as in the *Warricker* and the *Van Rooyen* cases, the policy benefits were not “provided or to be provided” to the deceased. So section 63 did not apply. The court cited *Meskin*²⁰⁸ with approval. This interpretation, the court said, “ascribes a consistent meaning to the same word – the word ‘person’ – when it appears in the section, and is consistent too with the basic premises and principles of insurance law that form the backdrop against which the Act must be interpreted”.²⁰⁹

So section 63 did not apply in this instance and the applicants were entitled to the full proceeds of the policy. The deceased is contemplated in section 63(1) as the potential beneficiary, not the applicants (or some other third party). Here the deceased was not a beneficiary of the policy benefits so those benefits never formed part of the deceased’s estate, therefore they could not “devolve upon” the deceased’s wife and mother.

(iv) Supreme Court of Appeal Decision

Both the decisions of *Shrosbree and Others NNO v Van Rooyen NO and Others*²¹⁰ and *Love and Another v Santam Life Insurance Ltd and Another*²¹¹ came before the Supreme Court of Appeal²¹² on the same day. The court had to decide whether the trustee of an insolvent deceased’s estate was entitled, in preference to the

²⁰⁶At 452 A/B-B.

²⁰⁷At 451D-F and 451 G-H – 452 A-B.

²⁰⁸“Since the section operates only in relation to those policy benefits envisaged by section 63(1) which are provided or to be provided to a person in terms of a policy under which that person, or his spouse is the life insured, where such benefits are provided or to be provided to some other person, the section is of no application. It is accordingly submitted that the section will not apply in relation to policy benefits which are payable, eg, to a beneficiary nominated under the policy, upon the death of the protected person where such beneficiary accepts the relevant benefits, firstly because such beneficiary is not the ‘person’ envisaged by section 63(1) and secondly, because the right to claim the benefits vests in the beneficiary and does not form part of the assets of the deceased estate”. *Meskin* para 5.3.2.1.

²⁰⁹At 451 E-H and 452 A-B.

²¹⁰2004 (1) SA 223 SECLD.

²¹¹2004 (3) SA 445 (SE).

²¹²*Pieterse v Shrosbree NO and Others; Shrosbree NO v Love and Others* 2005 (1) SA 309 (SCA).

beneficiaries, to the proceeds of the relevant insurance policies, for distribution to the deceased's creditors.

The court ruled that a contract of insurance came into existence when a proposer proposed for the insurance that was accepted by the insurer.²¹³ The person on whose death the insurance was payable was the life insured. The owner was the person who could enforce the benefits payable under the policy. The proposer, the life insured and the owner might be the same person or three different persons. The proposer effected the insurance either in his own favour, or in favour of another person. If the proposer effected the insurance in favour of someone else, the court said, it was a contract for the benefit of a third party (*stipulatio alteri*). It might be accepted by that third party who then became the owner. Usually the contract conferred no rights on the nominated beneficiary during the owner's lifetime.²¹⁴

In a *stipulatio alteri*, the court stated, the policy holder (*stipulans*) contracted with the insurer (*promittens*) that an agreed offer would be made by the insurer to a third party (the beneficiary). Acceptance of the offer by the beneficiary then created a contract between the beneficiary and the insured.²¹⁵ The original contracting parties must have the intention that the beneficiary's acceptance would confer rights that were enforceable at the instance of the beneficiary against the insurer. The beneficiary became a party to the contract by adopting the benefit.²¹⁶

When the insured died, the beneficiary's claim to the policy proceeds was based on the contract of insurance between the deceased and the insurance company. The beneficiary looked to the insurance company for payment. Section 63, the court said, did not regulate the payment of the proceeds of the policy, because the beneficiary appointment, until revoked, had the effect that the payment of the proceeds would be made to the beneficiary and not to the estate of the deceased.²¹⁷ The court ruled that section 63 applied to specific policies mentioned

²¹³At 313E.

²¹⁴At 313E-G.

²¹⁵At 313G-J.

²¹⁶At 313G-J.

²¹⁷At 313J- 314C.

in that section and the protection granted by section 63, applied to the “policy benefits” provided or to be provided under one or more of those specified types of policies or the assets acquired exclusively with those policy benefits. The protected policy benefits, were those payable to *the protected person* in terms of a *protected policy*²¹⁸ which had been in existence for at least three years.²¹⁹

The court pointed out that in the ordinary course, the proceeds of an insurance policy went directly to the nominated beneficiary. Absent section 63, on the death of the policy holder, the trustee of such person’s insolvent estate had no claim to those policy proceeds. Section 63, the court said, did not divert the proceeds of an insurance policy from a nominated beneficiary to the insolvent estate of a deceased policy holder. Such a trustee did also not, by virtue of section 63, become a creditor of the nominated beneficiary.²²⁰

Therefore both of the cases on appeal section 63 did not vest either trustee with any interest in, and to, the proceeds of the policies.

9.3.2.1.2.3 Is the Long-term Insurance Act in line with insolvency law policy?

In the debt collection process the important question is what assets are available for satisfying the debts of the creditors of a specific debtor. Policy in South African debt collection is one of collecting the maximum assets for the benefit of the creditors. This is the golden rule. But ideally, a sound policy must also be in place regarding the exclusion or exemption of certain assets from the insolvent estate for the benefit of the debtor, and this must be linked to a workable policy on rehabilitation and allowing a debtor a fresh start in the shortest possible time.²²¹ The term “property” is used in the Insolvency Act as the point of departure to ascertain what assets form part of the

²¹⁸Author’s emphasis.

²¹⁹At 314C-E.

²²⁰At 314E-G.

²²¹A policy regarding exemptions or exclusions of some assets from the estate has never been seriously considered in South African Law. The standard reference textbooks on South African insolvency law merely describe what assets are included in the insolvent estate and superficially refer to the exclusions without any attempt to holistically discuss the underlying policy considerations: see Meskin para 5.1; Smith *The Law of insolvency* (1988) at 81 and 87; Mars (1988) at 191. Mars (2008) at 192 refers to the distinction between excluded assets and exempt assets, but does not pursue the matter any further.

estate.²²² But although this definition is broadly formulated, it has now been pointed out that it has failed adequately to identify all assets that must be included or excluded in the insolvent estate. It hinges primarily on the policy of advantage to creditors, which translates into swelling the estate to the maximum, for the benefit of the creditors. But the provisions of the Long-term Insurance Act are so limited in scope that they actually fail to comply adequately with the latter policy, and they limit the exemption policy. These provisions are tilted more towards protecting policy benefits for third parties rather than considering the interests of the role players in insolvency, namely the debtor and his dependants, and the creditors.

Within the ambit of life insurance, the term “owner of a policy” is generally used. But the meaning of the term “property” is veiled in uncertainty in the context of insurance policies. In this instance a beneficiary (either the insured life or another person) has a personal right to claim either the surrender value or the insured amount after expiration of a time period or at the occurrence of a certain event (ie the death or disability of the insured life). The contractual right to claim these amounts could thus be viewed as “property”. But the beneficiary will, of course, only become the owner of the proceeds (the object of the right to property) once the insurer has paid over the relevant amount. The precise object (policy benefits) to which the beneficiary is entitled will also depend on the specific terms of the contractual arrangement in every individual case.

Theoretically therefore the insurance policy, and more specifically its value, which will usually include the surrender value or the ultimate maturing benefit (value) when the event occurs, will be available to satisfy the creditors of a particular debtor that is entitled to such insurance proceeds. Section 63 of the Long-term Insurance Act supports this principle in both the individual and the collective debt collection procedures. But this section protects a limited amount that will be excluded from the debt collection procedure in favour of the insured person, or a certain category of his or her relatives upon whom such benefits may devolve.²²³

²²²See ch 7 above.

²²³For the purposes of this discussion, the person who pays the premiums and whose life is insured or whose spouse's life is insured, will be referred to as the “owner” of the policy.

As a collective debt collecting device, and under present policies, insolvency law should dictate that the proceeds flowing from a life insurance policy should generally benefit the creditors of the person who effected it and who is paying the premiums, (ie the owner), *no matter who* should receive such proceeds. From the point of view of the policy of maximum collection of assets for the creditors advantage in insolvency, this should have been the intention of the legislature in its formulation of section 63 of the Long-term Insurance Act. As a corollary to this, and possibly due to social considerations, the legislature protects a certain amount of the policy under certain conditions, in favour of the owner, or certain close relatives who may be dependants. The protected amount can be considered property excluded by legislation, thus placing this legislation in step with the insolvency law policy of allowing the debtor to keep some of his assets in order to support himself and his family.

The ruling of the Supreme Court of Appeal, however, is that the acceptance of a benefit by a third party beneficiary excludes the policy owner's creditors from sharing in these benefits.²²⁴ A consequence hereof is that section 63 of the Long-term Insurance Act does not apply to this third party construction, thereby also excluding the debtor or his dependents²²⁵ from gaining access to the protected portion of the policy. On a literal interpretation of section 63 of the Long-term Insurance Act, this approach of the Supreme Court of Appeal is correct, but it begs the question whether it is fair to the policy owner's creditors and perhaps some of his dependants.

But for the time being the law seems to have been settled by the Supreme Court of Appeal. One must now consider the current legal position from an insolvency policy point of view. Previous insurance legislation dealt with a number of pertinent issues regarding the legal position of life insurance policies. Many of these issues were excluded from the current section 63 of the Long-term Insurance Act.²²⁶ So, for example, the 1923 Insurance Act²²⁷ seems to have been based on the premise that the benefits of life insurance policies could only be protected in favour of the

²²⁴See the discussion in para (iv) above.

²²⁵Meaning those envisaged in s 63 of the LTIA.

²²⁶See Smith "The protection of insurance policies from insolvency under section 63 of the Long-term Insurance Act 52 of 1998" (2000) SA *Merc LJ* at 94.

²²⁷Act 37 of 1923, ss 23-32.

insured person, or certain categories of persons to whom such policy had been ceded.²²⁸ These provisions generally contained specific arrangements regarding policies that were pledged, and to which protection did not apply.²²⁹ Policies of parties married in community of property to each other were specifically regulated,²³⁰ as were policies between spouses that were effected or ceded to each other.²³¹

Section 31 of the 1923 Act was of importance as it regulated the position regarding policies effected with the intent to defraud creditors. If it was proved that any policy was effected or that the premiums upon any policy were paid, with intent to defraud creditors, the court could order a sum equal to the premiums so paid, with interest thereon, to be a charge upon the policy and to be payable out of the proceeds of such a policy.

When the Insolvency Act came into force in 1936 it contained a section 28 that also dealt with the position of life insurance policies of the insolvent during sequestration, whilst the above provisions of the 1923 Insurance Act were also still in force. Hockly, at that time, the author of *Mars*,²³² attempted to discuss the effect of these two regimes. Apparently there was some overlap between the sections. The learned author explained that the different statutory regimes adopted different definitions of a life policy.²³³ The result was that where a life policy fell within the definition of one of the Acts, that Act would prevail, but where a particular policy complied with the definition of both Acts, it could have been governed by both. But where the provisions of the 1923 Insurance Act were in conflict with the provisions of section 28 of the Insolvency Act, the former Act apparently was to be interpreted to have been impliedly repealed by the latter Act.²³⁴ It seems as if the interpretation of these two systems was not clear at all, therefore Hockly²³⁵ concluded that “[e]xactly what the combined effect of the two Acts in some respects is, seems largely a matter of conjecture”. This whole

²²⁸See s 23 of the 1923 Insurance Act. It seems as if the protection was limited, but the benefit in favour of a third party construction was not specifically mentioned in this section.

²²⁹S 23(b).

²³⁰See ss 24(a), 25-27 and 28(2).

²³¹Ss 25-28.

²³²*Mars: The law of insolvency In South Africa* (3rd ed) (1936) at 175 (hereafter Hockly).

²³³Hockly at 177.

²³⁴Hockly above at 177.

²³⁵See also a similar remark in Hockly at 180.

dispensation, the 1923 Insurance Act as well as section 28 of the Insolvency Act, was subsequently replaced by the Insurance Act of 1943.²³⁶

The term “life insurance policy” was extensively defined in section 1 of the 1943 Insurance Act, but it basically referred to the payment of a certain sum of money upon, for instance, the death of the insured person. Certain life insurance policies were to a certain extent protected against the creditors upon the death or insolvency of a debtor. In brief, the 1943 Act initially provided for the three situations discussed above.²³⁷

All these provisions of the 1943 Insurance Act were replaced with the Long-term Insurance Act.²³⁸ Section 63 now has a limited scope of application compared to the previous Act. There is no similar provision to section 31 of the 1923 Act, nor section 47 of the 1943 Insurance Act, which makes provision for the repayment of premiums by a beneficiary to the insolvent estate under certain circumstances.²³⁹ Smith,²⁴⁰ in comparing the dispensation under the 1943 Insurance Act and the Long-term Insurance Act, says that sections 39 and 41 to 44 of the 1943 Act “were detailed (in some ways but not others), complicated, and in some respects, puzzling”.²⁴¹ After an in-depth comparison²⁴² between the 1943 Insurance Act and the current dispensation, in which he illustrates a number of problems that might arise due the brevity of section 63, and Smith concludes that

... the uncertainties widen when one begins to consider the position where the policy holder is married and cession of the policy benefits has taken place between the

²³⁶Act 27 of 1943.

²³⁷In para 9.3.1 above.

²³⁸The Long-term Insurance Act came into operation on 1999-01-01, see *Proc R* 128 of 1998 in *GG* 19596 of 1998-12-18.

²³⁹For instance when a premium on any life insurance policy was paid with the intent to favour another person at the expense of a creditor.

²⁴⁰Smith A “The protection of Insurance policies from insolvency under section 63 of the Long-Term Insurance Act 52 of 1998” (2000) 12 *SA Merc LJ* at 94.

²⁴¹Smith A “The protection of Insurance policies from insolvency under section 63 of the Long-Term Insurance Act 52 of 1998” (2000) *SA Merc LJ* at 95. In this regard the author refers to the older article by Douglas “The protection of life assurance policies” (1988) *Modern Business Law* at 71 where Douglas gives a detailed analysis of the difficulties of the provisions in the 1943 Act. Whilst attempting to provide a framework for these earlier provisions, Douglas states that these provisions were “riddled with gaps and inconsistencies which are poorly understood by lawyers and insurance men alike, no doubt because the sections constitute some of the most convoluted and logically inconsistent legislation on the statute book”.

²⁴²At 108.

spouses ... In its terseness, generality, and equality of reference to married persons, section 63 will require much careful thought about aspects on which the section is silent as regards the detail of its precise application.

The proposed Draft Insolvency Bill is silent about the protection of life insurance policies in favour of either the creditors or the insolvent,²⁴³ but it contains a new type of provision in clause 22, which will be considered in chapter 12 below.

Insurance law and insolvency law trespassing on each other's terrain regarding life insurance policies of insolvent debtors – particularly the insolvency of the life insured, has given rise to legal uncertainty and litigation, and consequently, a number of legal questions. This legislation must be reconsidered and improved in future developments in insolvency legislation. A proposal that should be considered, and that will be discussed in more detail in chapter 12 below, is the idea of including insurance policy income in the general pool of income of the debtor, thereby applying the formula suggested for income to insurance policies as well.

9.4 Other legislative and common law provisions

The following categories of property relate to assets that may in some way be connected to the insolvent estate, but, in fact, belong to third parties, or they may be assets that accrue to the insolvent through social security-type legislation. These assets must be considered to be excluded assets because they are not the property of the insolvent debtor, or they are expressly excluded by legislation, and therefore cannot form part of the insolvent estate. The exclusion of these assets thus hinges on the policy that property belonging to others cannot form part of the insolvent estate,²⁴⁴ or they are of a social security nature. These categories of property are generally not considered problem areas in insolvent estates and will therefore be mentioned only briefly. The main concern here is to decide whether to continue the policy of excluding property of this nature from insolvent estates of individuals.

²⁴³See ch 12 below.

²⁴⁴This policy is recognised in ss 23(1) and 24 of the Insolvency Act and the other legislation discussed in the paragraphs which follow.

9.4.1 Insurance payments in respect of third party liability

If an insurer has an obligation to indemnify an insured person in respect of a liability incurred by the insured person towards a third party, such third party is, on the sequestration of the estate of the insured, entitled to recover from the insurer the amount of the insured's liability towards the third party. This amount may not exceed the maximum amount for which the insurer has bound himself to indemnify the insured.²⁴⁵ The indemnified amount is therefore excluded from the insured's insolvent estate and the third party can recover that amount directly from the insurer.²⁴⁶

This provision places the third party in a preferred position *vis-à-vis* other concurrent creditors. In this respect it was stated in *Woodlley v Guardian Assurance Co of SA Ltd*²⁴⁷ that:

... the claimant, instead of having to prefer his claim against the estate and be content with a dividend at such rate as the trustee (after recovering what is due to the estate by the insurer) is able to pay to unsecured creditors, is placed in a more favourable position. He can recover directly from the insurer. The amount which he can recover cannot exceed the limit fixed by the policy. But subject to that, he recovers in full, even if other unsecured creditors have to be content with a few cents in the rand.

This provision effectively excludes the insured's liability from the insolvent estate, treating this property as property that belongs to someone other than the insolvent debtor. It is submitted that this is a reasonable ground for excluding such property because the third party in question is not a creditor of the insolvent debtor and involuntarily enters the position he is in.

9.4.2 Trust funds

The law is well established that trust property vests in the trustees of a trust,²⁴⁸ but the trust assets are excluded from the personal estate of an insolvent trustee of the

²⁴⁵Insolvency Act 24 of 1936 s 156.

²⁴⁶See Smith CH *Law of insolvency* at 96, Meskin at 5.3.2.2; Mars (2008) at 194; Where the insured is a company or a close corporation being wound up and unable to pay its debts, s 156 also applies. Companies Act 61 of 1973 s 339 and Close Corporations Act 69 of 1984 s 66(1) read with s 339 of the Companies Act 61 of 1973.

²⁴⁷1976 (1) SA 758 (W) at 759; *Przybylak v Santan Insurance Ltd* 1992 (1) SA 588 (C) at 601-602; see also *Supermarket Leaseback (Elsburg) (Pty) Ltd v Santam Insurance Ltd* 1991 (1) SA 410 (AD).

²⁴⁸*Commissioner for Inland Revenue v Mac Neillie's Estate* 196 (1) 3 SA 833 (A) at 840 G-H; *Burnett NO v Kohlberg* 1984 (2) SA 137 (E) at 141 D-E; Mars (2008) at 197.

trust in question.²⁴⁹ This exclusion is also based on the policy that property of third parties does not form part of the insolvent estate.²⁵⁰

However, one must distinguish between funds or assets held by an insolvent as trustee in terms of a duly constituted trust and funds held as an agent on account of another person. An agent cannot change his status to that of a trustee through some unilateral act, because a trust *inter vivos* can only be established by contract.²⁵¹ So if an agent holds money on behalf of another, it normally falls into the agent's insolvent estate. Consequently, legislative provisions are needed for the protection of money held by certain classes of persons on behalf of others. Some examples of such legislation, which will be discussed below, are the Attorneys Act²⁵² and the Estate Agents Act.²⁵³ In these legislated cases, therefore, the legal position is clear.

However, there was uncertainty on the position of trust assets falling outside these specific provisions. Honoré²⁵⁴ stated that a trust asset should fall outside the trustee's insolvent estate, where the trust asset was identified as such. It must not have been mixed with the trustee's other assets. Section 11 of the Trust Property Control Act required identification of property as trust property. However, section 12 of this Act was not linked to such identification. Section 12 provides that: "Trust property shall not form part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to the trust property". So trust beneficiaries were apparently protected by section 12, irrespective of whether the property was identified in terms of section 11 or not. Honoré and Cameron²⁵⁵ seemed to accept this conclusion, but they doubted whether it also applied to *immovable* property. However, while section 12 protection should perhaps have been linked to section 11

²⁴⁹S 12 Trust Property Control Act 57 of 1988 which applies only to trusts created by means of a written document. See also Mars (2008) at 196.

²⁵⁰See Wunsh "Trading and business trusts" (1986) SALJ 561 at 579 and *Burnett NO v Kohlberg and Others* 1984 (2) SA 137 (E) at 141-142 for different views.

²⁵¹Mars (1988) at 197; *Crooks v Watson NO* 1956 (1) SA 277 (A) at 298 G-H.

²⁵²53 of 1979. See *Geyser NO v Fuhri* 1980 (1) SA 598 (N).

²⁵³112 of 1976. See also s 4(5) of the Financial Institutions (Protection of Funds) Act 28 of 2001; s 14 of the Stock Exchanges Control Act 1 of 1985; s 22 of the Sheriffs Act 90 of 1986; s 3 of the Reinsurance of Damage and Losses Act 56 of 1989 and ss 17A and 17B of the Financial Markets Control Act 55 of 1989.

²⁵⁴*The South African Law of Trusts* (3rd ed) at 14-15, 226 and 432-444.

²⁵⁵*Honoré's South African law of trusts* (5th ed) (1992) at 558-565 .

identification compliance, the distinction between movable and immovable property in the application of section 12 seemed baseless.

The Act²⁵⁶ applies only to trusts created by a “trust instrument”. A “trust instrument” is defined as “a written agreement or a testamentary writing or a court order according to which a trust was created”.²⁵⁷ An *oral* trust therefore, is apparently not included in section 12. So here uncertainty prevails if no legislative provision expressly governs a specific case. It would appear that such trust property may fall in the trustee’s insolvent estate, unless it was transferred by way of registration, and is registered in the name of the trustee in his capacity as trustee. For movable property, the asset must not have been mixed with the trustees personal property.²⁵⁸ If an oral trust agreement is reduced to writing afterwards, the trust will fall under the Trust Property Control Act.²⁵⁹

The maxim *generalia specialibus non derogant* probably excludes the application of section 12 if a specific other Act applies in a particular case. So, if the latter is accepted, trust property governed by a specific Act, for example the Attorneys Act, but which is not protected because it does not comply with the identification requirement in section 79 thereof, may not be protected by section 12 of the Trust Property Control Act. But this position needs to be clarified to avoid future uncertainty.

9.4.3 Trust monies and trust property held by an attorney, notary or conveyancer

In terms of the Attorneys Act²⁶⁰ every practising attorney, notary and conveyancer must open and keep a separate trust account at a bank in the Republic of South Africa and all monies held by him on behalf of another person must be deposited in such account.²⁶¹ Any amount standing to the credit of such account or of any savings

²⁵⁶57 of 1988.

²⁵⁷S 1 Act 57 of 1988.

²⁵⁸See *Ex parte Milton NO 1959 (3) SA 347 (R) 349-350* and s 40 of the Administration of Estates Act 66 of 1965.

²⁵⁹S 2 Act 57 of 1988.

²⁶⁰53 of 1979.

²⁶¹Attorneys Act 53 of 1979 s 78(1).

or other interest-bearing account to which trust monies have been deposited, is excluded from forming part of the assets of the attorney, except for any excess in the account after payment of the claims of all persons whose monies were deposited in the account and of any claim by the fidelity guarantee fund.²⁶² A *curator bonis* controls and administers any such account if one is appointed by the Master on application of the applicable Law Society or any person who has an interest in such account.²⁶³ The rights of trust creditors of an attorney to recover in the ordinary way what is owing to them from the insolvent estate, namely by proving claims against it for the full amount, are not hampered by the provisions of this section of the Attorneys Act.²⁶⁴ Thus, the effect of this exclusion is:²⁶⁵

... that there is a fund which is available for distribution amongst trust creditors but which does not form part of the insolvent estate, which is beyond the reach and control of the trustee and which accordingly is not available for distribution among the general body of creditors.

Trust property registered in the name of any such practitioner, or jointly in his name and that of any person, in the capacity of administrator, trustee, curator or agent, is excluded from such practitioner's or other persons assets.²⁶⁶

9.4.4 Estate agent's trust account

When an estate agent is sequestrated, the amount at the date of sequestration that is in credit in his trust account is excluded from his insolvent estate. Also excluded is any amount standing to the credit of any savings or other interest-bearing account to which trust monies have been deposited.²⁶⁷

²⁶²Attorneys Act 53 of 1979 s 78(7).

²⁶³Attorneys Act 53 of 1979 s 78(9)(a).

²⁶⁴*Fuhri v Geyser NO and Another* 1979 (1) SA 747 (N). The existence of the trust account does not preclude a trust creditor from proving his claim against the insolvent estate of the attorney, but he may not recover from the estate any part of his claim which is paid to him by the *curator bonis* – see *Geyser NO v Fuhri* 1980 (1) SA 598 (N) at 601-602.

²⁶⁵*Fuhri v Geyser NO and Another* 1979 (1) SA 747 (N) at 750: confirmed on appeal in *Geyser NO v Fuhri* 1980 (1) SA 598 (N); see also *Ex Parte Law Society Transvaal: In re Hoppe and Visser* 1987 (2) SA 773 (T) at 780.

²⁶⁶Attorneys Act 53 of 1979 s 79; see also See *Mars* (1988) at 197; Smith CH *Law of insolvency* at 98 and Meskin at 5.3.4.

²⁶⁷S 32 (8) of the Estate Agents Act 112 of 1976.

9.4.5 The right of a spouse to share in accrual of the other spouse's estate

The Matrimonial Property Act²⁶⁸ provides that a marriage out of community of property by antenuptial contract that excludes community of property and community of profit and loss, entered into since 1 November 1984 is subject to the accrual system referred to in Chapter I of that Act, unless the accrual system has been expressly excluded by such contract.²⁶⁹ The Matrimonial Property Act provides that subject to any order of court under section 8 (1) thereof, “the right of a spouse to share ... in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse”.²⁷⁰

Thus, if the marriage is subject to the accrual system, the claim of a spouse to share in the accrual of the other spouse's estate arises and is acquired only on the date of the dissolution of the marriage and its value, if any, is determinable on that date. However, there appears to be a difference of opinion regarding the correct interpretation of section 3(2) of this Act. Meskin's opinion is that, giving the language used in the section its ordinary meaning, one cannot justify treating the words “during the subsistence of the marriage” as not qualifying also the words “and does not form part of the insolvent estate of a spouse”. Thus, Meskin says:

... the intention is that a spouse's “right to share in the accrual”, which in fact is merely a *spes* (since it evolves into an enforceable right only on dissolution of the marriage) is to be excluded from such spouse's insolvent estate only during the subsistence of the marriage. The legislature recognizes that there is no purpose in requiring administration in insolvency of a *spes* where it is uncertain not only when it will evolve into an enforceable right, but also whether, at the date it does, such right will have any value.

Therefore, if a spouse's estate is sequestrated during the subsistence of the marriage, such spouse's “right to share ... in the accrual of the estate of the other spouse” is excluded from the former's insolvent estate. Should the marriage, however, terminate during the period of sequestration, but prior to the rehabilitation of such estate, section 20 of the Insolvency Act would become operative, and the

²⁶⁸88 of 1984.

²⁶⁹S 2 Matrimonial Property Act 88 of 1984.

²⁷⁰S 3 (2) Matrimonial Property Act 88 of 1984.

resulting “claim” becomes part of such estate and vests in the trustee of the estate of the insolvent spouse.²⁷¹

9.4.6 Workmen’s compensation

The Workmen’s Compensation Act²⁷² has been repealed by the Compensation for Occupational Injuries and Diseases Act.²⁷³ This Act provides that “notwithstanding anything to the contrary in any other law contained, compensation shall not be capable of attachment or any form of execution under a judgment or order of a court of law”.²⁷⁴ This clearly also refers to any form of attachment or execution brought about by insolvency legislation,²⁷⁵ so this form of compensation must be considered excluded property that never forms part of an insolvent estate. Compensation of this nature is either taxation-based, or employer-based, so it may be argued that its exclusion is justified because creditors of the insolvent workman should not benefit from the proceeds of the general society. It is submitted that compensation of this nature is akin to a legislated welfare burden that is carried by the state or the employer and therefore indirectly by the citizens of the country.

Catherine Smith is of the opinion that this form of compensation is excluded because it is considered compensation for personal injury under section 23(8) of the Insolvency Act.²⁷⁶ However, it is submitted that this is strictly a legislative exclusion, while section 23(8) provides for other forms of personal injury that may not be specifically regulated or protected by legislation outside the Insolvency Act. But whatever the rationale behind legislation of this “welfare” nature, a policy-based decision must be taken whether or not to include all or only a portion of such compensation as part of an insolvent estate of the compensated workman. While it may be possible to include this compensation in the pool of assets that may be considered income of the insolvent person, thereby including it in the above formula²⁷⁷ for possible distribution amongst his creditors, it is submitted that it will not

²⁷¹Insolvency Act 24 of 1936 – s 20(1)(a) read with s 20(2)(b); Meskin at 5.3.6; Mars (2008) at 198.
²⁷²30 of 1941.

²⁷³130 of 1993.

²⁷⁴S 32(1)(b).

²⁷⁵See also Meskin at 5.3.8.

²⁷⁶Smith *Insolvency law* at 97.

²⁷⁷See para 9.2.3 above and ch 12 below.

be prudent to do so because of the possible nature of compensation of this kind. In respect of any compensation relating to personal injury, such compensation may be in the nature of payment towards future medical care over a lengthy period of time, such as providing for artificial limbs or specific medication for the remainder of the victim's life. While compensation may, of course, also be of a monetary nature, this situation will lead to much uncertainty and probably litigation if such assets must be included in insolvent estates under certain circumstances only. By excluding such assets from insolvent estates entirely, the administration process in such estates will be simplified and the debate whether "public funding" should be at the disposal of creditors is nipped in the bud.

9.4.7 Unemployment insurance benefits

Employee unemployment benefits are governed by the Unemployment Insurance Act.²⁷⁸ These benefits cannot be assigned or set off against debts and they cannot be attached by a court order other than for an order relating to maintenance of dependants.²⁷⁹ It would also appear that they will be excluded from the insolvent estate of the employee concerned.²⁸⁰

It is submitted that the rationale behind this legislation is essentially the same as that discussed in the previous paragraph in respect of taxation or welfare-based assets. However, in this respect the benefits payable to the insolvent debtor will be akin to income and a policy decision will therefore have to be taken in deciding whether or not to pool this asset with all other income in accordance with the proposed formula.²⁸¹ While very few debtors will probably be affected by this legislation, it is nonetheless important to formulate a policy in respect of this category of legislated property and the inclusion, exclusion or exemption thereof from the insolvent estate must be governed primarily by the Insolvency Act.

²⁷⁸63 of 2001.

²⁷⁹S 33.

²⁸⁰Mars (2008) at 193.

²⁸¹See para 9.2.3 above and ch 12 below.

9.4.8 Exclusions in terms of the Land and Agricultural Development Bank Act²⁸²

The Land and Agricultural Development Bank Act (hereafter the Land Bank Act) grants the Land and Agricultural Development Bank (hereafter the Land Bank) certain rights to property in insolvent estates in respect of which it has an interest. This is confirmed by section 90 of the Insolvency Act.

The Land Bank Act regulates certain actions that the Land Bank must take against its defaulting debtors.²⁸³ Under certain circumstances, and through a prescribed court procedure, the Land Bank can attach and sell a defaulting debtor's property and thereby satisfy the debt owed to it by its debtor. This process circumvents the ordinary debt collection procedures.²⁸⁴ Further, even if property over which the Land Bank has an interest is vested in the trustee of an insolvent estate, the Land Bank can apply to court for an attachment order to sell that property. So the Land Bank may opt to act in terms of Land Bank Act if it wishes to do so, thereby effectively, it is submitted, creating a category of excluded property after the property has vested in the insolvent estate, by "extracting" that property from the insolvent estate of its defaulting debtor.

The Land Bank Act also prevents the trustee of an insolvent estate from selling a debtor's property which is mortgaged by the Land Bank as security for its loan to the debtor, unless the Land Bank has granted written permission to sell the property, or if the bank has failed to sell the property within three months after notification from the trustee asking the bank to dispose of that property.²⁸⁵

It would appear that the Land Bank Act grants the Land Bank considerable powers in its position as a creditor in an insolvent estate. The Act effectively has the power to

²⁸²15 of 2002 (hereafter LADBA). This Act repealed and replaced the Land Bank Act 13 of 1944. For a comprehensive discussion of this topic see Kelly-Louw M "Investigating the statutory preferential rights the Land Bank requires to fulfil its developmental role" (part 1) (2004) *SA Merc LJ* at 211; Kelly-Louw M "Investigating the statutory preferential rights the Land Bank requires to fulfil its developmental role" (part 2) (2004) *SA Merc LJ* at 378; Kelly-Louw M "The Land Bank's decision whether or not to join in the insolvency proceedings" (2004) *Speculum Juris* at 281 and Kelly-Louw M "Defending the constitutionality of the Land Bank's exclusion from the insolvency legislation" (2005) *Speculum Juris* at 164.

²⁸³See s 33(2) of LADBA.

²⁸⁴S 33(4) of LADBA.

²⁸⁵See s 33(11) of LADBA.

class property as included or excluded property of an insolvent estate. Depending on the moment at which the Land Bank decides to invoke its rights, it can also have an adverse effect on the other existing creditors of the insolvent estate by effectively depleting the insolvent estate of the debtor. This begs the question whether there may be an extra duty on the trustee of the insolvent estate to assess the possibility of the Land Bank altering the content of the insolvent estate, and thereby affecting the benefits of the other creditors. This negates the notion of a *concursum creditorum*. The actions of the Land Bank may also result in the possibility that the sequestration of the debtor may not be to the advantage of creditors, but this may become apparent only after the sequestration order has been granted, with the consequence that the golden rule and all encompassing policy of advantage to creditors has effectively been sidelined.

One is further tempted to compare the rights of the Land Bank as a creditor in the insolvent estate with the rights of a child or other dependent person living in the home of the debtor whose estate has been sequestrated. In a sense a dependant can be compared to a creditor of the insolvent debtor. In fact, a parent has a legal duty to support his dependants. If the Land Bank can “extract” property from the insolvent estate, why cant a child extract “a right to a home” or a right to a sum of money from the insolvent estate of a parent. Are the rights of a child lesser rights than those of a creditor? This question will be considered further in chapters 11 and 12.

9.4.9 Contingent interests of a fideicommissary heir

It has previously been mentioned that “property”, as defined by the Act, bears a wide meaning²⁸⁶ in that it includes movable or immovable property wherever situated within the Republic of South Africa, including contingent interests in property other than the contingent interests of a *fideicommissary* heir or legatee.²⁸⁷ The term “contingent interest” is used to distinguish it from a “vested interest”. The contingent interest is something that may mature into a vested interest on the happening of an event. It must, however, be such that the happening of the event, on its own, gives the vested

²⁸⁶*Meyer v Transvaalse Lewendehawe Koöperasie Bpk* 1982 (4) SA 746 (A) at 767.

²⁸⁷S 2 Insolvency Act 24 of 1936.

interest.²⁸⁸ Thus, although the contingent interests of a *fideicommissary* heir do not form part of the assets of the insolvent estate, once all the investitive facts that are necessary to perfect such an interest have occurred, the interest becomes property which vests in the trustee. An interest that is contingent at the commencement of the insolvency can therefore ripen during the administration of the insolvent estate into a vested interest that will be included in such estate.²⁸⁹

It is clear that this property must then be considered as excluded property falling within the policy that property belonging to third parties cannot form part of an insolvent estate.

9.4.10 Assets acquired with monies received by the insolvent

A consequence of the provisions mentioned above which provide for the exclusion or exemption of property from the insolvent estate is that it is possible for an insolvent to acquire an estate that he holds with a title adverse to the trustee of his insolvent estate.²⁹⁰ Thus, prior to his rehabilitation, an insolvent can acquire an estate separate from that of his insolvent estate²⁹¹ which, in turn, can be sequestered or surrendered.²⁹² In this respect the following was said in *Miller v Janks*:²⁹³

... where an insolvent engages himself in an occupation for the support of himself and his dependants, he brings into existence a new proprietary entity which is an estate distinct from that already sequestered; it is none the less an estate because at one time it has only assets, at another time only liabilities and at another time both assets and liabilities.

This separate estate may, for example, be established by such specific provisions as those of the Long-term Insurance Act²⁹⁴ which protect, to a maximum of R50 000, assets acquired with the proceeds of certain policies. Also assets acquired by the insolvent with other monies protected by legislation will form part of the insolvent's separate estate and do not vest in the trustee of the insolvent estate. Smith points out that it would be absurd to allow the insolvent to retain, against his trustee,

²⁸⁸*Stern and Ruskin v Appleson* 1951 (3) SA 800 (W) at 805; *Wasserman v Sackstein* 1980 (2) SA 536 (O).

²⁸⁹Mars (1988) at 197; Smith CH *Law of insolvency* at 96 and Meskin at 5.1.

²⁹⁰*Miller v Janks* 1944 TPD 127.

²⁹¹*Ex Parte Fowler* 1937 TPD 353 at 358; *Marais v Marais* 1923 WLD 37; Smith CH *Law of insolvency* at 100.

²⁹²*Ex Parte Foxcroft* 1923 OPD 234.

²⁹³1944 TPD 127 at 132.

²⁹⁴See s 63 Long-term Insurance Act 52 of 1998.

monies recoverable by him, but that he is precluded from purchasing land therewith or investing such monies in any other manner.²⁹⁵

There is uncertainty regarding property purchased by the insolvent with his earnings.²⁹⁶ Until the Master has made an assessment regarding such part of the insolvent's earnings that are unnecessary for the support of the insolvent and his dependants, such earnings vest in the insolvent. If the Master does make an assessment, such assessed earnings then vest in the trustee.²⁹⁷

This issue brings one back to the policy that must be decided upon and formulated in respect of the idea of giving the debtor a fresh start when he is rehabilitated. It has been expressed elsewhere that the policy on exclusions and exemptions is inextricably linked to a policy on rehabilitation, and this policy must include the idea of allowing a debtor a fresh start, which can be achieved only by utilising excluded and exempt assets. Therefore, it is important to attain absolute clarity on a policy for exemption law so that the policy on rehabilitation will fall into place next to it and will consequently be functional as legislation. Once it has been decided what property must be included in the insolvent estate and what must be excluded or exempted from it, the content of the insolvent estate will be certain and the property included therein will be there for the benefit of the creditors. However, excluded and exempt property will belong to the debtor, and it is only logical that anything acquired by means of that property that does not belong to the insolvent estate must likewise be excluded from that estate. To hold otherwise will be interfering with the rights of third parties who may have an interest in that separate new estate.

9.5 Conclusion

To establish and maintain a workable and worthwhile policy on excluded and exempt property in insolvent estates, it is submitted that the strict and unbending policy on advantage to creditors will require some adjustment. But the proposals of the South African Law Commission apparently will not entertain this idea. In this

²⁹⁵Smith CH *Law of insolvency* at 99.

²⁹⁶Smith CH *Law of insolvency* at 99.

²⁹⁷S 23(5) and (9) Insolvency Act 24 of 1936.

respect Roestoff²⁹⁸ says that:

In die algemeen kan gekonstateer word dat die voorstelle van die regs kommissie in verband met uitgeslote bates redelik konserwatief vanuit die oogpunt van die skuldenaar is en hom bloot in staat stel om 'n basiese minimum lewensstandaard te handhaaf.²⁹⁹ Die voorstel dat 'n voertuig as primêre middel van vervoer van die insolvente boedel uitgesluit word, is deur die meerderheid skuldeisers verwerp.³⁰⁰ Verder is ook nie aan die moontlikheid om vir 'n uitsluiting met betrekking tot die woonhuis van die skuldenaar voorsiening te maak, oorweging geskenk nie. In die algemeen is die verslag van die regs kommissie met betrekking tot uitgeslote bates myns insiens 'n weerspieëling van die pro-skuldeiser-benadering van die Suid-Afrikaanse gemeenskap.

The South African Insolvency Act provides for excluded and exempt property in insolvent estates. This is supplemented by other legislation that also extends to insolvency law. The South African system recognises various categories of excluded and exempt property also found in other jurisdictions, but the South African system seems devoid of consistency of policy on exemption law, and there appears to be no desire to rectify the situation.³⁰¹ The legislature and other stakeholders have failed to formulate a progressive exemption policy. This is a consequence of South African insolvency law policy being unevenly balanced to favour the creditors, particularly secured creditors. Advantage to creditors is the golden rule in South African insolvency law and is the primary reason for this. In practice, if advantage to creditors in an insolvency application is not shown, a court will refuse to grant the sequestration order applied for. So “poor debtors” are at a disadvantage because they cannot shed their debt burden.

Exemption policy must commence by first identifying excluded property, which is beyond the creditors' reach, as well as property included in the insolvent estate that may be available for exemption purposes. Policy in this field must then develop around policy issues relating to the rationale behind collective debt collection. The

²⁹⁸Roestoff *Thesis* at 370 – generally one can accept that the proposals of the [South African] law commission regarding exempt assets are viewed rather conservatively from the debtor's point of view, allowing him to maintain only a basic minimum standard of living. (*Cf* the explanatory Memorandum at 61). The proposed exemption of a motor vehicle as a primary method of transport was rejected by the majority of creditors. (*Cf* the explanatory Memorandum at 61 and further). Further, no consideration was given to a provision for the exclusion of a dwelling of the debtor. Generally, the report of the law commission regarding excluded assets is a reflection of the pro-creditor approach of the South African community (author's translation).

²⁹⁹*Cf* memorandum 61.

³⁰⁰*Cf* memorandum 61 ev.

³⁰¹See ch 12 below and the proposals in ch 13 below.

overly strict policy of advantage to creditors hamstrings the formulation of a progressive exemption policy. Furthermore, different legislation from other fields of law that overlap with insolvency has affected existing exemption policy by failing to consider the impact that such legislation has on insolvency law policy that is already in place.³⁰²

A problem in South African insolvency legislation is the definition of “property”.³⁰³ It defines the content of the estate and the meaning of property, in the broadest of terms, but excluded property is not identified as part of the definition. Consequently, lack of clarity prevails regarding the whole specter of property in insolvent estates. This results in litigation, which, if unsuccessful, may shrink the estate in place of swelling it.

Because the South African Insolvency Act and other legislation do not expressly distinguish between excluded and exempt property, the courts have had to rule on this question in the past, and will do so in future, if required. So, for example, the problems surrounding the income of the debtor and the status of assets acquired with it has not yet been properly resolved. The many other problem areas in this respect have been identified and analysed in this chapter. But this illustrates the importance of finding clarity on the assets of the estate and the exemption law in future legislation. To achieve this aim, however, a progressive and consistent policy in step with the spirit of the Constitution must be formulated as a coat hanger for exemption legislation. Further suggestions concerning this topic will be proposed in chapters 12 and 13.

³⁰²See, eg, Long-term Insurance Act 52 of 1998 s 63.

³⁰³See s 2 of the Act.

Chapter 10: The effect of sequestration on the property of the spouse of the insolvent

10.1 Introduction

When the estate of a spouse (or spouses) is sequestrated in South Africa, the property of the other spouse(s), without exception, is affected.¹ Whether parties are married out of community of property or in community of property, sequestration of the estate of one spouse will affect the property in the estate of the other spouse as well. The effect of insolvency on both these marital regimes and on the property of all the parties involved, and the problems that have arisen regarding assets in both the solvent and insolvent estates of “married” individuals in South African law will be considered in this chapter.

Where parties are married out of community and the estate of one of the spouses is sequestrated, the property of the “spouse” of that person is also affected because section 21 of the Insolvency Act provides that an additional effect of the sequestration of a person who is married to a spouse whose estate has not been sequestrated² is to vest the solvent spouse’s property in the trustee of the insolvent spouse’s estate.³ So assets that ostensibly belong to a spouse may end up as property belonging to the insolvent estate of the insolvent spouse. In fact, the Insolvency Act and other legislation is geared towards achieving this result in its attempt to collect the maximum assets for the insolvent estate, thereby enforcing the insolvency law policy of advantage to creditors. The potential therefore exists that property ostensibly belonging to the solvent spouse may swell the insolvent estate for the benefit of the creditors of the insolvent spouse. Aspects of this policy of attacking the property of the solvent spouse have however been challenged, successfully and unsuccessfully, on many fronts, thereby creating several problem areas in respect of assets in the insolvent estates of individuals. So, although section 21 primarily regulates the position of the solvent spouse, for the purpose

¹Unless otherwise mentioned, for the sake of convenience it will be assumed in this chapter that the husband is the insolvent spouse and the wife the solvent spouse.

²Hereafter referred to as the “solvent spouse”.

³S 21(1).

of this thesis it is considered a problem area in respect of assets in insolvent estates of individuals, because it directly affects either the swelling or the depletion of a spouse's insolvent estate. Section 21 therefore requires scrupulous analysis.

However, the first important distinction in South African law that must be made when considering the effect of sequestration on an insolvent's spouse is the marital system into which the spouses have entered. If it is a marriage in community of property, there is, in principle, only one joint estate that is already under sequestration. Thus, in the case of the sequestration of a joint estate, both spouses acquire the status of an insolvent and section 21 cannot apply since that section relates only to solvent spouses. Where the marriage is one that is out of community of property, one is essentially dealing with two separate estates and in the event of the insolvency of one of the spouses, section 21 of the Insolvency Act will apply to the solvent spouse.⁴ However, as will be discussed below,⁵ section 21 is not applicable only to spouses who have formally entered into a marriage, but also to various other categories of "spouses" living together as "husband and wife". A consequence of the provisions of section 21 is that it vests the assets of the solvent spouse firmly within the hands of the trustee of the insolvent spouse where, depending on the circumstances, they may or may not remain. This vesting results in a transfer of the *dominium* of the property, albeit temporarily, to the trustee.⁶ Thus, assets that ostensibly belong to the solvent spouse may be claimed by the trustee (or provisional trustee)⁷ of the insolvent spouse for distribution among his creditors, thereby treating such assets as part of the insolvent estate. With the solvent spouse's assets being potential assets of the insolvent estate of another individual, it is therefore necessary, within the context of this thesis, to

⁴*Acar v Pierce* 1986 (2) SA 827 (W). In marriages in community of property there is in fact only one estate, therefore s 21 of the Insolvency Act cannot apply. S 21 will also not apply in a marriage in community of property in respect of property of the wife which has been excluded from the joint estate, because the wife is also an insolvent; see in this respect *De Wet NO v Jurgens* 1970 (3) SA 38 (AD) at 48; *Badenhorst v Bekker NO en Andere* 1994 (2) SA 155 (N) at 160-161; *Du Plessis v Pienaar NO & Others* 2003 (1) SA 671 (SCA) and Meskin PM *Insolvency law and its operation in winding-up* Service Issue 17 (of 2001) (1990) 5.30.1 (hereafter Meskin); Bertelsmann E, Evans RG, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L and Steyn L *Mars The law of insolvency in South Africa* (ed C Nagel) (2008) at 207 and further (hereafter Mars (2008)).

⁵See para 10.1.4 below.

⁶*De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A); *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

⁷S 2 of the Insolvency Act – definition of "trustee".

consider the consequences of sequestration on the assets of the solvent spouse where parties are married out of community of property or simply living together as man and wife. Thereafter, the situation that pertains to persons who are married in community of property will be considered. Both these marital systems provide for problem areas in respect of the property of the insolvent estates in question.

10.1.2 Marriages out of community of property

Before the amendment of the Insolvency Act 32 of 1916 by the Amendment Act of 1926,⁸ debtors often attempted to avoid payment of their debts by transferring their assets to a spouse, thereby defrauding their creditors and benefiting themselves. In marriages out of community of property, or in cases where two people were merely living together as man and wife, transferring assets in the face of insolvency by means of simulated transactions could be tempting. Proof of simulation then rested on the trustee. This was a heavy onus, because proprietary rights of assets of spouses are normally matters falling within their particular personal knowledge.⁹ In the past then it was sometimes impossible for the trustee to separate the property of one spouse from that of the other. In *Maudsley's Trustees v Maudsley*¹⁰ Greenberg JP described the problem as follows:

One knows that before the amendment of the law in 1926, it was common practice for traders (and perhaps others) to seek to avoid payment of their debts by putting property in their wives' names; on insolvency the burden rested on the trustee to attack the wife's title.

Section 21 ended this practice and simultaneously altered the common law. Section 21 burdens the solvent spouse with the onus of showing that the property belonged to her.¹¹

⁸No 29 of 1926.

⁹Smith CH *The law of insolvency* (3rd ed) (1988) at 108 (hereafter Smith *The law of insolvency*); See generally De la Rey EM *Mars The law of insolvency in South Africa* (8th ed) (1988) at 165 and further (hereafter Mars (1988)); Meskin at 5.30 and further (hereafter Meskin); Mars (2008) at 207 and further.

¹⁰1940 TPD 399 at 404.

¹¹De Wet en Van Wyk *De Wet en Yeats Die Suid-Afrikaanse kontraktereg en handelsreg* (4th ed) (1978) at 455; Smith CH *The Law of insolvency* at 108; Joubert "Skenkings tussen man en vrou, simulatie en artikel 21 van die Insolvensiewet 24 van 1936" (1992) *TSAR* at 345; Joubert N "Artikel 21 van die Insolvensiewet: Tyd vir 'n nuwe benadering?" (1992) *TSAR* at 699; *Coetzer v Coetzer* 1975 (3) SA 931 (EC); *Snyman v Rheeder* 1989 (4) SA 496 (T); *De Villiers v Delta Cables* 1992 (1) SA 9 (A).

But this section of the Act has received severe criticism. Section 21 has been described as a drastic provision,¹² and it appeared to infringe one or more provisions of the Constitution of the Republic of South Africa.¹³ The nature of the vesting of the separate property of the solvent spouse in the trustee is problematic, and section 21 also creates a conflict of interest between the separate creditors of the insolvent and solvent spouses. This is founded on the premise that the interests of the insolvent estate and its creditors should take precedence over those of the solvent spouse and his or her creditors.

In analysing problem areas relating to section 21, it is worth mentioning that the South African Law Commission has had as one of its projects the review of the law of insolvency in South Africa.¹⁴ It is submitted that section 21 of the Insolvency Act is one of the sections that perhaps best illustrates the need for this project. The following commentary by Voet in respect of a similar provision in South African common law is clear evidence that the law of insolvency has become somewhat antiquated:¹⁵

But today such presumptions of base gain fall away, since in case of doubt everyone is believed to be honest until the contrary has been proved. For that reason it is no longer necessary to presume that what a wife holds has come to her from the generosity of her husband, but rather is a donation to be proved, especially if the wife is a public trader.

10.1.3 The application of section 21: Vesting of solvent spouse's property in the Master or Trustee

When the estate of one of two spouses married out of community of property is sequestrated, an additional effect thereof is to vest in the Master and, upon the appointment of a trustee, to vest in him all the property of the spouse whose estate has not been sequestrated as if it were property of the sequestrated estate.¹⁶ While such

¹²South African Law Commission Working Paper 41: Project 63 *Review of the law of insolvency* "Voidable dispositions and dispositions that may be set aside and the effect of sequestration on the spouse of the insolvent" (1991) (hereafter Working Paper 41).

¹³Act 108 of 1996. In *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) the Constitutional Court however ruled that s 21, on the facts before the court, did not infringe the provisions of the Constitution. This judgment, and a criticism thereof, follows below in this chapter and in ch 11, 12 and 13.

¹⁴South African Law Commission Project 63: *Review of the law of insolvency report* vol 1 Explanatory Memorandum and vol 2 Draft Bill (2000) (hereafter the Explanatory Memorandum and the Draft Bill).

¹⁵24.1.16 Gane's translation as quoted in the South African Law Commission Working Paper at 41.

¹⁶S 21 (1) Act 24 of 1936; see also Ailola DA "Section 21 The rights of the separate creditors of a solvent spouse – understanding Section 21 is the Key" (1993) *Journal for Judicial Science* at 143.

property is so vested, the solvent spouse is effectively precluded from dealing with it. So, for example, immovable property cannot be mortgaged by the solvent spouse.¹⁷ As already mentioned, section 21 of the Act can only apply to spouses married out of community of property.¹⁸ In respect of marriages in community of property, there is only one estate, the joint estate, and section 21 will therefore not apply.¹⁹

Section 21 brings about a temporary transfer of *dominium* of the solvent spouse's property to the trustee,²⁰ and as will be shown below, it also is considered to result in the institution of a *concursum creditorum*²¹ in respect of her creditors *vis-à-vis* that property. Therefore, although the contractual capacity of the solvent spouse is not affected by the vesting, juristic acts by such spouse regarding that property will be a nullity.²² The property of the solvent spouse does not, however, as a result of the vesting, become the property of the insolvent within the meaning of sections 20(1)(c) and 20(2)(a) of the Insolvency Act.²³ A judgment creditor of the solvent spouse may therefore proceed with a sale in execution of the solvent spouse's property, it would appear, if he has the consent of the trustee to do so.²⁴ In *Stand 382 Saxonwold CC v Kruger NO*²⁵ the court did not give judgment on the question of whether the sale could properly proceed in the absence of the trustee's consent. If, however, it is accepted that a *concursum creditorum* is instituted in respect of the solvent spouse's creditors and property, this would prevent the judgment creditor from executing if the trustee fails to grant a consent to do so.²⁶

¹⁷See, eg *Acton NO v Reek NO and Others* 1996 (3) SA 640 (T) where it was held that the mortgage was a nullity, thus making an application to court for the cancellation thereof unnecessary in terms of s 56 of the Deeds Registries Act 47 of 1937. See also *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A).

¹⁸See paras 10.1 and 10.1.2 above.

¹⁹See *Badenhorst v Bekker No en Andere* 1994 (2) SA 155 (N); Nagel CJ and Boraine A "Badenhorst v Bekker No en Andere (Ongerapporteerde Saaknr 3259/92 (N)) Gevolge van sekwestrasie van gemeenskaplike boedel op testamentêre uitgeslote bates" (1993) *De Jure* at 457; Lee and Honoré *Family, things and succession* (2nd ed) (1983) at 74; Sonnekus "Insolvensie by huwelike in gemeenskap van goed" (1986) *TSAR* at 92; Van der Vyver en Joubert *Persone- en familiereg* (3rd ed) (1991) at 539; for the possibility of an opposing view see Hahlo *The South African law of husband and wife* (5th ed) (1985) at 166; Van Aswegen "Die insolvente gade en die wet op huweliksgoedere 88 van 1984" (1986) *De Rebus* at 273.

²⁰See *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 15-16 and *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at 317-318.

²¹See *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 13-14.

²²*De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 13-14.

²³*Stand 382 Saxonwold CC v Kruger NO* 1990 (4) SA 317 (T) at 321-322.

²⁴*Stand 382 Saxonwold CC v Kruger NO* 1990 (4) SA 317 (T) at 323.

²⁵1990 (4) SA 317 (T).

²⁶This requirement of the trustee's consent was confirmed in *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A), which is discussed below in this paragraph. Whether or not a *concursum creditorum* is in fact

When considering the nature of the vesting of the solvent spouse's property in the trustee, the question arises whether the trustee becomes the owner thereof. The Appellate Division, in an *obiter* decision in *De Villiers NO v Delta Cables (Pty) Ltd*²⁷ ruled that ownership did pass. Before considering the ruling of Van Heerden JA in this regard, it is necessary to look at the provisions of section 21(5) of the Insolvency Act as well as earlier case law. Section 21(5) provides as follows:

Subject to any order made under sub-section (4) any property of the solvent spouse realised by the trustee shall bear a proportionate share of the costs of the sequestration as if it were property of the insolvent estate but the separate creditors for value of the solvent spouse having claims which could have been proved against the estate of that spouse if it had been the estate under sequestration, shall be entitled to prove their claims against the estate of the insolvent spouse in the same manner and, except as in this Act is otherwise provided, shall have the same rights and remedies and be subject to the same obligations as if they were creditors of the insolvent estate; and the creditors who have so proved claims shall be entitled to share in the proceeds of the property so realised according to their legal priorities *inter se* and in priority to the separate creditors of the insolvent estate, but shall not be entitled to share in the separate assets of the insolvent estate.

In *Kilburn v Estate Kilburn*²⁸ Wessels ACJ said the following in this respect:

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.

Regarding this passage, Tindal JA in *Estate Phillips v Commissioner for Inland Revenue*²⁹ said the following:

In that case immovable property bought during the marriage between Kilburn and his wife was bought with his money and registered in her name. On his insolvency his wife's estate as well as his own vested in his Trustee. She applied for the

instituted, and the consequences thereof if it is so instituted, is debated in this paragraph.

²⁷1992 (1) SA 9 (A).

²⁸1931 AD 501 at 507-8.

²⁹1942 AD 35 at 45-46.

release of the property under proviso (a)(iii) on the ground that she had acquired the property during the marriage by a title valid against creditors of her husband. The Court decided that she had not acquired the property by a title valid against the creditors of the insolvent. But in the judgment there is a passage (at 508) which, superficially considered, seems to support the view that the Court there held that notwithstanding the registration of the property in Mrs Kilburn's name, the husband was in law the owner. A careful perusal of the reasons shows however, that that is not the correct interpretation of the judgment. The actual decision was that under the insolvency law, Mrs Kilburn could not retain the property against her husband's creditors; the question whether the ownership in the property vested in him was not decided nor did it arise for decision.

*Stand 382 Saxonwold CC v Kruger NO*³⁰ held that *dominium* over such property does not pass to the trustee. It was submitted in that case that ownership of immovable property of the solvent spouse had passed to the insolvent estate and that it should be dealt with in accordance with section 20 of the Insolvency Act. This submission was dismissed as follows by Justice Kirk-Cohen:³¹

By no stretch of the imagination does s 20(1)(c) include the property of the insolvent's spouse to whom he is married out of community of property. Her property is dealt with in terms of the provisions of section 21...

Referring to the submission that the property of the solvent spouse must be regarded as part of the property of the insolvent estate the judge quoted the following from *Estate Phillips*:³²

Having regard to our system of registration of immovable property, in the absence of fraud the proposition that the *dominium* in [immovable property registered in the name of one person may be owned by another is] "startling".

Kirk-Cohen J ruled that the solvent spouse did not lose her rights of ownership. In view of the system of registration of immovable property, the legislature would expressly have stated that ownership passes to the trustee if this were its intention.

Van Heerden JA, however, took an opposing view on this matter in *De Villiers NO v Delta Cables (Pty) Ltd*.³³ What follows is a brief summary of the relevant facts. Mr and Mrs Matthews (M), married out of community of property, entered into a

³⁰1990 (4) SA 317 (T) at 323.

³¹At 321 I-J and 323 D.

³²At 322.

³³1992 (1) SA 9 (A).

contract of suretyship with Delta Cables (the respondent). Hereby they bound themselves as sureties for the debts which VH Cables owed to Delta Cables. Mrs M also signed a power of attorney, the terms of which granted authority for the passing of a mortgage bond in favour of Delta Cables by VH Cables over property that was to be acquired at a future date. The property was duly acquired and the bond was registered over the property in terms of the above power of attorney. However, registration thereof occurred approximately three months after the final sequestration of the estate of Mrs M's spouse. Judgment was later taken against Mrs M by Delta Cables on grounds of the above-mentioned contract of suretyship. In the execution of this judgment the aforementioned property over which the mortgage bond was registered was sold in execution. Until briefly before the sale in execution the trustee of Mr M's estate was unaware of the registration of the aforementioned mortgage bond, or that judgment had been granted against Mrs M.³⁴ After becoming aware of this, it was agreed that the net income from the sale in execution, minus the amount to be paid to the first bond holder, would be carried over to the trustee. After this amount had been carried over to the trustee, Delta Cables, in its capacity as a secured creditor, instituted a claim against the insolvent estate. This claim was based on the aforementioned judgment against Mrs M. The trustee refused to treat Delta Cables as a secured creditor and in the court *a quo* applied for an order declaring Delta Cables a concurrent creditor. The trustee argued that Delta Cables was not a secured creditor because the bond on which it based its claim could not legally be registered after the sequestration of Mr M's estate without the trustee's consent. This argument was rejected by the court *a quo* which stated that the trustee would be obliged to consent to the registration of the bond, despite the provisions of section 21 of the Insolvency Act. The trustee, it was ruled, was bound by the power of attorney which was granted prior to sequestration.

Delta Cables argued that in terms of section 21, ownership of the solvent spouse's assets did not pass to the trustee. It based its argument on the fact that civil proceedings by, or against, a solvent spouse were not interrupted, that execution

³⁴This type of problem has probably now been alleviated by the amendment of s 17 of the act by the Insolvency Amendment Act 89 of 1989.

of judgment against such spouse could still proceed and the fact that such spouse's capacity to act was not limited by section 23(2) of the Insolvency Act.

Van Heerden JA rejected this argument by pointing out that a clear distinction had to be made between assets that fell within the ambit of section 21, and those that fell outside it. Only those assets acquired prior to sequestration of the insolvent estate were subject to the provisions of section 21. Assets acquired after sequestration and assets released by the trustee fell outside the limitations imposed by section 21. The aforementioned circumstances on which Delta Cables based its argument that ownership had not passed, he found, regulated only the spouses' capacity in respect of assets that were not in terms of section 21 subject to the control of the trustee.³⁵ None of these circumstances, the court said, tended to militate against a construction that *dominium* in the assets of the solvent spouse vested in the trustee.

Section 21 simply provided that the assets of the solvent spouse vested in the Master and, upon his appointment, in the trustee "as if it were property of the sequestrated estate, and to empower the Master or the trustee to deal with such property accordingly".³⁶ The ruling in *Stand 382 Saxonwold CC v Kruger NO*³⁷ to the effect that the legislature would expressly have provided for the passing of ownership to the trustee if this had been its intention is countered by Van Heerden JA by pointing out that also in respect of the assets of the *insolvent* no express provision is made in section 20 for the passing of ownership to the trustee, but despite this, it is generally accepted that the assets of the insolvent pass in ownership to the trustee.³⁸

³⁵At 15 C. A problem with this ruling by the court is that prior to the application for the release of such assets, the solvent spouse's property which factually does belong to her, but is released only (much later perhaps) after successfully applying for the release thereof, is in limbo during this period prior to release. It may even be lost to her if she is ignorant, or slow in the application for the release thereof.

³⁶See s 21(1).

³⁷1990 (4) SA 317 (T) at 323.

³⁸At 15 G-H; Van der Merwe *Sakereg* (2nd ed) 1989 states that the Master automatically becomes the owner of the insolvent estate without the requirements of delivery or registration. He refers to this as a statutory method of derivative acquisition of ownership. In this context, however, Smith CH *Law of insolvency* on page 81 says that it does not necessarily follow from the fact that the insolvent is divested of his estate, that he is deprived of all his rights thereto. On the contrary, Smith says, he retains a vital reversionary interest in his insolvent estate.

But whether this is “generally accepted” is debatable.³⁹ Although this may have been the intention of the legislature, the reference in the *Saxonwold* case to the method of registration of transfer of immovable property places a question mark on this argument. Although section 20 does state that the property of the insolvent vests in the trustee upon his appointment, no reference is made to the passing of ownership of such property or the manner in which the trustee may deal with such property. It may be argued that the manner in which the trustee must deal with the property of the solvent estate is regulated elsewhere in the act.⁴⁰ It could rather be argued that it is “generally accepted” that the trustee must deal with the property of the insolvent in accordance with the wishes of and to the advantage of the creditors.

The terms “*dominium*”, “ownership” or “vest” are not defined in section 2 of the Act. However, the trustee of an insolvent estate is clearly not in the same position as that of a common law owner of property.⁴¹

In this respect Joubert⁴² points out that Justice Van Heerden in the *Delta Cables* case concluded that in terms of sections 20 and 21 ownership passes, but he failed to inquire whether the passing of ownership is genuinely necessary to achieve the purpose of these respective sections of the Act. Even with respect to the “vesting” of the insolvent’s assets in the trustee, he says, it is unnecessary for the ownership thereof to pass to the trustee. In order to fulfil his functions, Joubert correctly states that only the control and

³⁹It is clear that s 21 has a more limited purpose than that of s 20. It may therefore unnecessary to ascribe to s 21 the interpretation that ownership passes to the trustee. This interpretation would also be detrimental to the creditors of the solvent spouse; See also Davids LC “The property of the solvent spouse in the hands of the trustee” (1994) *Juta’s Business Law* at 119, who is of the opinion that the property of the solvent spouse does not become the insolvent’s estate property.

⁴⁰See, eg, ss 40-53 and 69; See also Van Zyl FJ “Die subjek van ’n bestorwe boedel: Meester of eksekuteur” (1989) *THRHR* at 184 who discusses the question of who or what the subject or “owner” of a deceased estate is. He considers the questions of whether the deceased estate vests in the Master or the executor. Van Zyl supports the opinion of Jacobs JP in *Celliers v Kuhn* 1975 (3) SA 881 (NC) that the notion that the Master and thereafter the executor becomes owner of the estate, was wholly unacceptable to him. It should however be pointed out that while the Insolvency Act of 1936 expressly refers to the “vesting” of the estate in the Master, the Administration of Estates Act 66 of 1965 and its predecessors contains no such references. In this context also Stander says that the insolvent estate is administered by the trustee, but, “... hy doen dit egter volgens die aanwysings of besluite van die *concursum creditorum*”. See Stander L *Die invloed van sekwestrasie op onuitgevoerde kontrakte* LLD Thesis, Potchefstroom (1994) at 26 (hereafter *Standar Thesis*).

⁴¹For the possible meanings that may be attributed to the terms ownership and property, see chs 7 and 11 of this thesis.

⁴²“Artikel 21 van die Insolvensiewet: ‘Tyd vir ’n nuwe benadering?’” (1992) *TSAR* at 705.

the *ius disponendi* in respect of the insolvent's assets is required by the trustee. His argument is supported by referring to company liquidations in respect of which it is accepted that ownership of the company assets does not pass to the trustee.⁴³

This question now, however, appears to have been put to rest by a decision of the Constitutional Court,⁴⁴ which accepted the decision in Delta Cables regarding the passing of ownership to the trustee.

10.1.4 The term “spouse”

Section 21 defines “spouse” as a wife or husband by virtue of a marriage of any law or custom, as well as a woman living with a man as his wife or a man living with a woman as her husband, although not married to each other.⁴⁵

In *Chaplin v Gregory (or Wyld)*,⁴⁶ after considering subsection 21(1) read together with subsection 21(13), the court found that it was not empowered to grant an order vesting in the trustee of an insolvent man the property of a woman with whom he had been living as her husband where such man in fact had a legal wife from whom he was either not living apart or living apart though not under an order of judicial separation.⁴⁷ This prompted Cathrine Smith to comment that where a single man lives with a woman as her husband, although not married to her, and his estate is sequestrated, her estate automatically vests in his trustee. But if a

⁴³See also s 361 of the Companies Act 61 of 1973. Stander *Thesis* above on page 31 and further, says that the trustee is not merely an agent of the creditors. In *Gilbert v Bekker and another* 1984 (3) SA 774 (W), she says, the trustee was regarded as merely the holder of an office and could be regarded as a statutory officer. Stander sees the trustee as a statutory officer in a fiduciary position, but at the same time points out that the trustee is in fact regarded as an owner in South African insolvency law, although she is of the opinion that this situation finds no support in the Roman and Roman Dutch law. Stander's opinion however appears to be that merely control and not ownership of the insolvent estate passes to the trustee (or Master), and she says on page 42 that “Die kurator [of Meester] besluit oor die vervreemding-, beheer-, beswaring-, vindikasie- en beskikkingsbevoegdheid slegs vir doeleindes van die sekwestrasie-proses volgens die Wet”.

⁴⁴See the *Harksen* case in para 10.1 above.

⁴⁵S 21(13). In considering this section the court in *Chaplin v Gregory (or Wyld)* was prompted to say the following:

By introducing this subsection the Legislature quite obviously intended to bring into the net those persons who while not legally married were occupying the *de facto* position of husband and wife. The method by which this was done was, to say the least, a clumsy one.

⁴⁶1950 (3) SA 555 (C) at 565.

⁴⁷At 566; It should be noted that it is no longer competent for a court to grant an order for judicial separation – s 14 of the Divorce Act 70 of 1979.

legally married man chooses to live with another woman, her estate on insolvency does not vest in his trustee. This, Smith says, seems like placing a premium on adultery as contrasted with concubinage.⁴⁸

It is debatable whether this approach is correct. Although section 21(1) refers to “one of two spouses”, section 21(13) broadly defines what is meant by the word “spouse”, but it does not, in doing so, exclude one set of “spouses” if another set also exists.⁴⁹ As long as the “spouses” who are not married lawfully or according to any law or custom are living together as husband and wife at the date of sequestration, and if the spouses are lawfully married, but living apart by reason other than any decree of judicial separation, there appears to be no limit on the number of “spouses” to which section 21 may apply. Meskin, it is submitted, correctly points out that in view of the purpose of these provisions it is inconceivable that the legislature intended that the provision be limited.⁵⁰

Section 21(1) read with section 21(13) does not extend to include a “previous” spouse. Thus, where a widow’s marriage is terminated by the death of her husband, whose deceased estate is subsequently declared insolvent, these subsections do not apply.⁵¹ In *Janit v Van den Heever and Another NNO (No1)*⁵² the court also ruled that a solvent ex spouse whose marriage was terminated by divorce prior to the date of sequestration of the insolvent’s estate is excluded from the ambit of section 21(13). The court pointed out that section 21(13) encapsulated the present tense, and therefore the term “spouse” could not be extended to include a “previous spouse”.⁵³ The court further concluded that:⁵⁴

... all of the various permutations for which those sections provide, contemplate an existing relationship between the solvent and insolvent spouse as at the date of sequestration of the insolvent spouse’s estate, not a relationship which has terminated (whether by separation, in the case of an informal relationship, or death or divorce, in the case of a formal marriage).

⁴⁸Smith C “Problem areas in insolvency law” (1989) *South African Mercantile LJ* at 103.

⁴⁹Meskin 5.30.1.1

⁵⁰Meskin 5.30.1.

⁵¹*Janit v Van den Heever and Another NNO (No 1)* [2000] 4 All SA 513 (W), 2001 1 SA 731 (W) at 736.

⁵²[2000] 4 All SA 513 (W), 2001 1 SA 731 (W) at 736.

⁵³[2000] 4 All SA 513 (W), 2001 1 SA 731 (W) at 736.

⁵⁴At 736. See also *Shrosbree and Others NNO v Van Rooyen NO and Others* 2004 (1) SA 226 (SE) 229 H-I.

This conclusion of the court prompted Meskin⁵⁵ to question the meaning of the word “separation” in the case of an “informal relationship”. He submits that it is the intention of the legislature that the property of the solvent spouse who was living with the insolvent as his wife before his sequestration (as envisaged by section 21(13)) vests in his trustee notwithstanding that as at such date, they were not so living together, physically, in the same habitation, (whether fortuitously or by design). Meskin says that the anomalous situation that would otherwise arise if this were not to be the case is that the section would apply to a married solvent spouse who was not living with the insolvent at the date of sequestration, but would not apply, in the same circumstances, to the unmarried solvent “spouse” envisaged by section 21(13). He says that such an interpretation would defeat the intention of the section, which, according to *Harksen v Lane No and Others*,⁵⁶ is to collect all the property to which the estate is entitled. Meskin submits that the “separation” referred to in *Janit’s* case must be one that results in the permanent termination of the “informal relationship” and the relevant provisions therefore apply to the unmarried “solvent spouse”, notwithstanding that she is not physically living with the insolvent as at the date of sequestration unless the reason for such circumstance is that their relationship terminated prior to such date.⁵⁷ However, this postulation perhaps creates the further anomalous situation in the case of a formally married couple who have *de facto*, but not *de iure*, terminated their relationship. Why should the solvent spouse in the latter circumstance, (a), be subjected to the provisions of section 21, and (b), be treated differently from the “spouse” in the informal relationship. For the purpose of achieving the vesting of the assets of the “solvent spouse”, section 21(1) read with section 21(13) is treating all spouses envisaged by section 21(13) equally, but for the purpose of defining the meaning of “separation” it is possibly differentiating between different categories of “solvent spouses”. One can further labour the issue by questioning the meaning of “permanent separation”. Does a day-old permanent separation (as from the date of sequestration) differ from a year- or a two-year-old permanent separation, and should there be any form of policing of the *bona fides* of the permanent separation. This provides further cause to consider the *constitutionality* of this section of the Insolvency

⁵⁵Meskin at 5.30.1.1.

⁵⁶*Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

⁵⁷Meskin at 5.30.1.1.

Act. Surely, if at the date of sequestration the legally married spouses are living apart and have for all intents and purpose terminated their relationship, the solvent spouse should not be subjected to the provisions of section 21 if individuals are to be equal before the law and have the right to equal protection and benefit of the law.⁵⁸

Another aspect of section 21(13) that attracted attention from a constitutional point of view is the fact that it applied only to “spouses” of the opposite sex. But the introduction of the Civil Union Act⁵⁹ on 30 November 2006 impliedly amended the definition of the term “spouse” in the Insurance Act so as to include persons of the same sex who have entered into a civil union.

The Civil Union Act was introduced to accord same-sex couples the same family law rights and obligations, and the same status, benefits and responsibilities accorded to opposite-sex couples, thereby respecting the constitutional rights of same-sex couples.⁶⁰ “Civil union” is defined in this Act⁶¹ as the voluntary union of two persons who are both 18 or older, which is solemnised and registered by way of either a marriage or a civil partnership, according to the procedures prescribed in the Act, to the exclusion, while it lasts, of all others. A “civil union partner” means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of the Civil Union Act,⁶² and this Act applies to civil union partners joined in a civil union.⁶³

A consequence of a civil union is that the legal consequences of a marriage in terms of the Marriage Act⁶⁴ apply, with relevant contextual changes, to a civil union.⁶⁵ Furthermore, a reference to marriage in any other law, including the common law, includes, with relevant contextual changes, a civil union, and husband, wife or spouse in any other law, including the common law, includes a civil union partner.⁶⁶

⁵⁸See s 9 of the Constitution of the Republic of South Africa Act 108 of 1996.

⁵⁹Act 17 of 2006.

⁶⁰See the preamble of the Civil Union Act 17 of 2006.

⁶¹See s 1 of Act 17 of 2006.

⁶²See s 1 of Act 17 of 2006.

⁶³See s 3 of Act 17 of 2006.

⁶⁴Act 25 of 1961.

⁶⁵See s 13(1) of Act 17 of 2006.

⁶⁶See s 13(2)(a)-(b) of Act 17 of 2006.

For the purpose of section 21(13) of the Insolvency Act, this would mean that a civil union partner falls within the definition of the word “spouse” and section 21 will now apply with equal force to such partners. However, if two same-sex partners have not entered into a civil union, but are merely living together, section 21 will probably not apply to that relationship. Further, if partners in a civil union separate, but do not formally terminate the civil partnership, section 21 will probably continue to apply to that civil partnership. At the same time, however, if such partners should live with another same-sex partner, but not enter into a civil union with that person, then section 21 will not apply to that situation, even though they may be living together as man and wife. The Insolvency Act must therefore be amended to bring all same-sex relationships within the ambit of section 21 and, consequently, within the terrain envisaged by the Bill of Rights in the Constitution.⁶⁷

10.1.5 Protection of the solvent spouse

In *Malcomess’ Estate v De Kock*⁶⁸ it was pointed out that the vesting *per se* of the solvent spouse’s estate in the insolvent spouse’s trustee does not stay civil proceedings against the solvent spouse. However, as long as the assets of the solvent spouse remain vested in the trustee, his estate cannot be surrendered. This was seen in *Ex Parte Venter*⁶⁹ where an order for the surrender of the applicants estate was refused and a postponement was granted to enable the applicant to have his assets released by the trustee in his wife’s estate. Section 21(11) is meant to alleviate problems relating to the sequestration of the solvent spouse. If an application is made to the court for the sequestration of the estate of the solvent spouse resulting from an act of insolvency committed by that spouse since the vesting of her property in the trustee, the court may postpone the hearing of the application or make such interim order as may seem just. But the court must be satisfied that the act of insolvency resulted from such vesting, and if it appears that an application is being made or will be made for the release of any of his property, or that any of his property has been released since the making of the sequestration order, and that he is now in

⁶⁷For a comprehensive discussion of the constitutionality of s 21, also within the context of same sex partners, see ch 11 below.

⁶⁸1937 EDL 18.

⁶⁹1931 SWA 3.

a position to discharge his liabilities. However, the vesting of the solvent spouse's property in the trustee of the insolvent spouse's estate, as such, does not prevent the sequestration of the solvent spouse's estate.⁷⁰

Section 21(10) also attempts to limit the prejudice which the solvent spouse may suffer if he is a trader. This is if the solvent spouse is carrying on business as a trader apart from the insolvent spouse, and the court is satisfied that he is willing and able to make arrangements whereby the interest of the insolvent estate in his property, will be safeguarded without such vesting. Then the court, either when sequestrating the insolvent spouse's estate, or at some later stage, may exclude that property or any part thereof from the operation of the order for a period it thinks fit. This is, however, subject to the immediate completion of such arrangements. This provision also applies if the court thinks that he is likely to suffer serious prejudice resulting from such vesting.⁷¹ As indicated in *Van Schalkwyk v Die Meester*,⁷² under these circumstances the interest of the insolvent estate must be safeguarded against the alienation of property by the solvent spouse, malicious damage to, or destruction of, the property, accidental damage to, or destruction of, the property, fraudulent abandonment of the property by the insolvent spouse and theft of property by a third party.

A court application by the solvent spouse to claim an asset must be done by way of notice of motion supported by an affidavit. This must contain full particulars of the asset claimed, the serious prejudice he allegedly will suffer as well as the arrangements he will make to safeguard the interests of the insolvent estate.⁷³ Section 21(10) makes provision for the solvent spouse to lay before the trustee, during the period fixed by the court, evidence in support of his claim to such property. This is done by means of an affidavit. The trustee must then notify him in writing whether or not the trustee will release the relevant property.

⁷⁰*Souter NO v Said NO* 1957 (3) SA 457 (W) at 458-459 and see *Meskin* at 5.30.7.

⁷¹S 21(10).

⁷²1975 (2) SA 508 (N) at 510.

⁷³*Ex Parte Vogt* 1936 SWA 39 at 41; In *Hawkins v Cohen NO* 1994 (4) SA 23 (W) the court ruled that the act does not specify when the solvent spouse is entitled to apply for the release of property which has vested in the trustee in terms of s 21(1). An application to the trustee under s 21(2) and his refusal to release are therefore not prerequisites for an application to court for the release of the property; see also Ailola "Section 21 The rights of the separate creditors of a solvent spouse – understanding Section 21 is the Key" (1993) *Journal for Judicial Science* at 145.

Property of the solvent spouse outside the Republic of South Africa does not vest in the trustee of the solvent spouse's estate because section 21 has no extra-territorial force.⁷⁴

10.1.6 Release of solvent spouse's property

The trustee must release any property of the solvent spouse which is proved to:⁷⁵

- (a) have been her property immediately before her marriage to the insolvent or before the first day of October 1926;
- (b) have been acquired by that spouse under a marriage settlement;
- (c) have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent;
- (d) be safeguarded in favour of the spouse in terms of certain insurance legislation;⁷⁶ or
- (e) have been acquired with any of the aforementioned property or with the income or proceeds thereof.

In practice application for release should occur by way of a sworn affidavit.⁷⁷ The affidavit must contain complete information regarding the nature and origin of the solvent spouse's title to the property, and supporting documents such as an antenuptial contract, vouchers, receipts, paid cheques or other relevant documents must be attached, as well as affidavits by parties able to confirm the solvent spouse's claim. The trustee must apply his mind to the matter when deciding whether the property in question belongs to the solvent spouse.⁷⁸

The solvent spouse must prove, on a balance of probabilities, that he is entitled to the release of the property under one or more of these categories, and he must prove the valid transaction, being one which may confer a valid title.⁷⁹

⁷⁴*Viljoen v Venter NO* 1981 (2) SA 152 (W) at 154.

⁷⁵S 21(2)(a)-(e).

⁷⁶Previously s 28 of the Insurance Act 27 of 1943 or the Insurance Ordinance 12 of 1927. The Insurance Act of 1943 has been repealed by the Long-term Insurance Act 52 of 1998, but no provision has been made for a corresponding amendment of s 21(2)(d) of the Insurance Act. It is however submitted that reference must now be made to the provisions of Act 52 of 1998.

⁷⁷Although application proceedings are envisaged by s 21(4), proceedings by way of action are not excluded, eg, where facts are disputed as between the trustee and the solvent spouse; see *Rautenbach v Morris: In re Estate Rautenbach* 1961 (3) SA 728 (E) 731.

⁷⁸*De Villiers v Estate De Villiers* 1930 CPD 387 388.

⁷⁹*Maudsley's Trustees v Maudsley* 1940 TPD 399 at 404; and *Beddy NO v Van der Westhuizen* 1999 (3) SA 913 (SCA) at 916 917.

In applying for the release of property by a solvent spouse, the category most commonly relied on is that of section 21(2)(c), namely that the property has been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent. This is usually property which the solvent spouse claims to have acquired with his own money. A disposition that results in the alienee being preferred above the creditors of the insolvent, and a disposition which is intended to defraud creditors cannot confer a valid title under section 21(2)(c).⁸⁰ A donation between spouses can confer a valid title under this section and will be discussed below.⁸¹

Under section 21(2)(a) the trustee must release property that the solvent spouse proves belonged to him immediately before his marriage to the insolvent. Under this section the method by which the solvent spouse acquired the property prior to the marriage is irrelevant. For example, if the property was donated to the solvent spouse by the insolvent spouse prior to the marriage it must be released to the solvent spouse by the trustee. The trustee is however not prevented from setting aside such donation as a disposition without value,⁸² or if it is a simulated donation, he may succeed in setting it aside as a collusive dealing.⁸³

The trustee must release any property vesting in him if the solvent spouse proves that such property falls into one of the aforementioned categories.⁸⁴ This obligation to release such property is imperative and peremptory.

If the spouse fails to satisfy the trustee that she is entitled to the release of any such property, she may apply to court for an order either for the release of such property or declaring that she is entitled to the proceeds thereof, if sold. In the event of that property having been sold, she must apply before distribution of the proceeds, and the court may make an order it thinks just.⁸⁵ As a general rule, the court will allow such property to be released if it is satisfied that one of the grounds set out in section 21(2)

⁸⁰*Beddy NO v Van der Westhuizen* 1999 (3) SA 913 (SCA) at 916 917; *Jooste v De Witt NO* 1992 (2) SA 355 (T); *Meskin* at 50.30.2.

⁸¹See para 10.1.9 below.

⁸²Under s 26 of the Insurance Act.

⁸³Under s 31 of the Insurance Act.

⁸⁴*Conrad v Conrad's Trustee* 1930 NLR 100 102.

⁸⁵S 21(4); *Coetzer v Coetzer* 1975 (3) SA 931 (E); *Foot v Vorster* 1983 (3) SA 179 (0) 190.

exists.⁸⁶ If the trustee has erroneously released any property allegedly belonging to the solvent spouse, he can still prove that it belongs to the insolvent estate and recover it.⁸⁷ But if the court has made an order regarding the ownership of the property, the question is finally determined and the trustee will not be able to recover, under section 21(12), property released by the court.

10.1.7 Is section 21(2)(d) as a problem area for insolvent estates

In recent years insolvency law has been affected by the decisions of the high courts, the Constitutional Court and the legislature. Provisions of the Insurance Act⁸⁸ have been challenged in several cases before the Constitutional Court. *Brink v Kitshoff NO*⁸⁹ was one such case. That judgment, together with legislative intervention in the insurance field, may have altered the provisions of section 21 of the Insurance Act.

In *Brink v Kitshoff NO*⁹⁰ section 44(1) and (2) of the Insurance Act⁹¹ dealing with certain insurance policy benefits effected in favour of a female spouse were declared unconstitutional and struck out. Shortly thereafter the Long-term Insurance Act⁹² repealed and replaced the Insurance Act. This new insurance legislation, together with the *Brink* case, may have affected the provisions of section 21 of the Act. Section 21(2)(d) provides that the trustee of the insolvent spouse's estate must release any property of the solvent spouse that is proved to be property protected by certain insurance legislation.⁹³ The latter insurance legislation appears, primarily, to be that which governed the position of policies effected in favour of or ceded to a female spouse.

One must now enquire whether section 21(2)(d) has been affected by the decision in *Brink v Kitshoff*⁹⁴ and by the provisions of the Long-term Insurance Act, and if

⁸⁶*Constandinou v Lipkie* 1958 (2) SA 122 (O) 126.

⁸⁷S 21(12).

⁸⁸27 of 1943.

⁸⁹1996 (4) SA 197 (CC).

⁹⁰See also O'Brien and Boraine "Review of case law and publications" (2001) *SAILR* at 34 and Smith A "Passing through ghostly chains of the past undeterred" (2000) *JBL* at 156.

⁹¹27 of 1943.

⁹²52 of 1998. See Smith Alastair "The difficulties of simplicity" (2000) 8 *JBL* at 85; Smith A "The protection of insurance policies from insolvency under section 63 of the Long-Term Insurance Act 52 of 1998" (2000) *SA Merc LJ* at 94.

⁹³See Mars (1988) at 167.

⁹⁴1996 (4) SA 197 (CC).

so, to what extent. An analysis of the history of this legislation, as well as case law, may assist in deciding whether section 21(2)(d) may have become obsolete.⁹⁵ A consequence of this theory, if it is correct, will be the need to consider what the position is of insurance policies effected in favour of, or ceded by one spouse to another, *vis-à-vis* an insolvent estate.

For present purposes the relevant part of section 21(2) of the Act provides that:

- (2) The trustee shall release any property of the solvent spouse which is proved ...
- (d) to be safeguarded in favour of that spouse by section *twenty-eight* of this Act;
- ...

Section 78 of the Insurance Act repealed section 28 of the Insolvency Act. The Insurance Act, in turn, has been repealed and replaced by the Long-term Insurance Act. To ascertain the present status of section 21(2)(d) of the Act, the repealed statutory provisions must first be considered.

The repealed section 28 of the Act provided for, among other things, the protection of certain policy benefits resulting from certain policies of life insurance that a man effected in favour of or ceded to his wife. The protected policy benefit was excluded from the insolvent estate of the husband. Both marriage by antenuptial contract and marriage in community of property were regulated by section 28. For present purposes, only marriage out of community of property is of any relevance because section 21 of the Act does not apply to communal marital estates.

The Insurance Act, which repealed section 28 of the Act, contained provisions similar to those of section 28 of the Act. These provisions of the Insurance Act were found in section 44, the relevant provisions thereof reading as follows:

- (1) If the estate of a man who has ceded or effected a life policy in terms of section 42 or 43 has been sequestrated as insolvent, the policy or any money which has been paid or has become due ... shall be deemed to belong to that estate: Provided that, if the transaction in question was entered into in good faith [and within certain time periods or under certain conditions] ... only so much of the total value of all such policies ... as exceeds R30 000 shall be deemed to belong to the insolvent estate.

⁹⁵For this point of view see Sharrock R, Van der Linde K and Smith A *Hockly's Insolvency Law* (2002) at 68.

So, if a life insurance policy was ceded to a woman, or effected in her favour by her husband more than two years before the sequestration of her husband's estate, she would receive a maximum of R30 000 from the policy, by virtue of section 44. Any amount exceeding the R30 000 was deemed as against the creditors of the husband to belong to the husband's insolvent estate. If it was ceded or effected less than two years from the date of sequestration, the wife received no benefit from the policy at all.

Section 44 of the Insurance Act contained no direct reference to section 21 of the Act, but in view of the provisions relating to the interpretation of laws,⁹⁶ one can accept that this provision in the Insurance Act was primarily the relevant legislation that was applicable to section 21(2)(d) of the Act. A solvent wife could therefore rely on the provisions of section 44 of the Insurance Act in an application for the release by the trustee, under section 21(2)(d) or (e), of policy benefits, or property acquired with any such benefits. However, there may also have been situations under which a solvent spouse, be it the husband or the wife, may have been able to rely on section 39 of the Insurance Act for the release of assets under section 21(2)(d). Section 39 of the Insurance Act provided for the protection of a maximum amount of R30 000 in respect of certain policy benefits in favour of an insolvent debtor. Section 39 of the Insurance Act is the provision closest resembling section 63 of the new Long-term Insurance Act, but section 63 encapsulates only one of several aspects that was governed by section 39. The legislature probably thought that it was recreating a simplified section 39 (and perhaps sections 41 to 44) of the Insurance Act, but in reality, it created a gaping lacuna, in an insolvency context, in the insurance legislation embodied in section 63 of the Long-term Insurance Act. Section 63 is now considerably narrower in application than the repealed insurance legislation was.⁹⁷

A dual purpose of protecting both the wife of the insolvent husband, as well as his creditors, was served by section 44 of the Insurance Act (and by the repealed s 28 of the Insurance Act). Firstly, because the common law prohibited donations

⁹⁶See, eg, s 12 of the Interpretation Act 33 of 1957.

⁹⁷See s 63(1) and (2) of the Long-term Insurance Act, and for a comprehensive discussion hereof see chs 8 and 9 above.

between spouses, section 44 provided a married woman with a benefit which would otherwise have been lost.⁹⁸ Secondly, the interest of the creditors was protected from the possibility of collusion and fraud between the husband and wife. But section 22 of the Matrimonial Property Act 88 of 1984, abolished the prohibition of donations between spouses, and therefore the first purpose above fell away. It in fact reverted into a burden on a married woman who may have been affected by section 44. A policy envisaged in that section could in its entirety have amounted to a valid donation to the wife if the requirements of validity had been met and the suspicion of simulation had been removed, but section 44 now hindered this. Furthermore, only a married woman was affected by the provisions of this section, not a married man in whose favour his wife had taken out a policy or ceded it to him. This situation inevitably led to the decision of the Constitutional Court in *Brink v Kitshoff*⁹⁹ whereby section 44(1) and (2) was declared unconstitutional and therefore invalid.¹⁰⁰

The effect of the *Brink* decision is that the benefits of policies effected in favour of or ceded to one spouse by another would ostensibly belong to the estate of the recipient spouse without any limitation, and irrespective of the insolvency of the other spouse. This, of course, is subject to the provisions of section 21 of the Act.

The Long-term Insurance Act came into operation approximately two years after the judgment in *Brink v Kitshoff*.¹⁰¹ The only form of protection expressly offered by this new Act to both debtors and creditors in insolvency, is found in section 63 thereof. As already said, this provision is vaguely similar to section 39 of the old Insurance Act. In summary, section 63 of the Long-term Insurance Act affords protection of policy benefits under certain long-term policies under which such person or his or her spouse is the life insured, if the policy has been in force for at least three years.¹⁰² During such person's lifetime, the policy benefits will not form part of his insolvent estate.¹⁰³ This

⁹⁸The policies under discussion can be regarded as donations between spouses.

⁹⁹1996 (4) SA 197 (CC).

¹⁰⁰For a comprehensive discussion of *Brink's* case see ch 9 above.

¹⁰¹1996 (4) SA 197 (CC).

¹⁰²S 63(1).

¹⁰³S 63(1)(a).

protection of the policy benefits is limited to a maximum amount of R50 000.¹⁰⁴ Any sum in excess of this amount will form part of such person's insolvent estate.

No provisions similar to those of section 44 of the Insurance Act are included in the Long-term Insurance Act. Either of the spouses in a marriage will therefore be entitled to take out or cede a policy in favour of the other without any limitations on the donee spouse if the donor spouse should be sequestrated. If the transaction is proved to be valid and *bona fide*, and cannot be impeached, then the entire policy benefit will remain the property of the solvent spouse in whose favour it had been effected. Conversely, if the donee spouse should be sequestrated, the total policy benefits received by that spouse will vest in his or her insolvent estate.

But has the *Brink* case and the Long-term Insurance Act affected section 21(2)(d) of the Insolvency Act? Section 21(2)(d) appears to have related mainly to policy benefits envisaged by section 44 of the Insurance Act, and before it, section 28 of the Insolvency Act. Consequently, section 21(2)(d) would have applied mostly in cases where the solvent spouse who was attempting to invoke that section, was the wife. Section 39 of the Insurance Act and section 63 of the Long-term Insurance Act could not have been contemplated by the legislature as provisions that first and foremost would relate to section 21 of the Act, because those sections of the insurance legislation relate only to the protection of certain policy benefits in favour of an *insolvent* person. Section 21(2) can be invoked only by a *solvent spouse*. However, the possibility that these provisions (and now only s 63 of the Long-term Insurance Act) could relate to section 21 cannot be ruled out, as will be explained below.

The invalidation of section 44 of the Insurance Act by the Constitutional Court by implication destroyed at least some of the grounds upon which section 21(2)(d) can be invoked. The solvent spouse would now apparently receive the full benefit of the relevant policy,¹⁰⁵ thereby perhaps making it superfluous to apply for the release thereof under section 21(2)(d) as a benefit safeguarded by insurance

¹⁰⁴S 63(2)(a).

¹⁰⁵S 63 of the Long-term Insurance Act would not apply where a third party, such as the solvent spouse, is the beneficiary to the policy in question; see para 9 for a comprehensive discussion of the Long-term Insurance Act.

legislation. However, because of the vesting provisions of section 21 of the Act, the solvent spouse is still obliged to apply for the release thereof in terms of section 21(2) of the Act. The question is whether she must now rely on section 21(2)(c) or (d), or both, and if property has been acquired with the proceeds of the policy, on section 21(2)(e). As will be shown, however, there is at least one situation in which section 63 of the Long-term Insurance Act (and s 39 of the Insurance Act before being deleted) could apply to section 21(2)(d).

Perhaps the Long-term Insurance Act, by its omission to introduce provisions similar to those of section 44 of the Insurance Act, with the necessary amendments so as to bring it within the confines of constitutionality, is tacitly recognising the rights of spouses to the policy benefits under discussion, thereby protecting the interest of solvent spouses. This theory seems to stretch the imagination. But if this theory is acceptable, section 21(2)(d) cannot be considered obsolete and the solvent spouse will rely on this section to achieve the release of the policy benefit. However, if this is incorrect, then the policy benefit must be regarded purely as a donation and the solvent spouse should then probably rely on section 21(2)(c) to show that the benefit has been acquired during the marriage with the insolvent by a title valid as against creditors of the insolvent spouse.

Section 21(2)(d) will probably still apply in one hypothetical situation, albeit it a situation that will probably occur on only rare occasions. This is where, for example, in a marriage between spouse A and spouse B, spouse A is sequestrated. Spouse A is able to keep R50 000 of a policy protected by section 63 of the Long-term Insurance Act. This will be regarded as property excluded from his insolvent estate and will form part of a new solvent estate that he may start to establish. Should his wife, spouse B, now also be sequestrated, spouse A, as a “solvent spouse” *vis-à-vis* spouse B (spouse A may also have been rehabilitated) will be able to claim the release of the R50 000 as property safeguarded by the relevant insurance legislation. If this sum has been turned into property acquired with it by the “solvent spouse”, the protection will last for a period of five years and he can then also rely on section 21(2)(e) to claim its release. It should be relatively easy for the “solvent spouse A” in this situation to show that

the property is protected and the trustee is unlikely to challenge this claim under these circumstances.

To conclude, under this point, it is important for the solvent spouse to know which of the subsections of section 21(2) he must rely on in an application for release, because this may affect the nature of evidence he must bring forth in order to show that the policy benefit is his own property. If section 21(2)(d) may still be applied, as envisaged in either of the scenarios described above, then the solvent spouse can probably rely entirely on the Long-term Insurance Act to safeguard his property. But if section 21(2)(d) is now considered to be obsolete, at least in respect of ceded policies or policies taken out on behalf of a solvent spouse, the solvent spouse will have to rely on section 21(2)(c) to show that the policy was received as a valid donation, being a transaction that was not simulated.¹⁰⁶ The trustee in this situation will attempt to set the transaction aside on the grounds that it will either be a disposition without value under section 26 of the Act, a collusive dealing under section 31 of the Act or transaction in fraud of creditors.

In respect of section 21(2)(c) it has been suggested that when a donation was at issue, the onus in claiming the release is more burdensome. According to this point of view, the applicant not only carries the burden to provide a proper explanation as to the genuine character of the transaction, but also, because a donation is the cause of the transfer of the asset, an even greater burden is placed on the applicant to explain the nature of his claim.¹⁰⁷ Whether or not this is correct, is debatable.¹⁰⁸

Be that as it may, it would appear that section 21(2)(d), strictly speaking, is not obsolete. As described above, it would appear that it may, under very limited circumstances, continue to be invoked in respect of policy benefits protected under section 63 of the Long-term Insurance Act. In respect of policies ceded to or taken

¹⁰⁶See, eg, *Snyman v Rheeder NO* 1989 (4) SA 496 (T) and *Beddy v Van der Westhuizen* 1999 (3) SA 913 (SCA).

¹⁰⁷See *Rens v Gutman NO and Others* 2003 (1) SA 93 (CPD) but compare *Snyman v Rheeder NO* 1989 (4) SA 496 (T) and *Beddy v Van der Westhuizen* 1999 (3) SA 913 (SCA).

¹⁰⁸See the discussion hereof in para 10.1.9.

out in favour of another spouse, however, it does appear to be obsolete. Therefore, in view of the present uncertainty in respect of section 21(2)(d), it is probably advisable for the solvent spouse to rely first on section 21(2)(d) in his or her application for release, and in the alternative, on subsection (c).

The long-term solution would lie in the reform of this legislation which overlaps different fields of law, thereby causing legal uncertainty.¹⁰⁹

10.1.8 Realisation of solvent spouse's property

Except with leave of the court, the trustee must not realise property that ostensibly belongs to the solvent spouse until the expiry of six weeks' written notice to such spouse of his intention to do so.¹¹⁰ Publication of this notice is required in the *Government Gazette* and in a newspaper circulating in the district in which the solvent spouse resides or carries on business. That spouse's separate creditors for value must be invited to prove their claims as provided for in section 21(5).¹¹¹ Unless the court has ordered the release of such property, the trustee must deal with that property as if it were an asset of the insolvent estate.¹¹²

If the trustee realises such property, it bears a proportionate share of the costs of sequestration. The separate creditors for value of the solvent spouse with claims that could have been proved against the estate of that spouse if it had been the estate under sequestration, are entitled to prove their claims against the estate of the insolvent spouse.¹¹³ This is done in the same manner and they have the same rights, remedies and obligations as if they were creditors of the insolvent estate.¹¹⁴ However, they are not liable to make any contribution under section 106 and they may not vote at any creditors meeting.¹¹⁵ Those separate creditors who have proved their claims are entitled to share in the proceeds of the property realised according to their legal

¹⁰⁹See ch 9 for a comprehensive discussion of the Long-term Insurance Act and the policy considerations in respect of insurance policies in insolvent circumstances.

¹¹⁰If the solvent spouse is in the Republic and the trustee is able to ascertain her address.

¹¹¹S 21(3).

¹¹²S 21(1). See generally ch 11 of Mars (2008).

¹¹³S 21(5).

¹¹⁴S 21(5).

¹¹⁵S 21(9).

priorities *inter se* and in priority to the separate creditors of the insolvent estate. But they may not share in the separate assets of the insolvent estate.¹¹⁶

Where property of the solvent spouse has been released by the trustee or the court, the separate creditors of the solvent spouse must first excuse such released property and any property acquired by that spouse since the sequestration, before they can share in the proceeds of any property of the solvent spouse which has been realised by the trustee.¹¹⁷ Before awarding a creditor a share in the proceeds of any such realised property, the trustee may require the creditor to lodge an affidavit setting out the result of the excussion and disclosing the balance of his claim which remains unpaid. This must be done within a period determined by the Master. The creditor may share in respect of that balance only, provided that he may also add to the amount of his proven claim any excussion costs which he was unable to recover from the proceeds of that property.¹¹⁸ Failure either to lodge with the trustee the required affidavit or to excuss any separate property of the solvent spouse still available for the satisfaction of his claim debars that creditor from sharing in the proceeds of any property of the solvent spouse which has been realised by the trustee, unless the court orders otherwise.¹¹⁹

10.1.9 Section 22 of the Matrimonial Property Act 88 of 1984

Property that the insolvent alienated by means of a simulated contract could be difficult to retrieve. The trustee would have to discharge the heavy onus of proving that the parties did not have the serious intention to enter into a contract and that such a contract is therefore invalid. A controversial aspects in this regard relates to donations between spouses.

In applications by a solvent spouse for the release of her separate property, litigation relating to section 21(2)(c) of the Insolvency Act was most common prior to the enactment of the Matrimonial Property Act 88 of 1984. Section 21(2)(c) requires the trustee to release property of the solvent spouse that is proved to have been acquired by her during the marriage with the insolvent by a title valid as

¹¹⁶S 21(5).

¹¹⁷Insolvency Act s 21(6).

¹¹⁸S 21(7).

¹¹⁹S 21(8).

against creditors of the insolvent. The onus here is on the solvent spouse to show that the transaction whereby she acquired the property is not a simulated transaction or one intended to prejudice the rights of the creditors in the event of her husband's insolvency.¹²⁰ The solvent spouse must show that the transaction is not a donation, a disposition without value or a transaction amounting to a collusive dealing. In *Kilburn v Estate Kilburn*¹²¹ the following was said:

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 a 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.

A valid title could therefore not be acquired by a donation between spouses and the solvent spouse could not claim the release of property so obtained even where the donor actually intended entering into a contract of donation. Section 22 of the Matrimonial Property Act¹²² has altered this position. This section states that:

Subject to the provisions of the Insolvency Act, ... no transaction effected before or after the commencement of this Act is void or voidable merely because it amounts to a donation between spouses.

The intention of section 21 of the Insolvency Act is to relieve the trustee of the onus of proving that transactions between spouses were simulated. The onus is on the solvent spouse to show that the property she is claiming is, in fact, her separate property.¹²³ But what effect does section 22 of the Matrimonial Property Act have on the provisions of section 21 of the Insolvency Act. *Snyman v Rheeder NO*¹²⁴ was the first case in which a degree of clarity was given in this respect. To appreciate the implications of this case, it is necessary first to summarise the facts.

¹²⁰*Kilburn v Estate Kilburn* 1931 AD 501 507; *Maudsley v Maudsley's Trustee* 1940 WLD 166 172; *Coetzer v Coetzer* 1975 (3) SA 931 (E); *Snyman v Rheeder NO* 1989 (4) SA 496 (T); *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A); Joubert N "Skenkings tussen man en vrou, simulاسie en artikel 21 van die Insolvensiewet 24 van 1936" (1992) *TSAR* at 345; Joubert "Artikel 21 van die Insolvensiewet : Tyd vir 'n nuwe benadering?" (1992) *TSAR* at 699.

¹²¹1931 A 501 at 507-508.

¹²²88 of 1984.

¹²³*Conrad v Conrad's Trustee* 1930 NLR 100 at 102.

¹²⁴1989 (4) SA 496 (T).

Prior to the sequestration of her husband's estate, Mr Snyman, married out of community of property, generated her own income by providing accommodation and care for her ill father, as well as from a small farming concern. This income, as well as an inheritance that she received from her father was deposited in her husband's bank account. The total sum of this money amounted to approximately half the purchase price of a farm that her husband had purchased several years before his sequestration. Mrs Snyman and her spouse had apparently agreed to share equally in any profit generated by the resale of the farm. The farm was subsequently expropriated. The consideration received from the expropriation was used by Mr Snyman to purchase a game farm. The game farm was subsequently sold and Mr Snyman gave his wife a sum of money which amounted to less than half of the consideration received for the game farm. More than three years prior to the sequestration of her husband's estate, Mrs Snyman used these funds to purchase a residence. Using the house as security for a mortgage bond, Mrs Snyman later borrowed money for the purchase of a business. Approximately three months before her spouse's sequestration, Mrs Snyman purchased a plot of land from her husband for R25 000. Its purchase price was financed by a portion of a loan of R35 000 secured by the registration of a bond over the land in question. With the balance of this loan Mrs Snyman purchased a pick-up truck from her spouse.

When her husband's estate was sequestrated, Mrs Snyman applied to court in terms of section 21(4) for the release of the aforementioned residence, business (shop), plot and truck. Her initial application in terms of section 21(2)(c) was dismissed by the trustee, so she approached the court. One of the averments on behalf of Mrs Snyman was that section 22 of the Matrimonial Property Act radically altered section 21 of the Insolvency Act. This averment finds support in Smith¹²⁵ who confirms that no transaction effected before or after the commencement of section 22 of the Matrimonial Property Act is void or voidable merely because it amounts to a donation between spouses. Smith then reiterates that the purpose of section 21 was to relieve the trustee of the onus of proving that the transactions were simulated ones by placing the onus on the solvent spouse to show that it was in fact her separate property which

¹²⁵Smith *The law of insolvency* at 113.

she was claiming. Smith submits that this purpose has been defeated by section 22 of the Matrimonial Property Act, and says:¹²⁶

If the solvent spouse has acquired property from the insolvent by way of a donation, she acquires it with a title adverse to the insolvent's creditors. The onus is then on the trustee to prove that the disposition is one without value in terms of section 26 or a collusive dealing in terms of section 31 or a transaction in fraud of creditors under the common law.

So, according to Smith, the onus has moved to the trustee who now finds himself in the same position of a trustee prior to the introduction of section 21 of the Insolvency Act. As will be seen below, this interpretation of the effect of section 22 of the Matrimonial Property Act on section 21 of the Insolvency Act is not shared by all. In the *Snyman* case, Kriegler J points out¹²⁷ that the prohibition of donations within the marriage previously prevented the solvent spouse from claiming the release of such donated property. He then says that section 22 of the Matrimonial Property Act has apparently abolished the prohibition of donations within the marriage. Kriegler J summarises the effect of section 22 of the Matrimonial Property Act on section 21 of the Insolvency Act as follows:¹²⁸

Section 21(2)(c) still requires proof of a valid title. The healthy mind still insists that such proof must be thorough proof due to the claimant's exclusive knowledge of the relevant facts and due to the understandable temptation to hide assets. But a donation can now provide a valid title. It must be emphasised that the requirement of *bona fides* stands. It must be a true donation. Simulated transactions will still not provide a valid title.

The use of the words "*deeglike bewys*", led to some uncertainty. Joubert¹²⁹ correctly submits that the judge did not intend creating a heavier burden of proof for the solvent spouse. He says the trustee's onus of rebutting the solvent spouse's evidence should now be easier to discharge because of the solvent (claimant) spouse's exclusive knowledge of the particular facts. When claiming for the release of her property, he says, the solvent spouse must bring facts before the court that *prima facie* prove the existence of the legal contract in terms of

¹²⁶Smith *The law of insolvency* at 113.

¹²⁷At 504 C.

¹²⁸505 I 506A. Author's translation follows: "Section 21(2)(c) ...".

¹²⁹Joubert N "Skenkings tussen man en vrou, simulاسie en artikel 21 van die Insolvensiewet 24 van 1936" (1992) *TSAR* at 347.

which the property was received.¹³⁰ Thereafter the trustee will have to rebut such evidence by bringing forth facts which suspect the transaction of being a simulated one. The solvent spouse may then offer an explanation to remove such suspicion on a balance of probabilities. The solvent spouse will have proved the legality of the contract only once she has removed such suspicion of simulation by providing such acceptable explanation. Joubert therefore says that it is much easier for the trustee to discharge the above onus of rebuttal than it would be for him to give positive proof of the simulation. Relying on this explanation, Joubert rejects Smith's submission that section 22 of the Matrimonial Property Act defeats the purpose of section 21 of the Insolvency Act. Section 22, he says, now allows donations within the marriage, but it does not alter the fact that section 21 absolves the trustee from providing positive proof of the simulated nature of the transaction.

Be that as it may, the *Snyman* case's confirmation that a donation made with the serious intention of being bound thereby can provide a valid title, has provided legal clarity in this context. For the same reason one must welcome Kriegler J's remark that any simulated transaction, including a simulated donation, cannot provide the solvent spouse with a valid title.

However, as will be shown below, it would appear that the clarity provided by the *Snyman* case is not always considered when analysing donations between spouses, resulting in confusion regarding the onus that rests on the solvent spouse.¹³¹

To return to the facts, Kriegler J regarded the provision of the finances by Mr Snyman for the purchase price of the residence as an obligation owing in terms of a partnership contract, a *quasi*-partnership contract or a donation. He found that it was not a simulated transaction, and that a valid title could be acquired by means of any of the latter three forms of contract.¹³²

¹³⁰Joubert N "Skenkings tussen man en vrou, simulاسie en artikel 21 van die Insolvensiewet 24 van 1936" (1992) *TSAR* at 348.

¹³¹See the discussion of *Rens v Gutman NO and Others* 2003 (1) SA 93 (C) below.

¹³²At 506 C.

With regard to the business that was purchased, the court found that for the purpose of claiming release of the property, the business and the residence were inextricably linked, since the business had been purchased with money borrowed and secured by a mortgage bond over the residence.¹³³ The purchase of the plot of land from her husband, however, was regarded as a simulated transaction, firstly, because it was purchased only a few months prior to Mr Snyman's sequestration and, secondly, because it was sold to her for less than the market value. Contracts of purchase and sale are often identified as simulated contracts where property is sold below market price. Contracting parties often create the impression of entering into a contract of purchase and sale while in actual fact their true intention is that of a donation.¹³⁴

Joubert¹³⁵ submits that if the purchase of the plot was a simulated transaction which camouflaged a donation between Mr and Mrs Snyman, the mere simulation of the contract would not have resulted in Mrs Snyman not receiving a valid title over the plot. Joubert states that under such circumstances, effect should have been given to the true intention of donating the plot, in which case the contract of donation (although hidden) would have provided her with a valid title. Section 22 of the Matrimonial Property Act, he says, has obviated the need to circumvent the consequences of a donation within a marriage by feigning a contract of purchase and sale. However, while Joubert's assessment generally of the effect of section 22 is correct, it would appear that in this context he loses sight of Kriegler J's "*vereiste van goeie trou*" in the aforementioned quotation. So, although the transaction may be considered a donation, this does not mean that it is a valid donation that gives rise to a title valid against the creditors of the insolvent spouse, as required by section 21(2) of the Act.

Further, Joubert finds it difficult to see why, regarding the incident under discussion, Mr and Mrs Snyman could not have had the intention of being bound by the contract of purchase. He says the evidence provides no indication that the

¹³³At 508 H.

¹³⁴*McAdams v Fianders Trustee Bell NO 1919 AD 207; S v Dorfler 1971 (4) SA 374 (R); De Wet en Van Wyk Die Suid-Afrikaanse kontrakke en handelsreg (5^e uitg) (1992) at 314.*

¹³⁵*De Wet and Van Wyk Die Suid-Afrikaanse kontrakke en handelsreg (5th ed) (1992) at 349.*

parties could have intended that the purchase price should not be paid or that registration of transfer in the name of Mrs Snyman should not take place. On the contrary, the circumstances under which the transaction occurred, he says, rather indicate that the parties were serious about entering into a contract of purchase and sale. But, this appears to negate his argument that it could have been a contract of donation. If he wants to rely on the argument that they had the serious intention of entering into a contract of purchase and sale and if he wants to reconcile this argument with his opinion relating to it being a simulated contract providing a valid title, he should rather have regarded the difference between the purchase price of the plot and its true market value as being a donation, and the actual price paid as being part of the contract of purchase and sale which they faithfully intended entering into.

Joubert further says that in view of the advantages that the contract provided for the Snymans (essentially to help Mr Snyman obtain cash), it is unlikely that they could have intended entering into no contract or entering in a contract of another nature. Further, he says that the fact that Mrs Snyman borrowed money in her own name in order to finance the purchase price of the plot is an indication that she accepted the full consequences of her obligation to pay the purchase price.

But the fact that she borrowed a larger sum of money than was necessary (using the property as security) appears to be an indication that she was aware of the fact that she was purchasing below market price. Joubert further loses sight of the fact that the purchasing of the plot seems to have been a *sine qua non* for obtaining the finances to pay the purchase price thereof. By taking over the property (below market value) that formerly belonged to her spouse, she was diminishing his estate. This would be to the detriment of the *concursum creditorum*, which would later come into existence. If she was intent on providing cash for her spouse, she could also have given him the excess portion of the loan that remained after the payment of the purchase price of the plot. In this context, the *bona fides* of the parties could certainly be questioned.

The court also found that Mrs Snyman's claim in respect of the pick-up truck that she purchased should fail, since the purchase price thereof was derived from the purchase and securing of the plot.¹³⁶

Joubert¹³⁷ disagrees with this ruling because the pick-up truck was purchased from a third party with finances that the spouse obtained in her own name, and he argues that even if the purchase of the plot occurred by virtue of a simulated transaction, her right to the truck should not be affected thereby.¹³⁸ But it would appear that the purchase of the plot and the borrowing of the money, secured by the mortgage bond over the plot, are inextricably linked. Without the existence of the contract of purchase and sale of the plot, the loan transaction and the subsequent purchase of the truck could never have happened. As stated above, the difference between the purchase price of the plot and the amount loaned (which difference financed the truck) should or would in any event have formed part of the estate of Mr Snyman, whether before or after sequestration, if the correct market value had been received for the plot.

In conclusion, it may be argued that the introduction of section 22 of the Matrimonial Property Act 88 of 1984 has had an effect on section 21 of the Insolvency Act in the sense that it may in fact, have eased the trustee's evidentiary burden relating to release applications under section 21(2)(c), in the context of donations. Although the effect of section 22 of the Matrimonial Property Act has been drastic enough to bring this issue before the courts for clarity, events since its inception have shown that it has not defeated the purpose of section 21 of the Act.¹³⁹ However, the issue of donations between spouses, and the effect of insolvency on such donations, has continued to sow confusion regarding the evidentiary burden on the parties involved.¹⁴⁰

¹³⁶At 508 I.

¹³⁷Joubert N "Skenkings tussen man en vrou, simulasie en Artikel 21 van die Insolvensiewet 24 van 1936" (1992) *TSAR*.

¹³⁸Joubert erred regarding the truck being purchased from a third party. He rectifies this error in a later article but does not change his point of view regarding her right to the vehicle.

¹³⁹See, eg, *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); *Beddy NO v Van der Westhuizen* 1999 (3) SA 913 (SCA) and *Rens v Gutman NO* 2003 (1) SA 93 (C).

¹⁴⁰*Rens v Gutman NO* 2003 (1) SA 93 (C).

So, for example, the question concerning the burden of proof resting on the solvent spouse regarding donations between spouses was considered in *Rens v Gutman NO and Others*.¹⁴¹ In this case a solvent spouse (the applicant) applied for an order in terms of section 21(2)(c) of the Act, directing the trustee of her husband R's insolvent estate to release to her certain shares in a private company. She alleged that the member's interest in the predecessor of the private company, a close corporation, was transferred to her by her husband under a deed of donation dated 13 November 1993, and she was relying on section 22 of the Matrimonial Property Act to protect this donation. The trustee (the first respondent) attempted to oppose this application on the grounds that, firstly, the donation was concluded to allow her husband to avoid liability to his creditors. Secondly, he alleged that immediately after the donation had been made to the applicant, her husband's estate was insolvent and, thirdly, it was submitted that the applicant and her husband had colluded to the prejudice of his creditors. A point *in limine* was also raised by the trustee to the effect that the shares in question were subject to a restraining order under section 26 of the Prevention of Organised Crime Act¹⁴² and that no further steps could be taken while the order was in place. For present purposes no further attention will be given to this issue – suffice to say that the point *in limine* was dismissed.

The trustee argued that the applicant not only carried the burden of providing a proper explanation as to the genuine character of the transaction, but also, because a donation was the cause of the transfer of the asset, an even greater burden was placed on the applicant to explain the nature of her claim. Davis J agreed with the first respondent's approach to the issue of the onus and he proposed to examine the difficulties raised by the first respondent within the prism of this particular approach.¹⁴³

Confined to this prism, the court disagreed that the donation was made to avoid the claims of creditors. This was because the first respondent could not rebut the applicant's contention that the donation was effected to provide her with financial

¹⁴¹2003 (1) SA 93 (C).

¹⁴²121 of 1998.

¹⁴³At 97 G-H.

security at a time when she and her husband were experiencing marital difficulties. The first respondent's testimony also did not suggest that the applicant's spouse had been insolvent at the time of the disposition therefore the disposition could not be challenged even if R's motivation had been to protect his assets. Relying on the evidence before the court, Davis J held that R had not been insolvent when the donation was made, nor had it resulted in his insolvency. Collusion in respect of the donation was absent.¹⁴⁴ The court found that the applicant should succeed even on the onerous test advanced by the first respondent.¹⁴⁵

However, the question is whether the court was correct in examining the onus in this case within that prism as proposed by the first respondent? Does the solvent spouse in an application of this nature bear a more onerous burden than she would in any other civil case? It is submitted that she does not.

In a civil case the standard of proof is proof upon a balance of probability, while in a criminal case it is proof beyond a reasonable doubt. Conclusive proof means that rebuttal is no longer possible. It is proof that is taken as decisive and final. *Prima facie* proof implies that proof to the contrary is (still) possible. Generally, *prima facie* proof will become conclusive proof if there is no contrary proof.¹⁴⁶ The standard of proof in civil cases is described as follows in *Miller v Minister of Pensions*:¹⁴⁷

It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it is more probable than not" the burden is discharged, but if the probabilities are equal it is not.

In civil cases dealing with allegations of crime and dishonesty the standard of proof remains the same.¹⁴⁸ But is it possible that in civil cases a greater burden of proof (a more onerous test) may be required under certain circumstances, for example, where certain facts are personal to the person who is required to discharge the

¹⁴⁴At 100 A-B and I-J.

¹⁴⁵At 101 G-H.

¹⁴⁶Schwikkard *et al Principles of evidence* (1997) at 17. See also Schmidt *Bewysreg* (2000) at 77.

¹⁴⁷1947 2 All ER 372 at 374. This description was accepted by the South African courts in *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A).

¹⁴⁸Schwikkard *et al Principles of evidence* 1997 at 405.

onus in a particular instance? What, for example, must be made of the following *dicta* of Davis J in the *Rens* case:¹⁴⁹

On this basis, Mr *Brusser* submitted that not only was the *onus* on applicant to provide a proper explanation as to the genuine character of the transaction, but that, when a donation was the cause of the transfer of the asset, an even greater burden was placed upon the applicant to explain the nature of her claim.

With this approach there can be little quibble. I propose to examine the difficulties raised by first respondent within the prism of this particular approach as outlined by Mr *Brusser*.

Here the impression is created that in an application under section 21(2)(c) of the Act, based on the existence of a donation between spouses, a greater degree of proof is required than proof on a balance of probabilities. The impression is also being created that under section 21(2)(c) a different burden of proof is required in respect of a donation than that which is required for other types of transactions under that sub-section, and for claims under the other sub-sections of section 21(2). If this is, in fact, what was intended by the court, then the court appears to have erred.

In the past judgments have incorrectly created the impression that in certain civil cases a greater burden of proof is required than that of a balance of probabilities. Schmidt cites as examples of this cases in which the validity of documents and the authenticity of their content has been questioned, where the court required proof not only by means of the ordinary balance of probabilities, but on a substantial or strong balance.¹⁵⁰ In *Kunz v Swart*,¹⁵¹ in respect of a will, the court required proof “in the clearest manner”, and in *Ex Parte Tracy*,¹⁵² following *Smith and Others v Strydom and Others*,¹⁵³ the court required “’n sterk oorwig van waarskynlikhede”, while in *Ebrahim (Pty) Ltd v Mohomed*¹⁵⁴ the word “substantial” was used. This,

¹⁴⁹above 97 F-H.

¹⁵⁰Schmidt *Bewysreg* 2000 at 80.

¹⁵¹1924 AD 618 at 692.

¹⁵²1960 (1) SA 34 (W) 35.

¹⁵³1953 (2) SA 799 (T).

¹⁵⁴1962 (1) SA 90 (D) at 94 A. In this case the court seems to have misinterpreted Schreiner J in *Liepner v Berman* 1944 WLD 16 at 19 where he said the following: “On any issue of fact an *onus* rests on one party or the other as a matter of law; he discharges the *onus* by establishing, in a civil case, a substantial balance of probability in his favour. Experience may show that in certain classes of case the party bearing the *onus* commonly finds more difficulty in discharging it than in other classes of case. But this does not seem to me to be the same thing as saying that in the one class of case the *onus* is heavy, in the other light. This latter

however does not mean that a stricter standard than that of the established burden of proof in civil cases is required. The standard of proof remains the same, but it is accepted that the evidence presented to the court may have to be more thorough than in normal cases so as to persuade the reasonable mind. In this respect it was said in *Gates v Gates*:¹⁵⁵

There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry conviction to the reasonable mind, but the reasonable mind is not so easily convinced in such cases

This quotation supports the principle that the civil standard in all points of dispute is the same, and this has been repeatedly confirmed.¹⁵⁶

The use of the words “an even greater burden was placed on the applicant to explain the nature of her claim” in the *Rens* case seems to be calling for a variation in the required standard of proof. To support this proposition in respect of the onus the first respondent in *Rens*’s case relied¹⁵⁷ on *Snyman v Rheeder*¹⁵⁸ and *Beddy NO v Van der Westhuizen*.¹⁵⁹ However, the court in *Snyman* did not, it is submitted, call for a variation in the burden of proof in cases under section 21(2)(c) of the Act when a donation was the subject of a claim by a solvent spouse. It is submitted that in that case Kriegler J meant that a donation now can provide a valid title, but the mere fact that section 22 of the Matrimonial Property Act allows for donations between spouses does not in itself validate every such donation and consequently automatically provide a valid title as against third parties. Therefore, as in all points of dispute, thorough evidence of such title, but not a greater burden of proof, is required, to carry conviction to the reasonable mind. For this reason his words:¹⁶⁰

form of expression suggests, what I hardly think can be correct, that the Court ought to approach the decision of certain issues with an inclination to favour one side rather than the other.” It is submitted that Schreiner J’s use of the word “substantial” in this context means what the court was referring to in the *Miller* case, namely, that to discharge the burden the evidence must be such that the court can say that it thinks it is more probable than not. But if the probabilities are equal, the burden is not discharged.

¹⁵⁵1939 AD 150 at 155.

¹⁵⁶See Schmidt *Bewysreg* (2000) at 81 and the many cases cited in footnote 14 on that page.

¹⁵⁷Above at 97 C-G.

¹⁵⁸1989 (4) SA 496 (T).

¹⁵⁹1999 (3) SA 913 (SCA).

¹⁶⁰Above at 505 I-J.

[D]ie gesonde verstand verg *nog steeds* dat sodanige bewys wel deeglike bewys moet wees ...¹⁶¹

What Kriegler meant in the latter case is perhaps stated more clearly by the Supreme Court of Appeal in *Beddy's* case where Schutz JA said:¹⁶²

As far as the *onus* is concerned section 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 a sale) and saying to the trustee: "it is now your turn to do your worst with it". The onus is on the solvent spouse to prove the true validity and that it is a valid one such as may confer a valid title. Validity is usually closely related to the party's knowledge of the alienor's actual or imminent insolvency.

Here the court merely confirmed that the solvent spouse is burdened with the onus where she launches a claim under section 21(2)(c) of the Act. The onus included proof, on a balance of probabilities, not only of the existence of the transaction, but also of the validity of the relevant transaction.

It would therefore appear that in cases where an applicant seeks an order for release of his assets on the basis that he holds them by a title valid as against the creditors of the insolvent spouse, he must prove such validity on a balance of probabilities. The mere fact that one is dealing with a donation is, in my opinion irrelevant and it is incorrect to suggest that a heavier burden rests on the solvent spouse merely because he possesses knowledge of the transaction that is personal to him. The court in *Beddy* confirmed this where it stated:¹⁶³

In those cases [*Snyman v Rheeder*¹⁶⁴ and *Jooste v De Witt NO*¹⁶⁵] it was correctly held that, after putting any simulation aside, it is the validity of the true transaction that must be examined in order to ascertain whether a title valid against creditors has been established for the purposes of s 21(2)(c). This conclusion is reached without any resort to section 31 of the statute (collusive dealing). Nor, since the amendment of the law in 1984 is the enquiry whether the true transaction is a donation, as even a donation can now found such title. It is a collusive donation, not any donation, just as any other collusive transaction, that will not satisfy the requirements of the section.

Uncertainty in respect of donations after the introduction of section 22 of the Matrimonial Property Act really had nothing to do with the burden of proof. The

¹⁶¹ Author's emphasis and translation as follows: "The healthy still requires thorough proof ...".

¹⁶² At 917 D-F.

¹⁶³ At 917 B D.

¹⁶⁴ 1989 (4) SA 496 (T).

¹⁶⁵ 1999 (2) SA 355 (T).

burden of proof was always that of proof on a balance of probabilities. The uncertainty that was ushered in with the introduction of section 22 of the Matrimonial Property Act rather related to the question of what was to be proved to discharge the burden, and by whom. Was it proof by the solvent spouse of the existence of the transaction, irrespective of its validity, or was it proof of the existence of a valid transaction? *Snyman v Rheeder*¹⁶⁶ was the first instance in which the courts answered this question, as described above, and *Snyman* was followed in *Beddy v Van der Westhuizen*.¹⁶⁷

So this also resolved the dispute as to whether section 22 of the Matrimonial Property Act defeated the purpose of section 21 of the Act by shifting the onus of proving ownership of assets from the solvent spouse to the trustee. The Supreme Court of Appeal clearly confirmed that the onus in this instance remained on the solvent spouse. Joubert¹⁶⁸ therefore appears to be correct in asserting that when the solvent spouse claims the release of property which was the subject of a donation, the solvent spouse must bring facts before the court that *prima facie* prove the existence of the legal contract in terms of which the property was received. Thereafter, the evidential burden rests on the trustee to introduce facts on which the suspicion that the transaction is a simulated one is based. The solvent spouse may then offer an explanation to remove such suspicion on a balance of probability. The solvent spouse will have proved the legality of the contract only once he has removed the suspicion of simulation, by providing an acceptable explanation.

It is therefore submitted that it is wrong to suggest the presence of a heavier burden of proof in claims based on section 21(2), particularly when a donation is in dispute. It is true that in some cases the courts may scrutinise evidence put before them with extra caution. One instance where this is regularly called for is when a so-called “friendly sequestration” is considered by the court – here the court will scrutinise the application very carefully to avoid the abuse of the process

¹⁶⁶1989 (4) SA 496 (T).

¹⁶⁷At 917 A-C.

¹⁶⁸Joubert N “Skenkings tussen man en vrou, simulاسie en Artikel 21 van die Insolvensiewet 24 van 1936” (1992) *Tydskrif vir Suid-Afrikaanse Reg* at (1992) *TSAR* at 347 348.

of the court.¹⁶⁹ However, the degree of proof that is required to succeed in the application is not altered by extra scrutiny. Perhaps also in applications based on section 21(2) of the Act, (and perhaps not only applications concerning donations) extra scrutiny of the evidence before the court may sometimes be required. The degree of scrutiny however will be entirely within the discretion of the court, and it will surely differ in accordance with the facts of every different case. The standard of proof, being a balance of probabilities, however, remains the same, irrespective of the nature of the transaction that must be proved.¹⁷⁰

10.1.10 The solvent spouse's creditors: Section 21(5)

The Insolvency Act attempts in section 21(5) to regulate the position of the separate creditors of the solvent spouse *vis-à-vis* the interests of the insolvent estate, and its creditors. The interpretation of section 21(5) regarding the position of the creditors of the solvent spouse is a contentious issue.

In terms of this section, any property of the solvent spouse realised by the trustee bears a proportionate share of the costs of sequestration. The separate creditors for value of the solvent spouse having claims that could have been proved against the estate of that spouse if it had been the estate under sequestration are entitled to prove their claims against the estate of the insolvent spouse in the same manner and have the same rights and remedies and are subjected the same obligations as if they were creditors of the insolvent estate.¹⁷¹ But they are not liable to make any contribution under section 106 and they cannot vote at any meeting of creditors.¹⁷² Separate creditors that have proved their claims are entitled to share in the proceeds of the property realised, according to their legal priorities *inter se*, and in priority to the separate creditors of the insolvent estate. However, they are not entitled to share in the separate assets of the insolvent estate.¹⁷³ Here it should be noted that the Act does not compel the solvent spouse to

¹⁶⁹See Evans RG "The abuse of the process of the court in friendly sequestration proceedings in South Africa" (2002) *Int Insolv Rev* at 13.

¹⁷⁰See also Evans RG "Release of a solvent spouse's property under section 21(2)(c) of the Insolvency Act 23 of 1936" (2004) *Stell LR* at 193.

¹⁷¹S 21(5).

¹⁷²S 21(9).

¹⁷³S 21(5).

take vindicatory action to recover her property. Failing to do so, her property will be treated as part of the insolvent estate from the very beginning. In this way the separate creditors of the solvent spouse will be prejudiced because they would either not qualify as creditors of the insolvent estate, or would have to prove ownership of the property itself by means of a vindicatory action.¹⁷⁴

In *De Villiers NO v Delta Cables (Pty) Ltd*¹⁷⁵ the Appellate Division had to consider the implications of section 21 in order to establish whether the registration of the mortgage bond over Mrs M's property was legally binding towards the trustee of her husband's insolvent estate. To answer this question the court first inquired what the position would have been if it had been Mrs M's estate that had been sequestrated instead of that of her husband. In an *obiter* ruling Van Heerden JA found that the registration of the bond after the sequestration of Mrs M's estate would have been invalid because it would have interfered with the *concursum creditorum* which would have been established upon the sequestration of the estate.¹⁷⁶

Returning to the actual facts of the *De Villiers* case, the court found that section 21 established a *concursum creditorum* in respect of the creditors of Mrs M, and such *concursum creditorum* prevented the valid registration of the bond after the sequestration of Mr M's estate, unless his trustee consented to such registration. This line of thought regarding the *concursum creditorum*, according to Van Heerden JA, finds its origins in section 21(5). The legislature, he says:¹⁷⁷

Clearly intended that subsequent to the vesting of the assets of the solvent spouse in the Master nothing could be done by a creditor of that spouse to alter his own rights or those of other creditors ... The "legal priorities *inter se*" were thus intended to be the priorities existing at the date of the above vesting. Indeed, that vesting in itself had the effect that creditors of the solvent spouse could no longer, as against the trustee, claim specific performance of an obligation of the solvent spouse, or, as regards unrealised assets, act on authority conferred by that spouse.

¹⁷⁴See Ailola DA "Section 21 The rights of the separate creditors of a solvent spouse – understanding Section 21 is the Key" (1993) *Journal for Judicial Science* at 147.

¹⁷⁵See Ailola DA "Section 21 The rights of the separate creditors of a solvent spouse – understanding Section 21 is the Key" (1993) *Journal for Judicial Science* at 147.

¹⁷⁶At 13 D-G.

¹⁷⁷At 14 B.

Whether a “fictitious” *concursum creditorum* of this nature is established is debatable. Perhaps the court erred in its ruling. Authority for this opinion can be found first in the various attempts to describe what precisely is meant by a “*concursum creditorum*”. Although there are basically two lines of thought regarding the meaning of *concursum creditorum*, there is consensus on both sides that a *concursum creditorum* comes into existence upon the sequestration of an estate.¹⁷⁸ One should not lose sight of the fact that Section 21 deals with the effect of sequestration on the property of the spouse of the insolvent in her capacity as spouse, not in her capacity as an insolvent whose estate has been sequestrated.

This question on whether or not section 21(5) establishes a *concursum creditorum* with regard to the creditors of the solvent spouse is of more than mere academic importance. The court’s ruling that a *concursum creditorum* is established has far-reaching implications for both the solvent spouse and for her creditors. For one, maintaining the relative positions of preference of the solvent spouse’s creditors at the moment of sequestration of the insolvent estate necessitates the application of the rules of insolvency which relate to executory contracts.¹⁷⁹ If one accepts that

¹⁷⁸*In Re Blanckenberg; Watermeyer v Heckroodt* 7 Kuhl 1 Menz 477 (1830) is probably one of the earliest cases to discuss this aspect and *concursum creditorum* in that case referred to the procedure which applies after the sequestration of the estate. In the case of *Campagne Francaise v Cornwall and Bank of Africa* 3 HCG 442 (1885) the court found that the estate in question had not been sequestrated and the court consequently found it unnecessary to settle the dispute “on the basis of any *concursum* or *praelatio* of respective creditors in insolvency”. In this case *concursum* thus referred to the priorities of creditors after sequestration. *Walker v Syfret* 1911 AD 141 (also reported in *Walker v Grand Junction Railways* 4 Buch AC 378 (1911) is of course the *locus classicus* in respect of the law relating to *concursum creditorum*. Here too Lord De Villiers’s use of the term *concursum creditorum* is an indication that *concursum creditorum* refers to the rules of execution which apply upon the granting of a sequestration or liquidation order; Smith *The law of insolvency*, uses the term primarily in the context of “a gathering of creditors”. Eg, on page 4 Smith says: “on insolvency a *concursum creditorum* or concurrence of creditors comes into existence”. See also Smith “The recurrent motif of the Insolvency Act advantage to creditors” (1985) *Modern Business Law* at 27; Stander L *Die vernietigbare regshandelinge in die insolvensiereg* LLM Thesis Pretoria (1985). Most modern authorities use this term in the broader context of the collective execution procedure which comes into existence upon the sequestration of the creditor’s estate. See, eg, Mars (1988) at 136; Boraine in *Suid-Afrikaanse handelsreg* (3rd ed) (1988) vol 2 at 651; Forder “Insolvency of the hire purchase seller: *Concursum creditorum*, ownership and possession” (1986) *South African Law Journal* at 83 86; and for a comprehensive discussion see Swart *Die rol van ’n concursum creditorum in die Suid-Afrikaanse insolvensiereg* LLD Thesis, Pretoria (1990) ch 11 (hereafter Swart Thesis); Mars (2008) at 2 and further.

¹⁷⁹See *Muller and Another v Bryant and Flanagan (Pty) Ltd* 1978 (2) SA 807 (A); *Smith and Another v Parton* NO 1980 (3) SA 724 (D); *Porteus v Strydom* NO 1984 (2) SA 489 (D); *Thomas Construction (Pty) Ltd (in liq) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A); Oelofse N “Invloed van sekwestrasie op onuitgevoerde kontrakte” (1988) *THRHR* at 543; Reinecke en Cronje “Eiendom op die huurkoopsaak en kansellasië van onuitgevoerde kontrakte by

all the property¹⁸⁰ of the solvent spouse vests in the trustee, it would follow that all executory contracts whereby the solvent spouse obtained rights would be subject to the rules governing executory contracts. Joubert¹⁸¹ correctly points out that such an interpretation of section 21 would be most burdensome on the solvent spouse and her creditors. To illustrate the absurdity of the interpretation, Joubert points out that section 38 of the Act would apply to contracts of service entered into by the solvent spouse prior to the sequestration of the insolvent. Before the amendment of section 38 of the Act this would result in the services of the employees of the solvent spouse being terminated upon the insolvency of her husband. After the amendment of section 38, the suspension of such contracts of service may ensue.

A further disadvantage suffered by the solvent spouse's creditors lies in the fact that some of the protective regulations of the Act which are available to the insolvent's creditors, such as the right to receive certain notices and the rights of creditors at the various meetings of creditors, are denied the creditors of the solvent spouse.¹⁸² One can justifiably ask why these mostly innocent third parties should be prejudiced by the actions of someone they had no contact with, or at least why they should not enjoy the same measure of protection which the insolvent's creditors enjoy.

For all the aforementioned reasons it would appear that the legislature could not have intended creating a *concursum creditorum* in respect of the creditors of the solvent spouse. Ample authority exists to exclude the establishment of a *concursum creditorum* with respect to the solvent spouse and her creditors. Sequestration is a prerequisite for a *concursum creditorum*. It is a principle that originated through the evolving process of South African common law. Principles relating to the construing of statutes are not in favour of the common law being altered by legislation¹⁸³ and it

insolvensie van die huurverkoper" (1979) *THRHR* at 389; Smith *Law of insolvency* at ch 8; Swart *Thesis* ch 17; Van Rooyen L "Terugtrede uit 'n koopkontrak na sekwestrasie van koper se boedel as gevolg van koper se kontrakbreuk voor sekwestrasie" (1985) *THRHR* at 222.

¹⁸⁰As defined in s 2 of the Act.

¹⁸¹"Artikel 21 van die Insolvensiewet: Tyd vir 'n nuwe benadering?" (1992) *TSAR* at 703.

¹⁸²See, eg, ss 4, 9, 11 (notices to employees and others) and s 17 (notices to various other parties) of the Act.

¹⁸³Steyn LC *Die uitleg van wette* (5th ed) (1981) at 44.

is unlikely that the legislature could have intended altering the common law by means of a single section of an act. With section 21, the legislature has created an inadequate and contradictory provision. Its confusing nature is succinctly illustrated by Van Heerden AJ's dictum which infers that the provisions of section 21(5) provide for the establishing of a *concursum creditorum*:¹⁸⁴

Indeed, that vesting [of the assets of the solvent spouse in the Master] in itself had the effect that creditors of the solvent spouse could no longer, as against the trustee, claim specific performance of an obligation of the solvent spouse, or, as regards unreleased assets, act on an authority conferred by that spouse.

On the one hand, the legislature is including the solvent spouse's assets as part of the insolvent estate and thereby denying the existence of any rights that the solvent spouse had in respect of those assets. On the other hand, the legislature is recognising the existence of the solvent spouse's rights in respect of those assets by attempting to regulate the position of the solvent spouse's creditors.

The ability of the solvent spouse's creditors, under section 21(5), to institute a claim against the insolvent estate of the husband as if they were creditors of the husband, is no indication that a *concursum creditorum* is established in respect of these creditors. The creditors of the solvent spouse are not creditors of the insolvent, and in this respect Joubert¹⁸⁵ points out that in the absence of section 21(5) it would not be competent for them to institute claims against the insolvent estate. He further avers that the purpose of section 21(5) is merely to confirm that the solvent spouse's creditors can institute claims against the insolvent estate. By providing for the creditors to institute claims as if they are creditors of the insolvent estate, he says, the legislature probably only intended that the procedural rules of the Insolvency Act for the processing of claims should apply.

Is a *concursum creditorum* necessary for the protection of the creditors of the insolvent estate? Apparently not. Section 21(5) provides for those creditors to share in the assets in priority after the creditors of the solvent spouse. The provisions of section 21(5) have in fact reduced section 21 to a contradiction in

¹⁸⁴At 14 B.

¹⁸⁵Joubert N "Artikel 21 van die Insolvensiewet : Tyd vir 'n nuwe benadering?" (1992) *TSAR* at 704; See also Ailola DA "Section 21 The rights of the separate creditors of a solvent spouse – understanding Section 21 is the Key" (1993) *Journal for Judicial Science* at 174.

terms. Creditors of the solvent spouse are required to prove their claims in respect of (the solvent spouse's) assets which, in terms of section 21, have vested in the trustee of the insolvent estate to the satisfaction of the presiding officer at a meeting of creditors.¹⁸⁶ However, the question that inevitably arises is why the creditors of the solvent spouse should even be considered once the solvent spouse has failed to show that such assets do not form part of the estate of the insolvent spouse. By recognising the claims of the creditors of the solvent spouse one is recognising the fallacy and inadequacy of section 21. If a claim by the creditor of the solvent spouse is admitted it would effectively mean that the assets that are the subject of that claim do not form part of the insolvent estate. Joubert¹⁸⁷ feels that under the latter circumstances it ought to be irrelevant whether the creditor of the solvent spouse could after sequestration improve his position relative to other creditors. If a creditor of a solvent spouse fails to prove his claim against the insolvent estate, it would mean that any attempt to improve his position of preference in respect of that claim after sequestration of the insolvent estate would in any event be worthless.

But the situations illustrated above should not even arise if the idea and purpose embodied in section 21 is to be carried to its intended consequences. Reference in section 21(5) to creditors of the solvent spouse, appears to be the result of insufficient thought being given to this issue by the legislature. But, apart from abolishing section 21, how can this legislation be improved?

One possibility is that if the solvent spouse has *bona fide* creditors in respect of particular assets, the assets in question should not form part of the insolvent estate of her husband. This would create a greater measure of protection for the *bona fide* third parties (creditors) who probably had no way of knowing what the financial position of the insolvent spouse may have been at the time when they contracted with the solvent spouse. To bring section 21 back into its correct perspective one must again inquire as to the purpose of this section, namely to ease the burden of proof that rested on the trustee of the insolvent spouse's

¹⁸⁶See s 21(5) read with s 44.

¹⁸⁷Joubert N "Artikel 21 van die Insolvensiewet : Tyd vir 'n nuwe benadering?" (1992) *TSAR* at 704.

estate. The purpose of section 21 was not to attach the consequences of insolvency to creditors of the solvent spouse, and it is consequently unrealistic and jurisprudentially unsound to allow section 21 to create a *concursum creditorum* where it is unwarranted and unnecessary.

The flaws in the provisions of section 21, and more specifically of section 21(5), create a conflict of interest between the creditors of the different spouses. This could have been alleviated if transactions entered into by the solvent spouse, and property obtained in consequence of such transactions, was subjected to the same provisions which regulate any other dispositions which can be set aside in terms of the Insolvency Act. The relationship between spouses would appear to be no different to the relationship between, for example, parent and child, immediate family members, employer and employee or simply friends, to mention but a few. Section 21, in its present structure, is a drastic and inequitable provision which could have been avoided. If a trustee should suspect that property of a solvent spouse belongs to her husband's insolvent estate, such property would usually have been acquired by means of a disposition that can be set aside in terms of the act, for example, dispositions without value, section 26, voidable preferences, section 29, undue preferences, section 30 and collusive dealings before sequestration, section 31. Although the Constitutional Court has already found that section 21 does not infringe the provisions of the constitution, it will be submitted below¹⁸⁸ that it may be possible to launch a fresh challenge regarding the constitutionality of section 21 in the future. A solution should rather be sought in the removal of section 21 from the statute books. It is submitted that this should not be seen as burdening the trustee of an insolvent estate in proving the status of a transaction. The trustee has the entire Act at his disposal. The Act in itself contains stringent interrogatory and protective regulations¹⁸⁹ in favour of the trustee and creditors, while it should not be forgotten that the trustee is being remunerated for his efforts.

¹⁸⁸But see the comprehensive discussion in ch 11 and 12 below.

¹⁸⁹See specifically ss 26-44.

The South African Law Commission¹⁹⁰ has recommended the easing of the trustees burden of proof in respect of certain dispositions which may be set aside under circumstances where a close relationship exists between the insolvent and another party. Acceptance of this proposal would serve as further justification for the removal of section 21 of the Act. However, after vacillating between either removing section 21 from the Act, or replacing it with an improved model thereof, the Law Commission has opted for replacing section 21 with a provision which, it is submitted, is more draconian than section 21.¹⁹¹

10.1.11 The constitutionality of section 21 and section 16(3)

Experience has now shown that much difficulty and debate is experienced in the interpretation of the various provisions of the constitution and their effect on other legislation. This is occurring in a piecemeal fashion as time passes.¹⁹² However, from a constitutional point of view, one would have thought that the continued existence of section 21 of the Insolvency Act would be in the balance.¹⁹³ This proved not to be the case when the Constitutional Court handed down judgment in *Harksen v Lane NO and Others*,¹⁹⁴ where that court, in a majority judgment, ruled that section 21 did not infringe the provisions of the Constitution.¹⁹⁵

10.1.12 The proposals of the Bill

Over the past decade or two, cases dealing with section 21 have quite frequently come before the courts. But *Harksen v Lane NO*,¹⁹⁶ in which the Constitutional Court in a majority judgment found section 21 to be constitutional, is so far the most important case regarding section 21 of the Act. This decision probably also influenced the South African Law Commission in its approach to reforming section 21. The South African Law Commission has proposed replacing section 21 of the

¹⁹⁰See ch 12 below.

¹⁹¹See Clause 22A which is also discussed in para 12.4 below.

¹⁹²See ch 11 below.

¹⁹³See, eg, in this context Van der Vyver "The meaning of 'law' in the Constitution of the Republic of South Africa" (1994) *South African Law Journal* at 569.

¹⁹⁴1998 (1) SA 300 (CC).

¹⁹⁵The constitutionality of s 21, and the decision in the *Harksen* case is comprehensively discussed in ch 11 below, and will therefore not be considered any further at this point.

¹⁹⁶1998 (1) SA 300 (CC).

Act with a different provision that will apply to more classes of persons than only spouses of an insolvent.¹⁹⁷

10.1.13 Conclusion

The above discussion sheds light on the many problem areas that exist in respect of assets in a marriage by antenuptial contract when the estate of one of the spouses is sequestrated. Most of these problems stem directly from the existence of section 21 of the Insolvency Act. In many respects this section appears inequitable and outdated. The clumsy drafting of the provisions of this section has created a problem area in respect of assets in insolvent estates of both solvent and insolvent persons. It resulted in legal uncertainty concerning the relevant assets, and the constitutional rights of spouses.

While the provisions of this section may have been necessary when they were first drafted early in the previous century, the reality today is that many changes have transpired since the inception of section 21 and it is in need of a major overhaul. As mentioned above, the relationship between spouses appears to be no different to the relationship between parent and child or between immediate family members, and many others. While it would be impossible to apply the provisions of section 21 to all the latter relationships, it is possible to apply the existing provisions regarding voidable dispositions and dispositions that may be set aside to the relationships of spouses. The South African Law Commission has clearly illustrated its awareness of the need to change section 21, but it has vacillated between various different options, from the scrapping thereof to its replacement by the proposed clause 22A of the Draft Insolvency Bill.

While clause 22A may address a few of the pitfalls of its predecessor, in its present form it will be vulnerable to challenges on various grounds, including constitutional challenge. The solution would be to remove this type of legislation completely.

¹⁹⁷The Law Commission's proposal is discussed in detail in ch 12 below.

10.2 Marriages in community of property

10.2.1 Introduction

Spouses who are married in community of property do not have separate estates of their own, even if they carry on businesses of their own. Sequestration proceedings are therefore directed at the joint estate of both spouses, and this results in both spouses becoming insolvents, as defined in section 2 of the Act.¹⁹⁸ All the property of the spouses, including any separate property¹⁹⁹ of one of those spouses, vests in the Master, and ultimately in the trustee.²⁰⁰ An important question to consider is what assets belonging to a joint estate of this nature may be excluded from the joint insolvent estate. Related to this is the question whether the so-called separate assets of a spouse in a community marriage may be exempt from the reach of the creditors of the joint estate.

The Matrimonial Property Act,²⁰¹ other legislative provisions and the common law make provision for a spouse in a marriage in community of property to acquire property which is separate from the communal estate. On the face of it these provisions have created the impression that such separate assets are out of the reach of the creditors of the insolvent communal estate. But this is a false impression. Testators in particular, have commonly attempted to exclude a bequest to an heir in a communal marriage by bequeathing property to the heir as her separate assets, free from the joint estate and beyond the reach of the creditors of the other spouse, be it prior to, or during sequestration.²⁰² The Supreme Court of Appeal has confirmed that this is not possible.²⁰³

¹⁹⁸In s 2 “insolvent” means “[... a] debtor whose estate is under sequestration and includes such a debtor before the sequestration of his estate, according to the context”, and “insolvent estate” means “an estate under sequestration”. Smith *The law of insolvency* at 48; Meskin at 5.30.1.

¹⁹⁹The position of separate property belonging to a spouse who is married in community of property is described below.

²⁰⁰*Badenhorst v Bekker No en Andere* 1994 (2) SA 155 (N); *Du Plessis v Pienaar NO and Others* 2003 (1) SA 671 (SCA); Meskin at 5.30.1; Mars (2008) at 188; Evans RG “Testator beware!” (2002) *JBL* 166; Evans RG “Can an inheritance evade an insolvent communal estate?” (2003) *SA Merc LJ* at 228” at

²⁰¹88 of 1984.

²⁰²See, eg, *Vorster v Steyn NO en Andere* 1981 (2) SA 831 (O); *Badenhorst v Bekker No en Andere* 1994 (2) SA 155 (N); *Du Plessis v Pienaar NO and Others* 2003 (1) SA 671 (SCA).

²⁰³*Du Plessis v Pienaar NO and Others* 2003 (1) SA 671 (SCA).

However, finding clarity on this issue, has not been easy. The uncertainty that enveloped the legal principles relating to this field of law left both courts and academics sometimes groping blindly for precedents or common law authority to support their proposed solutions in this regard.²⁰⁴ It is common for testators to exclude a bequest from a communal marital estate or from an insolvent estate of an heir. But some testators, or presumably their estate administrators, do so more successfully than others. So, for example, many court cases in the past have considered the question whether an inheritance coming the way of an heir shortly before, or during sequestration, should be included or excluded from the heir's insolvent estate, or from the communal insolvent estate of an heir.²⁰⁵

Lee and Honoré confirmed the difficulty encountered in this field when stating that:²⁰⁶

The precise nature and implications of this community of debts are matters of some difficulty and uncertainty in our present law ... This is due to the fact that our Courts (mostly unconsciously) vacillate between two entirely different approaches ... The first approach treats the spouses as joint debtors ... The second approach does not regard the spouses as joint debtors

This was also expressed in *In re William Dyne's Estate*²⁰⁷ where Connor CJ stated that:

It may not be easy to see how, in our law, a wife's interest in the community of goods occasioned by her marriage, becomes vested in the trustee of her husband's insolvency ... The case has occasioned me not a little difficulty, but, on the whole, it seems to me that we may look upon the sum, now in question, in this light

This part of this chapter will consider which assets form part of a joint estate of spouses married in community of property, and which may be exempt therefrom. The question

²⁰⁴For conflicting opinions and decisions in this field see, among others, Yeats JP "Die algehele huweliksgemeenskap van goedere" (1944) *THRHR* 142 at 162; De Vos W "Aanspreeklikheid van die vrou getroud in gemeenskap van goedere vir gemeenskapskulde na ontbinding van die huwelik" (1954) *THRHR* 125 at 137; Hahlo HR *The South African law of husband and wife* (4th ed) at 226 and (5th ed) (1985) at 166; Sonnekus JC "Insolvensie by huwelike in gemeenskap van goed" (1986) *TSAR* at 92; Van Aswegen A "Die Insolvente gade en die Wet op Huweliksgoedere 88 van 1984" *De Rebus* (1986) 273 at 273; Nagel CJ en Boraine A "*Badenhorst v Bekker No en Andere* (Ongerapporteerde Saaknr 3259 (N)) Gevolge van sekwestrasie van gemeenskaplike boedel op testamentêre uitgeslote bates" (1993) *De Jure* at 457; Sonnekus JC "Privé bates en sekwestrasie in huwelik in gemeenskap van goed" (1994) *TSAR* at 143.

²⁰⁵See, eg, *Zeederberg v Zeederberg's Trustee and Another* (1864 67) 5 Searle 266 at 270, 274; *Pritchard's Trustee v Estate Pritchard* 1912 CPD 87 at 95 and *Vorster v Steyn NO en Andere* 1981 (2) SA 831 (O) and the many cases cited therein.

²⁰⁶Lee RW and Honoré T *Family, things and succession* (2nd ed) (1983) by Erasmus HJ, Van der Merwe CG and Van Wyk AH para 82 n 3.

²⁰⁷1885 NLR 43 at 46 and 47.

whether the so-called separate property of one of the spouses in a community marriage may ever be placed beyond the reach of the creditors of the insolvent joint estate will also be considered. In particular, the question whether an inheritance may be excluded from an insolvent joint estate, will be considered with reference to recent case law on this subject. The possibility of the existence of separate estates of a debtor, alongside the insolvent estate, at the time of and during his or her insolvency will also be analysed. All these issues have long been debated but are still largely problem areas that relate to assets of insolvent estates of individuals.

10.2.2 General rules in respect of assets apply

The joint estate of spouses in a community marriage is the “insolvent estate” under sequestration, as defined in the Act. Both spouses acquire the status of an insolvent,²⁰⁸ but for purposes of the Insolvency Act, one is dealing here with only one insolvent estate. Section 20 of the Act therefore applies to this insolvent estate, which means that this estate, as a single insolvent estate vests in the Master and ultimately in the trustee, just like any other insolvent estate. For this purpose, this insolvent estate includes all the property of the insolvent at the date of sequestration, as well as all the property that the insolvent may acquire during the sequestration, except as otherwise provided in section twenty three of the Act.²⁰⁹ Section 23 provides for the exclusion or exemption from the insolvent estate of various categories of property,²¹⁰ thereby excluding that property from the insolvent estate and the reach of the creditors.²¹¹ For the purpose of the Act the general rules relating to the inclusion and exclusion or exemption of assets applies.²¹²

10.2.2.1 Exceptions to the general rules

There appear to be exceptions to the general rules, particularly regarding assets that may be excluded by means of legislation other than the Insolvency Act. So,

²⁰⁸Smith *The law of insolvency* at 48; Meskin at 5.30.1; Mars (2008) ch 11. This is one of the reasons why s 21 of the Act cannot apply to spouses married in community of property. S 21 can relate only to a solvent spouse.

²⁰⁹See ss 20(2)(a) and (b) and 23(1).

²¹⁰See ch 9 above.

²¹¹See s 23 of the Act.

²¹²As envisaged in ss 20, 23, 79 and 82(6).

for example, in respect of insurance legislation, the particular marital regime that parties have entered into may create a big discrepancy regarding the inclusion or exemption of policy benefits, or a portion thereof. If spouses are married out of community of property, they may be able to protect their assets by means of life insurance policies which are structured as contracts for the benefit of a third party. Section 63 of the Long-term Insurance Act²¹³ applies where an insolvent person or his spouse is the life insured. If the insolvent is the beneficiary under that policy, the policy benefits to be provided to him, or assets acquired therewith within a five year period, are excluded from his insolvent estate to an aggregate of R50 000.²¹⁴ Any amount in excess of the R50 000 is at the disposal of the insolvent estate. So, irrespective of the marital regime that exists when the benefits are provided, the R50 000 will be excluded from the insolvent estate. However, if the spouse of the insolvent, or any other third party, is the beneficiary under that policy, section 63 will not apply, and the insolvent estate will have no recourse to any part of the policy, even if the insolvent husband had paid all the policy premiums.²¹⁵ This means that the spouse who is married by antenuptial contract is likely to receive the full policy benefits when they are paid out, to the exclusion of her husband's (deceased) insolvent estate.²¹⁶ But if these spouses are married in community of property, the insurance benefit will form part of the insolvent joint estate, without even the benefit of the R50 000 protection of section 63 of the LTIA. One possible method to avoid this consequence will be the repudiation of the benefit by that spouse,²¹⁷ so that it then accrues to an alternative beneficiary.

The position that the insolvent spouse finds herself or himself in is in a sense similar to the position of that envisaged by section 44 of the old Insurance Act,²¹⁸

²¹³52 of 1998. See the comprehensive discussion of the insurance legislation by Evans RG and Boraine A "Considerations regarding a policy for the treatment of certain beneficiaries of life insurance policies in the law of insolvency" (2005) *De Jure* 266.

²¹⁴See s 63(1) and (2) LTIA.

²¹⁵See ch 9 above. Depending on the circumstances, the trustee of the insolvent estate may be in a position to recover the premiums, or a part thereof paid by the insolvent spouse by virtue of the provisions of the Insolvency Act regarding impeachable dispositions or the common law *actio Pauliana*.

²¹⁶See "Considerations regarding a policy for the treatment of certain beneficiaries of life insurance policies in the law of insolvency" (2005) *De Jure* 266 for a comprehensive discussion of this insurance legislation.

²¹⁷See *Wessels NO v De Jager en 'n ander NNO* 2000 (4) SA 924 (SCA) and the discussion thereof in ch 8 above.

²¹⁸27 of 1943.

except that the present situation does not afford the insolvent spouse the limited protection that section 44 offered. Section 44 of the Insurance Act was struck out as unconstitutional by the Constitutional Court because it treated men and women differently.²¹⁹

Section 44 discriminated only against women. Section 63, it would appear, discriminates against either spouse, based purely on marital status.

Section 63 of the LTIA treats spouses differently. This unequal treatment has considerable negative financial consequences for the spouse in the community marriage, and she (or the insolvent estate) is denied the protection of a portion of her assets by virtue of the exemption under section 63 of the Long-term Insurance Act.

10.2.3 Recent case law

In *Badenhorst v Bekker NO en Andere*²²⁰ the court ruled that the “separate property” of a spouse who is married in community of property could not be excluded from the insolvent (joint) estate. In that case a testator bequeathed a substantial amount of property to his daughter, the applicant, who was married in community of property. During 1985 the communal estate was sequestrated. In 1989 the applicant’s father drafted a will bequeathing property to his daughter. The testator died in 1992 at a time when the communal estate of his daughter and her spouse was still under sequestration. A clause in the will bequeathed the property to the applicant as her separate property, to be excluded from the community of property and from the husband’ marital power, and immune to, or free from, the debts of the communal estate. The respondents were the trustees of the insolvent communal estate. They claimed the bequeathed property (the excluded assets) for the benefit of the insolvent estate. The applicant applied for a declaratory order that she was entitled to the excluded assets.

²¹⁹See the discussion in chs 9 and 12 above.

²²⁰ 1994 (2) SA 155 (N).

The court held²²¹ that although it was possible for the testator to bequeath the assets as her separate property and excluded from the community of property,²²² it was not possible to exclude them from the insolvent communal estate.²²³ The status of these assets, McLaren J found,²²⁴ was governed by the provisions of the Insolvency Act. Sequestration of the communal insolvent estate of spouses results in the insolvency of both spouses.²²⁵ So, inasmuch as the excluded assets accrued to the applicant after the sequestration of the joint estate, those assets were governed by section 20 of the Act, thereby vesting them in the insolvent joint estate.²²⁶ The Act contained no provisions, the court found, that pertinently deal with the position of excluded assets. Although there are exceptions to the general rules set out in section 20, the court held, the excluded assets in a joint estate were not included in such exceptions.²²⁷ There was no authority in the common law or in any judgments of the courts that excluded the separate property of a spouse in a community estate from the reach of the creditors of the joint estate.²²⁸ The confusion that has occurred among authors and in the courts in respect of the separate assets of spouses with joint estates, *vis-à-vis* the creditors of such estates could be ascribed, the court found, largely to the failure to enquire whether the relevant spouse is a debtor of the insolvent joint estate's creditors.²²⁹ The spouses were co-debtors in the communal estate. Thus, the court found, the debts of the husband and the wife in a marriage in community of property were communal debts payable out of the communal estate.²³⁰

In *Du Plessis v Pienaar NO and Others*²³¹ this question in respect of the separate assets of a spouse married in community of property was again considered. But before analysing this judgment of the Supreme Court of Appeal, it may be appropriate to first look at some of the legislative provisions that may relate to this issue.

²²¹ At 159 D-H.

²²² See *Erasmus v Erasmus* 1942 AD 265 and *Cuming v Cuming and Others* 1945 AD 201.

²²³ See, eg, *Vorster v Steyn NO en Andere* 1981 (2) SA 831 (O).

²²⁴ At 159 H-I.

²²⁵ See, eg, *De Wet NO v Jurgens* 1970 (3) SA 38 (A).

²²⁶ At 159 I, 160 D and 160 F.

²²⁷ At 160 A-F.

²²⁸ At 161 B and further.

²²⁹ At 171 B-C.

²³⁰ At 172 A-B; See also *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) at 476 B-E and *De Wet NO v Jurgens* 1970 (3) SA 38 (A) at 47 D-F.

²³¹ 2003 (1) SA 671 (SCA).

10.2.3.1 Overlapping legislation: The Insolvency Act and the Matrimonial Property Act

Section 20(1)(a) of the Act divests the insolvent of his estate upon sequestration, and vests it, ultimately, in the trustee. For this purpose, the estate of an insolvent includes all property of the debtor at the date of sequestration, including property in the hands of the sheriff under a writ of attachment.²³² It also includes property which the insolvent acquires or which may accrue to him during the sequestration, except as otherwise provided by section twenty three.²³³ Section 23 states that “subject to the provisions of this section [ie section 23] and of section *twenty four*, all property acquired by an insolvent shall belong to his estate”. Section 23 then proceeds to provide for certain property which is specifically excluded or exempted from the insolvent estate.²³⁴

The Matrimonial Property Act provides that an application by the debtor for the surrender of a joint estate must be made by both spouses, and an application for the sequestration of a joint estate by a creditor must be made against both spouses.²³⁵ The implication of this is that both spouses are being recognised as the debtor in the insolvent (joint) estate. A consequence of a marriage in community of property is that the spouses become co-owners of all the property which either of them has brought into the marriage. In this respect, transfer of ownership occurs automatically by operation of law. A further consequence is that the general rule is that all property acquired by either spouse after marriage in community of property also becomes part of the joint estate.²³⁶ There are exceptions to this general rule. The common law, the Matrimonial Property Act and other legislation make provision for the creation of a “separate estate” within a joint marital estate. For example, assets can be excluded from the joint estate in an antenuptial contract, by a will or deed of donation, or by a *fideicommissum* or a *usufruct*. So, for example, the Matrimonial Property Act provides for several exclusions, making such excluded property part of the spouse’s separate

²³²S 20(2)(a) of the Act.

²³³S 20(2)(b) of the Act.

²³⁴For a comprehensive discussion of the excluded property, see ch 9 above.

²³⁵Matrimonial Property Act s 17(4)(a) and (b).

²³⁶See Cronjé DSP and Heaton J *South African Family Law* (1999) 86.

property.²³⁷ “Separate property” is defined in the latter Act as “property which does not form part of a joint estate”.²³⁸

10.2.3.2 *Du Plessis v Pienaar*

The final word in respect of the question whether the separate property of spouses married in community of property is excluded from the insolvent joint estate was apparently spoken by the Supreme Court of Appeal in *Du Plessis v Pienaar*.²³⁹ Here the question of separate assets again arose where the appellant inherited a considerable amount of movable and immovable property from her father in 1983. The appellant was married in community of property when the inheritance accrued to her. Her father, the testator, bequeathed the property to her, subject to a stipulation that it was, among other things, to be excluded from the joint estate of the appellant and her husband, and that it was to be excluded from “any possible insolvent estate”. In March 2000 the joint estate of the appellant and her husband was finally sequestrated as a result of a failed business venture run by her husband. The trustees (respondents) claimed the separate property of the appellant for the benefit of the creditors of the insolvent estate. Following the judgment in *Badenhorst v Bekker NO*,²⁴⁰ Van der Westhuizen J in the lower court dismissed the appellant’s application to prevent the trustees from selling the property for the benefit of the creditors, and to restore the property to her.

On appeal the appellant submitted that the debts that had given rise to the claims against the insolvent estate were debts incurred by the joint estate and were therefore recoverable only from the property of the joint estate, and not from her separate property which was excluded from the joint estate. The court accepted the respondents’ argument that the debt was incurred by the person who was the debtor, and not by the person’s estate, the latter being merely the source from which the debt was recovered. The insolvent debtors were therefore both the spouses, because debts incurred by one spouse are generally the debts of both

²³⁷See, eg, ss 17(3), 18 and 19 Matrimonial Property Act.

²³⁸See s 1 Matrimonial Property Act.

²³⁹2003 (1) SA 671 (SCA)..

²⁴⁰Para 10.2.3 above.

of them in a marriage in community of property. The spouses, and not the joint estate, were therefore insolvent debtors.

Nugent JA stated that once it was accepted that debts were incurred by persons rather than by their estates, and that in marriages in community of property both spouses were generally liable for payment of the debts that were incurred by one of them, “it follows that a creditor may look to the estates of both the debtors for recovery of the debt. In the case of a spouse such as the appellant that estate comprises not only her undivided interest in the joint estate but also her separate property that falls outside the joint estate”.²⁴¹ Property that was separately owned by one of the spouses in community of property, the court held, was considered separate in the sense that it might be dealt with separately by the spouses *inter se* and upon dissolution of the marriage.²⁴²

Also the remedies of the Insolvency Act, the court stated, applied to both spouses in recovering the debt that was due by both of them. The court held that the Insolvency Act did not recognise separate estates of a debtor, nor did it allow for the sequestration of only part of a debtor’s estate. An order of sequestration, the court said, had the effect of divesting the debtor of the whole of his estate.²⁴³

Strictly within the context of this case these observations may be correct. But within the context of insolvency law, they should, it is submitted, be qualified. It is true that section 20(1)(a) has the effect of divesting the insolvent of his estate, vesting it finally in the trustee. It is not correct, however, that there is no provision, as the court stated, for only part of the debtor’s estate to be available to his creditors.²⁴⁴ Section 20(2)(b) in fact specifically provides for such an eventuality by its reference to section 23 of the Act. Section 20(2)(a) and (b) defines the content of this (divested) insolvent estate, and the content does not include certain property which belongs to the insolvent debtor, but which is specifically excluded or exempted from the insolvent estate. This excluded property belongs to another

²⁴¹At 675 D-G.

²⁴² At 675 D-G.

²⁴³ At 675 G-J.

²⁴⁴ At 676 B-C.

estate which is owned by the insolvent debtor, but it is an estate which is not under sequestration. One can assume that the Act's provisions in respect of excluded or exempt assets refer partly, to such excluded assets, and the consequential creation of another estate *after* the sequestration of the debtor, and it would appear that the court in *Du Plessis* was referring to the Act in this context. Whether or not excluded assets ever form part of the debtor's insolvent estate is open to speculation.²⁴⁵ This aspect is not expressly regulated in South African legislation, but it is submitted that excluded property never forms part of an insolvent estate, while exempt property may. However, in at least one instance it would appear that assets that belong to an insolvent debtor definitely never form part of his insolvent estate. Section 63 of the Long-Term Insurance Act²⁴⁶ provides for the protection of policy benefits under certain long-term policies. Under this section certain policy benefits that are provided or that are to be provided (and assets acquired with such benefits) are not "liable to be attached or subjected to execution under a judgment of a court or form part of his or her insolvent estate".²⁴⁷

A second example of assets that may never form part of a debtor's insolvent estate are those referred to in section 23(8) of the Act. Section 23(8) reads as follows:

The insolvent may for his own benefit recover any compensation for any loss or damage which he may have suffered, whether before or after the sequestration of his estate, by reason of any defamation or personal injury

In *De Wet NO v Jurgens*²⁴⁸ Rabie AJA stated the following in respect of section 23(8) of the Act:

The Act of 1953 lifted the restriction on a woman to personally sue for personal damages ... and it also gives her the right of control, which she previous did not

²⁴⁵It would for example appear that the insolvent has the right to his salary or remuneration, for his own benefit, to the exclusion of the rights of the trustee. To claim a part of such remuneration, the trustee must first take specified measures in order to bring that asset into the insolvent estate for the benefit of the creditors; see s 23(5) and (9) of the Act. Under s 21 of the Act, on the other hand, the solvent spouse (temporarily) loses ownership of her assets, and must specifically apply for the release thereof under s 21(2) of the Act, failing which, the assets will belong to the insolvent estate. If it was the intention of the legislature to include all assets of an insolvent in the insolvent estate, even temporarily, then it would have been necessary to make provision for the release, as in s 21, of the so-called excluded assets, before the insolvent debtor would have any rights to such assets.

²⁴⁶ 52 of 1998.

²⁴⁷ S 63(1)(a) of the Long-term Insurance Act.

²⁴⁸ 1970 (3) SA 38 (A) at 49 A-C. Author's translation: "The Act of 1953 ..."

have, over the money received as compensation ... but that does not mean, as is alleged, that this Act created a remedy that did not exist prior to 1953. The wife could institute an action with the support of her husband, or the husband himself could do so, and if successful, the communal estate, and therefor also the wife, received the advantage of the compensation received.

The communal estate to which Rabie is referring could not have been the insolvent communal estate, since the “*betaalde vergoeding*” to which he refers is an asset that is excluded from the insolvent estate by means of section 23(8). This asset would therefore not be subject to the claims of the creditors of the insolvent communal estate. The status of assets of this nature will however again be considered below.

In *Santam Ltd v Norman and Another*²⁴⁹ the underlying purpose of section 23(8) and the other provisions in section 23 was considered. The court quoted Steyn J in *Kruger v Santam Versekeringsmaatskappy Bpk*²⁵⁰ where he stated, among other things, that:

By virtue of the Insolvency Act the legislature is primarily interested in divorcing the insolvent from his assets, passing control of the estate to the trustee and to pass the assets to the creditors according to their ranking. The body of the insolvent does not, however, pass to the trustee in this manner. His personal integrity remains intact and also his status to an extent ... In that context the insolvent’s body is an “asset” that he can use to the advantage of himself and his family after sequestration ... Thus damage to his body or soul is his damage and compensation for such damage accrues to him personally for his own for his own advantage.

This exposition of the underlying purpose of these provisions was adopted with approval by the appellate division in *Santam Versekeringsmaatskappy Bpk v Kruger*.²⁵¹

In the *Norman* case the court also confirmed that section 23(8) does not only apply to compensation recovered after sequestration. The section applies to damages suffered before or after the sequestration of the insolvent’s estate. Traverso J said the following:²⁵²

I can find no reason in logic to distinguish between a case where *litis contestation* occurred prior to sequestration and where an award was made prior to sequestration. The underlying purpose of the legislation remains the same, namely

²⁴⁹1996 (3) SA 502 (C).

²⁵⁰1977 (3) SA 314 (O) at 317 C-F. Author’ translation follows: “By virtue of ...”

²⁵¹1978 (3) SA 656 (A).

²⁵²1996 (3) SA 502 (C).

to protect that which is attached to the person of the insolvent, and to enable the insolvent to retain it for his own benefit to the exclusion of his creditors. To demonstrate the inequity that will result if I had to uphold Mr *Kirk-Cohen's* argument, I will give the following hypothetical examples.

If X receives an award prior to sequestration which includes a component for future loss of earning capacity, will this award vest in the trustee? If X receives an award which is earmarked to enable him to purchase a new wheelchair at regular intervals for the rest of his life, could the Legislature ever have intended that such an award would vest in the trustee? The answer to this question is self-evident.

A third example of assets that do not vest in the trustee of an insolvent estate is that of pension moneys that the insolvent may in terms of section 23(7) recover for his own benefit. These benefits, it would appear, do not form part of the insolvent estate of the debtor.²⁵³

10.2.4 Does the Act recognise separate estates in insolvency?

As stated above, section 23 provides that “subject to the provisions of this section [ie section 23] and of section *twenty four*, all property acquired by an insolvent shall belong to his estate”. Generally, this relates to property acquired by the debtor after sequestration. But section 23 also provides for certain property which is specifically excluded from the insolvent estate.²⁵⁴ If, as the court states in the *Du Plessis* case above, the Insolvency Act does not recognise separate estates of a debtor, in which estate will such excluded assets reside? Sequestration therefore does divest the insolvent of his entire *insolvent estate*, but this does not mean that he is divested of property which does not form part of the insolvent estate. That excluded property will vest in the debtor’s “new” estate which does not form part of his insolvent estate.²⁵⁵ Section 24 regulates the position of property in possession of the insolvent after sequestration. Section 24(2) states that whenever the *insolvent* acquired the possession of any property, such property, if claimed by the trustee of the insolvent estate, will be deemed to belong to that estate unless the contrary is proved. If the contrary *is* proved, to what estate will such property belong if not to the insolvent estate? Unless it is proved that the property belongs to a third party, it will belong to the insolvent debtor, but not to the insolvent debtor’s insolvent

²⁵³See *Matanzima v Minister of Welfare and Pensions and others* 1990 (4) SA 1 (Tk AD).

²⁵⁴But see also s 63 of the Long-term Insurance Act.

²⁵⁵See *Miller v Janks* 1944 TPD 127.

estate. An example of assets so acquired would be property purchased with income which is exempt under section twenty three, or by virtue of the provisions of the Long-term Insurance Act. It would therefore appear that the Insolvency Act does recognise separate estates of a debtor, and so too it does allow for the sequestration of only part of a debtor's estate. Furthermore, by implication, this would also mean that a debtor, when incurring a debt, is capable in law of binding only part of his or her estate. From a practical point of view it is important to recognise this because it is not inconceivable that an application for the sequestration of an unrehabilitated debtor's "new" estate may come before the court.

10.2.5 The position regarding separate property in a communal estate

The Matrimonial Property Act specifically makes provision for the existence of separate property within a communal marital estate.²⁵⁶ In *Du Plessis's* case²⁵⁷ the court held that the existence of such separate property did not result in the creation of a separate estate comprising all property that was excluded from the joint estate, and which was out of reach of the joint creditors of the spouses. The existence of such a novel entity, the court found, would result in "startling anomalies for it would suggest that a debtor might be insolvent in relation to one estate and not insolvent in relation to the other". The Matrimonial Property Act, the court concluded, recognised the existence of separate property in the relationship between the spouses *inter se*, but it did not affect the rights of third parties.²⁵⁸

But, the above discussion shows that it is not so startlingly anomalous to find that a debtor may be insolvent in relation to one estate but not insolvent in relation to another. One last example where this "anomaly" again may occur is where a spouse, married in community of property, has recovered an amount by way of damages resulting from a delict committed against him or her. Section 18(a) of the Matrimonial Property Act excludes such property from the joint estate and it becomes the spouses separate property. At the same time damages on account of defamation or personal injury are excluded from the spouses' insolvent estate

²⁵⁶See s 1 of the Matrimonial Property Act 88 of 1984.

²⁵⁷2003 (1) SA 671 SCA.

²⁵⁸At 677 C-F.

by section 23(8) of the Insolvency Act. Assets emanating from such damages may therefore be out of reach of one of the spouses *inter se*, while simultaneously they may be out of reach of the creditors of the insolvent (joint) estate. Wherein then, do assets of this nature reside; is this not a separate estate within a communal marital estate, and if so, can such separate and excluded income, or assets acquired with such income, ever form part of an insolvent estate?

10.3 Conclusion

Although questions may emanate from both the *Badenhorst* and *Du Plessis* cases, it would appear that generally the only assets that may be excluded from a communal insolvent estate are those that are specifically excluded by virtue of the provisions of the Insolvency Act, insurance legislation and some other legislation. Such assets are beyond the reach of the creditors of the communal estate. However, as long as both spouses in a marriage in community of property are considered to be the debtor in respect of debts incurred by either of them, it is apparently not possible, other than by legislation, to create within a communal marriage, a separate estate beyond the reach of the creditors. Of course, the problems experienced by the spouses in question to a large extent originate from the particular marital regime that they have entered into, or that they have entered into by default, after failing, either through negligence or ignorance, to enter into a marriage out of community of property. In both the *Badenhorst* and *Du Plessis* cases, these problems may have been avoided if the parties had been advised to enter into a marriage out of community of property.

In many foreign jurisdictions the institution of a marriage in community of property is unknown. Generally, in those jurisdictions, the problems encountered above are also unknown. In his concluding remarks the judge in the *Badenhorst* case said:²⁵⁹

The result may seem unfair, but in my opinion this is the unavoidable result of a marriage in community of property.

The results of these cases certainly leave behind feelings of inequity, and where a will is involved, evidence of the poorest of estate planning. At this point one also cannot

²⁵⁹Author's translation :“ The result ...”

help but wonder why this issue was not given thorough consideration in the drafting of the Matrimonial Property Act. That legislation appears to be misleading when it provides for the creation of “separate estates” for spouses within a community marriage, but fails to give adequate warning of the consequences thereof *vis-à-vis* third parties. Perhaps an amendment of the relevant provisions is overdue.

It is also ironic that although a testator cannot exclude an inheritance from an insolvent estate by means of a clause such as that used in the *Du Plessis* and *Badenhorst* cases, the heir now can attain the result that the testator had in mind by a mere act of repudiation.²⁶⁰ While the heir will lose all rights to the inheritance if he repudiates, he will also ensure that the inheritance is excluded from the insolvent estate. The inheritance will then generally devolve upon another person, either in terms of the relevant will, or intestate. This result, one may argue, is more in line with what the testator probably intended. Simultaneously, however, it is in direct conflict of the insolvency law policy of the collection of maximum assets for the advantage of creditors in insolvent estates. These problems are the result of a lack of consistency in the formulation of policy in respect of assets in insolvent estates . Legislation on this important aspect is non existent.

Future legislation, or amending legislation, must consider the question of assets of insolvent estates in the context of the policy considerations and principles that support the idea of collection of maximum assets for the advantage of creditors, together with a solid policy on excluded and exempt assets and the idea of utilising those assets for a fresh start. As far as is possible, such legislation must be comprehensively contained in one Act, thereby avoiding the confusion and uncertainty that often arises when different fields of law overlap, but fail to consider or refer to the various overlapping provisions. Further, where a lack of legislation

²⁶⁰ See *Kellerman NO v Van Vuuren & Others* 1994 (4) SA 336 (T); *Boland Bank Bpk v Du Plessis* 1995 (4) SA 113 (T); *Klerck and Schärgees NNO v Lee & Others* 1995 (3) SA 340 (SE); *Simon NO & Others v Mitsui and Co Ltd & others* 1997 (2) SA 475 (W); *Wessels NO v De Jager en 'n Ander NNO* 2000 (4) SA 924 (SCA); *Durandt NO v Pienaar NO & Others* 2000 (4) SA 869 (C); Sonnekus JC 'Adiasie, insolvensie en historiese perke aan die logiese' 1996 TSAR 240; Sonnekus JC 'Delatio en fallacia in die Hoogste Hof' 2000 TSAR 793; Stevens R 'R I P TESTATOR: *Wessels NO v De Jager en 'n ander NNO*' (2001) 118 SALJ at 230 and Evans RG "Should a repudiated inheritance or legacy be regarded as property of an insolvent estate?"(2002) 4 SA MercLJ at 690.

has resulted in problem areas regarding assets in insolvent estates, like insurance policies and inheritance, new legislation must expressly regulate and solve these problems within a uniform policy for the collection of assets so as to create legal certainty regarding property included in the insolvent estate, and property exempt therefrom. This will resolve many of the existing problems regarding property in the insolvent estates of individuals in South Africa.

Chapter 11: The impact of the South African Constitution on selected problem areas in respect of assets in insolvent estates

11.1 Introduction

All constitutions regulate the exercise of public power, and modern constitutions determine the locus of power and the manner in which power is exercised.¹ Values and principles are also inherent in modern constitutions. These values:²

[are] *a priori* commitments upon which the whole edifice of democratic government is premised. They are the *a priori* assumptions that justify and give a bill of rights its particular form. Centred round human dignity, the values of freedom and equality ... form the mantra of values that inform democratic constitutions.

Modern constitutions also feature a Bill of Rights.³ South Africa now has such a modern Constitution and a Bill of Rights.⁴ However, none of this was in place when the Insolvency Act and most of its amending legislation came into force. The values and principles upon which the Constitution is built differ radically from many of the values, principles and policies that are the foundation of the Insolvency Act.⁵ It should therefore be expected that provisions of the Insolvency Act will be challenged as being unconstitutional. In respect of assets of the insolvent estate, this challenge has already been launched on several fronts, sometimes successfully, sometimes not.

The purpose of this chapter is to consider the manner in which the constitution has impacted on, or may impact on, certain provisions of the Insolvency Act that relate to assets of the insolvent estate. More specifically, this chapter will consider the constitutional impact on benefits of life insurance policies, property in the form of the dwelling of the insolvent debtor and his dependents, and the property of the spouse of the insolvent debtor. The first and last of these subjects, or aspects

¹Cheadle NH, Davis DM and Haysom NRL *South African constitutional law: The bill of rights* (2002) at 1 (hereafter Cheadle); see generally also Woolman S *Constitutional law of South Africa* (2nd ed) (2004) at para 31.1 (hereafter Woolman) and Rautenbach IM and Malherbe EFJ *Constitutional law* (4th ed) (2004) at para 2.1 and further (hereafter Rautenbach).

²Cheadle at 1.

³Cheadle at 1. In the Constitution the Bill of Rights is set out in ch 2.

⁴Constitution of the Republic of South Africa Act 108 of 1996 (hereafter the Constitution or the final Constitution).

⁵24 of 1936 (hereafter the Act or the Insolvency Act).

thereof, have already been considered by the Constitutional Court, but the issue of the dwelling of the insolvent debtor is yet to be considered within the context of insolvency legislation.

While certain provisions of the Insurance Act⁶ that overlapped with insolvency law were successfully attacked on constitutional grounds, the attack on section 21 of the Insolvency Act, concerning the solvent spouse's property, was less successful. But despite some provisions of the Insurance Act being struck out, new insurance legislation⁷ has failed to provide an adequate solution to the aspect of insurance benefits being either included or excluded as property of an insolvent estate. The reason for this, it would appear, is because there is no consistent policy concerning the manner in which estate property in insolvency must be approached.

The possibility of excluding the home of the debtor from his insolvent estate on constitutional grounds has not yet been considered within the confines of the collective mechanism of insolvency legislation. In respect of the individual debt collection procedures, however, the issue of a right to housing has been the subject of litigation, and it is probably only a matter of time before it encroaches upon the insolvency arena. Linked to the housing considerations is the right of children to be sheltered in homes.

In this chapter the constitutional impact, or possible impact, on insurance policies, on the assets of spouses of insolvent debtors, on the right of a debtor to a dwelling and the rights of children (and others) residing in that dwelling will be considered in some detail. It would appear that these problem areas cannot be rectified without a well considered policy in respect of estate assets. This policy must conform with the spirit of the constitution and the bill of rights. Section 39 of the constitution describes how the Bill of Rights must be interpreted. It states that a court, tribunal or forum must interpret the Bill of Rights so as to promote the values that underlie an open and democratic society based on human dignity, equality

⁶27 of 1943.

⁷The Long-term Insurance Act 52 of 1998.

and freedom.⁸ Further, in this interpretation it must consider international law, and may consider foreign law, and when interpreting legislation, that body must promote the spirit, purpose and objects of the Bill of Rights.⁹

Chapter 2 of the South African Constitution protects fundamental rights.¹⁰ These rights, however, are not absolute rights and may come into conflict with one another. They are also subject to a general limitation clause.¹¹ In terms of section 36 of the Constitution a fundamental right may be limited by a law of general application if such limitation is reasonable, is justified in an open and democratic society based on freedom and equality, and provided that such limitation does not negate the essential content of the right in question. Any substantial insolvency law policy must recognise, and be tested by, this limitation clause. As will be shown in the discussion below, the existence of the limitation clause is crucial in the Constitutional Court's finding of the presence or absence of constitutionally offensive insolvency legislation, or related legislation.

In respect of estate assets, some of the provisions in the Insolvency Act may be inconsistent with the provisions of the Bill of Rights in that they negatively affect the basic rights of the debtor and or his dependents. Such rights that will be considered in this chapter relate to equality,¹² the right to human dignity,¹³ privacy,¹⁴ property,¹⁵ housing¹⁶ and the rights of children.¹⁷ These rights will receive further consideration within the discussion of the relevant estate assets which may be considered to be problem areas in the insolvent estates of individuals. As already mentioned, the assets that will receive specific analysis are benefits emanating from insurance policies, property of a spouse, and the home of the insolvent debtor and others residing in it.

⁸S 39(1)(a) Constitution.

⁹S 39(1)(b)-39(2) Constitution.

¹⁰For a comprehensive discussion on the Interim Constitution, see also Cachalia A, Cheadle A, Davis D, Haysom N, Meduna P, Marcus G *Fundamental rights in the new Constitution: An overview of the new Constitution and a commentary on chapter 3 on fundamental rights* (1994); Basson DA *South Africa's Interim Constitution: Text and notes* (1994).

¹¹See s 36 of the Constitution.

¹²S 9 Constitution.

¹³S 10 Constitution.

¹⁴S 14 Constitution.

¹⁵S 25 Constitution.

¹⁶S 26 Constitution.

¹⁷S 28 Constitution.

11.2 Insurance policies

11.2.1 Introduction

New insurance legislation in the form of the Long-term Insurance Act¹⁸ and the Short-term Insurance Act,¹⁹ repealed the Insurance Act.²⁰ Both acts commenced operation on 1 January 1999. In the context of this chapter the Long-term Insurance Act is of importance in respect of protected life policies. The Insurance Act has been repealed by the new legislation, but in order to consider the implications that the constitution has had on insurance legislation within the insolvency law context, it is necessary to discuss the position under the old legislation briefly. Thereafter the new legislative provisions will be considered.²¹

11.2.2 The Insurance Act 27 of 1943 (prior to 1 January 1999)

The Insurance Act 27 of 1943 provided that, subject to certain conditions, life policies were excluded from an insolvent estate to the extent stated in that Act. Life policies which qualified for protection included ordinary life assurance and endowment policies, industrial policies and funeral policies. If several policies qualified for an exemption, the trustee could choose which policy would be released.²²

There were mainly three categories of protection under the Insurance Act, namely:

- (1) Protection of policies taken out by a person on his own life.²³
- (2) Protection of policies taken out by a married woman.²⁴
- (3) Protection of policies which a man had ceded to his wife or which he took out in favour of his wife or child.²⁵ On constitutional grounds, an aspect of this third category of protected policies was challenged as being inconsistent with the Bill of Rights, so only this aspect will be considered in more detail in paragraph 2.2.3 below.

¹⁸S 52 of 1998.

¹⁹S 53 of 1998.

²⁰S 27 of 1943.

²¹A more comprehensive discussion of this topic can be found in ch 9 below.

²²S 45 of the Insurance Act.

²³S 39 of the Insurance Act; The relevant statutory provisions are phrased in the masculine, but the law is the same where the insolvent is an unmarried woman. In terms of s 6(a) of the Interpretation Act 33 of 1957 the masculine gender must be read with the feminine gender.

²⁴S 41(1) and s 41(2) of the Insurance Act.

²⁵S 42 of the Insurance Act.

11.2.2.1 Protection of policies taken out by a person on his own life

The surrender value of a life policy taken out by a person on his own life was partly excluded from his insolvent estate if it had been in force for at least three years. Generally, if the joint value of all such policies owned by that person exceeded R30 000, the amount in excess of the R30 000 formed part of his insolvent estate.²⁶ Property purchased with such protected funds was also excluded from the insolvent estate for a period of five years from the date upon which the money became payable.²⁷

11.2.2.2 Protection of policies taken out by a married woman

A policy taken out by a woman on her own life, who then married, was, together with any money paid out in terms thereof, or property purchased with that money, excluded from a joint estate between her and her spouse, and from the husband's marital power.²⁸ Premiums paid on the policy by the husband while his liabilities exceeded his assets, or when the joint estate in a community marriage was insolvent, had to be repaid by the wife.²⁹ Where a woman took out a policy on her husband's life after the marriage, the same principles applied.

11.2.2.3 Protection of policies that a man ceded to his wife or that he took out in favour of his wife or child

If a man took out a policy on his own life and thereafter ceded the policy to a woman whom he intended marrying and whom he thereafter married *in* community of property, or if a man took out a policy in favour of a woman whom he intended marrying and whom he later married in community of property, or in favour of their child, that policy was excluded from the joint estate.³⁰

If a man ceded a policy to an intended spouse, or took out a policy in her favour or in favour of their child, and then married the woman *out* of community of

²⁶S 39(1) Insurance Act.

²⁷S 39(3) Insurance Act. S 39 relates to the position where the insolvent is still alive when his estate is sequestrated, while s 40 applied *mutatis mutandis* to deceased estates.

²⁸S 41(1)-(2) Insurance Act.

²⁹S 42(2) Insurance Act.

³⁰S 42(1) of the Insurance Act.

property, that policy did not form part of the woman's insolvent estate. The protection was limited to R30 000 of the joint value of that policy and of all other life policies of which the woman was the owner. It included all monies paid to her, or due to her, in terms of such policies, and the value of all other property which belonged to her and into which she converted any such money.³¹

A married man, whether married in or out of community of property, could cede a life policy taken out in his own favour, to his spouse, or he could take out a life policy in favour of his wife or their child.³² In such a case the policy, any benefits paid out under it, and any property into which that money was converted were excluded from the joint estate (if one existed) and from the man's marital power.³³ If the estate of a man who so ceded a policy to his wife, or who effected a policy in her favour or in favour of their child, was sequestrated, the policy and all money or assets emanating from it were deemed not to belong to the insolvent estate.³⁴ But this protection did not apply if the transaction was not *bona fide* and was ceded or taken out less than two years before sequestration.³⁵ The policy was fully protected if it was ceded or taken out under a duly registered antenuptial contract.³⁶ However, if the transaction was so entered into otherwise than by such antenuptial contract, only R30 000 was protected from the creditors of the insolvent estate.³⁷

Section 44(3) provided a measure of protection to women married in community of property. It regulated life policies that a woman married in community of property owned, or money or assets derived from it, which was excluded from the community of property, but which could be attached by her husband's creditors. Such policy could not be attached by the husband's creditors unless the spouses' joint assets were

³¹S 42(2) of the Insurance Act.

³²S 43 of the Insurance Act.

³³S 43 of the Insurance Act.

³⁴S 44(1) of the Insurance Act.

³⁵S 44(1) of the Insurance Act.

³⁶S 44(1)(a) of the of the Insurance Act.

³⁷S 44(1)(b) of the of the Insurance Act. S 44(2) of the of the Insurance Act dealt with these policies where the man's estate had not been sequestrated, in other words the position in the individual debt collection procedure. Then the policy was deemed to be his property as against any of his creditors so far as its value exceeded R30 000, if two years had passed since the cession or effecting of the policy had transpired (s 42(2)(a)). If less than two years had passed between the cession or effecting of the policy, and attachment thereof by a creditor, then the policy in its entirety was deemed to be his (s 44(2)(b)).

insufficient to satisfy the claim. But if the policy was so used to satisfy such claim, the woman was entitled to be refunded for the relevant amount out of any policy of money belonging to her husband which was withheld from his creditors or the trustee of his insolvent estate in terms of section 39 of the Insurance Act.³⁸

11.2.2.4 The constitutionality of section 44 of the Insurance Act

Previously, where the *husband's* estate was sequestrated, but not the wife's, section 44(1) and (2) of the Insurance Act regulated the position where *he* ceded certain life policies to *his wife* or which he took out in her favour, whether before or after their marriage. However, section 44(1) and (2) was declared void by the Constitutional Court³⁹ because it discriminated unfairly on the basis of sex and marital status.

11.2.2.4.1 What was the purpose of section 44?

Section 44 of the Insurance Act (and the repealed section 28 of the Insolvency Act) had the dual purpose of protecting both the wife of the insolvent husband as well as his creditors. Firstly, in view of the common law rule prohibiting donations between spouses, section 44 provided a married woman with a benefit which would otherwise have been denied her.⁴⁰ Secondly, the interest of the creditors was protected from the possibility of collusion and fraud between the husband and wife. However, with the introduction of section 22 of the Matrimonial Property Act 88 of 1984, which allowed for donations between spouses, the first purpose above fell away and in fact reverted into a burden on a married woman who may have been affected by section 44. But for section 44, a policy envisaged in that section could in its entirety have amounted to a valid donation to the wife if the requirements of validity had been met and the suspicion of simulation had been removed. Furthermore, only a married woman was affected by the provisions of this section, not a married man in whose favour his wife had taken out a policy or ceded it to him. This situation inevitably led to the decision of the Constitutional Court in *Brink v Kitshoff*⁴¹ whereby section 44(1) and (2) was declared unconstitutional and therefore invalid.

³⁸S 44(3) of the Insurance Act.

³⁹In *Brink v Kitshoff NO* 1996 (4) SA 197 (CC).

⁴⁰The insurance policies under discussion can be regarded as donations between spouses.

⁴¹1996 (4) SA 197 (CC).

11.2.2.4.2 *Brink v Kitshoff 1996 (4) SA 197 (CC)*

Mr Brink took out a life insurance policy valued at R2 million, of which he was the owner, in 1989. He ceded this policy to his wife in 1990. She is the applicant in this case. In 1994 Mr Brink died insolvent. His estate was administered under section 34 of the Administration of Estates Act 66 of 1965. The executor claimed, in terms of section 44 of the IA, all but R30 000 of the proceeds of this insurance policy for the estate. The insurer refused to accede to this claim, and the matter eventually came before the Constitutional court.

O'Regan J found that married women and married men were treated differently by section 44(1) and (2). Married women, but not married men, were disadvantaged,⁴² and it amounted to discrimination against women on the grounds of both sex and marital status. This was a contravention of section 8, the equality clause, of the interim Constitution.⁴³ Now section 44(1) and (2) had to be tested against the limitation clause in the Constitution.⁴⁴ To succeed under this clause it would have to be shown that section 44 was reasonable and justifiable in an open and democratic society based on freedom and equality, and that it did not negate the essential content of section 8 of the (interim) Constitution. To test this, the purpose and effects of the infringing provision had to be analysed and weighed against the nature and extent of the infringement caused.⁴⁵

The first purpose of section 44 of the IA, O'Regan J held, was to provide married women with a benefit which they had been denied because of the common law

⁴²At 217 F-G.

⁴³Constitution of the Republic of South Africa Act 200 of 1993 – now s 9 of the present Constitution of the Republic of South Africa Act 108 of 1996. The relevant subsections of s 9, the equality clause in the present Constitution, read as follows:

- 9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law ...
- 9(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth ...
- 9(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subs (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- 9(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

For a comprehensive discussion on the constitutional commitment to equality, see Currie I and De Waal J *The Bill of rights handbook* (5th ed) (2005) at 230 (hereafter Currie) and Cheadle at 51. See also Van der Schyff G *Limitation of rights: A study of the European Convention and the South African bill of rights* (2005) at 269.

⁴⁴S 33 of the interim Constitution and s 36 of the present Constitution.

⁴⁵At 218 F-H.

prohibition of donations between spouses. This purpose had fallen away when the common law rule was abolished by section 22 of the Matrimonial Property Act.⁴⁶ So, instead of being advantageous, section 44 of the Insurance Act became burdensome to married women.⁴⁷ The second purpose of protecting creditors of insolvent estates remained in place. The court considered the protection of creditors to be a valuable and important public purpose, and the court accepted that the close relationship between spouses could lead to collusion or fraud, but it could not accept that the distinction between married men and married women could be said to be reasonable and justifiable.⁴⁸ No persuasive reasons were advanced to show why section 44 should apply only to transactions in which husbands effected or ceded policies in favour of their wives, and not to similar transactions by wives in favour of their husbands. There seemed to be no reason why fraud or collusion does not occur when husbands, rather than wives, are the beneficiaries of insurance policies. Avoiding fraud or collusion, the court found, does not suggest a reason as to why a distinction should be drawn between married men and married women.⁴⁹ Sufficient other legislative provisions⁵⁰ that could reasonably serve the purpose of protecting the interests of creditors in a manner less invasive of constitutional rights were available. Section 44(1) and (2) of the Insurance Act caused discrimination that was not reasonable or justifiable in the light of the purpose of the legislation. The court declared these provisions invalid.⁵¹

The effect of the *Brink* decision was that the benefits of policies effected in favour of or ceded to one spouse by another would ostensibly belong to the estate of the recipient spouse without any limitation, and irrespective of the insolvency of the other spouse. This, of course, was subject to the provisions of section 21 and section 26 of the Act.⁵²

⁴⁶ 88 of 1984.

⁴⁷ In the absence of s 44, the entire policy could be regarded as a valid donation to the wife.

⁴⁸ At 218 I-J.

⁴⁹ At 219 A-C.

⁵⁰ Such as ss 26, 29, 30 and 31, for impeaching transactions, and s 21 of the Insolvency Act, for vesting the solvent spouse's assets in the trustee.

⁵¹ At 219 F-H.

⁵² This aspect relating to s 21 is discussed in ch 10 above.

11.2.3 The Long-term Insurance Act⁵³

As stated above, the Long-term Insurance Act,⁵⁴ which came into effect on 1 January 1999 repealed the Insurance Act 27 of 1943. In terms of the Long-term Insurance Act, policy benefits⁵⁵ (or the assets acquired exclusively with those benefits) provided to a person (the beneficiary) under one or more assistance, life, disability or health policies⁵⁶ are protected if such person or his/her spouse is the life insured⁵⁷ and the policy has been in force for at least three years.⁵⁸

Other than for a debt secured by such policy, the policy benefits (or aforementioned assets) will 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 upon his or her death, if he or she is survived by a spouse, child, stepchild or parent, not be available for the purpose of payment of his or her debts.⁵⁹ These policy benefits are only protected if they devolve upon the spouse, child, stepchild or parent of the beneficiary in the event of the latter's death.⁶⁰

This protection is limited in that it applies to benefits, or to assets acquired solely with the policy benefits, for a date of five years from the date on which the policy benefits were provided, to an aggregate amount of R50 000 or another amount prescribed by the Minister.⁶¹ The onus is on the person claiming the protection afforded by the section to prove, on a balance of probabilities, that he is entitled to them.⁶² Provision is made for the selection for realisation of protected policies where two or more long-term policies exist, and for the partial realisation of protected policies.⁶³

⁵³This Act is extensively discussed in ch 9 above. The present discussion is merely a summary that is intended to reflect on the consequences of the re-drafting of legislation that was intended, amongst other things, to assure its constitutionality, but in fact produced legal uncertainty, and predictably, a spout of litigation.

⁵⁴Act 52 of 1998.

⁵⁵Long-term Insurance Act 52 of 1998 s 63(1) read with s 1 "policy benefits" being one or more sums of money, services or other benefits, including an annuity.

⁵⁶Long-term Insurance Act 52 of 1998 s 63(1) read with s 1.

⁵⁷Long-term Insurance Act 52 of 1998 s 63(1) read with s 1 "life insured".

⁵⁸Long-term Insurance Act 52 of 1998 s 63(1).

⁵⁹Long-term Insurance Act 52 of 1998 s 63(1)(a) and (b).

⁶⁰Long-term Insurance Act 52 of 1998 s 63(3)(a).

⁶¹Long-term Insurance Act 52 of 1998 s 63(2)(a) and (b); s 1 "Minister".

⁶²Long-term Insurance Act 52 of 1998 s 63(1)(b).

⁶³See S 64 and S 65.

If compared with the Insurance Act, it would appear that the legislator exercised an attempt at simplifying the somewhat complex predecessor to the Long-term Insurance Act. In the process of doing so, however, the drafters of the Long-term Insurance Act possibly failed to adequately analyse the possible scenarios that would result when section 63 of the Long-term Insurance Act had to be applied to the context of the insolvent debtor. The first clutch of case law regarding section 63 of the Long-term Insurance Act proved that the drafters of this legislation failed to recognise the importance or the extent of the overlapping insolvency law, and consequently the principles and policies upon which insolvency law rests were not considered at all. While simplification of the legislation may have resulted in clarity on one level, on others this legislation has resulted in legal uncertainty regarding policy-benefits as property of insolvent estates, and the current insolvency law policy of swelling the insolvent estate to the maximum for the advantage of creditors, has been negated. Section 63 will probably not have any constitutional implications, but its formulation bears evidence that it was not drafted with insolvency law policy of advantage to creditors in mind. The implications of this legislation are comprehensively discussed in chapter 9 above. The one possible infringement of a spouse's rights when married in community of property, by section 63, is considered in paragraph 10.2.2 above and will not be repeated here.

11.3 Section 21 of the Insolvency Act⁶⁴

11.3.1 Introduction

In South African law sequestration of a married person automatically affects the “spouse” of that person in a number of ways. The property of the spouse, for example, is placed at risk by such sequestration. Without exception, the property that belongs, or ostensibly belongs to the spouse of an insolvent will be affected by the order of sequestration against the insolvent spouse. The Insolvency Act and other legislation are geared towards raking in property in possession of a solvent spouse that may belong to the insolvent estate, thereby enforcing the insolvency law policy of advantage to creditors. This policy of attacking the property of the

⁶⁴For a comprehensive discussion on the effect of sequestration on the property of married persons, see ch 10 above.

spouse has however been challenged. The introduction of section 21, in short, has created a problem area in respect of assets in the insolvent estates of individuals.

But section 21 relates only to marriages by antenuptial contract. This must be distinguished from marriages in community of property, which is also, it is submitted, a problem area in respect of property of individual debtors.⁶⁵ With a marriage in community of property there is, in principle, only one joint estate that is already under sequestration, and both spouses acquire the status of an insolvent. But in a marriage out of community of property one is essentially dealing with two separate estates and in the event of the insolvency of one of the spouses, section 21 of the Insolvency Act will apply.⁶⁶ However, as will be discussed below,⁶⁷ section 21 is not applicable only to spouses who have formally entered into a marriage, but also to various other categories of “spouses” living together as “husband and wife”. A consequence of the provisions of section 21 is that it vests the assets of the solvent spouse firmly within the hands of the trustee of the insolvent spouse where, depending on the circumstances, they may or may not remain. This vesting in fact results in a transfer of the *dominium* of the property, albeit temporarily, in the trustee.⁶⁸

11.3.2 Marriages by antenuptial contract

Section 21 came about because, before its inception,⁶⁹ debtors frequently attempted to avoid payment of their debts by transferring their assets to a spouse, thereby defrauding their creditors while simultaneously benefiting themselves.⁷⁰ Particularly in marriages entered into by antenuptial contract or in cases where two people were

⁶⁵This problem area is discussed in ch 10 above.

⁶⁶*Acar v Pierce* 1986 (2) SA 827 (W). In marriages in community of property there is in fact only one estate, therefore s 21 of the Insolvency Act cannot apply. S 21 will also not apply in a marriage in community of property in respect of property of the wife which has been excluded from the joint estate, because the wife is also an insolvent; see in this respect *De Wet NO v Jurgens* 1970 (3) SA 38 (AD) at 48 ; *Badenhorst v Bekker NO en Andere* 1994 (2) SA 155 (N) at 160-161; *Du Plessis v Pienaar NO and Others* 2003 (1) SA 671 (SCA) and *Meskin* at 5.30.1. Evans RG “Can an inheritance evade an insolvent communal estate?” (2003) *SA Merc LJ* at 228. See ch 10 above for a comprehensive discussion of s 21 of the Insolvency Act.

⁶⁷See para 11.3.3 below.

⁶⁸*De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 15-16; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at 317-318.

⁶⁹By amending the Insolvency Act No 32 of 1916 by the Amendment Act 29 of 1926.

⁷⁰*Maudsley v Maudsley's Trustee* 1940 WLD 166; Smith CH *The law of insolvency* (3rd ed) (1988) at 108 (hereafter *Smith Law of insolvency*); De la Rey EM Mars *The law of insolvency in South Africa* (8th ed) (1988) at 165 (hereafter *Mars* (1988)).

merely living together as man and wife, estate assets would be transferred between spouses by simulated transactions. The onus was then on the trustee of an insolvent estate to prove that such transfers were simulated transactions.

Section 21 halted this practice. It was the intention of section 21 to relieve the trustee of the onus to show that the property claimed by the solvent spouse was in fact her separate property. Section 21 placed this onus on the solvent spouse.⁷¹ Section 21, however, has been challenged in the Constitutional Court⁷² in the case of *Harksen v Lane NO and Others*,⁷³ which is discussed in more detail below. The position of spouses of insolvent debtors is extensively discussed in chapter 10 of this thesis, therefore only the constitutionality of section 21 will be considered here.

11.3.3 The term “spouse”

"Spouse" is defined in section 21 as a wife or husband by virtue of a marriage of any law or custom, as well as a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another.⁷⁴

However, since the commencement of the Civil Union Act⁷⁵ on 30 November 2006, the definition of the term “spouse” in the Insolvency Act has by implication been amended to include persons of the same sex who have entered into a civil union.

The Civil Union Act was introduced to accord same-sex couples the same family law rights and obligations, and the same status, benefits and responsibilities

⁷¹De Wet en Van Wyk *De Wet en Yeats Die Suid-Afrikaanse kontraktereg en handelsreg* (4th ed) (1978) at 455; Smith *The law of insolvency* at 108; Joubert N “Skenkings tussen man en vrou, simulاسie en artikel 21 van die Insolvensiewet 24 van 1936” (1992) *TSAR* 345; Joubert N “Artikel 21 van die Insolvensiewet: Tyd vir 'n nuwe benadering?” (1992) *TSAR* at 699; *Coetzer v Coetzer* 1975 (3) SA 931 (EC); *Snyman v Rheeder* 1989 (4) SA 496 (T); *De Villiers v Delta Cables* 1992 (1) SA 9 (A).

⁷²The position of property of spouses *vis-à-vis* an insolvent spouse, including the provisions of s 21 have been fully discussed in ch 10, therefore only the constitutional challenge to s 21 is discussed here.

⁷³1998 (1) SA 300 (CC).

⁷⁴S 21 (13). In considering this section the court in *Chaplin v Gregory (or Wyld)* 1950 (3) SA 555 (C) at 564 was prompted to say the following:

By introducing this subsection the Legislature quite obviously intended to bring into the net those persons who while not legally married were occupying the *de facto* position of husband and wife. The method by which this was done was, to say the least, a clumsy one.

⁷⁵17 of 2006. Aspects of this topic were discussed in ch 10 and are being repeated here for ease of reference for the reader.

accorded to opposite-sex couples, thereby respecting the constitutional rights of same-sex couples.⁷⁶ “Civil union” is defined in this Act⁷⁷ as the voluntary union of two persons who are both 18 or older, which is solemnised and registered by way of either a marriage or a civil partnership, according to the procedures prescribed in the Act, to the exclusion, while it lasts, of all others. A “civil union partner” means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of the Civil Union Act,⁷⁸ and this Act applies to civil union partners joined in a civil union.⁷⁹

A consequence of a civil union is that the legal consequences of a marriage in terms of the Marriage Act⁸⁰ apply, with relevant contextual changes, to a civil union.⁸¹ Furthermore, a reference to marriage in any other law, including the common law, includes, with relevant contextual changes, a civil union, and husband, wife or spouse in any other law, including the common law, includes a civil union partner.⁸²

For the purpose of section 21(13) of the Insolvency Act, this would mean that a civil union partner falls within the definition of the word “spouse” and section 21 will now apply with equal force to such partners. However, if two same-sex partners have not entered into a civil union but are merely living together, section 21 will probably not apply to that relationship. Further, if partners in a civil union separate but do not formally terminate the civil partnership, section 21 will probably continue to apply to that civil partnership. At the same time, however, if such partners should live with another same-sex partner but not enter into a civil union with that person, then section 21 will not apply to that situation, even though they may be living together as man and wife. The Insolvency Act must therefore be amended to bring all same-sex relationships within the ambit of section 21, and consequently within the terrain envisaged by the Bill of Rights in the Constitution.

⁷⁶See the preamble of the Civil Union Act 17 of 2006.

⁷⁷See s 1 of Act 17 of 2006.

⁷⁸See s 1 of Act 17 of 2006.

⁷⁹See s 3 of Act 17 of 2006.

⁸⁰25 of 1961.

⁸¹See s 13(1) of Act 17 of 2006.

⁸²See s 13(2)(a)-(b) of Act 17 of 2006.

In its present form, it may be argued that section 21 discriminates on grounds of equality because it differentiates between persons of the same class, namely solvent “spouses”. More specifically, the discrimination appears to be based on the specified grounds of sexual orientation and marital status, because only certain classes of persons who may be classified as spouses under section 21(13) and now the Civil Union Act, are affected by section 21. Discrimination on these grounds is presumed to be unfair, and one would think that it would be difficult to establish the fairness thereof as there seems to be no rational connection between section 21 and its purpose, being the protection of creditors and assisting the trustee in his duties.⁸³ Section 21(13) stifles this aim. But it is submitted that the lacuna in this sub-section should not affect the continued existence of section 21 as a whole, because the Constitutional Court’s ruling in *Harksen v Lane* on the justification of the differentiation caused by section 21 should stand. If anything, pending the amendment of this subsection, the courts could rectify section 21(13) by requiring a reading in of, for example, the words “or persons of the same sex living together as spouses”.⁸⁴

11.3.4 The constitutionality of section 21 and section 16(3) of the Insolvency Act

In the discussion in chapter 10 above it has been suggested that section 21 is a drastic provision. In the common law a presumption known as the *presumptio muciana* existed, whereby everything in possession of a married woman, in respect of which the source was uncertain, was considered to have come from her husband or someone under his power. However, in most of the modern world this principle of merging the spouses (usually the wife’s) property with that of the insolvent spouse has fallen away.⁸⁵ While section 21 may have served its purpose at the time of its enactment in the previous century, before the existence of a democratically based constitution, it now looks like a provision that discriminates

⁸³See, eg, *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) concerning discrimination on grounds of sexual orientation; see also Currie at 251-256 where he also discusses discrimination on grounds of marital status.

⁸⁴See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) in respect of reading in. See Van Heerden CM and Boraine A “Reading procedure and substance into the basic right to security of tenure” (2006) *De Jure* at 319.

⁸⁵See the discussion in part III and in ch 10 of this thesis.

against certain persons on the grounds of, among others, marital status and therefore may be repugnant to the provisions of the Constitution.

In respect of the solvent spouse, section 16(3) of the Insolvency Act is inextricably linked to section 21 of that Act, and in this context, may be in conflict with provisions of the Bill of Rights. Section 16(3) of the Insolvency Act provides that a spouse whose separate estate has not been sequestrated and upon whom a final order of sequestration of the other spouse's separate estate has been served, must lodge with the Master a statement of his affairs. As mentioned in Chapter 5, a proposal similar to this was rejected by the *Cork Report* in the United Kingdom. The provisions of both sections 16(3) and 21 of the Insolvency Act could infringe on the provisions of section 14 of the Constitution, which protects the right to privacy, since sections 16 and 21 encompass, directly or indirectly, the searching of property and the seizure of possessions. The relevant portions of section 16 read as follows:

- 16 Insolvent and spouse whose separate estate has not been sequestrated must deliver his business records and lodge statement of his affairs with Master
- (1) The registrar of the court granting a final order of sequestration (including an order on acceptance of surrender) shall without delay cause a copy thereof to be served by the deputy sheriff, in the manner provided by the rules of court, on the insolvent concerned and if such order relates to the separate estate of one of two spouses who are not living apart under a judicial order of separation, also on the spouse whose estate has not been sequestrated, and file with the Master a copy of the deputy sheriff's return of service.
 - (3) A spouse whose separate estate has not been sequestrated and upon whom a copy of an order referred to in subsection (1) has been served shall within seven days of such service lodge, in duplicate, with the Master a statement of his affairs, as at the date of the sequestration order, framed in a form corresponding substantially with Form B of the First Schedule to this Act containing the particulars for which provision is made in the said Form and verified by affidavit (which shall be free from stamp duty) in the form set forth therein.

Section 21(1) of the Insolvency Act states the following:

- 21 Effect of sequestration on property of spouse of insolvent
- (1) 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.

Read together (and perhaps separately), these provisions may amount to a search, seizure and infringement of communications, which is further analysed below.⁸⁶ Further, section 16(3) possibly infringes section 9 of the Constitution. Section 9 makes provision for, among other things, every person to be treated equally before the law and to have the right to equal protection and benefit of the law.⁸⁷ Section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, amongst others, gender and marital status.⁸⁸ Section 9(5) provides that discrimination on one or more of these listed grounds is unfair unless it is established that the discrimination is fair. It would appear that in our patriarchal society, it is an overwhelming majority of men who are commercially active and who are sequestrated. The wife is usually the “solvent spouse”.⁸⁹ It will now be considered whether these provisions may be in conflict with the Constitution.

11.3.4.1 Section 9 and section 14 of the Constitution

Section 14 of the Constitution protects a person’s right to privacy. This provision provides that :

- Everyone has the right to privacy, which includes the right not to have –
- (a) their person or home searched;
 - (b) their property searched;
 - (c) their possessions seized; or
 - (d) the privacy of their communications infringed.

Section 14 firstly protects a general right to privacy, while secondly, it protects specific infringements regarding searches, seizures and privacy of communications. If an individual’s person, property or home is searched, or his possessions seized or communications intercepted, this will usually amount to an infringement of section

⁸⁶See para 11.3.4.1 below.

⁸⁷S 9 (1) Act 108 of 1996; See also Olivier D (1994) “Chapter 3 of the Constitution – Interpretation by the courts” (1994) *De Rebus* at 692. See generally Woolman at para 35 and Cheadle at para 4.1 and further.

⁸⁸S 9(3) of the Constitution.

⁸⁹See also the South African Law Commission Working Paper above 77, and the minority judgment in *Harksen v Lane* No discussed in para 11.3.4.2 below

14.⁹⁰ But Currie points out that the right against searches and seizures is a subordinate element in the right to privacy. So the applicant must show that a search, seizure or interception of communication infringes the general right to privacy before the Constitution's protection kicks in.⁹¹ But the converse does not apply, so that the right to privacy is not limited to protecting individuals against searches and seizures or trespassing on communications.⁹²

In the common law the right to privacy is considered an independent personality right which the courts see as an element of the concept of "*dignitas*",⁹³ and a breach thereof is an *iniuria*. An example of a breach of privacy at common law, includes the reading of private documents.⁹⁴ But a straightforward use of common law principles to interpret fundamental rights and their limitation cannot be assumed.⁹⁵

Constitutional assessment of a violation of a right to privacy requires a two step investigation. Here the scope of the right must be assessed first to know whether law or conduct has infringed the right. If it has been infringed, the second step is to decide whether the limitation clause justifies this.⁹⁶

The scope of a person's general right to privacy "extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured". A "legitimate expectation of privacy" has two components 'a *subjective expectation* of privacy ... that the society has recognized ... as *objectively reasonable*'.⁹⁷

In the *Bernstein* case the court also stated that no right is absolute, but is limited by rights accruing to other citizens, and concerning privacy, this means only the "inner

⁹⁰Currie at 316; *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) para 82. See also Woolman at para 38.1 and 38.3.

⁹¹Currie at 316.

⁹²Currie at 316. See also Cheadle at para 9.1 and further.

⁹³Currie at 316; Woolman at para 38.2; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A) at 455H-456H. *Bernstein v Bester NO* 1996 (2) SA 751 (CC) at para 68, citing *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) at 247 F-249D and see also Cheadle at para 9.2.1 on the protected sphere of privacy.

⁹⁴Currie at 316.

⁹⁵*Bernstein v Bester NO* 1996 (2) SA 751 (CC) at para 71.

⁹⁶Currie at 317; Woolman at 38.3.

⁹⁷Currie at 317-318 citing Ackerman J in *Bernstein v Bester NO* 1996 (2) SA 751 (CC) at para 75.

sanctum of a person”, like family life, sexual preference and home environment is shielded from being tarnished by conflicting rights of the community. This is the acknowledgement of privacy in the “truly personal realm”. However, when one enters into communal relations such as business and social interaction, the court said, “the scope of personal space shrinks accordingly”.⁹⁸

Currie states that this is an application of the “legitimate expectation test” and that in the “truly personal realm” an expectation of privacy is more likely to be considered reasonable than a privacy expectation in the context of ‘communal relations and activities’.⁹⁹ Thus in *Bernstein* the applicant considered the forced disclosure of his confidential books and documents, and the revelation of information that he wanted to keep to himself, an invasion of privacy. But while this was a subjective expectation of privacy, the court found it was not a reasonable one.¹⁰⁰ The court further stated in *Bernstein* that the running of a company was not a private matter, but carried statutory obligations of disclosure and accountability to members. Information relating to participating in such a public sphere, the court found, could not inhere in the person, and therefore, regarding such information, no reasonable expectation of privacy exists, nor would society consider such an expectation to be objectively reasonable.¹⁰¹

In section 16(3) of the Insolvency Act, the forced disclosure of his affairs includes the divulging of all information relating to the solvent spouse’s movable and immovable property, his outstanding claims, and his creditors. This looks like an invasion of privacy, similar to that alleged in *Bernstein*. So, while this may entail

⁹⁸At para 67.

⁹⁹Currie at 318.

¹⁰⁰At para 56 and 85.

¹⁰¹At para 85. Currie at 319 summarises Ackerman J’s reasoning on privacy as (a) a subjective expectation of privacy that is reasonable, and (b) that privacy can reasonably be expected in the “inner sanctum”, in the “truly personal realm”. However, he says that a further step of identifying the value served by protecting the “inner sanctum” is required to make this conception of privacy more usable in future cases. The value served by protecting the “inner sanctum” and the “truly personal realm” must therefore be identified. So, from *Bernstein’s* reference to the scope of privacy being closely related to identity (at para 65 of that case), his third step is “(c) this is because a protected inner sanctum helps achieve a valuable good – ‘one’s own autonomous identity’”. However, in weighing up the provisions of the Insolvency Act with those of the Bill of Rights, the measures set out in *Bernstein* will be adhered to for present purposes, and no further philosophical debate will be entered into at this point.

a subjective expectation of privacy, it may not be a reasonable one. But could this invasion of privacy perhaps be considered within the inner sanctum and the personal realm of the solvent spouse. Examples of invasions of privacy, particularly by virtue of the provisions of the Criminal Procedure Act,¹⁰² are given by Cheadle¹⁰³ in respect of searches and seizures, so no further consideration will be given to particular acts that have been found to be an invasion of privacy. But within the context of insolvency law, if one was to assume that sections 16 and/or 21 do invade the solvent spouse's privacy rights, then one must enquire whether the limitation clause justifies this infringement of section 14 of the Constitution. In this respect it would appear that the analysis given in *Harksen v Lane No*¹⁰⁴ of the justification of the limitation by section 21 of the Insolvency Act of the solvent spouse's rights will also apply in respect of the invasion of privacy rights guaranteed by section 14 of the Constitution, by sections 16 and 21 of the Insolvency Act. Consequently, it seems unlikely that any court will find that sections 16 and 21 infringe a solvent spouse's privacy.¹⁰⁵

But if one assumes that in accordance with *Bernstein's* analysis of the infringement of the right to privacy the solvent spouse's right has not been infringed, one must question why the solvent spouse must be subjected to the treatment of sections 16(3) and 21 of the Insolvency Act in the first place. This occurs by reason only of being married to the insolvent debtor. The further enquiry on constitutional grounds is therefore whether these provisions discriminate on grounds of sex or marital status, or whether they infringe the spouse's property rights under section 25 of the Constitution.

¹⁰²51 of 1977.

¹⁰³At para 9.4.

¹⁰⁴See para 11.3.4.2 below.

¹⁰⁵See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit No and Others* 2000 (10) BCLR 1079 (CC) at para 54 where Langa J considered certain search and seizure provisions of the National Prosecuting Authority Act 32 of 1998 and found that on a proportionality analysis, the provisions serve an important purpose in fighting crime, being an objective sufficiently important to justify the limitation of privacy under certain circumstances. In this respect it would appear that the provisions of that Act are more severe than those of the Insolvency Act.

11.3.4.2 Section 9 and section 25 of the Constitution

The question whether section 21 of the Insolvency Act infringes a spouse's right to equality has already been considered by the Constitutional Court in *Harksen v Lane NO*.¹⁰⁶ This case will be considered in more detail below. First however, the equality clause must be looked at. Section 9 reads as follows:

- 9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- 9(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- 9(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- 9(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- 9(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

For the purpose of this analysis of equality discrimination by insolvency legislation, it is important to note that the equality clause in section 9 of the Constitution differs to a minor extent from that in section 8 of the interim Constitution. But generally the courts' interpretation of section 8 can be applied to section 9 of the Constitution. However, the difference between the two rights in the two constitutions that is of importance for this analysis is that the listed grounds of unfair discrimination in section 9(3) have been extended to include also pregnancy, marital status and birth.

In summary, the Constitutional Court set out the stages of an enquiry into the violation of the equality clause as follows:¹⁰⁷

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

¹⁰⁶Discussed below.

¹⁰⁷In *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 54. In this case, at para 42 and further, the courts equality jurisprudence was analysed in some detail, drawing particularly from its judgments in *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) and *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).

- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
- (i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily of the impact of the discrimination on the complainant and others in his or her situation.
- If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution).”

So, in respect of sections 16 and 21 of the Insolvency Act, one must first enquire whether these provisions differentiate between people or categories of people. These provisions do clearly differentiate between married people and other categories of people who may have contact with the insolvent debtor. This is a violation of section 9(1) of the Constitution. Therefore, the next question in a two step analysis is whether there is a rational connection between the relevant differentiation and a legitimate governmental purpose that it is intended to achieve. If not, then this legislation violates section 9(1), thus failing the first stage. But if the differentiation is considered rational, then step two of the enquiry comes into play. Despite differentiation being rational, it may still amount to unfair discrimination under section 9(3) or (4). Currie points out that, in principle, both differentiation without a rational basis and unfair discrimination can then be justified as section 36 limitations of the right to equality, but argues that it is conceptually difficult to characterise unfairness and irrationality as reasonable and justifiable.¹⁰⁸

The general limitation clause in section 36 of the Constitution applies generally to all the rights included in the Bill of Rights.¹⁰⁹ If it has been shown that a right has been

¹⁰⁸Currie at 236 and 163.

¹⁰⁹Currie at 165 and 237.

infringed, the respondent must show that the infringement is a justifiable limitation of the right. To succeed in this, it must be shown that the right has been limited by a law of general application for reasons considered reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹¹⁰ Here all relevant factors are taken into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.¹¹¹ *Harksen v Lane NO*¹¹² illustrates the Constitutional Court's approach to section 21 of the Insolvency Act, and the same approach should apply to section 16(3) of the latter Act, if challenged on grounds of equality infringement.

Harksen's case will now be considered to illustrate how the Constitutional Court applied its analysis of the equality clause to section 21. In *Harksen v Lane NO*¹¹³ section 21 was challenged on two fronts, namely the equality clause, under section 8 of the interim Constitution¹¹⁴ and the property clause under section 28¹¹⁵ of the interim Constitution. The infringement of property rights will be considered after this discussion of the equality issues.

In respect of the equality clause the applicant's contention was that section 21 violated section 8(1) and 8(2) of the Constitution. This was because it denied her equality before the law and equal protection of the law since its vesting provisions constituted unequal treatment of solvent spouses as against other persons having relations with the insolvent debtor.¹¹⁶ Further, it was argued that section 21 discriminated unfairly against solvent spouses by imposing severe burdens, obligations and disadvantages upon them, but not on other persons dealing with or close to the insolvent debtor.¹¹⁷ It was also their contention that a consequence of section 21(10), which provided for the protection of assets of solvent spouses who are traders, was that this provision

¹¹⁰S 36(1) of the Constitution.

¹¹¹S 36(1)(a)-(e) of the Constitution.

¹¹²1998 (1) SA 300 (CC).

¹¹³1998 (1) SA 300 (CC).

¹¹⁴S 9 of the final Constitution.

¹¹⁵S 25 of the final Constitution.

¹¹⁶Para 41.

¹¹⁷Para 41.

discriminated against non-trading spouses in the acquittal of their onus of proof regarding the ownership of the vested property.¹¹⁸

On section 8(1) of the Constitution the court found that section 21 of the Insolvency Act did differentiate between solvent spouses and other persons having contact with the insolvent spouse.¹¹⁹ However, it said that section 21 served an appropriate and effective service in assisting the trustee in determining which property belongs to the insolvent estate.¹²⁰ It prevented collusion between spouses and helped spouses overcome the confusion as to which spouse owned what asset.¹²¹

The court stated that while the section was potentially inconvenient, it was not arbitrary and irrational. It was rational that the onus should be on the solvent spouse to prove ownership of the assets in question, since that spouse was in the best position to discharge the onus concerning facts peculiarly within her knowledge.¹²² Thus there was a rational connection between section 21 and its legitimate governmental purpose, and sufficient protective measures are built into section 21 to protect the interests of the solvent spouse. It is therefore not in violation of section 8(1).¹²³

Concerning section 8(2) the court found that section 21 did discriminate against solvent spouses on an unspecified ground, meaning that the discrimination was based on attributes or characteristics of the persons or group involved, being solvent spouses, and their usual close relationship to the insolvent spouse. Potentially these attributes could demean persons in their inherent humanity and dignity.¹²⁴

The next test was therefore whether this amounted to unfair discrimination. Here the onus was on the complainant as the discrimination was on an unspecified ground. Unfairness must be decided by considering, firstly, the position of the complainant in society, and here the court found that solvent spouses were not a group traditionally

¹¹⁸Para 41.

¹¹⁹Para 56.

¹²⁰Para 61.

¹²¹Para 58.

¹²²Para 60.

¹²³Para 61.

¹²⁴Para 62.

discriminated against or vulnerable to discrimination.¹²⁵ Secondly, the nature of the provision was analysed. The purpose of section 21 lay in protecting the public interest in securing the rights of creditors. This purpose, the court ruled, was not repugnant to the values protected by section 8(2) of the Constitution.¹²⁶ Thirdly, the effect of the discrimination on solvent spouses was tested. Here the court ruled that one could assume that masters and trustees would act honestly and reasonably, failing which, one had recourse to the courts. Thus they would not claim from solvent spouses that to which they were not entitled.¹²⁷ The court further stated that the solvent spouse is not necessarily dispossessed of her property by the statutory vesting thereof. It merely prevented her from alienating or burdening the property. The legal presumption, the court said, was that the property belonged to the insolvent estate, not the solvent spouse and, in effect, the solvent spouse was not divested of her property. Further, the relevant facts were specifically within the knowledge of the spouses.¹²⁸ In the opinion of the court possible litigation regarding these assets, if entered into, could be potentially embarrassing, expensive and inconvenient, but this was an inevitable consequence for any person who might have to resort to litigation to vindicate a right. This did not cause the impairment of fundamental dignity nor was it an impairment of a comparably serious nature. Consequently, Mrs Harksen failed to prove that section 21 constituted unfair discrimination.¹²⁹ Before considering whether the Constitutional Court may decide differently in respect of section 9 of the final Constitution, which now includes marital status as a specified ground of discrimination, it is necessary to consider the minority judgments of Judges O'Reagan and Sachs.

O'Reagan J agreed with the majority's approach to the equality legislation, but not with the application thereof in this particular case.¹³⁰ She agreed that the purpose of section 21 was to protect innocent creditors, and that there was a rational connection between section 21 and this purpose, and it therefore did not breach section 8(1) of the interim Constitution.¹³¹ O'Reagan J further agreed that section

¹²⁵Paras 63-64.

¹²⁶Para 65.

¹²⁷Para 66.

¹²⁸Para 66.

¹²⁹Paras 67-69.

¹³⁰Para 86.

¹³¹Para 87.

21 did differentiate between solvent spouses and other persons dealing with the insolvent.¹³² The applicant argued that section 21 discriminated on the grounds of marital status and personal intimacy. The extended definition of “spouse” in section 21(13) was the root of the personal intimacy argument. But a successful challenge based on “marital status” would mean that section 21 was invalid and would require no further challenge.¹³³

As marital status was not a specified ground of discrimination in section 8(2) of the interim Constitution, the applicant had to establish unfairness. After considering the Canadian case of *Miron v Trudel*,¹³⁴ which also considered discrimination on the basis of marital status, O’Reagan J said;¹³⁵

For most people, the decision to enter into a permanent personal relationship with another is a momentous and defining one. It requires related decisions concerning the nature of the relationship and its personal and proprietary consequences. In my view, these considerations are sufficient to accept that marital status may give rise to the concerns of s 8(2). Accordingly, given the disadvantages conferred by section 21 on the basis of marital status, the applicant has established discrimination for the purposes of s 8(2).

Now, to establish whether this discrimination is unfair, one looks at the impact of the discrimination on the applicant and others in her position. To judge whether the impact was unfair, one considers the group affected by the discrimination, the nature of power by which the discrimination was effected, and the nature of the interests affected by the discrimination.¹³⁶

O’Reagan J found that in this case the affected group was married people, and specifically solvent spouses. She said that historically marriages were closely governed by the law and that discrimination based on marital status generally happened in two ways. The first was that people living together in a close personal relationship, or married within religions or customs not recognised in South African law, were denied the usual benefits of marriage. Secondly, married women often

¹³²Para 89.

¹³³Para 88.

¹³⁴(1995) 29 CRR (2d) 189.

¹³⁵Para 93.

¹³⁶Para 94.

suffered discrimination, because many laws entrenched the idea of the husband as breadwinner and the wife as home caregiver, thereby enforcing deep inequalities between men and women.¹³⁷

The effect of section 21 on solvent spouses, O'Reagan J said, was substantial. The spouse lost ownership of her assets, and may lose her rights of disposal and control of her assets. The implications for the solvent spouse were therefore severe¹³⁸ and the solvent spouse was adversely affected by section 21.¹³⁹ She ruled that the extent of the impairment of the spouse's rights was substantial and sufficient to constitute unfair discrimination.¹⁴⁰ The question of the justification of section 21 under section 33 of the interim Constitution now had to be addressed.

Here one must consider the invasion caused by section 21, in proportion to the importance, purpose and effects of section 21. Although she acknowledged that section 21's protection of creditors' interests and its assisting the trustee in finalising the insolvent estate, she pointed out that section 21 ensnared all spouses, even honest ones, as well as all property of these spouses.¹⁴¹

But the provision, she said, was also under-inclusive because it failed to recognise the wide range of other questionable relationships the insolvent might have with close friends and family.¹⁴² There was little evidence, she said, that section 21 was particularly effective in achieving its aim, while a calculated fraudulent plan by spouses could easily bypass section 21.¹⁴³ In her opinion the purpose of section 21 could be attained by different means, as was done in many other countries.¹⁴⁴ She found that section 21 disproportionately favoured creditors while placing a disproportionate burden on solvent spouses. It was therefore not saved by the limitation clause and is inconsistent with the provisions of section 8 of the interim Constitution.¹⁴⁵

¹³⁷Para 95.

¹³⁸Para 98

¹³⁹Para 101.

¹⁴⁰Para 101.

¹⁴¹Para 103.

¹⁴²Para 103.

¹⁴³Para 105.

¹⁴⁴Para 106-111.

¹⁴⁵Para 112.

Sachs J, in his minority judgment stated that section 21 more than inconvenienced and burdened the solvent spouse, tarnished her personal dignity as an independent person in a spousal relationship, infringed her fundamental rights of personality, and made marriage look archaic if compared with the values of the interim Constitution.¹⁴⁶ This provision, he said, promoted the concept that in marriage estates were merged, regardless of spousal living arrangements and careers. He found section 21 to be too narrow in the class of persons it affected, and too wide regarding the members of the group selected and the property affected.¹⁴⁷ It treated the spouses as one business mind at work within the marriage, and that, if measured against the values of the Constitution, was patriarchal in origin and demeaning.¹⁴⁸ In his view the Insolvency Act provided adequate mechanisms for collecting assets for the creditors and for setting aside certain impeachable dispositions.¹⁴⁹ He agreed with O'Reagan J that the provision was unfair and violates section 8(2) of the interim Constitution.¹⁵⁰

It has already been stated that the final Constitution has included marital status as a specified ground of discrimination in section 9(3). In view of the reasoning of the majority judgment in *Harksen*, however, it would appear that this inclusion of marital status would make no difference, because section 21 is saved by the limitation clause¹⁵¹ in the Constitution.¹⁵²

In respect of the property clause the applicant, Mrs Harksen, argued that section 21(1) constituted an expropriation of the solvent spouse's property without provision for compensation, because the vesting of the solvent spouse's assets, ultimately in the trustee of the insolvent estate, was a transfer of ownership.¹⁵³ For this argument section 28(3) of the interim Constitution was relied on. But section 28 distinguished

¹⁴⁶Paras 119 and 120.

¹⁴⁷Para 121.

¹⁴⁸Para 121.

¹⁴⁹Para 123.

¹⁵⁰Paras 120 and 126.

¹⁵¹S 36 of the final Constitution.

¹⁵²For a discussion of differentiation based on marital status, see Currie at 254.

¹⁵³The applicant relied on *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) for the view that ownership of the spouses property passes to the trustee, and the Constitutional Court, at para 31, assumed this to be so for the purpose of the case before it. But see Evans RG "The constitutionality of section 21 of the Insolvency Act 24 of 1936" (1998) 3 *Stell LR* 359 at 363 for the possibility of ascribing different meanings to the word "vest". On the property clause in the final Constitution, see Woolman at para 46.1 and further and Cheadle at para 20.1 and further.

between deprivation of rights in property¹⁵⁴ and expropriation of rights in property.¹⁵⁵ Under section 28(3) the expropriation must be for a public purpose, against payment of compensation.

Citing several authorities,¹⁵⁶ the court ruled that section 21 of the Insolvency Act did not amount to an expropriation of the solvent spouse's property, so it was unnecessary to decide whether the Master or the trustee is a public authority, or whether the vesting was for a public purpose.¹⁵⁷ The court stated that the purpose and effect of section 21 was to divest the solvent spouse of property that was, in fact, hers only temporarily, and to ensure that the insolvent estate obtained the property to which it was entitled.¹⁵⁸ Section 21 of the Insolvency Act was therefore not in contravention of section 28(3) of the interim Constitution. But it would appear that the applicant in this case should rather have argued that section 21 was a deprivation of rights as envisaged by section 28(1) and (2) of the interim Constitution.¹⁵⁹ It might then have been argued that the provision could not be saved by the limitation of the right under section 33, because the other provisions in the Insolvency Act regulating interrogations and impeachable dispositions were at the disposal of the trustee for the collection of estate assets.

However, for the purpose of this discussion, one must first determine the meaning of "property" as envisaged by section 25 of the Constitution. This will determine the scope of the rights protected by that section, after which one can enquire what protection the Constitution affords to property. Currie points out that there are at least three possible meanings to the term "property". Firstly, the property clause may refer to physical property as such, like land, houses and cars. Secondly, it may mean the set of legal rules that regulate relationships between individuals and physical property, in other words, the common law property rights. So property rights such as ownership, and the elements that make up ownership, like the right to dispose of property, is the

¹⁵⁴S 28(2).

¹⁵⁵S 28(3).

¹⁵⁶*Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T); *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZS); *Vora v State of Maharashtra* 1984 AIR 866 (SC) and *Davies and Others v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZS);.

¹⁵⁷At para 39.

¹⁵⁸At para 36.

¹⁵⁹S 25(1) of the 1996 Constitution.

property protected by the clause. Thirdly, Currie states that the term could pertain to any relationship or interest having an exchange value.¹⁶⁰ Currie states that the courts will be guided by the existing scope of property law when interpreting the term, thus property is what is accepted as such in existing law. So property in section 25 appears to fall within the second meaning above, being property as rights.¹⁶¹ But Currie says that accepting that property means rights in property does not eliminate the difficulty in determining the scope of the term,¹⁶² and that property envisaged by section 25 should be seen as “those resources that are generally taken to constitute a persons wealth, and that are recognised and protected by law”.¹⁶³

They are protected by private law rights, namely real rights in respect of physical things, contractual rights for performances and intellectual property rights in respect of intellectual property.¹⁶⁴ Currie further points out that in the modern state an important channel of wealth is “interests in government largesse”, which includes a right to medical aid schemes, state pensions, state jobs and state contracts. Most of these public law rights, he says, should receive property clause protection as they have the character of property.¹⁶⁵ If these rights of the individual are taken over without compensation, or arbitrarily interfered with, the individual can rely on section 25 for protection.¹⁶⁶

Van der Walt states that a wide interpretation will be given to the property concept in section 25, wider than in private law, but not without limits.¹⁶⁷ Thus a right must be a vested right in order¹⁶⁸ to constitute property, meaning that it must have accrued in accordance with the relevant common law principles or statute.¹⁶⁹ Thus a “vested” right must be more than a mere expectation that may or may not accrue

¹⁶⁰Currie at 537. See also Cheadle at para 20.3 and Woolman at 46.3.

¹⁶¹Currie at 357-358. See also Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 349 (hereafter Van der Walt). This is also the approach that is followed in the definition of “property” in s 2 of the Insolvency Act.

¹⁶²This difficulty is also encountered in insolvency law – see for example the difficulties and uncertainty concerning a repudiated inheritance in insolvency as discussed in ch 8.

¹⁶³Currie at 539; Cheadle at para 20.3.

¹⁶⁴Currie at 539.

¹⁶⁵Currie at 539-540. For a further analysis of the meaning of property see Cheadle at para 20.3.

¹⁶⁶Currie at 540.

¹⁶⁷Van der Walt at 353.

¹⁶⁸Van der Walt at 357.

¹⁶⁹Van der Walt at 353; Currie at 540.

in the future. So, if an individual did not have a right in the first place, he cannot complain that his rights under section 25 of the Constitution have been infringed.¹⁷⁰

That being the scope of the right to property, or the limitation thereof, there is still the general limitation clause in section 36 of the final Constitution. Once it has been determined that a right to property has been infringed, the respondent must show that this infringement is a justifiable limitation thereof. Section 36, which is close to a codification of the Constitutional Court's first analysis (under the interim Constitution) of the limitation issue in *S v Makwanyane and Another*,¹⁷¹ governs the process of limitation. In *Makwanyane* the court stated that the limitation of rights when reasonable and necessary in a democratic society "ultimately [involves] an assessment based on proportionality ... which calls for the balancing of different interests". This balancing, the court said, must be done on a case by case basis, not abstractly, because "different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality'".¹⁷² So, to justify limitations, the proportionality test will be used which reveals the interests of society and the interests of those affected by the limitation.¹⁷³

But what protection is property afforded by the Constitution? Section 25 protects property against illegitimate deprivation and expropriation of property. There is a distinction between "deprivation" and "expropriation" in section 25(1) and (2), and the circumstances under which these acts are legitimate. The state may deprive one of property as long as it is not arbitrary, and it is done by virtue of a law of general application. Only if the deprivation of property is also an expropriation, will the individual be entitled to compensation.¹⁷⁴ In the *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services*¹⁷⁵ the Constitutional Court noted that in a certain sense there is some deprivation of property

¹⁷⁰Currie at 540.

¹⁷¹1995 (3) SA 391 (CC) as cited in Van der Walt at 357. See generally Currie at 561.

¹⁷²Van der Walt at 358.

¹⁷³Van der Walt at 358. See Van der Schyff G *Limitation of rights: A study of the European convention and the South African bill of rights* (2005) for a comparison of the limitation of rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ETS No 005, and the South African Bill of Rights.

¹⁷⁴Currie at 541. Cheadle at para 20.4.

¹⁷⁵2002(4) SA 768 (CC) at para 57.

whenever there is any interference with the use, enjoyment or exploitation of private property. Applying section 25 to this “wide genus of interference” would mean “deprivation” would encompass all species thereof and “expropriation would apply only to a narrower species of interference”.¹⁷⁶The court then stated that:¹⁷⁷

Viewed from this perspective section 25(1) deals with all “property” and all deprivations (including expropriations). If the deprivation infringes (limits) section 25(1) and cannot be justified under section 36, that is the end of the matter. The provision is unconstitutional.

If, however, the deprivation passes the scrutiny under section 25(1) (ie it does not infringe section 25(1) or, if it does, is a justified limitation) then the question arises as to whether it is an expropriation.

Thus, the act of expropriation will always be a deprivation, but not every deprivation will amount to an expropriation.¹⁷⁸

The reference in section 25 to the deprivation of property in terms of “law of general application” means that rights may be limited only if permitted by law, and that law must be impersonal, meaning that it burdens an abstract class, no matter what size the class is.¹⁷⁹

But even if the deprivation is in terms of law of general application, the effect thereof must not be to allow “arbitrary” deprivations of property. This means that a deprivation must be in accordance with due process, in the narrow procedural sense, meaning the deprivation must occur through fair procedures, and in a wider substantive sense, meaning that deprivation must not be arbitrary in substance.¹⁸⁰

In respect of the *Harksen* judgment, particularly the aspect of substantive arbitrariness may be relevant. To assess arbitrariness in substance, a test must be applied that is specific to the property clause, and is found “somewhere between a ‘mere rationality’ enquiry and a proportionality enquiry used to assess the legitimacy of limitations of rights”.¹⁸¹

¹⁷⁶At para 57.

¹⁷⁷At para 58-59.

¹⁷⁸Currie at 541.

¹⁷⁹Currie at 542.

¹⁸⁰See Currie at 542 and further for a comprehensive discussion of these elements of the arbitrariness of deprivations.

¹⁸¹Currie at 545.

In the *First National Bank* case¹⁸² the court found that “arbitrary” in section 25(1) meant that sufficient reason had not been given for a particular deprivation, or it was procedurally unfair. It then stated that sufficient reason was to be determined as follows:¹⁸³

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and the ends sought to be achieved, namely the purpose of the law in question.
- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
- (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
- (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with “arbitrary” in relation to the deprivation of property under section 25.

Application of this enquiry might explain the courts ruling on section 21 of the Insolvency Act in *Harksen’s* case. The court there found that the purpose of section 21 was to divest the solvent spouse of her property only temporarily, and further to ensure that the insolvent estate was able to collect all property belonging to it.¹⁸⁴ Based on the above test of the Constitutional Court, section 21 was not an arbitrary deprivation of property. It served the legitimate and important purpose of protecting the interests of the creditors of an insolvent spouse’s estate. The impact of section 21 was minimal and partial because the deprivation of property was only temporary. Therefore, a rational relationship between means and ends could be

¹⁸²At para 100.

¹⁸³At para 100.

¹⁸⁴At para 36.

established, and section 21 could thus be justified without having to establish if a less invasive method should be utilised. It would therefore appear that an attempt on the life of section 21 on grounds other than expropriation would not succeed. For the same reasons, it would appear that section 16(3) of the Insolvency Act would not be considered an invasion of the solvent spouse's property rights.

11.4 Section 26 of the Constitution: The right to adequate housing

A right to housing is a socio-economic right.¹⁸⁵ Section 26 of the Constitution makes provision for, amongst other things, the right to adequate housing,¹⁸⁶ and the right not to be evicted from one's home without a court order granted after considering all the relevant circumstances.¹⁸⁷

Within the context of the process of debt collection, and in particular, insolvency, the question arises whether the dwelling of the debtor should be beyond the reach of his creditors, or an asset that is excluded from the insolvent estate, and if so, to what extent. At present there is no provision for the protection of the family home in South African insolvency legislation. A number of Acts have been promulgated to give effect to section 26(3) of the Constitution so as to provide for particular procedures that must be followed before evicting a person from his home or land that he may occupy. So, for example, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹⁸⁸ regulates the eviction of persons unlawfully occupying land. In terms of this legislation eviction may be ordered by a court if it is just and equitable to do so, and in considering the eviction, the court must consider all relevant circumstances.¹⁸⁹

¹⁸⁵Cheadle at para 21.1; Woolman at para 33.1.

¹⁸⁶S 26(1).

¹⁸⁷S 26(3). When analysing s 26 of the Constitution within the context of insolvency law, one must take into account that the "tenure legislation" hinges on historical considerations of racist evictions and forced removals. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) the court stated that the idea of security of tenure envisaged by s 26 of the Constitution was to reject this invasive legislation of the past. So while it is inevitable that eviction of persons within the debt collection context will come face to face with the tenure legislation, one should take into account that this legislation did not have as its primary concern the protection of debtors who voluntarily entered into agreements with their creditors. As will be shown below, the few eviction or property rights cases which have so far clashed or overlapped with creditor/debtor legislation have involved rare and unusual facts, usually involving cases of extreme poverty.

¹⁸⁸19 of 1998 (hereafter referred to as "PIE").

¹⁸⁹S 4 PIE. See also the Restitution of Land Rights Act 22 of 1994; the Land Reform (Labour Tenants) Act 3 of 1996; the Interim Protection of Informal Land Rights Act 31 of 1996; the Extension of Security of Tenure Act (ESTA) 62 of 1997 and the Rental Housing Act 50 of 1999.

Within the ambit of traditional debt collection, the exclusion of the debtor's home from the reach of his creditors is a foreign concept which, from the creditor point of view, is unacceptable. However, certain jurisdictions, in varying degrees, do make provision for the protection of the debtor's home in insolvency. Where this is permitted, this policy developed over a lengthy period of time and it is usually linked either to the idea of allowing the debtor a fresh start, or to socio-economic interests which are probably underpinned by human rights considerations.¹⁹⁰

Section 26(1) of the Constitution provides for a right to access to adequate housing, but this is not an unqualified duty on the state, nor is the state obliged to provide housing on demand. It is a right to "access to" housing rather than a "right to adequate housing".¹⁹¹ Section 26(3) provides for the protection against unlawful and arbitrary eviction from a home without a court order, which court must have considered all the relevant circumstances. But this provision does not prohibit evictions, even if people are put out of their homes.¹⁹² In this respect "relevant circumstances" means circumstances that are legally relevant, not personal circumstances of the person being evicted, or the availability of alternative accommodation.¹⁹³

The question that must now be considered is whether a sale in execution in the individual or collective debt collection procedure may be considered an infringement of a debtor's rights under section 26 or the Constitution. Related to this question is the interest of the rights of children who may be affected by an eviction from or the sale in execution of a house. Section 28 of the Constitution protects the rights of children and this will be further considered below. In respect of the right to adequate housing, however, the circumstances of every case will probably be of paramount importance

¹⁹⁰See chs 5 and 6 above.

¹⁹¹Currie at 586; see generally *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁹²*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 21.

¹⁹³*Brisley v Drotzky* 2002 (4) SA 1 (SCA) at para 42. In respect of PIE, persons formerly lawfully in possession of a place, but whose possession subsequently became unlawful, are considered unlawful occupiers – see *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA). However, in terms of s 4(7) PIE, if the occupation has exceeded 6 months, the court must consider whether the eviction is just and equitable, also looking at the needs and rights of the elderly, children and disabled, and the court must consider whether the unlawful occupier can be relocated to land provided by the state or another landowner. The latter will however not apply where the land is sold in execution to satisfy a mortgage debt – s 4(8). Van der Walt AJ "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation" (2002) *Journal of South African Law* at 286.

in judging whether or not section 26 has been infringed, and if so, whether the limitation clause saves the offensive provision or action.

In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*¹⁹⁴ the infringement of the right to access to adequate housing was considered by the Constitutional Court in respect of a sale in execution of houses of poor uneducated debtors who had received the houses through the South African reconstruction and development programme. The sales in execution resulted from default judgments against the applicants in the magistrate's court on what was originally a "trifling" debt. The constitutionality of sections 66(1)(a) and 67 of the Magistrate's Court Act¹⁹⁵ was considered in this case. In the absence of enough movable property being found to satisfy a debt, section 66(1)(a) provides, amongst other things, for the execution sale of the debtor's immovable property in satisfaction of the debt in question. Section 67 exempts certain assets from execution, such as clothing, bedding, furniture and tools that are required for the maintenance of the debtor and his family.

In its judgment the Constitutional Court found that the right to adequate housing is "the right to live somewhere in security, peace and dignity".¹⁹⁶ The court pointed out that in the light of its conception of adequate housing, any measure allowing for the deprivation of existing access to adequate housing limited the rights protected by section 26(1) of the Constitution. But this could possibly be justified by section 36 of the Constitution.¹⁹⁷

In applying section 36, the court pointed out that the nature of the right and the nature and extent of the limitation were very important when balanced against the

¹⁹⁴2005 (2) SA 140 (CC). See Van Heerden CM and Boraine A "Reading procedure and substance into the basic right to security of tenure" (2006) *De Jure* 319 at 319; Steyn L "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" Paper delivered at INSOL International Annual Regional Conference Academic's Group Meeting 17-18 March 2007 Cape Town South Africa and on record with author; Steenkamp H and Burr-Dixon M "Removing the Immovable" (2006) August *De Rebus* at 12; and see the more comprehensive and insightful discussion of Steyn L "Safe as houses' – balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) *Law, democracy and development* at 101.

¹⁹⁵32 of 1944.

¹⁹⁶At para 24, with reference to General Comment 4 (1991) E/1992/23 at para 7, on Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, 1966. In this respect s 39 (1)(b) of the Constitution requires the Constitutional Court to consider international law when interpreting the Bill of Rights.

¹⁹⁷Para 34.

importance of the purpose of the limitation.¹⁹⁸ Here the respondent argued that the recovery of debt was an important government purpose and that the procedure for doing so was reasonable, and that in the absence of the relevant execution procedures the administration of justice would be severely hampered.¹⁹⁹

However, the court pointed out that there was a link between the access to adequate housing and the inherent dignity of a person. In the present case access to adequate housing already existed for the parties in question, and it was common cause that the relevant housing regulations under which these housing rights were granted to the applicants, could result in them permanently losing their access to future housing if execution was levied against them. Thus these impugned sections, the court said, could potentially undermine the “empowering and dignifying human experience” of owning a home, or preventing them from doing so again in the future.²⁰⁰ Although the court found section 66(1)(a) to be a severe limitation of an important right, it also ruled that the purpose of the limitation was important. But in the present case, the trifling nature of the debt diminished the importance of this purpose.²⁰¹ In this respect the Mokgoro J stated:

It is difficult to see how the collection of trifling debts in this case can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated, possibly permanently, especially where other methods exist to enable the recovery of the debt.²⁰²

She, however, pointed out that factors might exist in other circumstances where such sales in execution of trifling debts might be reasonable and justifiable, and consequently the interests of the creditors could not be overlooked. Here the legitimacy of the sale in execution “must be seen as a balancing process”.²⁰³ The court was of the opinion that the remedies that were available to debtors in sections 62 and 73²⁰⁴ of the Magistrates’ Court Act were of little use to debtors

¹⁹⁸Para 36.

¹⁹⁹Para 37.

²⁰⁰Para 39.

²⁰¹Paras 39-40.

²⁰²Para 40. But compare the opposite finding in respect of other less invasive methods of debt collection in the Constitutional Court’s ruling in *Harksen v Lane NO* in para 11.3.4.2 above.

²⁰³Para 42.

²⁰⁴Briefly stated, amongst other things, s 62 empowers the court to stay or set aside a warrant of execution under certain circumstances, and s 73 allows the debtor to pay his debts in instalments.

such as the applicants as they were a vulnerable group of indigent people who were either ignorant of these provisions or generally lacked the resources to utilize them. These remedies, the court found, place a burden on the debtor to approach the court and show good cause why the warrant of execution ought to be set aside.²⁰⁵ Section 66(1)(a) was therefore considered over-broad, allowing sales in execution to occur without judicial intervention and where they are unjustifiable.²⁰⁶

In respect of section 73 which protects the basic necessities of debtors from execution, the appellants argued that it was unconstitutional in failing to include debtors' homes as essential for survival. They contended that words should be read into section 67 to exclude execution sales of houses below a specified minimum value.²⁰⁷ The court rejected this blanket prohibition, as it could result in a poverty trap by incapacitating the generation of capital, and it would be ignoring the interests of the creditor. "It would potentially foreclose the possibility of creditors recovering debts owed to them by owners of excluded properties. Section 67 cannot be unconstitutional to the extent that it does not provide for a blanket prohibition against sale in execution of a house below a certain value."²⁰⁸

One may however question the value of this argument. It is precisely because of the possibility of obtaining capital via the security of the property that debtors in the position of the appellants are caught up in a debt trap. That is if they are even aware of the possibility of using their property as security for their debts. As in *Jafftha's* case, many debtors apparently are not aware that their property may be lost to creditors to whom they are indebted for purchasing goods totally unrelated to their dwelling. Should they be aware, but irresponsible, the danger remains that they may over-extend themselves and sooner or later have their property sold in execution.²⁰⁹ Conversely, the creditors are usually at an advantage in the creditor-debtor relationship, and they can decide whether they wish to enter into such a relationship

²⁰⁵Para 47. It is difficult to reconcile this reasoning of the court with similar arguments relating to the inconvenience of litigation, and the ignorance of the solvent spouse, in the judgment of *Harksen v Lane* in para 11.3.4.2 above.

²⁰⁶Para 48.

²⁰⁷Para 50.

²⁰⁸Para 51.

²⁰⁹See, eg, *ABSA Bank Ltd v Ntsane* 2007 (3) SA 554 (T).

whilst aware that a limited value home may be exempt from execution. In such cases debtors and creditors must make do with the legal provisions for payment of debts in instalments. Exemption of a home, or of a limited value home from the reach of creditors is not a novel idea. In this respect section 39 of the Constitution also states that the court may consider foreign law in the interpretation of the Bill of Rights. Both the United States of America and the United Kingdom make provision for the exemption of homes in one way or another, with the United Kingdom specifically prohibiting the sale in execution of minimum value homes.²¹⁰

Be that as it may, the court ruled that sufficient judicial scrutiny over the execution process was needed by requiring the court to oversee execution against immovable property. Here the judicial officer should take the various circumstances into account when considering whether to allow the sale in execution of a debtors home, including how the debt arose, the financial state of the parties, the amount of the debt, attempts to repay the debt, the debtor's state of employment and income, and any other relevant circumstances.²¹¹ Thus, section 66(1)(a) was broad enough to allow sales in execution with the required judicial oversight, but words must be read into this section to provide for court consent for execution against immovables once the sheriff has issued a *nulla bona* return in respect of the debtor's movable property.²¹²

The next case to be considered in respect of section 26 of the Constitution is *Standard Bank of South Africa Ltd v Saunderson and Others*.²¹³ Standard Bank issued summonses against several respondents in respect of mortgage bond debts. The defendants failed to enter an appearance to defend the actions, so the appellant applied to the Registrar of the court for default judgments in terms of Rule 31(5) of the Uniform Rules of Court.²¹⁴ The matters were disposed of in open

²¹⁰See chs 5 and 6 above.

²¹¹Paras 56-60.

²¹²Para 65.

²¹³2006 (2) SA 264 (SCA). See also *Standard Bank of SA Ltd v Snyders* 2005 (5) SA 610 (C).

²¹⁴Supreme Court Act 13 of 1959 – This Rule states that “[w]hen a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the Registrar a written application for judgment against such defendant, and that the registrar may then “Grant judgment as requested”.

court instead of by the Registrar, and the Provincial Division granted the requested default judgments, but in view of *Jaftha*'s case, declined the order for execution of the mortgaged properties. The court thought that the *Jaftha* judgement meant that section 26 of the Constitution may be compromised by any execution against residential property, no matter what the nature of the property or the circumstances of the owner, so all such cases had to establish that execution was permissible under section 26(3), failing which, it declined the order.

The Supreme Court of Appeal ruled that this was an incorrect interpretation of *Jaftha*, which dealt with section 26(1) rather than section 26(3). The court said that *Jaftha*'s case ruled only that a deprivation of "adequate" housing by a writ of execution would compromise a person's rights under section 26(1), and this infringement of rights would have to be justified under section 36 of the Constitution.²¹⁵ The court further ruled that section 26(1) envisaged only a right of access to "adequate" housing, which was a relative concept and a factual enquiry. It did not confer a right to housing *per se*. The Constitutional Court in *Jaftha* did not hold that the ownership of all residential property was protected by section 26(1).²¹⁶ *Jaftha* dealt with a debtor being deprived of title to a home for failing to satisfy a trifling extraneous debt with no judicial oversight to prevent an unjustifiably disproportionate result. There the creditor was not a mortgagee with contractual rights over the property, which rights originated from an agreement willingly entered into by the debtor in return for capital. This debt in the present case was fused into the title of the property, and not extraneous, as in *Jaftha*'s case.²¹⁷ The court commenced its judgment in this case by explaining the importance of mortgage bonds in making home ownership possible. With the property as security, the mortgage bond enabled the individual to become a home owner, and it was an agreement that was binding on all parties. The borrower voluntarily allowed his rights of ownership to be compromised until the debt had been satisfied. Continued ownership and occupation depended on the repayment of the loan.²¹⁸

²¹⁵At 273 F-H.

²¹⁶At 273 I-274 D.

²¹⁷At 274 D-F.

²¹⁸At 269 B-F.

Seeking an execution order in respect of residential property, the court held, was not enough to be regarded as an infringement of section 26(1), and in this case such infringement had not been alleged or shown, so the appellant did not have to justify the orders sought, and they should have been granted.²¹⁹ The Registrar was in fact entitled to deal with the applications for execution by default.²²⁰ The appeal thus succeeded and the mortgaged property was declared executable. But the court also ruled that a rule of practice must be established whereby the defaulting debtor be informed that section 26(1) could affect the right of execution by the bondholder. Thus a practice directive was issued requiring certain information to be included in the summons, including notifying the defendants of their section 26(1) rights. *The Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another*²²¹ was an application to the Constitutional Court for leave to appeal against the *Standard Bank* judgment and order, or alternatively, direct access to the Constitutional Court. This was refused and for the purpose of this chapter no further attention will be given to this case.

In *ABSA Bank Ltd v Ntsane*,²²² the facts of which are similar to the *Standard Bank* case, Bertelsman J declined an order for the sale in execution of the defendants' home. The difference between this case and the *Standard Bank* case was that an arrear debt of R18 odd rand on a bond of R62 000 was the basis for the plaintiff's application to declare the home of the defendant's executable for default judgment for the full amount owing on the bond. The court declined the application to declare immovable property executable for default judgment, but it did award a judgment for the R18,46 arrear payment.²²³

In his judgment Bertelsman J found relevance in the fact that the National Housing Code excludes a former homeowner from obtaining a further subsidy.²²⁴ The *amicus curiae* argued that the loss of the defendants' first home together with the

²¹⁹At 275 F-G.

²²⁰At 275 H.

²²¹2006 (6) SA 103 (CC).

²²²2007 (3) SA 554 (T).

²²³Paras 992-93.

²²⁴Para 62.

loss of any further subsidy in the future would effectively deprive them of access to “adequate” housing. So, he argued, in view of the provisions of section 26(1), and the *Jaftha* judgment, granting of the default judgment declaring the property executable would be unconstitutional.²²⁵ The *Jaftha* case was referred to concerning instances where a deprivation of existing access to adequate housing, thus a limitation of section 26(1) rights, might be justified under section 36, and the instances where execution against the family home would be unjustifiable. The latter would be, for example, when action was taken to recover a debt of trifling importance to the creditor but disastrous for the debtor.²²⁶ Bertelsman J also referred to *Nedbank Ltd v Mortinson*²²⁷ which stated that taking judgment on a small amount that was in arrears could possibly infringe section 26(1) rights, so those claims required careful scrutiny.²²⁸ Bertelsman J ruled that the competing rights of the relevant parties concerned had to be weighed up against each other.²²⁹ In doing so all relevant information had to be considered, including the value of the bonded property, the debtor’s past history of payments, the outstanding balance of the bond, movable assets that could be attached and sold in execution, other debts, such as municipal taxes, that the bondholder may be aware of and the debtor’s employment status.²³⁰

Bertelsman J pointed out that the Constitution enjoined the court to prevent the infringement of fundamental human rights, if necessary, acting *mero motu* to prevent infringements.²³¹ So the court ruled that it was entitled to decline the relief sought “where the result is so seemingly iniquitous or unfair to the house owner that the enforcement of the full rights to execution would amount to an abuse of the system”.²³² The court then found that enforcing the right to execute against immovable property in the present case would be in conflict with section 26, while

²²⁵Para 63.

²²⁶Paras 64-65.

²²⁷2005 (6) SA 462 (W).

²²⁸Para 68.

²²⁹Paras 69-70.

²³⁰Para 72.

²³¹Citing at para 76 *Potgieter v Lid van die Uitvoerende Raad, Gesondheid, Provinsiale Regering, Gauteng en Andere* 2001 (11) BCLR 1175 (CC).

²³²At para 78.

it may also infringe the right to dignity.²³³ Further, an enforced sale in execution, the court found, could result in a gross unfairness being perpetrated against the defendant if a price below market value was obtained, while a controlled sale might leave the defendant with some money in his pocket after paying the plaintiff's claim.²³⁴ Enforcing such a small claim in the present case, when it would have been easier to settle it by other means, was an abuse of the system and the processes of the court.²³⁵ The plaintiff attempted to justify its application for execution by alleging that defendants incurred a large debt regarding municipal rates and taxes over the property. But the court ruled that the absence of any evidence of the enforcement of that debt by the municipality excluded this point from being taken into account.²³⁶

The court suggested that the banking and financial services sector created a compulsory arbitration process to deal with situations such as the present where small sums were at issue. It could be invoked by the court by referring the matter to an arbitral tribunal which would resolve the matter informally and quickly.²³⁷

But it is difficult to reconcile Bertelsman J's judgment with the finding of Supreme Court of Appeal in the *Standard Bank* case, and the Constitutional Courts decision in *Jaftha*. It would appear that the presence of the trifling sum that was owing in the *Ntsane* case weighed too heavily in the final judgment. *Ntsane's* facts differ substantially from *Jaftha's* facts, but are near identical to *Standard Bank's* facts. Therefore the following observations from the latter two cases should also have been considered in *Ntsane*. Firstly, in *Jaftha* Makgoro J pointed out that factors may exist where sales in execution of trifling debts may be reasonable and justifiable, and therefore the interests of the creditors could not be overlooked.²³⁸

²³³Paras 81-82.

²³⁴Para 83.

²³⁵Para 84.

²³⁶Para 89. For a comprehensive discussion in respect of concerns relating to municipal debt over immovable property, see Kelly-Louw M "Selling or leasing property? Beware of Municipal debts! A note in two parts (part I)" (2005) *SALJ* at 557; Kelly-Louw M "Selling or leasing property? Beware of municipal debts! A note in two parts (part II)" (2005) *SALJ* at 778; Kelly-Louw M "Municipalities versus bondholders – who won?" (2006) 2 *Speculum Juris* at 160.

²³⁷Para 97.

²³⁸At para 42 of that case cited in para 11.4 above.

Secondly, the Supreme Court of Appeal in the *Standard Bank* case pointed out that *Jaftha's* case did not rule that ownership of all residential property was protected by section 26(1).²³⁹ *Jaftha* concerned a debtor being deprived of title to a home for failing to satisfy a trifling *extraneous* debt with no judicial oversight to prevent an unjustifiably disproportionate result. There the creditor was not a mortgagee with contractual rights over the property, which rights originated from an agreement willingly entered into by the debtor in return for capital.²⁴⁰ The court further stated in *Standard Bank* that seeking an execution order on residential property was not enough to be regarded as an infringement of section 26(1), and because no infringement had been alleged or shown it was not necessary to justify the orders sought, and they should have been granted.²⁴¹

Be that as it may, it is interesting to note that the developments discussed above did not relate to the possible infringement of the section 26 rights of *insolvent* debtors. None of the debtors in the aforementioned cases had been sequestrated and they were therefore not within the confines of the collective debt collection procedure regulated by the Insolvency Act. So what impact will cases of this nature have on the provisions of the Insolvency Act? Steyn points out that one usually does not deal with indigent debtors for whom adequate housing is a problem in High Court insolvency proceedings.²⁴² The whole crux of the Insolvency Act is geared towards relieving the debtor of his assets for the advantage of his creditors.

One can only speculate at this point as to how the courts will deal with debtors in the position of the *Ntsane* case once their estates are sequestrated. On the reasoning of the *Ntsane* case, it will be difficult for a court to rule differently in respect of a house attached by the trustee of an insolvent estate. On the same facts, but within insolvency, the position will be no different. Loss of the home will likewise be an infringement of the insolvent debtor's section 26 rights. Usually, only

²³⁹Para 273 I – 274 D *Standard Bank* case cited in para 11.4 above.

²⁴⁰Para 274D-F *Standard Bank* case cited in para 11.4 above.

²⁴¹Para 275 F-G.

²⁴²See also Evans RG "The abuse of the process of the court in friendly sequestration proceedings" (2002) *International Insolvency Review* 13 at 30. See also the comprehensive discussion hereof by Steyn L "'Safe as houses' – balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) *Law, democracy and development* at 101.

the bond holder, as a secured creditor, will realistically have any interest in the sale of the home, and he will often be the only creditor to have much of his claim satisfied by such sale. Will this infringement of section 26 rights be justified under section 36? Or will the courts in future be required to investigate the state of the debtor's housing arrangements at the initial sequestration proceedings. Under what circumstances would a payment on a bond, or the outstanding balance, be considered "trifling", bearing in mind that several other debtors may be part of the *concursum creditorum*. At present the only judicial oversight in insolvency proceedings is during the initial application for sequestration, and that oversight is geared rather towards ascertaining the advantage for creditors, than in the interest of the debtor. When the sequestration order is granted, the possessions of the debtor, including any dwelling, automatically vest in ownership in the Master, and later in the trustee of the insolvent estate. Is section 20 of the Insolvency Act, which is almost the legislative foundation of our insolvency law, in the line of fire by the constitutional rifle. Why should the *Ntsane* dwelling not be excluded from the insolvent estate on constitutional grounds?

This uncertainty brings one back to the question of the policies upon which South African insolvency law is based. In the light of the new constitutional dispensation it would appear that a rational policy regarding the protection of assets, including one's dwelling, must be formulated. In this respect a suitable policy must be formulated to balance the interests of all the stakeholders, as well as considering the interests of the national economy. It would appear that a policy must be established in this respect to exclude a debtor's dwelling from attachment by creditors under certain circumstances. These circumstances may relate to the general health and age of the debtor and his dependants, the debtor's ability to generate an income, his behaviour and responsibility in respect of his debts and the property in general. In the *Ntsane* case, Bertelsman J effectively did this, but the reasoning behind the exclusion of that asset from execution was perhaps not clear. Perhaps the starting point should be that the sale of a debtor's dwelling must be postponed for a particular period if circumstances justify this. It should become an entrenched policy to completely exclude only low value houses from the reach of creditors in general. The availability of such houses

as security for capital should be prohibited.²⁴³ But one must remember to heed the words of Cameron JA and Nugent JA in the *Standard Bank* case,²⁴⁴ namely, that mortgage bonds are indispensable tools for the spreading of home ownership, but that the borrower voluntarily enters into mortgage agreements, thereby compromising his rights of ownership pending repayment of the loan. The following words of the court are of particular importance.²⁴⁵

The value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms. That confidence has been shaken by a recent decision of the Cape High Court that is the subject of this appeal. The decision must be seen against the background of the ordinary legal process for recovering debts. When judgment is given against a debtor and the debtor fails to satisfy the judgment debt the process for recovery of the judgment debt is by execution against the judgment debtor's belongings.

11.5 The rights of children

Section 28 of the Constitution makes provision for the protection of children²⁴⁶ in addition to the protection the other provisions of the Bill of Rights. However, the rights of children are not accorded a special status in the Bill of Rights, and except for some restrictions, children and adults have the same protections in the Bill of Rights.²⁴⁷ Section 28 entrenches certain socio-economic rights for children, with section 28(1)(c) providing for amongst other things, the right to shelter.²⁴⁸ A duty is imposed on the state by section 28 to provide the child with the basic requirements mentioned in that section, and to provide the child's family with the means to support those requirements. But some of the section 28 rights will also have horizontal application, thereby placing a duty on the parents not to abuse the child.²⁴⁹ There is also a common law duty upon parents to provide, amongst other things, shelter for their children.²⁵⁰

²⁴³One would think that low value houses will not be attractive as security to the larger banking and finance houses. It is therefore doubtful whether such housing will be of much use in obtaining capital or credit for the owner thereof. In this respect it is probably more acceptable to accept the existence of poor individuals with roofs over their heads than poor but homeless individuals.

²⁴⁴Para 11.4 above at 269 B-F.

²⁴⁵Para 11.4 above at 269 F-G.

²⁴⁶S 28 applies to people younger than 18 years (s 28(3)).

²⁴⁷Currie at 600. Woolman at paras 47.1 and 47.4 and Cheadle at paras 23.1 and 23.8.

²⁴⁸S 28(1)(c).

²⁴⁹Currie at 603.

²⁵⁰Currie at 611.

In the context of insolvency law, and perhaps debt collection in general, the question arises whether the sale of a debtor's dwelling for the purpose of satisfying debts may amount to an infringement of a child's right to shelter under section 28(1)(c). In *Government of the Republic of South Africa v Grootboom*²⁵¹ the question regarding the realisation of socio-economic rights was considered. In this case the respondents were evicted from private land earmarked for low-cost housing, and were therefore made homeless. An application was made to the Cape High Court²⁵² for an order that adequate shelter or housing be provided for them by the government until permanent accommodation could be obtained. The respondents claim was based on section 26 and section 28(1)(c) of the Constitution. The High Court distinguished between section 26 and 28(1)(c), saying that no constitutional obligation rested on the state to provide housing on demand, but that it had to take reasonable measures to provide housing within available resources. But in respect of section 28(1)(c), the High Court ruled that the section obliged the state to provide rudimentary shelter to children and their parents on demand where parents were not in a position to provide such shelter.

But the Constitutional Court found that the High Court was wrong in its distinction between section 26 and 28(1)(c), as it would result in an anomaly in that section 28 would allow people with children direct and enforceable rights to housing, while childless people, or those with adult children would be denied housing under section 28, despite perhaps being old or disabled. So section 28(1)(c) does not impose a duty on the state to provide shelter on demand to children or their parents.²⁵³

One now returns to the question of how section 28(1)(c) may impact on creditor's rights if a creditor or a trustee sells a house in execution of judgment, thereby depriving the children in that house of shelter. If there are no duties on the state in this respect, why should creditor's rights be eroded by imposing duties on them to provide or maintain shelter for children where creditors are acting legally and within the confines of the law? The argument for creditors may be stretched further by placing the fault for the loss of shelter on the parents who failed to comply with their

²⁵¹2001 (1) SA 46 (CC).

²⁵²*Grootboom v Oostenberg Municipality* 2000 (3) BCLR 227 (C).

²⁵³*Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 79.

contractual financial obligations which they willingly entered into. However, cases may arise in which the loss of adequate housing or shelter consequent upon a sale in execution may amount to an abuse of human rights of the residents of the dwelling, and not only that of children. In our human rights oriented society, it is therefore important to formulate a policy by which to be guided, rather than to ignore the issue until it arises. Some foreign jurisdictions do have policies in place to deal with the protection of the dwelling in times of financial stress for the inhabitants.²⁵⁴

In this respect it would be short-sighted to concentrate only on the rights of children who may be affected by the loss of a dwelling, because the rights of the old, ill or disabled may equally be infringed under certain circumstances. But what guideline should be used in formulating a policy for the protection of these parties while simultaneously looking after the rights of creditors? In respect of children, the courts have held that the “best interest of the child” requirement is the most important consideration when considering issues affecting children.²⁵⁵ In implementing this best interest requirement, the court, as upper guardian of minors, must exercise its discretion to promote the interests of the child rather than focussing on the rights of the parents.²⁵⁶ In respect of children, the old, ill or disabled, a useful test or requirement in insolvency may be “the interest of the child, old, ill or disabled” that must be considered when the dwelling in which such a party resides must be sold in execution.²⁵⁷ As with the “best interest of the child” requirement, this test will not be without difficulties.²⁵⁸ A test of this nature will

²⁵⁴See chs 5 and 6 above.

²⁵⁵*Fletcher v Fletcher* 1948 (1) SA 130 (A). See the reference to Stander L and Horsten DA “Die reg van die onderhoudsbehoefte kind kragtens artikel 29 van die grondwet teenoor die reg van skuldeisers van die insolvente boedel van die ouer” (2008) *TSAR* at 203 and further, in ch 12 below, who call for maintenance to be paid out of the insolvent estate of a parent, for the education of the insolvent parent’s children.

²⁵⁶Bonthuys E “Of biological bonds, new fathers and the best interests of children” (1997) *SAJHR* at 622, 623.

²⁵⁷It should be a requirement to notify the court of the presence of the interest of a child, old, ill or disabled person in every insolvency application. The trustee should also be empowered to resolve this issue without first approaching the court, while any interested party should have recourse to the courts if necessary.

²⁵⁸See Currie at 618 and Cheadle at para 23.8. Howell G *Family breakdown and insolvency* (1993) at 208 (hereafter Howell) makes the interesting point that the issue of the family home in this context presents a stark contrast between policies espoused by family law on the one hand, and insolvency law on the other. He says, “In family law, the welfare of the child is the paramount consideration. That, however, is simply not the case when bankruptcy intervenes and it is a question of seeking to balance the interest of the creditors against the interests of the child and family. That is not to say

probably not provide for a reliable and concrete standard, but this is probably a situation in which one is not seeking a reliable and determinable standard. It should rather be considered a legislative guideline to be used as a useful tool by the trustee in assessing the facts, or by the court which must exercise its discretion, in considering the best interest of the child, old, ill or disabled, as dictated by the facts of each case. In using this tool, the court will have to consider whether the specific facts of the case before it justify the implementation of the test in the first place. If this is found necessary, many further factors, peculiar to each set of facts, will have to be considered before deciding whether or not the interested parties should continue to enjoy any rights in respect of the dwelling. Here one may think of the age, illness or extent of disability, social services, medical services within the immediate vicinity of the dwelling, future employment possibilities of inhabitants of the dwelling, availability of transport, schooling facilities and so forth.

Once the inhabitant of the dwelling's rights have been confirmed in accordance with the above guidelines and judicial discretion, the next step will be to formulate a suitable remedy that may balance the rights and expectations of both debtors and creditors. The idea here is not to deny the creditors their rights in respect of the most valuable asset in the estate, but rather to postpone their rights or to assist them in making alternative provisions for the affected debtor and or his family. The remedy in this respect should remain supple, thereby allowing the courts to develop this newly formulated policy regarding the protection of the debtor's dwelling. Here one may consider the postponement of the sale of the dwelling, of finding alternative accommodation in a state funded retirement home for elderly residents, and so on. In this respect, it will be helpful to consider how foreign jurisdictions have implemented policies to protect the dwelling of the debtor, and a more comprehensive discussion thereof is found in chapters 5 and 6 of this thesis.

that there would not be sympathy on the part of the trustee in bankruptcy and some support under the law for the position of children. However, if the trustee in bankruptcy wishes to push the matter through, then the interests of the creditors will prevail". See also *Mullard v Mullard* [1981] 3 FLR 330 CA which is authority for the proposition that it would not be right, under the Matrimonial Causes Act 1973, to prefer creditors claims over those of the other spouse and children where the one spouse has substantial debts where bankruptcy proceedings have not been instituted.

11.6 Conclusion

In formulating new insolvency law legislation the question is not whether constitutional requirements, underpinned by human rights interests, must form an integral part thereof, but rather to what extent policy changes should occur in order to align such legislation with the required constitutional principles and expectations, and how to achieve this while maintaining or balancing the interests of creditors, debtors, society and the state. While some guidance may be taken from the Constitutional Court's decisions that dealt *directly* with insolvency law issues, these decisions by no means provided for clear and accurate answers on how to approach insolvency law's impact on the constitutional rights that have been discussed above. Nor do the court's decisions in respect of issues such as rights to housing and children's rights, which may impact *indirectly* on insolvency law, provide for any clear answers on how to formulate insolvency law policies that provide for an acceptable balance of interests of all stakeholders, but always within the constitutional framework. The formulation of a possibly more progressive policy in insolvency law must be done holistically, and not in a piecemeal fashion. The fallacy of approaching this task in a piecemeal fashion was illustrated by the Law Commission's approach in dealing with section 21 of the Insolvency Act. In *Harksen v Lane NO*,²⁵⁹ in which the Constitutional Court in a majority judgment found section 21 to be constitutional. This decision apparently directly influenced the South African Law Commission policy formulation in its approach to reforming section 21. This is seen in the Law Commission's draft Bill of 1996,²⁶⁰ which excluded section 21 from its text, stating in that draft Bill's *Explanatory Memorandum*²⁶¹ that section 21 should be scrapped as conceptually it is an anachronism and appeared to be unconstitutional. But then came the *Harksen* decision which probably prompted the Law Commission to re-introduce section 21 as clause 11A in its *Preliminary Proposals of its Project Committee*.²⁶² The Law Commission then apparently reconsidered its *Project Committee Proposals*, and section 21 was excluded from the latest draft Bill of 1999. However, the Law Commission has replaced section 21 with what appears to be, on the face of it, a less-

²⁵⁹See para 11.3.4.2 above.

²⁶⁰See the discussion in ch 12 below, and the reference in ch 1 above.

²⁶¹At 63.

²⁶²See Evans RG, Loubser A and Van der Linde K "Aspects of the Draft Insolvency Bill" (1999) SA *Merc LJ* at 210.

draconian provision in the form of clause 22A. In its detail, however, clause 22A is more severe than section 21 of the Insolvency Act. In this respect it is clear that the Law Commission has no clear policy upon which it intends formulating future insolvency legislation. If anything, its vacillation between a progressive scrapping of section 21, to the institution of the severe clause 22A reeks of unprincipled policy formulation, and certainly a policy formulation that is creditor oriented. If this approach is maintained, it is doubtful whether policies in respect of issues such as housing and rights of the child, old ill and disabled will even be considered.

But if policy changes or reconsideration should trigger a more progressive approach to legislation, the constitutional guidelines are there. Particularly in respect of the assets in, or excluded from, insolvent estates, and the relevant parties rights and duties in respect of those assets one must consider the possible infringement of rights relating to assets, together with the justification of such infringement. If new legislation is measured in accordance with the tests and analysis of the Constitutional Court in the various cases discussed in this chapter, and the constant consideration of the proportionality of legislative consequences on relevant stakeholders, it will probably withstand the test of constitutionality and, in turn, will probably be approved by the majority of the interested parties. Since the drafting of the Insolvency Act almost one hundred years ago, South Africa has effectively become a radically changed society with radically changed societal interests and values. With respect to the assets that are included or excluded from insolvent estates, some problem areas regarding South African legislation, or the lack of it, also requires radical revision which may be underpinned by a radical new policy shift. This, in turn, may reduce the problem areas regarding assets in the insolvent estates of individuals.

Chapter 12: Law reform

12.1 Introduction

In its report on the review of the law of insolvency in South Africa the South African Law Commission states that the principal Insolvency Act dealing with insolvency in South Africa has been amended more than 20 times, but it has never been reviewed as a whole.¹ It then recognises that insolvency law has become a dynamic part of the law, subject to constant change and having to adjust to new circumstances, and that its report is an important first step to modernise insolvency law.²

But in this project of the Law Commission, entitled “The Review of the Law of Insolvency”, only in paragraphs 2 and 2.4 of the introduction to the Explanatory Memorandum is there a reference to the word “reform”.³ For the rest it refers to “review” and “investigation”. But “reform” and “review” appear to be used interchangeably without considering the actual meaning of either word. “Review” in the *Oxford English Dictionary*⁴ means “a general survey or assessment of subject or thing; retrospect, survey of the past; revision or reconsideration”. “Reform” means “to make or become better by removal of faults or errors; removal of faults or abuses especially of moral or political or social kind”. Considering all the changes that have occurred in every sphere of society in South Africa since 1994, it is clear that it is a reform of insolvency law that is required, not merely a review.⁵ Further, there is no indication or proposal to consider

¹The regular amendment of the insolvency legislation brings to mind Keay’s observation that “[s]ociety in general, and Parliament in particular, has experienced some difficulty in knowing how to handle the incidence of insolvency among individuals”. Keay A “Balancing Interests in Bankruptcy Law” (2001) *Comm L World Rev* 206 at 206. See, generally, the South African Law Commission Report: Project 63 *Review of the Law of Insolvency* (2000) Explanatory Memorandum (vol 1) and Draft Insolvency Bill (vol 2). Hereafter respectively the Explanatory Memorandum and the Draft Bill. Explanatory Memorandum at 9. The Draft Bill replaces the words “sequestration” and “trustee” with “liquidation” and “liquidator” respectively, but the respective words will be used inter-changeably in this chapter.

²Explanatory Memorandum at 9.

³Explanatory Memorandum at 10.

⁴*Oxford English Dictionary*.

⁵Although various project committees of the South African Law Commission commenced this review of the law of insolvency several years before the change of the political dispensation in 1994, it is submitted that the idea of *reform*, and not merely *review*, should have been the first consideration on this project, bearing in mind that the latest draft legislation was published in 2000, almost ten years after the negotiations for a democratic society had commenced. The interest in this reform process, and the pace applied to it, can perhaps be described as deplorable, and one is tempted to “scoff” over it. “The occasional visitors from Versailles who came to scoff saw a beautiful woman willingly staying inside, working at her desk well into the evening, twenty candles around her stacks

the policy considerations in South African insolvency law upon which this “review” or “investigation” will hinge. It is submitted that a failure to consider policy issues will lead to a disjointed and flawed “revision” of insolvency law. What is needed is a review of the policy upon which insolvency legislation was based in the past, and then to consider a reform of the policy, before embarking on a reform of the legislation. The UNCITRAL Guide states that an efficient insolvency system must be transparent and predictable, thereby allowing creditors to “clarify priorities, prevent disputes by providing a backdrop against which relative rights and risks can be assessed and help define the limits of any discretion”.⁶ It is submitted that particularly in respect of certain assets in the insolvent estates of individuals, there is a lack of transparency and predictability, and as is shown in the general body of this thesis, this has created complex problem areas in respect of property in such estates.

Under the heading “Guidelines for Reform” the Commission Report⁷ states that several legal systems and reform proposals were considered in order to find innovative solutions for problems experienced in insolvency law. It then states: “In the few cases where it seemed advisable, provisions were adapted for use in South Africa”. It also states that the aim of this investigation into the review of South African insolvency law by the commission is to “balance and satisfy the needs of the different stakeholders. The major stakeholders are the commercial community in general and creditors in particular; insolvent debtors; insolvency practitioners and the government”.⁸

In its summary of changes proposed in the Draft Bill the commission accepts that a debtor’s insolvency may be without fault on the part of the debtor and he therefore deserves a fresh start if he acts honestly.⁹ Here the commission also states that

of calculations and translations; advanced scientific equipment stacked in the great hall” – Bodanis *D E = mc² A Biography of the world’s most famous equation* (2000) at 37. This, apparently, is not the picture viewed by the visitor to the reform process of South African insolvency law. The draft Bill has been pending for eight years now with no further interest shown to the project. If anything, the candles in the room have gone out.

⁶United Nations Commission on International Trade Law *Legislative guide on insolvency law* 2005 at 13 (hereafter UNCITRAL Guide).

⁷Explanatory Memorandum para 2 at 10.

⁸Explanatory Memorandum at 10.

⁹Explanatory Memorandum at 17. For an understanding of the term “fresh start” and the policy or policies supporting the fresh start idea, see Ferriell J and Janger EJ *Understanding bankruptcy* (2007) at 97 and 135 and further, and generally the discussion in ch 9 above (hereafter Ferriell). Keay A “Balancing interests in bankruptcy law” (2001) *Comm L World Rev* at 207 and further where

creditors may contribute to insolvencies by providing credit to debtors who cannot repay it, and therefore a balance is needed between the rights of creditors and the debtor's right to a fresh start.¹⁰ However, no policy considerations are given by the commission in respect of a fresh start, nor is it linked in any way to excluded or exempt property. In fact, in the summary no distinction is made between excluded and exempt property, nor is such property linked to a fresh start policy, or considered essential for the debtor to achieve a fresh start. On the subject of excluded property, the summary briefly states that excluded property must be brought into line with property not subject to attachment by creditors, that further assets may be made available to debtors under certain circumstances, and it mentions the debtor's right to his remuneration.¹¹ But here too no policy considerations in respect of excluded or exempt assets are mentioned. So, generally, there has apparently never been a comprehensive and substantial drive in South African law to consider the notion of excluded or exempt property on a policy orientated basis. The South African Law Commission's Draft Bill and Explanatory Memorandum contain no substantial policy driven approach in respect of excluded or exempt property.¹²

The current Insolvency Act's¹³ exclusions and exemptions appear to be no more than perfunctory exemptions, because in practice they hold limited value for the debtor, and under certain circumstances, may be detrimental to creditors of the estate. They are of little value for the debtor because the value limits of the exempt or excluded property is usually very low. For the creditors, they can be detrimental because some excluded property, such as, for example, a portion of the insolvent debtor's income, can be lost to the insolvent estate if a trustee fails to take the measures required by the Act to claim such income. In practice the present exemptions are probably insufficient for an insolvent debtor to support himself and his dependants, not to mention the possibility of attaining a fresh start by utilising

he points out that the idea of a debtor obtaining a fresh start and obtaining rehabilitation is universally regarded as one of the rationales for the institution of bankruptcy, and further at 213.

¹⁰Explanatory Memorandum at 17. See also Keay (2001) *Comm L World Rev* 206 at 208.

¹¹Explanatory Memorandum at 17.

¹²See generally the Explanatory Memorandum and the Draft Bill.

¹³24 of 1936 (hereafter the Act).

exempt property, nor is there clarity as to whether the relevant property is considered either excluded or exempt. For example, a significant asset in an insolvent estate is the insolvent debtor's ability to generate an income. Although on the face of it such income is an excluded asset in South African insolvency law, the debtor, on the one hand, can find a large portion of that income being taken away from him, while on the other, a lax trustee can lose a portion of that income if he fails to take the necessary measures to claim it for the benefit of the creditors.¹⁴ This state of affairs has come about because there is no rational policy regarding exemptions upon which a workable exemption law can be founded.

Generally, South African exemption law is strict in the sense that there is very little scope for a debtor to obtain a meaningful exemption from the existing fixed statutory provisions. Furthermore, there is no policy upon which the different exemptions are based and, consequently, there is no relationship between exemptions that are similar and that should therefore be formulated and calculated in a similar fashion, nor is there any real policy connecting exemption law to a fresh start policy. It is submitted, for example, that one formula should be used by which to ascertain what portion of a debtor's pension, insurance policy and salary should be protected from his or her creditors, and how much thereof should form part of the insolvent estate. The arbitrary capping of a protected or exempt amount will only lead to constant amendment of such legislation, or failing amendment, it may disadvantage either the debtor or the creditor, depending on the particular asset and the nature of the exclusion or exemption.

In formulating an exemption policy, problems of this nature must be avoided. An exemption policy can also include the idea of a temporary exemption of certain assets if this will assist the debtor in obtaining a fresh start in the shortest possible time, or for reasons of humanity.¹⁵ An exemption policy must also take into account that a discharge generally should not become freely available in the sense that exemptions in themselves would make the whole procedure of sequestration and collective enforcement worthless. Exemption policy thus requires careful planning in order to find

¹⁴See, eg, *Ex Parte Theron*; *Ex Parte Smit*; *Ex Parte Webster* 1999 (4) SA 136 (O).

¹⁵See, eg, 335A to 338 of the United Kingdom Insolvency Act of 1986 and Doyle and Keay *Insolvency legislation: Annotations and commentary* (2005) at 435 (hereafter Doyle Legislation) in respect of the exemption of a dwelling in the United Kingdom.

an acceptable balance between swelling the estate in favour of creditors, and protecting the interests of the debtor and all other players in the insolvency arena.

The insolvency law review proposed by the South African Law Commission in respect of assets in insolvent estates, and excluded or exempt property, will now be considered in more detail.

12.2 The Draft Bill

Clause one of the Draft Bill defines a number of words that are used in the Bill. Those words that are relevant to problem areas in respect of property in insolvent estates of individuals will be considered here. Clauses 11 and 15 are the most important clauses in respect of property included or excluded or exempted from insolvent estates of individuals. Essentially these clauses propose to replace sections 20, 23 and 82(6) of the Insolvency Act. Clause 22A affects, among other things, spouses of insolvent debtors, thereby proposing to replace section 21 of the Act, and clause 62 replaces section 79 of the Act in respect of certain exempt or excluded assets. These provisions of the Draft Bill and the comment in the Explanatory Memorandum will now be considered and commented on in some detail.

12.2.1 *The definitions in the Draft Bill*

12.2.1.1 Associate

“Associate” is defined in relation to natural persons and in relation to juristic persons. Juristic persons as associates will not be considered here, suffice to say that the word is defined very broadly in respect of juristic persons. In relation to a natural person it means the spouse of an associate, or any relation of the associate or his spouse by consanguinity in the first second or third degree of relationship as determined by the Intestate Succession Act.¹⁶ The definition includes a partner of an associate or the partner’s spouse or any relation to the latter two persons by consanguinity as contemplated above. An associate is also the beneficiary of a trust to which the associate is the trustee, or a company of which an associate is the director or a close

¹⁶81 of 1987 s 1(3)(d).

corporation of which he is a member, or any juristic person to whom such person is a manager or of which he or she is in control.

This definition of associate is apparently in line with modern developments in other legal systems and is meant to simplify the wording of provisions for persons closely associated with the insolvent. The Explanatory Memorandum mentions only three instances in which the term associate is used in the Draft Bill.¹⁷ However, by implication the word may be relevant whenever the word spouse or partner is used, or trustee or trust beneficiary, or where a director of a company or a member of a close corporation is involved. The commission considers this to be a narrow definition therefore justifying it as a drastic rule, whereas in the commission's view, a wide definition would disrupt free trade and would be unacceptable. Including partners and trust beneficiaries in the definition was however not considered casting the net too widely, but including persons whose bank accounts have been used to launder money was considered too wide. So while spouses, family members or partners, for example, are brought into the net merely because of the relevant relationship, persons conducting criminal activities are not.

This definition has been discussed in more detail in elsewhere in this work.¹⁸

12.2.1.2 Disposition

“Disposition” is defined in the Draft Bill as “any transfer or abandonment of rights to property and includes a sale, mortgage, pledge, delivery, payment, release, compromise, donation, suretyship or any contract therefore”.¹⁹ The Explanatory Memorandum points out that the list of dispositions is not exhaustive, but that “suretyship” has been expressly included in view of decided cases, although no reference is given as to the cases that were considered for this purpose.²⁰ But this definition is virtually the same as the definition of “disposition” in the Insolvency Act. While the Draft Bill's definition has included a disposition in compliance with court

¹⁷At 31.

¹⁸See ch 10 above.

¹⁹Cl 1.

²⁰Explanatory Memorandum at 35.

orders, which is not included as a disposition in the definition in the Insolvency Act, some dispositions that in the past have been the source of much uncertainty and academic debate were not considered. For example, the question of the repudiation of an inheritance as a disposition has been a hotly disputed topic for many years, and was finally resolved by the Supreme Court of Appeal.²¹ But when the Draft Bill was published this problem area in respect of the repudiated inheritance being a disposition, or an asset in an insolvent estate, had not yet been resolved by the Supreme Court of Appeal. This matter apparently received scant attention by the commission, probably because the whole “review” process was not policy based. If the policy of collection of maximum assets for the advantage of creditors had been taken into account, the definition of disposition would expressly have included a repudiation of an inheritance as a disposition. In the same vein, the repudiation of an insurance benefit should have been included in the definition as a disposition.

12.2.1.3 Insolvent

A spouse married in community of property has been included in the Bill’s definition of “insolvent” in order to align it with case law on the subject.²² Although this is an improvement which should make both lay people and practitioners aware of the fact that both spouses in a marriage in community of property are insolvents, particularly in respect of estate planning, it still does not alleviate the inequity that may be suffered by a spouse who owns separate property within a marriage in community of property. It is submitted that this inequity has resulted partially because matrimonial property law and insolvency law overlap with each other, but the legislation in the respective fields fails to reconcile and rectify the problems created by this overlapping legislation. In this respect, for example, the Law Commission has stated that the problems experienced by the separate spouses who are married in community of property when the community estate is sequestrated, is a problem of matrimonial property legislation, and not a lacuna in the Insolvency Act.²³ However, one must agree with the UNCITRAL Guide which states that an efficient insolvency law system must indicate,

²¹See *Wessels NO v De Jager en 'n Ander NNO* 2000 (4) SA 924 (SCA), and see the comprehensive discussion in ch 8 above.

²²Explanatory Memorandum at 36.

²³See the comprehensive discussion on this subject in ch 10 above and Explanatory Memorandum at 36..

as far as possible, all provisions of overlapping laws that affect insolvency proceedings and legislation “even family and matrimonial law”.²⁴ It is submitted that this policy is essential to include in any exercise in law reform.

12.2.1.4 Insolvent estate

The Bill defines this as “an estate which is under liquidation and where the joint estate of spouses married in community of property is under liquidation it includes the separate property of the spouses”.²⁵ The commission does not think that this provision is in any way discriminatory towards women in whose favour such separate property is usually excluded, nor does it think that this provision frustrates the intention of testators who want to exclude property from an heirs community estate. The commission’s view is that any discrimination that there may be would lie rather in the field of family law, rather than in insolvency law, which simply perpetuates the position before insolvency.²⁶ The Explanatory Memorandum states that the parties to a marriage must accept the effects of their chosen marital regime while testators must correctly draft their wills to plan for insolvency of an heir.²⁷

While this may be partially true, case law has shown that inequitable results have visited debtors due to the present state of affairs.²⁸ It would appear from case law that also legal practitioners or estate planners may be ignorant of the legal position of spouses in community marriages, and the spouses’ liability when insolvency intervenes in such a union.²⁹ If anything, family law, while misleading, attempts to protect the parties (usually the woman) in a marriage in community of property. The Matrimonial Property Act³⁰ expressly provides for the possibility of separate property belonging separately to a spouse in a community marriage.³¹ However, an arrangement of this nature is valid only between the spouses *inter se*, and not towards

²⁴UNCITRAL Guide at 13.

²⁵CI 1.

²⁶Explanatory Memorandum at 37.

²⁷Explanatory Memorandum at 37.

²⁸See, eg, *Badenhorst v Bekker No en Andere* 1994 (2) SA 155 (N) and *Du Plessis v Pienaar NO and Others* 2003 (1) SA 671 (SCA).

²⁹See, eg, *Badenhorst v Bekker No en Andere* 1994 (2) SA 155 (N) and *Du Plessis v Pienaar NO and Others* 2003 (1) SA 671 (SCA).

³⁰88 of 1984.

³¹See the comprehensive discussion on this subject in ch 10 above.

third parties. This may be acceptable, because third parties have no knowledge of arrangements between spouses, but it is submitted that it is unacceptable for the commission merely to abandon the problem to family law and turn its back on the consequences that poorly drafted family law has on this field of insolvency law. After all, the commission's aim with this review of the law is to strike a balance between the various concerned parties, including the debtor.³² More clarity is required in both the insolvency legislation and in family law in order to alert practitioners as to their responsibilities when advising individuals of the consequences that may result from a marriage in community of property or from a poorly drafted will. It is true that the problems encountered in case law in this field result primarily from the marriage in community of property, but that does not mean that the matter must be ignored, to the detriment of ordinary citizens. Ideally, it is submitted that marriages in community of property should be abolished. During insolvency, spouses who are married in community of property, for example, are severely compromised as beneficiaries of insurance policies by section 63 of the Long-term Insurance Act,³³ whereas spouses married out of community of property are not compromised at all.³⁴

12.2.1.5 Property

“Property” is defined in the Draft Bill as “movable or immovable property wherever situated and includes contingent interests in property”.³⁵ It excludes the reference to property situated anywhere in the Republic, and it excludes the exclusion of the contingent interests of a *fideicommissary* heir or legatee, both being in the present definition of property in the Insolvency Act.³⁶

It is submitted that the definition of “property”, together with the definition of “disposition”, are the most important definitions in the insolvency legislation in respect of assets in the insolvent estate. Failure to define “property” more adequately in the existing Insolvency Act has been the source of legal uncertainty in South African insolvency law, resulting in some of the most complex litigation

³²Explanatory Memorandum at 10.

³³52 of 1998.

³⁴See the discussion of the possible constitutional implications hereof in ch 10 above.

³⁵Cl 1.

³⁶See cl 1 of the Draft Bill and s 2 of the Insolvency Act.

in this field of law. It has created several problem areas in respect of assets in insolvent estates of individuals.³⁷ However, the definition of property in the Draft Bill is essentially the same as the definition in the present Act. Although it appears to be a broad all inclusive definition, in failing to specify in more detail specifically what property may be excluded or included as property, it creates uncertainty in respect of some categories of property, thereby perpetuating the problem areas in this field.

So, for example, an inheritance and/or an insurance benefit which has been repudiated should be specifically included or excluded from the definitions of both property and disposition. If the review by the commission had been policy based, this specific problem area would have been avoided by including these assets in the definition of property, thereby maintaining the policy in South African insolvency law of collection of the maximum assets for the advantage of creditors in the insolvent estate. Apart from this, the definition should provide for the inclusion of rare or new forms of property and property that may come into existence in the future.³⁸ In the latter instances computer technology can lead to the creation of property or property rights that do not fall within the realms of intellectual property, or the common law definition of property. Or if such property is protected by intellectual property rights, it may be difficult to identify. So, for example, Chalkiadis says:³⁹

One of an insolvency office holder's first tasks is to ascertain what are the assets of the company to which, or over which, he is appointed and how best to preserve them ... Here lies the first issue when insolvency meets the computer industry: what exactly is the asset?

Hardware is what might be called the typical asset. It is visible and tangible and, as such, easy to deal with. Software, on the other hand, is not a typical asset. For many, it is not visible – it is simply what comes with the purchased hardware, and, as a result, is sometimes not recognised as a separate asset that requires separate focus. For the uninitiated, a computer is simply something to sell “lock, stock and barrel” for whatever it might fetch, and little thought is given to whether that computer has software installed on it.

³⁷See particularly ch 8 above.

³⁸See generally, Chalkiadis M *Insolvency and Information technology* (2000); Corbett S “Copyright versus commerce: The business database as a commercial asset in New Zealand – Much ado about nothing?” (2005) *The Journal of Business Law* at 209; Smith A “Privacy and the sale of consumer lists in South African insolvency law: Some issues reconnoitered” (2004) *SA Merc LJ* at 598.

³⁹At 5.02 to 5.04.

Failing to identify the asset or to recognise the separate but valuable component parts as separate assets of an insolvent estate can result in drastic losses for all the stakeholders in the insolvent estate.

Likewise, a citizen's right to certain state benefits, or public law rights may be considered property at present and in future legal development. Policy must be developed to decide whether or not such property, or portions thereof, must be included or excluded from insolvent estates.⁴⁰

A question that has not yet come before the South African courts is whether a debtor's secret formula should be considered property in his insolvent estate. On this point the English courts have ruled that it must be included as property of an insolvent estate.⁴¹ The South African Act's definition of property should expressly include or exclude a secret formula as property in order to avoid the uncertainty and litigation experienced in English law. It is submitted that a secret formula should be excluded from an insolvent estate in view of possible problems that may ensue from the inclusion thereof in an insolvent estate. For example, who will be held liable if the formula is incorrectly utilised by its new owner, either because of the latter's negligence, or because the debtor provided the wrong information in respect of the ingredients to the formula. On a policy basis this may be likened to the professional services of a debtor, which he cannot be forced to practice, or the goodwill attaching to a doctor, or to a payment of compensation for personal injury suffered by the debtor. It is something close and personal to the debtor as described by the court in *Santam Ltd v Norman and Another*⁴² when explaining the underlying purpose of section 23(8). The court quoted Steyn J in *Kruger v Santam Versekeringsmaatskappy Bpk*⁴³ where he stated, *inter alia*, that:

Die Wetgewer is deur middel van die Insolvensiewet primêr daarop ingestel om die insolvent en sy bates van mekaar te skei, beheer van die boedel aan die kurator oor te dra en die bates na die krediteure op 'n sekere rangorde van voorkeur oor te skuif. Die liggaam van die insolvent word egter nie so oorgeskuif nie. Sy persoonlike integriteit bly onaangetas en sy status gedeeltelik ook ... In daardie sin is die

⁴⁰See ch 11 for a discussion of these public law rights.

⁴¹See ch 5 above.

⁴²1996 (3) SA 502 (C).

⁴³1977 (3) SA 314 (O) at 317 C-F.

insolvent se liggaam 'n "bate" wat hy tot voordeel van homself en sy familie na sekwestrasie kan aanwend ... Skade aan sy vlees of gees berokken, is gevolglik sy skade en vergoeding daarvoor kom hom persoonlik en vir sy eie voordeel toe.⁴⁴

In respect of a secret formula any income derived from the formula should be included in the insolvent estate, but the formula itself, it is submitted, should remain the property of the debtor.

12.2.1.6 Spouse

The Draft Bill defines a "spouse" as "a spouse in the legal sense, and even if there is such a spouse, also a spouse according to any law or custom or a person of any sex living with another as if married".⁴⁵ This definition will now set aside the uncertainty created by *Chaplin v Gregory (or Wyld)*⁴⁶ by including in the definition a person living with the debtor as a spouse, while the debtor is still legally married to another person. It also includes same sex relationships so it puts to rest the present equality loophole regarding same sex marriages in section 21(13) of the Insolvency Act.

12.2.1.7 Ownership, *dominium* and vest

The terms "*dominium*", "ownership" or "vest" are not defined in section 2 of the Act, or in the Draft Bill. It has been decided by the courts that the insolvent estate passes to the Master and ultimately to the trustee in ownership.⁴⁷ However, the trustee of an insolvent estate is clearly not in the same position as that of a common law owner of property. These words must therefore be included in the defining clause of new legislation and reference should be made to the fact that the Act brings about a temporary divesting of ownership of the assets of the insolvent estate and of the estate of an associate, which will include a spouse,

⁴⁴“Through the Insolvency Act the Legislature is primarily concerned with divorcing the insolvent from his assets, transferring control of the insolvent estate to the trustee and moving the assets to the creditors in a specific order of preference. His personal integrity remains intact, and to an extent also his status ... In that sense the insolvent's body is an 'asset' that he can utilise for the advantage of himself and his family after sequestration ... Damage to his flesh or soul is consequently his damage and compensation for such damage accrues to him personally for his own advantage” (author's translation).

⁴⁵C1 1.

⁴⁶1950 (3) SA 555 (C).

⁴⁷See *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A); *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

where relevant. Failure to define these words within the context of insolvency law has resulted in uncertainty as to the status of assets in insolvent estates, and in the estates of spouses of insolvent persons, and this in turn has resulted in considerable litigation and academic debate.⁴⁸

The word “vest” may also carry different meanings in different contexts,⁴⁹ so defining “vest” in the context of insolvency law, together with “dominium” and “ownership”, will bring clarity to a sphere of insolvency law that has not yet been fully analysed by the courts. “Vest” or “divest” must be defined, for the purpose of insolvency law, as a temporary transfer of ownership from an insolvent debtor, or an associate of an insolvent debtor, to the administrator of an insolvent estate. Ownership must be defined as the possession of custody and control of the property of an insolvent estate or the estate of an associate of the insolvent debtor, for the purpose of the administration of that insolvent estate, and “dominium” will bear the same meaning.

12.2.1.8 Social benefit

Social benefit in the Draft Bill is defined as the pension, allowance or benefits payable to a person in terms of certain specified legislation.⁵⁰ This is a new definition. “Social benefit” is not defined in the Insolvency Act. This definition relates to clause 15(4) of the Draft Bill concerning the exclusion of pension and social benefits from insolvent estates, and to clause 22 concerning certain contributions to pension funds that can be recovered for the benefit of the creditors.⁵¹

⁴⁸See, eg, *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A); *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); Joubert N “Artikel 21 van die Insolvensiewet: Tyd vir ’n nuwe benadering?” (1992) *TSAR* at 699; Sonnekus JC “Adiasie, insolvensie en historiese perke aan die logiese” (1996) *TSAR* 240; Evans RG “Who owns the insolvent estate” (1996) *TSAR* 719; Evans RG “Should a repudiated inheritance or legacy be regarded as property in an insolvent estate?” (2002) *SA Merc LJ* at 688; Sonnekus JC “*Dellatio* en *fallacia* in die Hoogste Hof” (2000) *TSAR* at 793.

⁴⁹See Evans RG “A critical analysis of section 21 of the Insolvency Act 24 of 1936” (1996) *THRHR* at 613 and (1997) *THRHR* at 71.

⁵⁰Namely the Occupational Diseases in Mines and Works Act 78 of 1973, s 9 of the Civil Protection Act 67 of 1977, the Social Assistance Act 59 of 1992 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993. See cl 1.

⁵¹Explanatory Memorandum at 42.

12.3 Proposals in respect of included property, and excluded or exempt property in the Draft Bill

Clause 11 of the Draft Bill carries the title “Effect of liquidation on insolvent and his or her property”. In line with the subject of this thesis, however, only aspects in respect of the effect of liquidation on the insolvent’s property are considered here. Clause 11(1) is essentially the same as section 20(1)(a) of the Act in that it states that a first liquidation order will divest the insolvent and vest it in the Master and ultimately in the liquidator.

Clause 11(6) expressly excludes the following property:

the necessary beds, bedding and wearing apparel of the insolvent and his or her family;⁵²
the necessary furniture (other than beds) and household utensils of the insolvent in so far as they do not exceed R2 000 in value;⁵³

stock, tools and agricultural implements of a farmer, in so far as they do not exceed R2 000 in value;⁵⁴

the supply of food and drink in the house sufficient for the needs of the insolvent and his or her family during one month;⁵⁵

tools and implements of trade, in so far as they do not exceed R2 000 in value;⁵⁶

professional books, documents or instruments necessarily used by the insolvent in his or her profession, in so far as they do not exceed R2 000 in value;⁵⁷

such arms and ammunition as the insolvent is required by law, regulation or disciplinary order to have in his or her possession as part of his or her equipment.⁵⁸

All other property of the insolvent at the date of the issuing of the first liquidation order will be included in the insolvent estate. This includes property or its proceeds in the hands of the sheriff under a writ of attachment or a warrant of execution.⁵⁹ Subject to clause 15, which provides for, amongst other things, exempt or excluded property, all property acquired or accruing to the insolvent during his sequestration also forms part of his insolvent estate, notwithstanding the provisions of any other law.⁶⁰

⁵²CI 11(6)(a)(i).

⁵³CI 11(6)(a)(ii). All the monetary amounts mentioned here may be revised by the Minister in terms of cl 11(7).

⁵⁴CI 11(6)(a)(iii).

⁵⁵CI 11(6)(a)(iv).

⁵⁶CI 11(6)(a)(v).

⁵⁷CI 11(6)(a)(vi).

⁵⁸CI 11(6)(a)(vii).

⁵⁹CI 11(6)(b).

⁶⁰CI 11(6)(b).

The Explanatory Memorandum states that excluded assets form part of a different estate, so there is no longer re-vesting of assets upon rehabilitation.⁶¹ Clause 11(2) therefore makes no provision for re-vesting upon rehabilitation as in the case of section 25(1) of the Insolvency Act that does provide for re-vesting.⁶² This should then mean, it is submitted, that any excluded assets will be at the disposal of the debtor during his sequestration, to do with as he wishes. It should then also not be necessary for the debtor to apply for a declaratory order in respect of those assets when he applies for rehabilitation.⁶³ Here too the Explanatory Memorandum refers only to excluded assets,⁶⁴ so no distinction is made in respect of assets that may be exempted, or that have already been exempted. It is submitted that if the assets have in fact been exempted, they will thereafter be excluded assets and therefore beyond the reach of the creditors. However, a provision should be included in new legislation to prevent the debtor from waiving his right to exempt or excluded property. It is submitted that a debtor's ability to waive his rights to such property will be in conflict with the "fresh start" policy, because without even these basic assets, the debtor will struggle to recover from his financial difficulties. But this is also linked to the policy behind exemption law which dictates that the debtor's dignity must remain intact, and that he should not become a welfare burden in society. These aspects are not considered in the Draft Bill.

The only substantial difference in the reviewed clause 11, from that of section 20 of the Act, is that the property previously "excepted" under section 82(6)⁶⁵ of the Act has now been moved to Clause 11 as "excluded" property. The Explanatory Memorandum⁶⁶ states that section 82(6) of the Act effectively excludes the debtor's property mentioned in that section, since that property cannot be sold by the trustee.⁶⁷ But the Act makes no

⁶¹Explanatory Memorandum at 60.

⁶²Explanatory Memorandum at 59-60.

⁶³For the present position on declaratory orders regarding property in insolvent estates, see Mars (2008) at 583 and further; see also, eg, *Ex parte Fowler* 1937 TPD 353; *Ex parte Kay* 1942 WLD 11 and *Vorster v Steyn* 1981 (2) SA 831 (0).

⁶⁴Explanatory Memorandum at 60.

⁶⁵S 82(6) of the Act uses the word "excepted".

⁶⁶At 60.

⁶⁷Explanatory Memorandum at 60. Strictly speaking this is incorrect because the property referred to in s 82(6) first vests in the insolvent estate and it is exempted only when the creditors or the Master have decided specifically what property of the debtor will be exempted, as explained above. Furthermore it is also incorrect to state that this property cannot be sold by the trustee, because the insolvent can apparently waive his rights to such property. In this regard see *Ex parte Anthony en*

distinction between excluded property and exempt property. It is submitted that the property in section 82(6) of the Act is exempt property, because until the creditors or the Master determine what property the debtor may keep, all that property is part of the insolvent estate. When the creditors allow for the release of that property to the debtor, then it will be exempted property that will be at the disposal of the debtor. Another reason why it should be distinguished from excluded property is because the debtor can apparently waive his right to such property⁶⁸ and therefore it will remain part of the insolvent estate. It is submitted that property in respect of which such rights have been waived is not then property being brought back into the estate, particularly if the creditors had not yet made a determination under section 82(6).

The Explanatory Memorandum also points out that for the purpose of pre-sequestration debt collection, the Supreme Court Act⁶⁹ and the Magistrate's Courts Act⁷⁰ include more categories of "exempted" property and that the same provision in the Insolvency Act must be brought into line with these pre-sequestration provisions.⁷¹ It states that "the inconsistency between property exempt from execution and property exempt from sale in terms of section 82(6) cannot be justified. Clause 11(6) harmonises the different categories." Although this harmonisation is essential if the exemption or exclusion is to be worth anything during insolvency, it must again be noted that there has been no understanding here of the difference between excluded property and exempt property. The words "excluded" and "exempt" have been used here interchangeably without consideration for their meaning within the context of exemption law in insolvency. The proposal that this harmonisation take place is however to be recommended, in fact, it is essential, because property that is not excluded from debt collection in the pre-sequestration collection procedure will probably be foreclosed on and sold prior to sequestration. It will then have no value in the context of exemption law within the sequestration process.

⁶⁸*'n Ander en Ses Soortgelyke Aansoeke* 2000 (4)116 (C); See also Mars (2008) at 193 and Sharrock R, Van der Linde K and Smith A *Hockly's insolvency law* (8th ed) (2006) at 38-39.

⁶⁹*Ex parte Anthony en 'n Ander en Ses Soortgelyke Aansoeke* 2000 (4)116 (C); See Mars 2008 at 193 and Sharrock R, Van der Linde K and Smith A *Hockly's Insolvency Law* (8th ed) (2006) at 38-39.

⁷⁰59 of 1959.

⁷¹32 of 1944.

⁷¹Explanatory Memorandum at 60.

For the classes of excluded property in Clause 11(6) to have any value, the Commission should firstly expressly have identified the property in that clause as excluded property, not exempt property, and an express provision should have been included to prevent a debtor from waiving his right to such excluded property. This would provide the debtor with property of his own, in a new estate, with which to commence a fresh start. Secondly, the maximum value of R2 000 placed on the excluded assets makes this provision meaningless in exemption law, particularly if a fresh start policy is considered. Take, for example, the exclusion of books to the value of R2 000. If the debtor is a lawyer, this may allow him, at most, the equivalent of four or five textbooks. The exemption is pointless, as are all the exemptions upon which this low cap has been placed. Further, the commission apparently finds it important to exempt certain arms and ammunition in favour of certain persons under circumstances⁷² that are likely to exist only in the rarest of cases. But something as essential as a motor vehicle does not qualify for exemption. All the exemptions in Clause 11(6) are essentially worthless in South Africa if the debtor has no transport.

A vehicle as a primary means of transport was not considered an item to be excluded or exempted from an insolvent estate because the majority of creditors failed to support such a proposal.⁷³ The Explanatory Memorandum explains that it could cause outrage from the insolvent's creditors, and that it is unjustified or unacceptable, and it will reduce the dividend available to concurrent creditors. The commission further explains that it will be difficult to distinguish between expensive and inexpensive vehicles, and it then states that the insolvent debtor's spouse will usually be in possession of a vehicle, and that the provision of a vehicle at the cost of the estate is an unjustified luxury.⁷⁴ It is submitted that this is some of the poorest reasoning in the entire Explanatory Memorandum, if it can be considered reasoning at all. It further confirms that the commission's approach to assets in the insolvent estate, and in respect of exemption law, is totally devoid of any policy consideration. Essentially, it is simply a restatement of existing law. It is not a review or a reform thereof. Even if the commission decided from the outset that a vehicle will not be excluded from the

⁷²CI 11(6)(a)(vii).

⁷³Explanatory Memorandum at 61. Precisely who these creditors are is not mentioned, nor is there any indication that debtors were represented by any particular lobby group.

⁷⁴Explanatory Memorandum at 61-62.

insolvent estate at any cost, some attempt could have been made to provide a rational explanation, perhaps with some comparative insight on this subject. Many international systems recognise the need for the debtor to have a motor vehicle, at least for the purpose of earning a living.⁷⁵ Actually to include the statement that the insolvent's spouse usually has a vehicle is embarrassing in a report of this nature. As the law stands presently, and in the proposed Draft Bill, the solvent spouse will be relieved of her vehicle because it will automatically vest in the trustee at the date of sequestration. Although it could be released to the solvent spouse, this vesting of the spouse's vehicle will cause inconvenience, and the spouses will have no vehicle for a considerable time. The most damning aspect of this explanation, however, is the fact that the commission actually mentioned the existence of the spouse who will usually have a vehicle. The assumption is that a single debtor is somehow not equal to a married debtor, and therefore in less need of transport than married persons.

Clause 62 of the Draft Bill, which deals with the rights and duties of the liquidator, allows the liquidator to make available to the insolvent or his dependants a sum of money or assets for his own or his dependants maintenance,⁷⁶ and he may make available assets of the insolvent estate in excess of the values referred to in clause 11(6).⁷⁷ It is submitted that these two subsections should have been included in clause 11 of the Draft Bill, just as the present section 82(6) of the existing Act was moved to clause 11 in the Draft Bill. In respect of clause 62(4)(l) the Explanatory Memorandum states that it will provide some flexibility to low maximum values of the excluded property in clause 11. It states that the low values warrant some form of flexibility.⁷⁸ While this appears to be a sensible proposal, it is submitted that in view of the creditor friendly approach in South African insolvency law, it will probably be utilised only in rare cases. One must also question why the amounts mentioned in clause 11 are not more reasonable and realistic if one is to take seriously the commission's utterances⁷⁹ that a fresh start

⁷⁵See part III above.

⁷⁶CI 62(4)(k).

⁷⁷CI 62(4)(l). See also Stander L and Horsten DA "Die reg van die onderhoudsbehoefte kind kragtens artikel 29 van die grondwet teenoor die reg van skuldeisers van die insolvente boedel van die ouer" (2008) *TSAR* 203 and further.

⁷⁸Explanatory Memorandum at 61.

⁷⁹Explanatory Memorandum at 17

is an important aspect in insolvent estates. In respect of maintenance, Stander and Horsten weigh up the rights of the children of the insolvent parent against those of the creditors. They point out that the important principle in South African insolvency of “advantage to creditors” may be in conflict with rights of the child which are protected in the South African constitution.⁸⁰ The authors state that the Insolvency Act should contain a provision to allow for fair and reasonable maintenance to be paid out of the insolvent estate to provide for the education of the children of the debtor, and where possible, for their tertiary education.⁸¹ It is submitted that this will be a positive development in South African insolvency law. However, safeguards will have to be put in place to make sure that such maintenance is used for the purpose of educating the child. Further, that maintenance will probably be considered an exempt asset, the rights to which should not be able to be forfeited for any reason.⁸²

Clause 15 of the Draft Bill is entitled “Rights and obligations of insolvent during insolvency”. It contains some provisions in respect of excluded or exempt property.

Clause 15(2) allows the insolvent to follow any profession or occupation, and to keep any remuneration received after the issuing of the first liquidation order. This is subject to clause 15(5) which essentially gives the liquidator the power to investigate the insolvent and his dependants’ income and expenses, and to bring the insolvent before a court in order to give evidence under oath concerning such income and expenses. After the hearing the court can issue a certificate awarding a portion of the insolvent’s future earnings which is not required for support, to the insolvent estate. The crux of clauses 15(2) and 15(5) is essentially the same as sections 23(5) and 23(9) of the Act. However, the Draft Bill in these clauses provides for a more elaborate procedure for investigating the insolvent’s income and collecting any excess portion thereof. Much of this procedure is taken from the debt collection procedure of the Magistrate’s Court

⁸⁰See s 28 of the Constitution of the Republic of South Africa 1996.

⁸¹See Stander L and Horsten “Die reg van die onderhoudsbehoefige kind kragtens artikel 29 van die grondwet teenoor die reg van skuldeisers van die insolvente boedel van die ouer” (2008) *TSAR* 203 and further.

⁸²The rights of the child are considered briefly in ch 11 above.

Act.⁸³ Clause 15, in this respect, may therefore extinguish some of the past problems resulting from sub-sections 23(5) and 23(9) relating to this aspect of the insolvent's income.⁸⁴ The concern relating to the status of assets acquired with the insolvent's income is also done away with in clause 15(5)(c) which specifically states that assets bought after the issuing of the first liquidation order with income excluded from the estate by virtue of the aforementioned certificate, will not form part of the insolvent estate.⁸⁵ While the provisions in clause 15(5) appear to be an improvement on the existing situation, an alternative method of dealing with the insolvent's income is proposed elsewhere in this thesis.⁸⁶

A benefit received by an insolvent by virtue of any pension law or the rules of a fund, or a social benefit that the insolvent can claim, and which is paid after the date of the liquidation of his estate is excluded from his insolvent estate to a maximum sum of R200 000.⁸⁷ The Minister may amend the excluded amount or R200 000 if monetary fluctuations call for this.⁸⁸ This provision of the Draft Bill is similar to section 23(7) of the Act, except that the latter provision excludes a pension benefit from an insolvent estate in its entirety. Clause 15(4) also consolidates exclusions of pensions and social benefits presently provided for in other Acts.⁸⁹ This is an improvement on present legislation, but the amount of R200 000 seems arbitrary and no explanation is given on how it was come by. The commission does, however, explain that this provision is included in the Draft Bill because pension funds and annuities have become attractive ways to safeguard funds against creditors.⁹⁰ A problem that may arise could be the Minister's failure to amend this amount when necessary, or to decide when it may be necessary to amend it. A provision for the compulsory revision of all the monetary limits in new legislation, for example, every two years should be provided for.

⁸³Act 32 of 1944. The procedures envisaged in s 65 of the Magistrates' Court Act 32 of 1944.

⁸⁴See the discussion hereof in ch 9 above.

⁸⁵The Explanatory Memorandum at 67 makes it clear that only moneys received by the insolvent in the future may be the subject of a direction by the Master, and that the problem concerning assets purchased with income as considered in *Hicks v Hicks' Trustee* 1909 TS 727 has been alleviated.

⁸⁶See chs 9 and 13.

⁸⁷Cl 15(4) of the Draft Bill.

⁸⁸Cl 15(4A).

⁸⁹See the Explanatory Memorandum at 67 and sch 5 to the Draft Bill in respect of other pension related legislation that will have to be repealed.

⁹⁰Explanatory Memorandum at 67.

By virtue of clause 22, the Draft Bill provides for the recovery of certain contributions to pension funds regarding new obligations, if they were made within two years before the presentation to the Registrar of the application for the liquidation of the debtor's estate. The payment of such contributions must however have been made when the debtor's liabilities exceeded his assets, or they must have resulted in this. The liquidator can then recover from the fund concerned any such contribution in respect of the new obligations which together with the total contributions in respect of existing obligations, exceed the sum of R10 000 per annum.⁹¹

Clause 15(7)(c) provides that compensation recovered by the insolvent for loss or damage that he may have suffered by reason of defamation or personal injury, whether before or after the date of the liquidation of his estate, will be excluded from his insolvent estate. But there is a proviso that if that compensation includes medical or other expenses, the creditor in respect of those expenses can be paid out of that compensation or recover the compensation from the insolvent even if that claim for such expenses arose before the date of the liquidation of the estate.⁹²

In this respect the Explanatory Memorandum⁹³ refers to *Santam Versekeringsmaatskappy v Kruger*⁹⁴ where Miller J indicated the anomaly created if creditors in respect of medical and hospital expenses incurred by the debtor prior to sequestration had only a concurrent claim against the insolvent estate while the compensation was paid to the insolvent for his own benefit for those very expenses. This unfair situation gave rise to clause 15(7)(c) in the Draft Bill and thereby improves the present section 23(8) which is otherwise basically the same as clause 15(7)(c).

12.4 Matrimonial property

12.4.1 Introduction

When the estate of a spouse(s) is sequestrated, the property of both spouses is

⁹¹See cl 22 for further detail.

⁹²Cl 15(7)(c).

⁹³At 69.

⁹⁴1978 (3) SA 656 (A).

affected.⁹⁵ In South African law parties may enter into a marriage in community of property, which establishes one estate that is owned by the spouses equally in undivided shares, or they may enter into a marriage out of community of property, which pre-supposes two estates, separately owned by the respective spouses. The effect of sequestration on spouses in a marriage has already been discussed in detail in chapter 10 above, while the Draft Bill's comment on marriages in community of property was considered in paragraph 12.2.1.4 above. Therefore only the proposal in the Draft Bill concerning marriages out of community of property will be briefly considered here.

12.4.2 The proposals of the Draft Bill

Over the past few decades cases concerning section 21 of the Insolvency Act have come before the courts quite frequently. But *Harksen v Lane NO and Others*,⁹⁶ in which the Constitutional Court in a majority judgment found section 21 to be constitutional, is by far the most important case regarding section 21 of the Act. It probably influenced the South African Law Commission in its approach to reforming section 21.

The Law Commission's draft Bill of 1996⁹⁷ excluded section 21 from its text, stating in that draft Bill's Explanatory Memorandum⁹⁸ that it should be scrapped as conceptually it is an anachronism and appeared to be unconstitutional. But the *Harksen* was handed down after the intended scrapping of section 21, probably prompting the Law Commission to re-introduce section 21 as clause 11A in its Preliminary Proposals of its Project Committee. The Law Commission then apparently reconsidered its Project Committee Proposals, and section 21 was excluded from the latest draft Bill of 2000.

However, in the later Draft Bill⁹⁹ section 21 of the Act was replaced with clause

⁹⁵Unless otherwise mentioned, for the sake of convenience it will be assumed in this chapter that the husband is the insolvent spouse and the wife the solvent spouse.

⁹⁶1998 (1) SA 300 (CC).

⁹⁷The result of the South African Law Commission's Working Paper 41 Project 63 *Review of the Law of Insolvency* 1991.

⁹⁸See ch 10 above.

⁹⁹South African Law Commission Project 63 *Review of the Law of Insolvency* Report vol 1 Explanatory Memorandum, and vol 2 Draft Bill (2000).

22A. This clause allows the liquidator to instruct the sheriff to attach property in the possession of an associate of the insolvent pending an application to have a disposition of the property set aside. If instructed by the liquidator to release the property, the sheriff must do so. Such instruction will be given by the liquidator if the attachment is not required to safeguard the interests of the estate in the setting aside of a disposition of property. Clause 22A may be less drastic than section 21, in the sense that it will probably effect only a temporary dispossession of property, as opposed to the complete loss of ownership under section 21. It would appear that the property forms part of the insolvent estate only if the trustee succeeds in setting aside the disposition. Further, the provision applies to associates of the insolvent, thereby avoiding possible claims of discriminatory action against a particular class of people.

But this clause appears to have been hurriedly formulated, and further analysis shows that it may be more drastic than section 21. It is submitted that if it is to be retained, it requires further refinement. Clause 22A seems to give the liquidator unfettered powers to dispossess an associate of his or her property, but the associate appears to be left with absolutely no rights in respect of property which may genuinely belong to him or her. It is in the discretion of the liquidator whether to release the property or not, or when to do so. Pending an application to have a disposition of property set aside, the ostensible owner is granted no rights whatsoever. This is more drastic than the provisions of section 21, which at least provides for the release of the property of the solvent spouse under certain circumstances, as well as other protective measures, including the protection of the solvent spouse's creditors. Clause 22A also fails to provide sufficient detail regarding the specific property of an associate that must be attached, nor does it provide sufficient detail in respect of the circumstances or conditions under which it should be released. This is an arbitrary attachment of property that may fail constitutional scrutiny. The provision seems to be too vague, and if the definition of "associate" is considered, this provision can severely affect the economic expediency of the affected associate.

12.5 Conclusion

The South African Insolvency Act contains provisions on excluded and exempt property. Other legislation also supplements the exemption law in the context of insolvency law. The South African system recognises various categories of excluded and exempt property also found in other jurisdictions, but the South African system seems devoid of consistency of policy on exemption law, and there appears to be no desire to rectify the situation.

It is submitted that the failure by the legislature to formulate progressive exemption law policies results from South African insolvency law policy being unevenly balanced to favour the creditors. The golden rule of “advantage to creditors” in South African insolvency law is the primary reason for this. If advantage to creditors in an insolvency application is not shown, a court will refuse to grant the sequestration order applied for.¹⁰⁰ So “poor debtors” are at a disadvantage because they cannot shed their debt burden. This could result in constitutional requirements forcing a more progressive development of exemption policy in South Africa. But why not rather avoid this in future legislation.

This very strict policy of advantage to creditors seems to have hamstrings the formulation of a progressive exemption policy by the South African Law Commission. A further problem in South African insolvency legislation is the definition of “property”. It defines the content of the estate, and the meaning of property, in the broadest of terms, but excluded and exempt property is really not identified in any way in this definition. Instead, it is scattered in several provisions of the Insolvency Act and in other legislation. Consequently, lack of clarity prevails regarding the whole spectre of property in insolvent estates, and this position is perpetuated in most of the proposals in the Draft Bill. The proposals of the Draft Bill will, therefore, not succeed in eradicating the problem areas regarding assets in the insolvent estates of individuals in South Africa.

¹⁰⁰See ch 1 and 7 above.

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