

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

²⁹UNCITRALGuide 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.