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INSOLVENT ESTATE**

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## LEGISLATIVE EXCLUSIONS OR EXEMPTIONS OF PROPERTY FROM THE INSOLVENT ESTATE

RG Evans\*

### 1 Introduction

A fundamental to the general policy in South African insolvency law is that the maximum quantity of assets must be recovered and included in the insolvent estate, to the advantage of the creditors. This means 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, forms part of the sequestrated estate. 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.<sup>1</sup> The *Insolvency Act*,<sup>2</sup> however, does not expressly distinguish between excluded and exempt assets,<sup>3</sup> so various problem areas have consequently arisen in this regard. Uncertainty concerning such assets has existed in the past and given rise to litigation, and will probably continue to do so in the future. The fundamental difference between excluded and exempt assets is that excluded assets, in the author's opinion, 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 in certain circumstances those assets, or a portion thereof, may be exempted from the estate for the benefit of the insolvent debtor.<sup>4</sup> Both excluded assets and exempt assets could also carry that status because they may belong to a third party.<sup>5</sup> It is therefore possible for an insolvent to build up a (new) solvent personal estate with these excluded or exempt assets, which cannot be applied to for the payment of his debts in his insolvent estate.<sup>6</sup>

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1 Bertelsman *et al Mars* 192.

2 *Insolvency Act* 24 of 1936.

3 See, generally, Ferriell and Janger *Understanding Bankruptcy*; Bertelsman *et al Mars* 97, 239, 415.

4 See generally, Ferriell and Janger *Understanding Bankruptcy*.

5 Mackenzie-Skene "Proposal for a Comparative Study".

6 *Miller v Janks* 1944 TPD 127; Roestoff *Kritiese Evaluasie* 368; Bertelsman *et al Mars* 36; 186.

Although South African insolvency law is based on the policy of the collection of the maximum quantity of assets available, to the advantage of the creditors of the insolvent estate, a further policy, that of allowing a debtor to keep a part of his estate, has also been entrenched, originally through the common law.<sup>7</sup> 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.<sup>8</sup> It is submitted that this remains the cornerstone upon which this policy rests, but that the 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. In this article only property excluded from the insolvent estates of individual debtors by legislation other than the Insolvency Act and by the common law will be considered. It must, however, be understood that these legislative provisions relate to insolvent estates and thus generally overlap in one way or another with some provisions of the Insolvency Act.<sup>9</sup>

## **2 Excluded property by means of other legislation and common law**

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 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,<sup>10</sup> or that the assets are of a social security nature. These categories of property create

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7 See chp 2 on Roman Law in Evans *Critical Analysis* 17; Ferriell and Janger *Understanding Bankruptcy* 97.

8 Ferriell and Janger *Understanding Bankruptcy* 97 state 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".

9 For exemption provisions included in the *Insolvency Act* see Evans *Critical Analysis* chp 9.

10 This policy is recognised in ss 23(1), 24 *Insolvency Act* 24 of 1936 and the other legislation discussed in the paragraphs which follow.

some problem areas in insolvent estates, but the main concern here is to decide whether or not to continue the policy of excluding property of this nature, or a part thereof, from insolvent estates of individuals.

## **2.1 Insurance payments in respect of third party**

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 a 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.<sup>11</sup> The indemnified amount is therefore excluded from the insured's insolvent estate and the third party can recover that amount directly from the insurer.<sup>12</sup>

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* 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.<sup>13</sup>

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.

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11 Section 156 *Insolvency Act* 24 of 1936.

12 Smith *Law of Insolvency* 96, Kunst *et al Meskin* 5.3.2.2; Bertelsman *et al Mars* 194. Where the insured is a company or a close corporation being wound up and unable to pay its debts, s 156 also applies; s 66(1) *Close Corporations Act* 69 of 1984 read with s 339 *Companies Act* 61 of 1973.

13 *Woodley v Guardian Assurance Co of SA Ltd* 1976 1 SA 758 (W) 759. See also *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 6 SA 21 (SCA); *Przybylak v Santam Insurance Ltd* 1992 1 SA 588 (C) 601-602; *Supermarket Leaseback (Elsburg) (Pty) Ltd v Santam Insurance Ltd* 1991 1 SA 410 (AD).

## 2.2 Trust funds

The law is well established that trust property vests in the trustees of a trust,<sup>14</sup> but the trust assets are excluded from the personal estate of an insolvent trustee of the trust in question.<sup>15</sup> This exclusion is also based on the policy that the property of third parties does not form part of the insolvent estate.<sup>16</sup> However, one must distinguish between the funds or assets held by an insolvent as a 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 be established only by contract.<sup>17</sup> 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 Act*<sup>18</sup> and the *Estate Agents Act*.<sup>19</sup> 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. Honoré<sup>20</sup> 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*<sup>21</sup> requires identification of property as trust property. However, s 12 of this Act is 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 are apparently protected by s 12, irrespective of whether the property was identified in terms of s 11 or not. Honoré

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14 *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 3 SA 833 (A) 840G-H; *Burnett v Kohlberg* 1984 2 SA 137 (E) 141D-E; *Bertelsman et al Mars* 197.

15 Section 12 *Trust Property Control Act* 57 of 1988 which applies only to trusts created by means of a written document. See also *Bertelsman et al Mars* 196.

16 See *Wunsh* 1986 SALJ 579 and *Burnett v Kohlberg* 1984 2 SA 137 (E) 141-142 for different views.

17 *Bertelsman et al Mars* 197; *Crooks v Watson* 1956 1 SA 277 (A) 298G-H.

18 *Attorneys Act* 53 of 1979. See *Geyser v Fuhri* 1980 1 SA 598 (N).

19 *Estate Agents Act* 112 of 1976. See also s 4(5) *Financial Institutions (Protection of Funds) Act* 28 of 2001; s 14 *Stock Exchanges Control Act* 1 of 1985; s 22 *Sheriffs Act* 90 of 1986; s 3 *Reinsurance of Damage and Losses Act* 56 of 1989; ss 17A, 17B *Financial Markets Control Act* 55 of 1989.

20 Honoré *Law of Trusts* 14-15, 226, 432-444.

21 *Trust Property Control Act* 57 of 1988.

and Cameron<sup>22</sup> seemed to accept this conclusion, but they doubted whether it also applied to immovable property. However, while s 12 protection should perhaps have been linked to s 11 identification compliance, the distinction between movable and immovable property in the application of s 12 seemed baseless.

The *Trust Property Control Act* 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".<sup>23</sup> An oral trust, therefore, is apparently not included in s 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. In regard to movable property, the asset must not have been mixed with the trustee's personal property.<sup>24</sup> If an oral trust agreement is reduced to writing afterwards, the trust will fall under the *Trust Property Control Act*.<sup>25</sup>

### **2.3 Trust monies and trust property held by an attorney, notary or conveyancer**

In terms of the *Attorneys Act*<sup>26</sup> 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 an account.<sup>27</sup> Any amount standing to the credit of such an account or of any savings 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.<sup>28</sup> 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

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22 Honoré and Cameron *Law of Trusts* 558-565.

23 Section 1 *Trust Property Control Act* 57 of 1988.

24 *Ex Parte Milton* 1959 3 SA 347 (R) 349-350; s 40 *Administration of Estates Act* 66 of 1956.

25 Section 2 *Trust Property Control Act* 57 of 1988.

26 *Attorneys Act* 53 of 1979.

27 Section 78(1) *Attorneys Act* 53 of 1979.

28 Section 78(7) *Attorneys Act* 53 of 1979.

account.<sup>29</sup> 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*.<sup>30</sup> Thus, the effect of this exclusion is:<sup>31</sup>

... 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 a practitioner's or other person's assets.<sup>32</sup>

#### **2.4 Estate agent's trust account**

When an estate agent is sequestered, 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 into which trust monies have been deposited.<sup>33</sup>

#### **2.5 The right of a spouse to share in accrual of the other spouse's estate**

The *Matrimonial Property Act*<sup>34</sup> provides that a marriage out of community of property by ante nuptial 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 the *Matrimonial Property Act*, unless the

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29 Section 78(9)(a) *Attorneys Act* 53 of 1979.

30 *Fuhri v Geyser* 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 v Fuhri* 1980 1 SA 598 (N) 601-602.

31 *Fuhri v Geyser* 1979 1 SA 747 (N) 750; confirmed on appeal in *Geyser v Fuhri* 1980 1 SA 598 (N); see also *Ex Parte Law Society Transvaal: In re Hoppe and Visser* 1987 2 SA 773 (T) 780.

32 Section 79 *Attorneys Act* 53 of 1979; see also Bertelsman *et al Mars* 197; Smith *Law of Insolvency* 98; Kunst *et al Meskin* 5.3.4.

33 Section 32(8) *Estate Agents Act* 112 of 1976.

34 *Matrimonial Property Act* 88 of 1984.

accrual system has been expressly excluded by such a contract.<sup>35</sup> The *Matrimonial Property Act* provides that, subject to any order of court under s 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".<sup>36</sup>

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 s 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 recognises 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 a 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 an estate, s 20 of the *Insolvency Act* would become operative, and the resulting "claim" becomes part of such an estate and vests in the trustee of the estate of the insolvent spouse.<sup>37</sup>

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35 Section 2 *Matrimonial Property Act* 88 of 1984.

36 Section 3(2) *Matrimonial Property Act* 88 of 1984.

37 Section 20(1)(a) read with s 20(2)(b) *Insolvency Act* 24 of 1936; Kunst *et al Meskin* 5.3.6; Bertelsman *et al Mars* 198.



## 2.6 Workmen's Compensation

The *Workmen's Compensation Act*<sup>38</sup> has been repealed by the *Compensation for Occupational Injuries and Diseases Act*.<sup>39</sup> 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".<sup>40</sup> This clearly also refers to any form of attachment or execution brought about by insolvency legislation,<sup>41</sup> 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.

Smith is of the opinion that this form of compensation is excluded because it is considered compensation for personal injury under s 23(8) of the *Insolvency Act*.<sup>42</sup> However, it is submitted that this is strictly a legislative exclusion, while s 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 a formula<sup>43</sup> to collect income-type assets for possible distribution amongst his creditors, it is submitted that it will not 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

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38 *Workmen's Compensation Act* 30 of 1941.

39 *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

40 S 32(1)(b) of Act 130 of 1993.

41 Kunst *et al Meskin* 5.3.8.

42 Smith *Law of Insolvency* 97.

43 Evans *Critical Analysis* para 9.2.3, chp 12.

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 in certain circumstances only. By excluding such assets from insolvent estates entirely, the administration process in such estates will be simplified and the debate over whether or not "public funding" should be at the disposal of creditors is nipped in the bud.

## **2.7 Unemployment insurance benefits**

Employee unemployment benefits are governed by the *Unemployment Insurance Act*.<sup>44</sup> 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.<sup>45</sup> It would also appear that they will be excluded from the insolvent estate of the employee concerned.<sup>46</sup>

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.<sup>47</sup> 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*.

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44 *Unemployment Insurance Act* 63 of 2001.

45 Section 33 *Unemployment Insurance Act* 63 of 2001.

46 Bertelsman *et al Mars* 193.

47 Evans *Critical Analysis* para 9.2.3; chp 12.

## 2.8 Exclusions in terms of the Land and Agricultural Development Bank Act<sup>48</sup>

Section 90 of the *Insolvency Act* confirms that the *Land and Agricultural Development Bank Act*<sup>49</sup> (hereafter LADBA) 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.

The LADBA regulates certain actions that the Land Bank must take against its defaulting debtors.<sup>50</sup> In 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.<sup>51</sup> 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 LADBA 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 LADBA 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.<sup>52</sup>

It would appear that the LADBA grants the Land Bank considerable powers in its position as a creditor in an insolvent estate. The Act effectively has the power to

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48 *Land and Agricultural Development Bank Act* 15 of 2002. This Act repealed and replaced the *Land Bank Act* 13 of 1944. For a comprehensive discussion of this topic see Kelly-Louw 2004a *SA Merc LJ* 211; Kelly-Louw 2004b *SA Merc LJ* 378; Kelly-Louw 2004 *Speculum Juris* 281; Kelly-Louw 2005 *Speculum Juris* 164.

49 *Land and Agricultural Development Bank Act* 15 of 2002.

50 Section 33(2) *Land and Agricultural Development Bank Act* 15 of 2002.

51 Section 33(4) *Land and Agricultural Development Bank Act* 15 of 2002.

52 Section 33(11) *Land and Agricultural Development Bank Act* 15 of 2002.

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 raises the question if there may be an extra duty on the trustee of the insolvent estate to assess the possibility of the Land Bank's 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 of advantage to creditors and all encompassing policy 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 can't 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 has been considered elsewhere.<sup>53</sup>

### **3 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.<sup>54</sup> Thus, prior to his rehabilitation, an insolvent can acquire an estate separate from that of his insolvent estate<sup>55</sup> which, in turn, can be sequestrated or surrendered.<sup>56</sup> In this respect the following was said in *Miller v Janks*:<sup>57</sup>

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53 Evans *Critical Analysis* chp 11, 12.

54 *Miller v Janks* 1944 TPD 127.

55 *Ex Parte Fowler* 1937 TPD 353 358; *Marais v Marais* 1923 WLD 37; Smith *Law of Insolvency* 100.

56 *Ex Parte Foxcroft* 1923 OPD 234.

... 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 sequestrated; 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 Act*<sup>58</sup> 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, monies recoverable by him, but that he is precluded from purchasing land therewith or investing such monies in any other manner.<sup>59</sup>

There is uncertainty regarding property purchased by the insolvent with his earnings.<sup>60</sup> 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.<sup>61</sup> 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. 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

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57 *Miller v Janks* 1944 TPD 127 132.

58 Section 63 *Long-term Insurance Act* 52 of 1998.

59 Smith *Law of Insolvency* 99. See also Bertelsman *et al Mars* 186, generally 192 and further.

60 Smith *Law of Insolvency* 99; Bertelsman *et al Mars* 200 and further.

61 Sections 23(5) and (9) *Insolvency Act* 24 of 1936.

otherwise will be interfering with the rights of third parties who may have an interest in that separate new estate.

#### 4 Conclusion

From the discussion above it would appear that the strict and unbending policy on advantage to creditors will require some adjustment if a sensible policy on excluded and exempt property in insolvent estates is to be achieved. The provisions of the South African Law Commission Report<sup>62</sup> (as it then was) made certain proposals in this respect, but it apparently will not entertain this idea of overhauling the aspect of exemption laws. In this respect Roestoff,<sup>63</sup> citing some examples, 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.<sup>64</sup> Die voorstel dat 'n voertuig as primêre middel van vervoer van die insolvente boedel uitgesluit word, is deur die meerderheid skuldeisers verwerp.<sup>65</sup> 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* also provides for excluded and exempt property in insolvent estates.<sup>66</sup> As shown in this article, this Act is supplemented by other legislation that also extends to insolvency law. Here insolvency legislation and other legislation therefore overlap. The South African system recognises various categories of excluded and exempt property also found in other jurisdictions, but the South African system, it is submitted, does not have a consistent policy on

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62 South African Law Commission 2000 [www.justice.gov.za](http://www.justice.gov.za).

63 Roestoff *Kritiese Evaluasie* 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).

64 South African Law Commission 2000 [www.justice.gov.za](http://www.justice.gov.za) (Cf Memorandum 61).

65 South African Law Commission 2000 [www.justice.gov.za](http://www.justice.gov.za) (Cf Memorandum 61).

66 See, eg, s 23 *Insolvency Act 24 of 1936*.

exemption law, and this has not been addressed by the authorities.<sup>67</sup> The legislature and other stakeholders have failed to formulate a progressive exemption policy. The policy of advantage to creditors may be too unevenly balanced to favour the creditors. In practice, if advantage to creditors in an insolvency application is not shown, the sequestration order will not be granted. So "poor debtors" are at a disadvantage because they cannot shed their debt burden, nor in many cases have they access to excluded or exempt property, while debtors who have been sequestrated do have such access. A reconsideration of existing exemption law in both the *Insolvency Act* and overlapping legislation and fields of law will go a long way in clarifying many of the problem areas in respect of excluded and exempt property in insolvent estates.

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67 Evans *Critical Analysis* chp 12 and the proposals in chp 13 thereof.

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**List of abbreviations**

SALJ	South African Law Journal
SA Merc LJ	SA Mercantile Law Journal