consumer protection measures – in the form of a statutory preferent claim – do not take away the fact that an amount was received by the merchant upon conclusion of a sale of a gift card for the merchant's benefit. Depositing money in a separate account does not protect the money from the merchant's creditors. Similarly, the mere separation of funds does not create a "trust" account free from the merchant's creditors and it does not constitute a "trust" account for the benefit of another. Unless the proceeds of the sale of the gift card can be linked to the specific purchaser and the merchant has complete records to show what money belongs to who, a statutory trust, as alluded to by Binn-Ward J, has not been created. Thus, the argument that the separation of the proceeds of the sale of gift cards constitutes a "trust" account and that the proceeds so received are not received for the benefit of the merchant, but for the benefit of the consumer, is flawed. I am convinced that this judgment is likely to be overturned on appeal.

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EFFECT OF SEQUESTRATION ON THE PROPERTY OF THE SOLVENT SPOUSE: SECTION 21 OF THE INSOLVENCY ACT

***Davies v Van Den Heever NO* (16865/2017) [2019] ZAGPJHC 59 (1 March 2019)**

OPSOMMING

Gevolge van sekwestrasie met betrekking tot die eiendom van die solvente gade: Artikel 21 van die Insolvensiewet

Ingevolge artikel 21 van die Insolvensiewet 24 of 1936 vestig die eiendom van die solvente gade na sekwestrasie van die insolvente gade se boedel in laasgenoemde se kurator. Die onus rus dan op die solvente gade om te bewys dat die betrokke eiendom aan haar behoort. In *Davies v Van Den Heever*, het die kurator geweier om bepaalde eiendom van die solvente gade vry te gee. Gevolglik het sy die hof genader. Die hof het beslis dat die betrokke eiendom vrygegee moet word op grond daarvan dat sy dit gedurende haar huwelik, kragtens 'n titel wat regsgeldig teenoor die insolvent se skuldeisers is, verkry het. Die hof het beslis dat die transaksie, ingevolge waarvan sy die eiendom verkry het, 'n ware transaksie was wat nie met die doel om skuldeisers te bedrieg, aangegaan was nie. Gevolglik kon dit 'n geldige titel verleen.

Die aansoek in *Davies* is 'n ongelukkige gevolg van die Konstitusionele hof se uitspraak in *Harksen v Lane*, dat artikel 21 nie ongrondwetlik is nie. In *Harksen* het die hof die belange van skuldeisers oorbeklemtoon. Die internasionale tendens is om van die tradisionele doelwit van die verbruikersinsolvensiereg, om die maksimum voordeel vir skuldeisers te bewerkstellig, af te wyk. Volgens internasionale riglyne moet beleidsvormers 'n gebalanseerde benadering volg en toesien dat skuldeisers se belange nie bo dié van ander partye, wat by insolvensie-aangeleenthede betrokke mag wees, geag word nie.

Dit word aan die hand gedoen dat daar ander, minder indringende, wyses is om die doelwitte van artikel 21 te bereik. Die voorstelle van die Regskommissie ter wysiging van die wetsbepalings met betrekking tot vernietigbare vervreemdings dui op 'n gebalanseerde benadering en verleen opsigself voldoende beskerming aan skuldeisers.

Die hof in *Davies* se tegemoetkomende hantering van die solvente gade se dilemma is te verwelkom. Artikel 21 kom egter op 'n onbillike, onnodige en onvanpaste inbreukmaking van die solvente gade se eiendomsreg neer en moet afgeskaf word.

1 Introduction

The effect of the sequestration of the estate of an insolvent is to divest the insolvent of his estate and to vest it in the Master and thereafter in the trustee, upon the latter's appointment (s 20(1)(a) of the Insolvency Act 24 of 1936). Where the sequestrated estate is the separate estate of one of two spouses, the additional effect is to vest in the trustee3 all the property of the solvent spouse, as if it were property of the sequestrated estate (s 21(1)). However, in terms of section 21(2), the trustee must release any property of the solvent spouse if she is able to prove the existence of one of the grounds listed in section 21(2). One of these grounds is that she has acquired the property during her marriage with the insolvent by a title valid against his creditors (s 21(2)(c)). For the sake of convenience, the discussion assumes that the insolvent spouse is male and the solvent spouse is female.

Since its enactment in 1926, the interpretation, justification and appropriateness of section 21 have been contentious issues in judgments and in academic opinion (see, eg, Joubert "Artikel 21 van die Insolvensiewet: Tyd vir 'n nuwe benadering?" 1992 *TSAR* 699; Evans "A critical analysis of section 21 of the Insolvency Act 24 of 1936" 1996 *THRHR* 613 (part 1), 1997 *THRHR* 71 (part 2); "The constitutionality of section 21 of the Insolvency Act 24 of 1936" 1998 *Stell LR* 359; "Sequestration of the estate of a spouse: What happens to the 'property' of the solvent 'spouse'" 2014 *THRHR* 632; Stander "Artikel 21 van die Insolvensiewet – reg of weg?" 2005 *TSAR* 316).

Before enactment of section 21, debtors foreseeing the sequestration of their estates apparently often transferred their assets to their spouses in an attempt to defraud their creditors and to benefit themselves. In such instances, the burden rested on the trustee to prove that such transfers were simulated transactions. Thus, the purpose of section 21 is to relieve the trustee of this burden and to cast the onus on the solvent spouse to show that the property belongs to her (*Maudsley's Trustees v Maudsley* 1940 TPD 399 404; Smith *The law of insolvency* (1988) 108).

According to Smith, when considering the provisions of the Insolvency Act, it is clear that there is a "recurrent motif" or "dominant thread" running through the Act, namely, the advantage of creditors (Smith "The recurrent motif of the Insolvency Act – advantage of creditors" 1985 *MB* 27). Section 21 is clearly one of the provisions that has been designed for the advantage of creditors (*idem* 30), a concept that always has been regarded as the primary object of the South African Insolvency Act (see, eg, *Ex parte Arntzen* 2013 1 SA 49 (KZP) para 13).

In *Enyati Resources Ltd v Thorne NO* (1984 2 SA 551 (C) 557), the court described the effect of section 21 as to constitute "a drastic and arbitrary invasion upon, and inroad into, the propriety rights of citizens". In reality, the effect of section 21 is to confiscate the property of the solvent spouse, merely because she is married or deemed to be married to an individual whose estate has been sequestrated (see the minority judgment in *Harksen v Lane NO* 1998 1 SA 300 (CC) para 93). In 1996, the South African Law Commission observed that the provisions of section 21 is intrusive and that its attempts to limit prejudice to the

solvent spouse are not effective. The Commission suggested that the section is an anachronism and proposed its abolishment. Further, the Commission doubted whether section 21 would pass constitutional muster (South African Law Commission *Review of the law of insolvency draft Insolvency Bill and explanatory memorandum* Working paper 66 Project 63 (1996) 59; 63 (hereafter the "1996 Bill")). However, the Commission's prediction eventually proved to be wrong. In *Harksen*, the Constitutional Court found section 21 to be constitutional. Therefore, the solvent spouse's court application in *Davies v Van Den Heever* (16865/2017) [2019] ZAGPJHC 59 (1 March 2019), for the release of her property in terms of section 21(4), approximately twenty years after the *Harksen* judgment, was a direct consequence of the Constitutional Court's unfortunate decision to uphold section 21's constitutionality.

The aim of this discussion is first, to analyse and evaluate the facts and decision in *Davies* with reference to the applicable provisions of section 21. Second, to evaluate the facts and decision considering the unfortunate effect that the *Harksen* judgment had on the solvent spouse in *Davies*. In 2001, the Consumer Debt Committee of INSOL International made the following observation regarding insolvency systems for natural persons (INSOL International *Consumer debt report: Report of findings and recommendations* (2001) 15):

> "The system should not be abusive to debtors and not necessarily designed just to protect and maximise value for creditors. It should contain a balanced approach to give the debtor the possibility of a second chance."

The above observation equally applies to the individual who is married or deemed to be married to the insolvent. The system obviously should not be abusive to the debtor's spouse. It should follow a balanced approach and should not over emphasise creditors' interests to the detriment of other parties who may be involved in the process.

Therefore, the ultimate aim of this discussion is to consider the need for and appropriateness of section 21 in light of the international trend to move away from the traditional debt collection aim of consumer insolvency law and its purpose to maximise returns for creditors (Spooner "Seeking shelter in personal insolvency law: Recession, eviction, and bankruptcy's social safety net" 2017 *Journal of Law and Society* 374 378ff). It is argued, with reference to, among others, the relevant international best practices described in a report by the World Bank (Working Group on the Treatment of the Insolvency of Natural Persons (Insolvency and Creditor/Debtor Regimes Task Force) *Report on the treatment of the insolvency of natural persons* (2012) (hereafter WB *Report*)) that there are alternative, less harsh ways to achieve the purpose of section 21. Lastly, the latest law reform initiatives (South African Law Commission *Report: Project 63* "Review of the law of insolvency" (2000) Vol 1 (hereafter 2000 *Explanatory memorandum*); Vol 2 Draft Bill (hereafter the 2000 Bill)) are also discussed.

2 Facts and decision

Davies entailed an application by the solvent spouse in terms of section 21(4) for an order releasing property that have vested in the trustee of the insolvent's estate (para 1; the court incorrectly referred to s 21(1)). The insolvent's estate was finally sequestrated on 19 April 2016. The couple were married out of community of property on 3 April 1998, in terms of the Matrimonial Property

Act 88 of 1984, which marriage still subsisted when the proceedings in terms of section 21(4) were instituted (para 2).

On 27 February 2017, the applicant was served with a notice in terms of section 21(5) that the respondent, who was appointed as trustee of the insolvent estate, intended to realise the matrimonial home (the "Oaklands property") in terms of section 21(3). The applicant contended that the property with its contents should be released from the insolvent estate, because it belonged to her and not to the insolvent (paras 3–5, 19).

According to the applicant, the Oaklands property was purchased from the proceeds of another property (the "Abbotsford property"), the latter of which she previously owned. She contended that she sold the latter property for R4,1 million and then bought the Oaklands property for R5,5 million. In contending that it was always the intention that the property be hers, she relied on the Windeed and on the Transfer Deed (paras 6–7).

During July 2011, almost five years before sequestration of the insolvent's estate, renovations were effected to the Oaklands property at a cost of almost R2 million. According to the applicant, the value of the contents of the property amounted to approximately R2,5 million and the total value of the property to approximately R10 million (para 8).

Thus, the applicant contended that she purchased the Oaklands property together with its contents in her own name and that it should therefore be released from the insolvent estate (para 9).

In support of the respondent's case, an answering affidavit by the insolvency practitioner confirmed that an order was granted in favour of ABSA Bank against the insolvent in September 2009 for approximately R15,5 million. During February 2016, ABSA instituted provisional sequestration proceedings against the insolvent (paras 10–11).

The crux of the respondent's case was that the insolvent and the applicant colluded to prejudice creditors and potential creditors of the insolvent. According to the respondent, the circumstances that pointed to the alleged collusion were as follows (paras 12–14, 23):

(a) The bond payments in respect of the Abbotsford and Oaklands properties were paid by the insolvent with money obtained from an entity known as Delta Forklifts and from the insolvent's monthly salary, which was paid into the applicant's account. On 3 December 2015 (in para 15 of the judgment, the date given is 3 December 2013), the applicant received R600 000 from Delta Forklifts and two amounts of R120 000 and R50 000 from the insolvent's account. The applicant failed to disclose these facts in her application (para 13);

(b) The insolvent gave the instruction to renovate the Oaklands property and he paid therefor. The invoices were issued to the insolvent and payment for the renovations did not reflect in the applicant's bank statement (paras 13 and 16);

(c) The balance of the purchase price of the Oaklands property was financed by a loan made by the insolvent's mother to the applicant, which in reality was a loan to the insolvent (paras 13, 26);

(d) The insolvent attended to the applicant's financial affairs, which included the management of both the spouses' bank accounts (para 13);

(e) The applicant could not have afforded the monthly payments in respect of the properties from her teacher's salary. In addition, she resigned from her teaching position in 2000, when she launched a business, which arranged children's parties (para 13);

(f) The insolvent paid for movable property on the Oaklands property, which were supplied at a cost of R61 000 and R23 000 (paras 13, 17);

(g) The insolvent signed the contract for the architectural alterations and additions to the Oaklands property (para 13);

(h) The applicant failed to attend the section 152 inquiry. Based on what the insolvent said at the investigation, the respondent maintained that the applicant was "still able to lead a 'normal life' of attending at shopping malls and restaurants" (para 14).

The court referred to section 21(2)(c) and confirmed that the trustee is obliged to release the property of the solvent spouse upon proof that she acquired the property during the marriage to the insolvent by a title valid against his creditors (para 20). Referring to case law (*Rens v Gutman NO* 2003 1 SA 93 (C); *Beddy NO v Van der Westhuizen* 1993 3 SA 913 (SCA); *Snyman v Rheeder NO* 1989 4 SA 496 (T) and *Coetzer v Coetzer* 1975 3 SA 931 (E)), the court pointed out that the onus in these type of proceedings rests on the solvent spouse who is required to show (para 21):

> "that the true transaction that resulted in the acquisition of the property in question was valid and conferred a valid title on him or her. In other words, the solvent spouse in seeking to have an estate released from the insolvency proceedings has to demonstrate the true validity of her title and its validity against creditors of the insolvent. Put in another way the solvent spouse has to show that the transaction(s) under which she acquired the property was not simulated, or designed to defeat the rights of creditors".

The court explained that the trustee is obliged to release the property once the solvent has discharged the onus of proving that the property "was not acquired by improper methods intended to prejudice the creditors" (para 22). Referring to *Kilburn v Estate Kilburn* (1931 AD 501 507–508), the court stated that the property would "in other words, have been acquired by the solvent spouse through her or his resources during the marriage and such acquisition would have vested on his/her [sic] a valid title against the creditors of the insolvent spouses" (para 22).

In evaluating the evidence in support of the respondent's case, the court deduced that the respondent opposed the application on the basis that an inference should be drawn from the manner in which the applicant and insolvent conducted their affairs, which points towards collusion to prejudice the creditors of the insolvent. The contention was partly based on the manner in which they conducted their financial affairs, but mainly on the fact that they utilised the same bank account and that payment for the applicant's properties was done by the insolvent (para 23).

The court pointed out that there appeared to be no dispute regarding the sources of the payments for the Oaklands property and for its renovation. It was paid for from the proceeds of the Abbotsford property and from the proceeds of two mortgage bonds obtained from Nedbank. The renovations were paid for in cash and the sum amounted to approximately R554 000 (paras 24–25).

The remaining issue was whether the insolvent or his mother paid the balance of the purchase price (para 26). At the inquiry, the insolvent's mother indicated that she lent the money to the applicant without asking for what it would be used. The applicant undertook to repay the money upon the sale of the Oaklands property (para 27). The court stated that it could not find any reason to reject the applicant's version that her mother in law made the loan to her. According to the court, the allegation by the respondent that the loan actually was made to the insolvent, was unlikely and should thus be rejected (paras 28–29).

According to the court, the suggestion that the alleged collusion should be inferred from the fact that the insolvent paid the bond instalments was unsustainable. The court stated that there is "no principle that parties married out of community of property cannot support each other in the running of the family affairs and also each other's affairs during the marriage" (para 30).

In concluding that there was no collusion, the court considered the long period between the conclusion of the parties' marriage and the eventual sequestration of the insolvent's estate. The antenuptial contract was concluded in April 1988 (earlier in the judgment (para 2), the court referred to the date of marriage as 1998. It is unclear which date is correct) and the insolvent's estate was sequestrated 28 years later, in February 2016 (para 31).

The court pointed out that the insolvent was fully involved in assisting the applicant with the management of her financial affairs from the commencement of their marriage and that there was no evidence that the insolvent's involvement was in anticipation of insolvency (para 32).

As regards the applicant's failure to attend the inquiry in terms of section 152 (para 33), the court emphasised that case law confirms that it "is simply an investigative procedure which does not envisage a finding or determinative of a person's rights". Consequently, the court ruled that there was no basis to draw a negative inference from the applicant's non-attendance. The court stated that even if it was mistaken in this regard, it would in any event not have drawn a negative inference, because there was insufficient information to determine the wilfulness of the applicant's absence. The information before the court was in the form of a medical certificate, which the applicant submitted as an excuse for her absence. Further, there was no evidence that she was warned of the consequences that would ensue, should she fail to attend the hearing (para 34).

The court concluded that the applicant has made out a case for the relief sought and that her application must succeed. The respondent was ordered to release the Oaklands property from the insolvent estate. It was also ordered to pay the costs of the proceedings (paras 35–36).

3 Analysis and evaluation

3 1 Applicable provisions of the Insolvency Act

Section 21 only applies to marriages out of community of property (Smith 109). Where the joint estate of parties married in community of property is sequestrated, both spouses acquire the status of an insolvent (*Du Plessis v Pienaar NO* 2003 1 SA 671 SCA 674–675).

The word "spouse" has an extended meaning and is not limited to the traditional husband and wife (Evans 1998 *Stell LR* 360; Meskin *et al Insolvency law* (2019 update) para 5.30.1.1). Also, it includes "a wife or husband by virtue

of a marriage according to any law or custom, and also 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" (s 21(13)). Since enactment of the Civil Union Act 17 of 2006 "spouse" also includes same sex civil union partners (Meskin *et al* para 5.30.1.1).

The effect of section 21 is to temporarily divest the spouse of her property (*Harksen* paras 36–37). The trustee is bound to release the property if the solvent spouse has established, on a balance of probabilities, one of the listed grounds in section 21(2) (*Enyati* 557).

The solvent spouse may also approach the court for an order releasing the property (s 21(4)). However, an application to the trustee is not a prerequisite for such a court application (*Hawkins v Cohen NO* 1994 4 SA 23 (W) 25). The solvent spouse carries the burden of proof that the property belongs to her (*Snyman* 505; *Beddy* 917; *Rens* 97).

In *Davies*, the applicant relied on section 21(2)(c) in claiming release of the relevant property and thus contended that she acquired the Oaklands property during the marriage with the insolvent by a title valid against his creditors. Therefore, she had to prove that she bought the property with her own money or with money that the insolvent donated to her (Meskin *et al* para 5.30.2). *In casu*, the insolvent actually paid the purchase price of the Oaklands property. Thus, for all practical purposes, the payment constituted a *donation* to the applicant, a fact that the court has failed to point out. Although the court correctly applied the relevant legal principles, its explanation of the latter is incomplete and inaccurate. It should be noted that a donation may provide a valid title, since section 22 of the Matrimonial Property Act validates donations between spouses. Nonetheless, although the court did not identify the transaction to be a donation, the court correctly pointed out (para 21) that the relevant transaction must still qualify as a true and *bona fide* transaction for a valid title to be established. Therefore, simulated transactions will not provide a valid title (*Snyman* 505–506).

However, the enquiry is not whether the true transaction was a transaction in terms of which she acquired the property with her own resources, because a donation can find a valid title. It is a *collusive* donation that will not satisfy the requirements of section 21(2)(c). Thus, the law is concerned with the actual intention of the parties (*Beddy* 917). As mentioned above, the court in *Davies* stated that the trustee is obliged to release the property once the solvent has discharged the onus of proving that the property was not acquired by "improper methods intended to prejudice the creditors" (para 22). The court referred to *Kilburn* and stated that the property would therefore then "have been acquired by the solvent spouse *through her or his resources* during the marriage" (my emphasis) and that such acquisition would have vested in her a valid title against the insolvent's creditors. It should be noted that *Kilburn* was decided before donations between spouses were validated. Thus, the court's reference to *Kilburn* is incorrect – in *Davies*, the acquisition of the property in question occurred by means of a donation and not by means of the solvent spouse's own resources.

The court in *Davies* rightfully refused to deduce collusion from the mere fact that the insolvent paid the applicant's bond instalments. According to the court, there is no rule that parties married out of community of property cannot support each other in the management of their financial affairs (para 30).

In concluding that there was no collusion, the court considered the long period between conclusion of the marriage and the eventual sequestration of the insolvent's estate (para 31). Although the court made no mention of it, the period that has passed between the actual date on which the "donations" were effected and the eventual date of final sequestration is of vital importance to the issue of collusion (*Snyman* 506, 508; *Sali-Ameen v Smit NO* 2009 JDR 1363 (GSJ) para 22). Except for the bond payments made after February 2014 and the payments from the insolvent's account on 3 December 2015 (para 13), all the "donations" *in casu* would have occurred long before, or at least more than two years before, sequestration. To have the "donations" that occurred before February 2014 set aside as dispositions without value, in terms of section 26 of the Insolvency Act, the *trustee* will have to prove that the liabilities of the insolvent exceeded his assets immediately after the disposition was made. Alternatively, the trustee will have to rely on section 31 to have the donations set aside as collusive dealings that took place before sequestration. However, in such case, the trustee will have to prove collusion, which the court in *Davies* rightfully concluded did not occur.

Another important factor in determining the *bona fides* of the parties, which the court in *Davies* took into consideration, is whether the insolvent's involvement in the applicant's financial affairs was in anticipation of insolvency (para 32; *Jooste v De Witt NO* 1999 2 SA 355 (T) 362; *Beddy* 917; *Rens* 98–101; *Sali-Ameen* para 17).

As mentioned earlier, section 21 was enacted to relieve the trustee of the onus to prove that transactions between spouses were simulated and thus, to cast the onus on the solvent spouse to show that the property belongs to her. However, as to the actual effect of section 21, Evans (1998 *Stell LR* 361), with reference to *Maudsley*, suggests that the section does not simply shift the burden onto the solvent spouse. Rather, it actually attacks the property of the solvent spouse and thereby deprives the spouse of the benefits of being married out of community of property. Evans (*ibid*) further points out that later decisions (*De Villiers NO v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A) 15) went so far as to interpret the wording of section 21, regarding the vesting of the spouse's property, to mean the transfer of *dominium* to the trustee (see also *Harksen* (para 31), where the Constitutional Court endorsed the interpretation in *De Villiers*).

3 2 Harksen

In *Harksen*, the constitutionality of section 21 was decided with reference to the interim Constitution (para 6). Goldstone J delivered the majority judgment. O'Regan J and Sachs J delivered separate judgments dissenting in part from the majority judgment. Section 21 was attacked on two constitutional grounds, namely the right to equality and the right to property (ss 8 and 28 of the interim Constitution; para 29).

The facts were briefly that Mr and Mrs Harksen were married out of community of property and that Mr Harksen's estate was sequestrated. Consequently, Mrs Harksen's property vested in the trustees of Mr Harksen's estate and was therefore attached. Mrs Harksen did not apply for the release of her property in terms of section 21(4). The High Court ordered her to respond to summons and to subject herself to an interrogation in terms of sections 64 and 65. The latter order eventually led to the proceedings in the Constitutional Court (paras 25–26).

Counsel for Mrs Harksen relied on section 28(3) of the interim Constitution and contended that section 21(1), which constitutes a transfer of ownership of the solvent spouse's property, amounts to an expropriation without compensation (para 31). Evans (1998 *Stell LR* 362) suggests that it may have been better to argue that section 21(1) amounts to a deprivation of rights in terms of section 28(1) and (2) and that such deprivation is unjustified in terms of section 33. This is because the Insolvency Act contains provisions for the setting aside of impeachable dispositions and for interrogations, which serve the same purpose than that of section 21 (Brits "Section 21 of the Insolvency Act and the final Constitution's property clause: Revisiting *Harksen v Lane NO*" in Muller *et al Transformative property law* (2018) 74 argues that the deprivation caused by s 21 is probably not arbitrary as envisaged in s 25(1) of the final Constitution).

Nonetheless, the court unanimously found that the purpose and effect of section 21 were not to divest the solvent spouse permanently of her ownership of the property, but rather to "ensure that the insolvent estate is not deprived of property to which it is entitled" (para 36). Goldstone J concluded that section 21 "do not have the purpose or effect of a compulsory acquisition or expropriation of the property of the solvent spouse whether by a public authority or at all" and that section 21 therefore does not violate section 28(3) of the interim Constitution (para 38).

Next, the court had to consider whether section 21 infringes the equality clause in terms of section 8 of the interim Constitution. Counsel for the applicant contended, among others, that section 21 constitutes unequal treatment of solvent spouses and unfairly discriminates against them (ie, a violation of both s 8(1) and (2)). Further, section 21 inflicts severe burdens, obligations, and disadvantages on the solvent spouse. These do not apply to other individuals with whom the insolvent may have had dealings and who may have been in a close relationship with the insolvent. Further, the applicant contended that section 21(2), providing for the possible release of property, does not cure the unfairness of the provision, because there may be several innocent reasons why the spouse is unable to establish ownership of the property in question (para 41).

The court ruled that section 21 does differentiate between the solvent spouse and other parties who might have had dealings with the insolvent (para 56). However, the court disagreed that the provisions of section 21 are arbitrary or without rationality (para 59). The court referred to the difficulty spouses may have in keeping proper record of their own contributions to acquired property and that it would therefore even be more difficult for the trustee to do so (para 58). However, as pointed out by Evans (1998 *Stell LR* 366), this may also be the reason

> "why a spouse may not be able to prove title to his or her property, consequently losing what is rightfully his or hers, solely because he or she happened to be married to an insolvent person".

Nevertheless, the court ruled that the legislator acted rationally in taking the view that the common law and statutory remedies in respect of impeachable transactions were incapable of ensuring that all the property of the insolvent finds its way into the insolvent estate. The latter remedies cast an onus on the trustee to establish ownership where property is claimed from the insolvent spouse. If a claim were to be opposed, delays could result, which may deprive the insolvent estate of property that rightfully belongs to it (para 59). The court held that it was rational that the onus should be cast on the solvent spouse, since facts

necessary for the determination of ownership would fall within her knowledge (para 60). According to the court, there was a rational connection between the differentiation created by section 21 and the legitimate governmental purpose behind its introduction. Further, the court was of the view that reasonable procedures were introduced to safeguard the interests of the solvent spouse in respect of her property and that section 21 therefore does not infringe the provisions of section 8(1) (para 61).

The court held that section 21 does discriminate against the solvent spouse (para 62). The question that remained was whether the discrimination is unfair. Since the discrimination *in casu* (the applicant argued that s 21 discriminates on the basis of marital status and on the basis of personal intimacy; para 88) does not resort under one of the grounds specified in section 8(2), there is no presumption in favour of unfairness. Consequently, the applicant had to prove that the discrimination was unfair (para 63; see s 8(4)). The court found that discrimination on an unspecified ground would be established if it is based

> "on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner" (paras 47 and 54).

Therefore, the important question is whether the burden, inconvenience, and embarrassment that the solvent spouse had to tolerate, amounted to such impairment. The court found that the group affected (ie solvent spouses) by section 21 has neither suffered discrimination in the past nor is it a vulnerable one (para 64). As regards the nature of the provision, the court emphasised the importance of protecting the interests of creditors. It ruled that section 21 is aimed at protecting the public interest by safeguarding the rights of creditors and that such purpose is consistent with the fundamental values protected by section 8(2) (para 65). In relation to the effect of the discrimination, the court stated that masters and trustees obviously will act reasonably when claiming property and that courts will intervene if they fail to do so (para 66; s 21(4) and (10)).

However, in *Davies* it eventually transpired that the trustee did not act reasonably. This compelled the solvent spouse to approach the court to intervene. Apart from the inconvenience she suffered and the legal costs she had to incur to prove that the property in question belonged to her, she had to endure the humiliation of the process (Joubert 1992 *TSAR* 700–701). As pointed out by Evans, section 21 affects the solvent spouse's dignity, merely because she is married or considered to be married to an insolvent individual. The solvent spouse is effectively treated as an insolvent person and must endure the inconvenience and stigma coupled with the status of an insolvent person (Evans 1998 *Stell LR* 368). However, the court in *Harksen* regarded the inconvenience and embarrassment the solvent spouse had to suffer or the fact that she may not be able to afford the legal costs to approach the court as "an inevitable consequence of a dispute between a trustee of an insolvent estate and a solvent spouse as to ownership of property" (para 67). The court held as follows (par 68):

> "[T]he cumulative effect of these criteria, and in particular the impact of the inconvenience or prejudice on solvent spouses in the context of the Act, and having regard to the underlying values protected by section 8(2), does not justify the conclusion that section 21 of the Act constitutes unfair discrimination. Looked at from the perspective of solvent spouses, it is the kind of inconvenience and burden that any citizen may face when resort to litigation becomes necessary . . . Again, the inconvenience and burden of having to resist such a claim does not lead to an

> impairment of fundamental dignity or constitute and impairment of a comparably serious nature."

In her minority judgment, O'Regan J was of the view that the applicant correctly did not challenge the provisions of section 21 as being indirectly discriminatory on the ground of gender (para 96). The purpose of section 21 is not to prejudice women *per se*, because its wording does not specify the gender of the persons it applies to (Evans 1998 *Stell LR* 366). However, in practice, as was the case in *Davies*, section 21 frequently prejudice women as such, since they are usually the "solvent spouse" in sequestration applications (Evans 1998 *Stell LR* 366, 1997 *THRHR* 82; Joubert 1992 *TSAR* 699–700).

Concerning the possible violation of the equality clause, O'Regan J rightfully concluded that section 21 does amount to an impairment of the solvent spouse's interests and that the impairment was indeed substantial and sufficient to constitute unfair discrimination in terms of section 8(2) (paras 101–102). As regards section 33 of the interim Constitution and the proportionality between the invasion caused by section 21 and the purpose and effects of section 21 (para 102), O'Regan J regarded the purpose of section 21 to protect creditors against collusion between spouses as an important one (para 112). However, the judge found the fact that section 21 affects all spouses, including those innocent of collusion, while it does not affect other individuals in similarly close relationships with the insolvent, to be unacceptable (paras 103–105, 112). Therefore, O'Regan concluded that section 21 does not meet the test of section 33 and that it is consequently inconsistent with the provisions of the interim Constitution (para 112).

Sachs J found section 21 to be unfair in terms of section 8(2), because it

> "affronts [the solvent spouse's] personal dignity as an independent person within the spousal relationship and perpetuates a vision of marriage rendered archaic by the values of the interim Constitution" (para 119).

According to Sachs J, section 21, being "[m]anifestly patriarchal in origin . . . promotes a concept of marriage in which, independently of the living circumstances and careers of the spouses, their estates are merged". The judge stated that section 21 "reinforces a stereotypical view of the marriage relationship which, in light of the new constitutional values, is demeaning to both spouses" (para 121).

In terms of the final Constitution, "marital status" is one of the listed grounds of discrimination (s 9(3)) and discrimination on such basis would be presumed to be unfair (s 9(5)). However, it should be noted that section 21 would still, because of the majority decision in *Harksen*, be saved by the limitation clause (s 36 of the final Constitution; Bertelsmann *et al Mars the law of insolvency* (2019) 233).

The emphasis on creditors' interests encapsulates the manner in which our courts have mostly approached insolvency matters. This is the position, despite the international trend to move away from the traditional aim of consumer insolvency law to maximise returns for creditors (Spooner 2017 *Journal of Law and Society* 378ff). In *Harksen*, the interests of creditors unjustifiably triumphed over the solvent spouse's interests (Evans 1998 *Stell LR* 368). However, *Harksen* is but one example of the many court decisions where the interests of creditors were favoured above the interests of other parties who are involved in insolvency matters. Sequestration applications brought with the aim to obtain debt relief are as a rule refused, unless advantage to creditors is shown (Boraine and Roestoff

"Revisiting the state of consumer insolvency in South Africa after 20 years: The courts' approach, international guidelines and an appeal for urgent law reform (part 1) 2014 *THRHR* 351). Coetzee argues that the advantage to creditors requirement in reality violates the equality clause, because its effect is to exclude certain debtors (the so-called "no income no asset" debtors) from debt relief. She argues that such differentiation amounts to unjustifiable unfair discrimination based on these debtors' socio-economic status and that it thus infringes their right to equality in terms of section 9 of the Constitution (Coetzee "Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African exposition" 2016 *International Insolvency Review* 36 54).

3 3 International perspectives and law reform initiatives

According to the World Bank, lawmakers from several jurisdictions have identified a variety of benefits to be achieved by insolvency systems for natural person debtors. Benefits for creditors have historically constituted the main purpose of such systems. More recently, the focus has shifted to the benefits a system should afford to debtors and their families (WB *Report* para 57). The World Bank points out that the debtor's spouse and children "suffer through no fault of their own and are especially deserving of compassion and relief" (*idem* para 75). Apart from the benefits to debtors and their families, a third category, namely the benefits afforded to the broader society, has also emerged (see WB *Report* paras 76–111). According to the World Bank, policymakers should "maintain a balanced approach when evaluating the distribution of benefits and burdens among these three interest groups" (*idem* para 57).

In *Harksen*, the court considered section 21 to be an appropriate and effective tool in assisting the trustee to recover all the assets that belong to the insolvent estate (para 58). However, O'Regan J's comparative investigation of foreign insolvency systems (paras 106–111) indicates that most other jurisdictions do not have similar provisions and that there are other measures (most commonly measures pertaining to voidable transactions) to achieve the purposes served by section 21.

As regards South African law, apart from the provisions of the Insolvency Act pertaining to the setting aside of voidable dispositions (ss 26, 29, 30 and 31) and the common-law remedy namely, the *actio Pauliana*, the trustee is also armed with comprehensive interrogatory provisions (ss 64–66, 152), which could assist him in finding the assets that belong to the insolvent estate. These remedies appear to be sufficient for all situations that fall outside the scope of section 21 (Evans 1998 *Stell LR* 362 and 367). Moreover, even in the case of a true donation to the solvent spouse, the trustee will still be able to attack it as a disposition without value (Meskin *et al* para 5.30.2). In *Davies*, the trustee would have been entitled to attack the "donations" in terms of section 26. Payments that were made within two years before sequestration can be set aside, unless the spouse is able to prove that immediately after the disposition was made the assets of the insolvent exceeded his liabilities (s 26(b)).

Criticism against replacing section 21 with the remedies relating to voidable dispositions and interrogations is the fact that the onus to prove ownership of the property claimed from the solvent spouse would then rest on the Master or the trustee. It would be more onerous for the Master or the trustee to prove such ownership than it would be for the solvent spouse (*Harksen* para 59; Stander 2005 *TSAR* 318). In *Harksen*, the court argued (para 59) that opposition by the

spouse could cause delays and could result in the trustee being unable to recover property, which factually belongs to the insolvent estate. However, as pointed out by Evans (1998 *Stell LR* 367), it is not clear why the onus to prove ownership should rest on the solvent spouse, while other individuals who are in similar relationships with the insolvent (eg, parents or children) are not required to do so. Moreover, as was the case in *Davies*, the solvent spouse is saddled with the inconvenience, the embarrassment and the legal costs to bring an application to court for the release of assets where the trustee is unwilling to do so.

Evans submits that *Harksen* directly influenced the Law Commission in its approach to the reform of section 21. In the 1996 Bill, the Commission initially proposed that the section should be abolished (Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* (LLD thesis UP 2008) 428). However, in the latest official Bill of 2000, section 21 has been replaced with a new provision (cl 22A), which according to Evans is more severe than section 21 (*idem* 428–429).

Clause 22A has been retained in the latest version of the Bill (see cl 25 of the 2016 Insolvency Draft Bill and *Explanatory memorandum* – unofficial draft on file with the author – hereafter "2016 Bill" and "2016 *Explanatory memorandum*"). Clause 22A provides that the liquidator may instruct the sheriff to attach property if he suspects that a disposition of property by the insolvent to an "associate" may be liable to be set aside (cl 22A(1)). The concept "associate" relates to more relationships than the one between spouses (see cl 1 – eg, the relationship between the insolvent and his children, parents and partners). As soon as it is evident that an attachment is unnecessary to safeguard the interests of the estate, the liquidator must instruct the sheriff to release the property. Should the associate be of the view that property has been attached without reasonable cause, she may apply to court for appropriate relief (cl 22A(2), (3) and (3A)).

Evans (LLD thesis 362) submits that this type of creditor-oriented legislation should be abolished. The attachment of property in terms of clause 22A, which involves many more persons and entities than a spouse (2000 *Explanatory memorandum* 82) may, according to Evans (*idem* 362), be susceptible to challenges on various grounds, including on constitutional bases. Stander (2005 *TSAR* 326) suggests that clause 22A would not necessarily provide relief to the solvent spouse, because she still loses control (although only temporarily) of the assets. In practice, the liquidator will probably simply instruct the sheriff to attach all property and then, in his own time, grant a release of the property. In such a case, the solvent spouse may have to incur legal costs to approach the court for relief (*idem* 327).

Because clause 22A has the same draconian effect as section 21 it should be excluded from the Act. It is submitted that the Law Commission's proposals in the 2000 Bill, for amendment of the provisions regarding impeachable dispositions, signifies a balanced approach to reform and by itself provide sufficient protection to creditors.

The criticism that section 21 only applies to spouses and not to other persons or entities who may also be in a close relationship with the insolvent has been addressed in clauses 18 and 20 of the 2000 Bill. These clauses are concerned with dispositions without value and with voidable preferences (the proposed provisions have been retained in the 2016 Bill; see cl 19 and cl 21). The upshot of the latter provisions is that a disposition to an associate is liable to be set aside

for a longer period before sequestration. In case of a disposition without value, it may be set aside if it was made in favour of an associate within three years before the presentation of the application for liquidation. In the case of a disposition to any other person, it may be set aside if it was made within two years of presentation of the application. Thus, a time limit of three years in the case of an associate and of two years in other cases has been imposed for the setting aside of dispositions without value (2000 *Explanatory memorandum* 70).

The difficulty liquidators often experience in proving insolvency has been addressed in clause 25(2)(a) of the 2000 Bill. The latter clause provides for a presumption of insolvency, thus, a presumption that the liabilities of the debtor exceeds his assets. This presumption is applicable for a period of three years before the date of liquidation of the estate, until the contrary has been proved. However, the 2016 Bill (cl 29(4)) proposes, based on objections by NEDLAC, that a three-year period is too long and that the period should be reduced to one year before the date of the presentation of the application for liquidation. According to the Commission, creditors have a duty to enforce the payment of their debts timeously and cannot rely on the insolvency law to protect them against their own tardiness (2016 *Explanatory memorandum* para 29.5). It is submitted that clause 29(4) has not been properly considered. As mentioned, the 2016 Bill has retained the wording of clause 18. Thus, a three-year period in respect of associates and a two-year period in respect of other cases still apply. However, the issue of the burden of proof of insolvency, outside the one-year period, has not been addressed. It is submitted that the initial proposal for a three-year period is sensible and reasonable to creditors.

4 Conclusion

The court's considerate approach to the solvent spouse's predicament in *Davies* is commendable. Section 21 clearly constitutes an unfair, unnecessary and inappropriate inroad into the proprietary rights of an individual. In *Davies*, the inconvenience and embarrassment the applicant had to suffer, merely because she was a married woman, was the direct result of the unfortunate majority judgment in *Harksen*. As pointed out by Sachs J, section 21 infringes the solvent spouse's personal dignity as an independent person within the spousal relationship. It is demeaning to both spouses and underscores an archaic view of marriage, which does not conform to the values of the Constitution.

The above analysis has shown that there are adequate, less drastic measures to achieve the purposes of section 21. The worldwide trend to move away from the traditional debt collection aim of consumer insolvency law and from its focus on creditors' interests indicates that there is no more room for section 21 and that lawmakers should urgently remove it from the Act. Section 21 is not only oblivious of international trends and guidelines, but in direct contrast with a holistic approach to consumer insolvency.

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