The Impact of Section 25 of the Constitution of South Africa, 1996, on Insolvency Law

By

Masonwabe Honest Mhambi

Submitted in partial fulfilment of the requirements for the degree

LLM in Mercantile Law

in the Faculty of Law

University of Pretoria

PRETORIA

Supervisor: Dr J.S. van Wyk

2 April 2023

Declaration of originality

Full names of student:

Masonwabe Honest Mhambi

Student number:

13369840

Topic of work:

The Impact of section 25 of the Constitution of South Africa, 1996, on Insolvency Law

Declaration:

1. I understand what plagiarism is and I am aware of the University of Pretoria's policy in this regard.
2. I declare that this dissertation (e.g. essay, report, project, assignment, dissertation, thesis, etc) is my own original work. Where other people's work has been used (either from a printed source, the internet or any other source), this has been properly acknowledged and referenced in accordance with institutional requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

SIGNATURE DATE

Acknowledgements

First and foremost, I am grateful to the almighty God for giving me this opportunity. Forgiving me the wisdom and strength to complete this dissertation against all odds. When I look back, I wonder where I even got the strength to start this journey.

I also wish to acknowledge the following people, with gratitude:

To my Supervisor, Dr Jani van Wyk, for her meticulous supervision and invaluable guidance in shaping up this dissertation, may God bless you.

I would want to express my gratitude to my wife, Lebo Mhambi, and our four children, Mpilo, Lusenathi, Luthando, and Luyuvo, for allowing me the grace and support to carry out this task.

Aluta Dyamdeki, thank you for your assistance during this journey.

Melissa Adendorff, your assistance is much appreciated.

To my late parents, Thozama Margaret Mhambi and Mthuthuzeli Raymond Mhambi, this is the fruit of the seed that you planted whilst you were still alive. On 27 May 2022, I lost my mother while I was in the middle of this work. This could have turned to be the reason for me to drop out, but her love for education carried me through.

Last, but not least, I would want to express my gratitude to all of my friends who have supported this study in some way, whether directly or indirectly. In particular, I would like to thank to my late friend, Mamello Moiloa, who inspired me to return to university and complete this work. I will always be grateful to him.

Abstract

This qualitative study aims to investigate the constitutionality of section 20 and 21 of the South African Insolvency Act 24 of 1936. These sections relate to the regulation of sequestration of the estate of an insolvent individual. This study is underpinned by the critical analysis of section 25 of the Constitution. It seeks to question or examine the specific application of section 20 and section 21 of the Insolvency Act, within the context of the potential arbitrary deprivation of property. Section 25 of the Constitution prohibits the arbitrary deprivation of property, and, as such, the primary research question of this study is whether interference with property rights as per the prohibitions in section 20 and section 21 of the Insolvency Act qualify as a prohibited deprivation in terms of the Constitution.

Consequently, the problem that this research addresses is the constitutionality of section 20 and section 21 of the Insolvency Act. This study argues that sequestration, by necessity, affects the property rights of the insolvent debtor. To address the research problem, the study critically analysed the issues relating to deprivation, as set out in section 25 of the Constitution. The analysis was undertaken in order to ascertain whether the deprivation which occurs in terms of sections 20 and 21 of the Insolvency Act is arbitrary, and to determine the form of arbitrariness.

The structure of the research comprises a legislative and literary contextualisation of the Insolvency Act, followed by a critical analysis of the constitutionality of the Insolvency Act. The critical analysis yields the following interpretation:

The Insolvency Act is considered to be a law of general application, and it governs the two processes through which a debtor's estate may be sequestrated, namely voluntary surrender and compulsory sequestration. The fact that sequestration has formal procedures set out in the Act indicates that the process is non-arbitrary, as the two processes directly aim to fulfil the purpose of the Insolvency Act, through specific procedural steps which require compulsory compliance.

This ensures due process and prevents the undermining of the constitutional rights of both the insolvent debtor and the creditors in question. This also limits arbitrary deprivation of property, as the arbitrariness is determined in terms of deprivation for

public purpose or public interest. If the deprivation is not made in the public interest, it may be found arbitrary in terms of section 25 of the Constitution. It may be argued that the sequestration of an insolvent debtor is not a process which serves the public interest, however, if the arbitrary deprivation is justifiable and reasonable, then it is constitutional in terms of section 36 of the Constitution. Inasmuch as sequestration is a process which aims to repay creditors what is owed to them by the insolvent debtor, it is a justifiable process, and provided that the process follows the conditions set out in the Insolvency Act, by the court, it is substantively and procedurally reasonable. This is substantiated by the fact that the sequestration order will only be granted if sequestration is to the advantage of creditors. The Insolvency Act lays down 'advantage to creditors' as a prerequisite for sequestration applications.

This study makes recommendations for legislative review of the definition of 'property', as the broad definition and discretion in its application resulted in conflicting court judgements within the context of insolvency procedures. Against the background of the findings and recommendations related to property rights, this study further supports a legislative review of the debt relief process and the timespan of post-sequestration rehabilitation, which may take up to ten years.

Table of contents

*"The fault does not lie in our stars, but in ourselves for underachieving. As is a tale, so is life: not how long it is BUT how good it is, is what matters. Justice is the constant and perpetual wish to render everyone his due. "**LIVE HONESTLY, HURT NO ONE AND GIVE EVERY PERSON HIS/HER DUE. DO UNTO OTHERS WHAT YOU WOULD HAVE OTHERS DO UNTO YOU**"* – VIWE NOTSHE

Chapter 1: Introduction

1.1 Chapter introduction

This dissertation aims to investigate the constitutionality of section 20 and section 21 of the Insolvency Act.[1] This qualitative, critical analysis of the aforementioned sections of the Insolvency Act is based on a comparative presentation of case law, with particular reference to *De Lange v Smuts NO*[2] in conjunction with a literature study which investigates the constitutionality of the relevant sections of the Insolvency Act[3] in terms of section 25 of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution).[4]

Chapter 1 provides the introduction to the study, through an overview of relevant theoretical concepts, and a legal contextualisation of the Constitution and the Insolvency Act.[5] Furthermore, this chapter sets out the research questions, frames the research problem and provides a methodological overview. Finally, this chapter highlights the relevance of the study, and addresses its limitations.

1.2 Constitutional contextualisation

The Constitution is understood to serve as the supreme law of the land and all systems of law must abide by its principles and provisions. Two such systems of law which are relevant to this study are insolvency law and common law. To this effect, section 2 of the Constitution renders any law in conflict with the Constitution invalid.[6] This means that the validity of all the laws within the Republic of South Africa should be tested

[1] Act 24 of 1936.
[2] 1998 (7) BCLR 779 (CC). Hereinafter referred to as the *De Lange* case.
[3] Act 24 of 1936, sec 20-21.
[4] The Constitution of South Africa, 1996, sec 25 (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005).
[5] For the purposes of this study, section 20 section 21 of the Insolvency Act are read against section 25(1) of the Constitution to ascertain whether sequestration is tantamount to the arbitrary deprivation of property.
[6] The Constitution of South Africa, 1996, sec 2 (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005). See also C Hoexter Administrative law in South Africa (2012) 28.

against the Constitution, as evidenced in the cases of *State v Zuma and Others,*[7] and *State v Makwanyane and Another.*[8] In the first instance, the court emphasises the importance of the superiority of constitutional considerations applied to the evolution of common law[9]. In the second instance, the emphasis is on South African legislative history, wherein past political discriminatory practices impacted South Africa's social, economic, and political contexts to such an extent that both the Interim Constitution and the Constitution serve to establish and protect the fundamental human rights of South African citizens as a corrective measure to past discrimination on the part of the state.[10]

Furthermore, in *Masethla v President of the Republic of South Africa,*[11] the court explained that while procedural fairness is assessed on a case-to-case basis, the constitutional standard which provides the definition and requirements of procedural fairness aims to prevent the exercise of public power which undermines the fundamental human rights set out in the Constitution. Procedural fairness is assessed in terms of the reasonable and justifiable enforcement of the law in an open and democratic society based on human dignity, equality, and freedom.[12] Fair, reasonable, and justifiable procedure are addressed in sections 8(1) and 8(2) of the Constitution, providing that: [13]

> the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state; [and]
>
> a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

[7] 1995 (3) SALR 391 (CC).
[8] 1996 (3) SALR 165 (CC).
[9] H Webb 'The Constitutional Court of South Africa: Rights interpretation and comparative constitutional law'. (1998) *Journal of Constitutional Law* 205-283.
[10] Webb 208-209.
[11] 2008 1 BCLR 1 (CC).
[12] Webb 209.
[13] The Constitution of South Africa, 1996, sec 25 (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005).

These two subsections provide for the vertical and horizontal application of the Bill of Rights, which means that the Bill of Rights applies to the State as well as to private individuals, and it is also binding between private individuals.[14] Procedural fairness, in this regard, is relevant to the study, as sequestration may be argued to constitute the arbitrary deprivation of property, if not proven to be reasonable and justifiable. As such, this study investigates the constitutionality of the Insolvency Act,[15] with specific reference to the sequestration of individuals,[16] and some reference to the liquidation of companies.[17]

The question of procedural fairness in terms of property deprivation involved in sequestration and liquidation, respectively, is based on the initial declaration of insolvency on the part of either the individual or a company. [18] Insolvency may be declared when a debtor's liabilities exceed his or her assets, as set out in section 2 of the Insolvency Act.[19] It is necessary to note that the liabilities should be fairly estimated, and that the assets be fairly valued. The declaration of insolvency requires that the debtor be bankrupt. The application for sequestration is, in effect, an application to be declared bankrupt while gaining a measure of protection against certain creditors, as sequestration is granted when there is a proven benefit to the creditors.[20]

[14] R Brits 'The impact of the constitutional property law on insolvency law in South Africa' (2021) *International Insolvency Review* 34-53.
[15] Act 24 of 1936.
[16] Act 24 of 1936 at sec 2. Section 2 of the Insolvency Act addresses the insolvency and sequestration of a natural person, a partnership, and a deceased estate.
[17] The Companies Act 71 of 2008 (hereafter referred to as the 2008 Companies Act) and the Companies Act 61 of 1973 (hereafter referred to as the 1973 Companies Act) (chapter 14 of the latter was retained by virtue of item 9 of schedule 5 of Act 71 of 2008 and in the instances specified in the item). It is noted that insolvent companies are liquidated in terms of Chapter 14 of the Companies Act 61 of 1973 (old Companies Act), while solvent companies are liquidated in terms of the new Companies Act.
[18] R Evans 'Waiving of rights to property in insolvent estates and advantage to creditors in sequestration proceedings in South Africa' (2018) *De Jure* 298-317.
[19] Act 24 of 1936 sec 2.
[20] Evans (2018) 300. See also Act 24 of 1936 sec 6; sec 10; sec 12.

The requirement that the sequestration order benefit the creditors aligns with the study's investigation into the constitutionality of sequestration, as the benefit of the order to the creditors may be harmful or detrimental to the insolvent individual. This is documented in *Ex parte Pillay,*[21] as the court stated that "the procedure of voluntary surrender was primarily designed for the benefit of creditors, not for the relief of harassed debtors".[22] As sequestration may be detrimental to the insolvent individual, it must be ascertained whether the consequent deprivation of property is arbitrary, fundamentally questioning the constitutionality of sequestration. This forms the crux of the study's problem statement and research questions.

1.3 Problem statement and research objectives

1.3.1 Rationale

Section 25(1) of the Constitution provides that '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.

This is relevant to the due process of sequestration based on examples of questionable conduct, where the deprivation of property may be questioned in terms of fairness and appropriateness, based on the procedural requirements, as presented in *Fourie v Edkins.*[23] In this case, the court's discretion of the application of section 20(1)(c) of the Insolvency Act led to sheriff selling the insolvent party's immovable property in the execution of the judgement, based on the incorrect assumption of concluded sale agreement.

A further example of the potential arbitrary deprivation of property is found in *Harksen v Lane*[24]*,* where equality rights are called into question, as socioeconomic status may limit an insolvent individual's access to statutory recourse, raising questions of discrimination and procedural fairness.

[21] 1955 2 SA 309 (N) 311.
[22] Evans (2018) 300.
[23] (740/12) [2013] ZASCA 117, hereinafter referred to as the *Fourie case.*
[24] 1998 1 SA 300 (CC), hereinafter referred to as the *Harksen case.*

It may be argued that the Insolvency Act, as enacted in 1936, requires a socio-culturally appropriate amendment, which applies section 25(1) of the Constitution, with specific reference to section 20 and section 21 of the Insolvency Act.[25]

The rationale for this recommendation is based on the fact that the constitutionality of the Insolvency Act has been brought under scrutiny in the Constitutional Court, with specific reference to *De Lange v Smuts,*[26] where section 66(3) of the Insolvency Act was tested against section 36 of the Constitution. In this case, the Constitutional Court found that section 66(3) of the Insolvency Act is unconstitutional, based on the procedural authority granted to a presiding officer who is not a magistrate to commit a recalcitrant witness to prison.[27] This investigation into the constitutionality of the Insolvency Act highlights procedural fairness when ensuring the protection of creditors, [28] and the necessity of procedural and contextual knowledge regarding the estate in question.

A further contextual example of potential points of conflict between the Constitution and the Insolvency Act comprises section 27(1) of the Insolvency Act potentially contravening section 9(3) of the Constitution. It is noted that this contextual example is not addressed within the scope of this study, but it is recommended as a topic for future investigation and support for the amendment of the Insolvency Act.

Section 27(1) of the Insolvency Act protects benefits and gifts given in good faith by a man to his wife and any child born of that marriage. Section 9(3) of the Constitution addresses unfair discrimination on the grounds of, *inter alia*, gender, sex, pregnancy, and marital status. The protection of benefits may be constitutionally tested in terms of same-sex marriage, as section 27(1) of the Insolvency Act specifically addresses benefits bestowed by a man to his wife, thus assuming a heteronormative couple; and assuming that the insolvent is the male husband, rather than the female wife.[29]

---

[25] Act 24 of 1936 sec 20, sec 21.
[26] *De Lange case* at paras 31-33.
[27] *De Lange case* at paras 31-33.
[28] *De Lange case* at paras 31-33.
[29] Z Mabe 'Section 27 of the Insolvency Act 24 of 1936 as a Violation of the Equality Clause of the Constitution of South Africa: A Critical Analysis' (2016) *PELJ* 1. See also sec 27(1). See also A Boraine, R Evans, M Roestoff and L Steyn 'The Pro-Creditor Approach in South African Insolvency Law and the Possible Impact of the Constitution' (2015) 3 NIBLeJ 5.

In support of the relevance of this argument, the National Economic Development and Labour Council (NEDLAC)[30] suggested amendments to the scope of the definition of a spouse cited in section 21(13) of the Insolvency Act, which may be extended to apply to section 27(1). This adjustment is suggested to provide for all forms of marriage recognised by law[31] – including civil marriages, which are concluded in terms of the common law as amended by the Marriage Act 25 of 1961, and other marital relationships such as those permitted in terms of the Civil Union Act 17 of 2006. These Acts provide for opposite and same-sex couples to marry. Furthermore, the Recognition of Customary Marriages Act 120 of 1998 makes provision for the legal recognition of both monogamous and polygynous customary marriages, even though polygynous marriages are not addressed in section 27(1) of the Insolvency Act.

A proposal has been made to address the aforementioned shortcomings of section 27 of the Insolvency Act in order to make it compliant with the Constitution. This proposal is contained in the South African Law Reform Commission's Report, in the sections that apply to antenuptial contracts and section 27(1) of the Insolvency Act.[32]

1.2.3 The aim of the dissertation

It is clear from the above discussion that there are numerous constitutional challenges that may arise in the context of insolvency law. Some issues have been dealt with by the courts and others have caught the interest of insolvency law scholars.

The aim of this dissertation is to investigate whether the constitutional property clause in section 25(1) of the Constitution may be found to be applicable on the provisions of the Insolvency Act which govern sequestration, namely section 20 and section 21. This study argues that it is plausible that these provisions may not pass legal scrutiny against the background of section 25 of the Constitution.

---

[30] NEDLAC Interim Report, cl 4.1.7. presented by the Department of Justice and Constitutional Development to the labour Market Chamber on 28 July 2003 and 23 November 2006.
[31] BS Smith & JA Robinson 'An embarrassment of riches or a profusion of confusion? an evaluation of the continued existence of the Civil Union Act 17 of 2006 in light of the prospective domestic partnerships legislation in South Africa' (2010) *PELJ* 37.
[32] South African Law Reform Commission Report on the Review of the Law of Insolvency: Draft Insolvency Bill and explanatory memorandum Project 63 (2015) (hereafter referred to as the SALRC Report Draft Insolvency Bill), cl 19, cl 20.

1.3.3 Research objectives

Based on the problem statement noted above, the research objectives are:

Objective 1: Exploring the extent to which the property rights of an insolvent debtor are affected in pursuit of the goal to settle the debts owed to the creditors in an orderly and fair manner.[33] In addition, the study explores whether the application of the section 20 and section 21 of the Insolvency Act may be interpreted to comprise arbitrary deprivation of property, based on section 25 of the Constitution.

Objective 2: Determining whether section 20 and section 21 of the Insolvency Act fall short of the constitutional standard regarding property rights, set out in section 25(1) of the Constitution.

Objective 3: Determining whether any reformation is needed to enhance the alignment of section 20 and section 21 of the Insolvency Act with section 25(1) of the Constitution.

1.4 Research questions

Section 25 of the Constitution prohibits the arbitrary deprivation of property. The primary research question is, therefore, whether interference with property rights as per section 20 and section 21 of the Insolvency Act qualifies as a prohibited deprivation in terms of the Constitution.

The secondary research questions comprise of the following:

1. How do section 20 and section 21 of the Insolvency Act affect an insolvent debtor's property rights as protected by section 25(1) of the Constitution?
2. Are section 20 and section 21 of the Insolvency Act aligned with section 25(1) of the Constitution?
3. How can section 20 and section 21 of the Insolvency Act, be enhanced to further the rights set out in section 25(1) of the Constitution?

[33] Nagel *et al Commercial Law* (2019) 2; 33.

1.5 Methodological overview

The desktop research for this dissertation comprises of a literature review of books, journal articles, theses, reports, legislation, and a review of relevant case law.

Based on the literature study and case law review, this study undertakes a critical analysis of the impact of the Constitution on the South African insolvency law. This is achieved through the consideration of the general principles of insolvency law and whether or not the insolvency law can be interpreted to align with section 25 of the Constitution. This interpretation is scrutinised in the context of South African citizens' constitutional right to property.

This analysis ultimately aims to answer the question of whether the legal framework of the insolvency law in South Africa is consistent with the property provisions of the Constitution.

1.6 Relevance of the study

While the Insolvency Act has been investigated in terms of its constitutionality, as noted in *De Lange v* Smuts, *Fourie v* Edkins, and *Harksen v Lane,* section 20 and section 21 of the Insolvency Act have not been explored within the context of constitutional property rights, as set out in section 25(1) of the Constitution. As such, this study presents a novel topic with practical relevance to the socioeconomic climate of South Africa.

1.7 Study delineation and limitations

The study focuses on consumer insolvency law, and the impact of section 25(1) of the Constitution on South African insolvency law in terms of sequestration. This research is not intended to constitute a comprehensive study of constitutional law principles and the Insolvency Act. Therefore, given the limited scope of the study, this dissertation focuses on sections 20 and 21 of the Insolvency Act in relation to section 25(1) of the Constitution.

The main focus of the study is the provisions of the Insolvency Act and although 'insolvency law' may have a broader meaning in general (so as to also include

common law provisions and other non-Insolvency Act procedures such as Administration and Debt Review) the terms are used interchangeably to denote the legislative framework as per the Insolvency Act. This study does not address every aspect of insolvency law due to the technical constraints inherent to a mini-dissertation and, as a result, only selected sections of the Insolvency Act are discussed in this research.

1.8 Structure of the dissertation

Chapter 1 presents the introduction to the study, highlighting relevant theoretical concepts, alongside the presentation of the rationale for the study, research aim, research questions, problem statement, methodological overview, relevance, and limitations.

Chapter 2 provides the literature study which addresses the consumer insolvency procedure in South Africa. This chapter provides the historical overview of the application of the Insolvency Act in South Africa, with specific references to its aims, purpose, and processes.

Chapter 3 provides the critical analysis and case law review in terms of section 25 of the Constitution, as this section of the Constitution is applied to the relevant sections of the Insolvency Act, which is introduced in Chapter 2.

Chapter 4 concludes the study by reflecting on the research undertaken, and answers the research questions. This chapter further provides recommendations for reform in order to ensure alignment of the provisions of the Insolvency Act with those of the Constitution.

1.9 Conclusion

This chapter served as an introduction and orientation to the research. Chapter 1 presented an overview of relevant theoretical concepts, as well as a legal contextualisation of the Constitution, and the Insolvency Act. This created the foundation of the presentation of the rationale of the study. The rationale created the baseline for presentation of the problem statement and research questions, which are addressed throughout the dissertation, and which informs the findings and

recommendations found in Chapter 4. Finally, this chapter highlighted the relevance of the study, and addressed its limitations informed by the objectives, aims, and scope.

Chapter two: Overview of consumer insolvency procedures

2.1 Introduction

This chapter presents an overview of the relevant provisions of the Insolvency Act, with specific reference to sequestration. This chapter sets out the sequestration process in detail and compares same briefly to other debt relief measures to illustrate, albeit on a theoretical level, the impact of sequestration on the property of the debtor and property rights of the creditors. This provides the context for the critical analysis presented in Chapter three.

As such, voluntary surrender, preliminary formalities, and debt relief mechanisms are explored through a presentation of the acts and legislation in question, alongside relevant case law, as well as peer-reviewed journal articles.

2.2 The Insolvency Act

Prior to undertaking a critical analysis to gauge the impact of section 25(1) of the Constitution on section 20 and section 21 of the Insolvency Act, it is necessary to provide a general overview of the current South African consumer insolvency procedures. This overview is provided to give context to the process of sequestration and to explain why debtors' property rights are affected. For example, debtors lose control of their estates and creditors need to abide by the discharge provisions of the Insolvency Act when it comes to unpaid pre-sequestration debts. As such it is vital to contextualise and ground the sequestration process prior to delving into the specific aspects that affect property rights.

As noted by Evans[34]The Insolvency Act is considered to be the primary source of South African consumer insolvency law, although the scope of consumer practice with respect to insolvency takes more acts into account, including, *inter alia,* the

[34] RG Evans 'A critical analysis of problem areas in respect of insolvent estates of individuals' Unpublished LLD thesis, University of Pretoria, 2008 57-68.

Administration of Estates Act,[35] the Companies Act,[36] the Close Corporation Act,[37] and the National Credit Act.[38]

2.3 Sequestration

The Insolvency Act makes provision for two processes through which a debtor's estate may be sequestrated. Section 2 of the Insolvency Act defines a debtor as: [39]

> In connection with the sequestration of the debtor's estate, means a person or a partnership or the state of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies.

Creditors may apply to the court for an order to sequestrate the debtor's estate[40] – this process is known as compulsory sequestration. The debtor himself or herself may approach the court to seek relief and petition the court to accept the surrender of his or her estate[41] – this process is known as voluntary surrender. However, the South African insolvency law is still viewed as conservative, because it is not viewed as a form of debt relief for a debtor but rather as a way to ensure some form of payment to the creditors in circumstances where the debtor is in fact no longer able to repay the debt obligations fully due to factual insolvency, or the debtor has committed an act of insolvency in terms of section 8 of the Insolvency Act.[42]

2.3.1 The nature and aim of sequestration

The principal aim of the sequestration process aligns with creditors' interests – to make provision for a collective debt collecting procedure that will ensure that the distribution of the debtor's assets occurs in a fair and orderly manner, considering that the debtor's assets are insufficient to satisfy the debts of all his or her creditors.[43] Once a

[35] Act 66 of 1965; see also Evans (2008) 57-68.
[36] Act 61 of 1973, by virtue of item 9 of schedule 5 Act 71 of 2008; see also Evans (2008) 57-68.
[37] Act 69 of 1984; see also Evans (2008) 57-68.
[38] Act 34 of 2005 (as amended); see also Evans (2008) 57-68.
[39] Act 24 of 1936 sec 9(1)
[40] Act 24 of 1936 sec 9(1).
[41] Act 24 of 1936 sec 3(1).
[42] *Ex parte Pillay* 1955 (2) SA 309 (N) 311; *R v Meer 1957* (3) SA 614 (N) 619; *Fesi v Absa Bank Ltd* 2000 (1) SA 499 (C) 502; *Ex parte Ford* 2009 (3) SA 376 (WCC) 383; *Ex parte Shmukler-Tshiko* 2013 JOL 29999 (GSJ) para 8; *Ex parte Arntzen* 2013 (1) SA 49 (KZP) para 13.
[43] Bertelsman et al Mars: The law of insolvency in South Africa (2008) 30.

sequestration order is granted, a collective procedure is initiated. The *concursus creditorum* is established, meaning that '… the rights of the general body of creditors have to be taken into consideration' over and above the interests of individual creditors'.[44] The concept of *concursus creditorum* is described in *Walker v Syfret* as the rights of the general body of creditors being managed in such a way as to prevent transactions entered into by a single creditor, as this may prejudice the rights of the general body, as the claim of each creditor must be addressed as it was at the time the order was issued.[45]

The sequestration order will only be granted if sequestration is to the advantage of creditors.[46] This matter is dealt with in more detail under the requirements for voluntary surrender and compulsory sequestration, but it is necessary to explain the concept here in order to contextualise the nature of insolvency proceedings.

Sequestration may only be enacted if it can be reasonably proved that the process will be to the advantage of the relevant creditors. As such, the advantage to creditors is a procedural prerequisite which must be reasonably presented in the application process. This premise is presented in *Meskin & Co v Friedman*[47] where the court emphasises the need for 'a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors'.[48]

The advantage to the relevant creditors is influenced by the size of the dividend, as a negligible amount is not to the creditors' benefit, when considering the cost of seeking a sequestration order.[49] In *Stratford and Others v Investec Bank Limited and Others*[50]

[44] *Walker v Syfret* 1911 AD 141 166. Hereinafter referred to as the *Walker* case.
[45] *Walker* case 166.
[46] Act 24 of 1936 sec 12(1)(c).
[47] 1948 (2) SA 555 (W) 559.
[48] *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) 68; *Ex parte Bouwer* 2009 (6) SA 382 (GNP) 386.
[49] *Absa Bank Ltd v De Klerk* 1999 (4) SA 835 (SE) 840; *Ex parte Anthony* 2000 (4) SA 116 (C) 121; *Niewenhuizen v Nedcor Bank Ltd* [2001] 2 All SA 364 (O) 367; *Ex parte Mattysen et Uxor* 2003 (2) SA 308 (T) 316; *Ex parte Kelly* 2008 (4) SA 615 (T) 617; *Ex parte Ogunlaja* 2011 JOL 27029 (GNP) para 9.
[50] [2014] ZACC 38; 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC). Hereinafter referred to as the *Stratford* case.

the Constitutional Court held that the correct procedure is guided by the *Friedman case* dicta, based on the principle of a pecuniary benefit to the creditors.[51]

The Constitutional Court in the *Stratford* case reaffirmed the principle that in order for sequestration to be to the advantage of the creditors, there should be a substantial estate which can be shared among the creditors. In *Ex parte Ford*,[52] where the size of the dividend was insufficient to be favourable to the creditors in question. As such, the court found the debt review would be reasonable and justifiable, as opposed to the voluntary surrender of the respective insolvent estates.[53] As debt review does not involve a discharge of debts, it proved more advantageous to the creditors in this case than sequestration.[54]

Contextually, in *Ex parte Ford,*[55] the applicant had amassed notable debt through credit agreements, as outlined in the National Credit Act. The Court noted that the debt was disproportionately high in relation to the applicant's income, creating the basis of the assumption of the credit having been recklessly granted, based on section 85 of the Insolvency Act.

In terms of the voluntary surrender of an estate, the Practice Manual of the Gauteng Division provides that in order for the applicant to establish the residue and render the sequestration advantageous to the creditors, the applicant, in his or her founding affidavit, must allege that he or she will have the cost of application R6000,00 or R8000,00.[56] Based on this, in case of the correspondent attorney being utilised an additional R700,00 should be reserved for cost in the events of postponement.[57] Furthermore, the Practice Manual of the Gauteng Division requires that a minimum of R2500,00 administration cost be reserved.

[51] *Stratford* case 45.
[52] 2009 (3) SA 376 (WCC).
[53] *Ex parte Ford* case 378-384.
[54] A Boraine & C Van Heerden 'To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgements' (2010) *PELJ* 112-113.
[55] *Ex parte Ford* case 378-384.
[56] Practice Manual of the Gauteng Division: Pretoria para 4.5.1.
[57] Practice Manual of the Gauteng Division: Pretoria para 4.5.2.

In addition to the above, paragraph 4.5.7 of the Practice Manual of the Gauteng Division provides that: [58]

> If the court hearing an application is doubtful whether the free residue in an insolvent estate will be sufficient to render a dividend of 20c in the Rand to concurrent creditors, it may order any shortfall of such dividend to be supplemented from the applicant's attorney's taxed fees in order to ensure that proven concurrent creditors receive at least 20% of their claims. The court may further order the applicant's attorney to inform all concurrent creditors by registered mail that a dividend of 20% of all proven claims has been guaranteed by such order.

The study does not consider the validity of these requirements in light of the *Stratford* case, but merely notes that this means that the bar has been set high for sequestration processes. An applicant cannot come to court with nothing, and this confirms the view of Coetzee that the sequestration process is only reserved for 'those who have'.[59]

2.3.2 Voluntary surrender

An applicant may only approach the court in a voluntary surrender application if the applicant qualifies as a debtor, defined in terms of section 2 of the Insolvency Act. The qualifying applicant may bring an *ex parte* application to any High Court that has jurisdiction to hear the application.[60] The application may also be brought by a *curator bonis* of a person who is incapable of managing his or her own estate, or even the executor of a deceased insolvent estate.[61] Spouses married in community of property must each participate in the voluntary surrender process, as, in terms of the Matrimonial Property Act,[62] spouses are required to act as equal managers of their joint estate.

Prior to presenting the application to court, the debtor must comply with the following requirements prescribed by statute:

[58] Practice Manual of the Gauteng Division: Pretoria para 4.5.1.
[59] H Coetzee 'Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African exposition' (2016) *International Insolvency Review* 42-43.
[60] Act 24 of 1936 sec 2, sec 3.
[61] Act 24 of 1936 sec 3(1).
[62] Act 88 of 1984 sec 17(4)(a). See also Nagel *et al* 520.

1. Publishing a notice of surrender in the Government Gazette and in a newspaper circulating in the debtor's residential district or, if the debtor is a trader, in the district where the principal place of business is situated;
2. Delivering or posting a copy of such notice to every one of the debtor's creditors whose address he or she knows or can ascertain, the relevant trade unions and employees if the debtor is an employer, and to the South African Revenue Services (SARS);[63]
3. Lodging a statement of the debtor's affairs at the Master's office or a Magistrates' Court depending on the circumstances.[64]

In terms of section 6(1) of the Insolvency Act, in *Trust Wholesalers and Woollens (Pty) Ltd v Mackan*, and *MacGillivray v Edmundson*, the respective courts indicated that it could accept the surrender of a debtor's estate and grant an order in this regard if it is satisfied that: [65]

> [There is] compliance with all the formalities prescribed in section 4 of the Insolvency Act; through factual insolvency of the debtor and sufficient assets in the free residue of the insolvent's estate to defray all the costs of the sequestration; [and that there is] objective advantage of sequestration to the debtor's creditors. Where it is clear, however, that the process of compulsory sequestration is abused in order to obtain a relief for the debtor only, the court is entitled to dismiss the order.

(i) Standard of proof

In a voluntary surrender application, the debtor must prove that he or she is indeed insolvent.[66] The test is whether a fair estimation of the debtor's liabilities proves to exceed a fair valuation of his or her assets.[67] Proof of an inability to pay debts merely constitutes a *prima facie* view and, in such circumstances, the onus of proof is now vested on the debtor to prove that his or her liabilities exceed his or her assets. In practice, the extent of the debtor's assets and liabilities is usually determined by reference to the statement of affairs. The court maintains discretionary power over the declaration of insolvency, and is thus not obligated to act in accordance with the valuations in the statement. As such, the court may declare a debtor insolvent even

[63] Act 24 of 1936 sec 4.
[64] Act 24 of 1936 sec 4.
[65] 1954 (2) SA 109 (N) 112; 1958 (3) SA 387.
[66] Act 24 of 1936 sec 6(1).
[67] Act 24 of 1936 sec 6(1).

where the statement or other evidence put forward by the debtor indicates that his or her assets exceed his or her liabilities.[68]

(ii) Free residue

Free residue is the balance remaining of the estate after secured creditors have been paid from the proceeds of secured assets. The proceeds generated from unencumbered assets may be applied in paying the remaining creditors in priority of the statutorily prescribed order of preference, as provided for in the Insolvency Act.[69] Any remaining balance is used to pay the unsecured or otherwise non-preferential (concurrent) creditors in proportion to their claims.[70] Where the free residue is not sufficient to cover the costs of sequestration, all creditors who proved claims against the estate must contribute toward these costs.[71] The non-preferent creditors must make contributions to the cost of proceedings relative to the size of their respective claims. Such secured concurrent creditors receive compensation for their claims from the free residue.[72] The statutory preferential creditors, defined in section 106(a)-(c) of the Insolvency Act are only liable to contribute to the cost of proceedings in exceptional circumstances.[73]

The applicant creditor must contribute to the cost of the proceedings regardless of whether the claim against the insolvent estate has been proven, as mandated in section 14(3) of the Insolvency Act. The size of the contribution regardless of the outcome of the application will not be less than the amount required in a successful application.[74]

The debtor must prove that he or she owns property that will generate sufficient proceeds to cover the sequestration costs, which are payable from the free residue of the estate.[75] Practice Manual of the Gauteng Division[76] indicates that the value of the free residue must be at least R22 800,00 to pay the costs of sequestration. However,

[68] *Ex parte Van den Berg* 1962 (4) SA 402 (O) 404.
[69] Act 24 of 1936 sec 96-103.
[70] Act 24 of 1936 sec 106(1)(a).
[71] Act 24 of 1936 sec 102.
[72] Act 24 of 1936 sec 97(1).
[73] Act 24 of 1936 sec, 14(3); sec 106.
[74] Evans (2008) 57-68.
[75] Act 24 of 1936 sec 6(1).
[76] Practice Manual of the Gauteng Division: Johannesburg 111.

it is necessary to take cognisance of the periodical adjustment of this amount, based on contextual mitigating circumstances. Regardless of potential adjustments, the costs of sequestration include the costs of the application and the general administration costs.[77]

(iii) Advantage to creditors

The courts are likely to grant an order for the sequestration of the debtor's estate only in circumstances where it is satisfied that to grant such an order will be to the advantage of the relevant creditors.[78] It should be noted, however, that the Insolvency Act does not provide for the definition of the word 'advantage to creditors'. As such, the courts have assigned different interpretations to the term 'advantage to creditors' in various judgements, as explored below.

In *Lotzof v Raubenheimer*[79] and *Meskin & Co v Friedman,*[80] the court granted sequestration orders based on the precedent set by Roper which addresses the reasonable prospect of a pecuniary benefit to creditors.

The court has also referenced *Fesi v ABSA Bank Ltd*[81] in this context, where it held that the failure by applicants to disclose their salaries, ownership of their motor vehicles, and rental properties was contrary to the requirements of the good faith and disclosure of material facts that are required in an *ex parte* application.[82] Furthermore, the court held that in any event, the applicants failed to prove that sequestration would be to the advantage of creditors, as it could not be known that 13 cents in the Rand that it was suggested would be received by each creditor, would be to the advantage of creditors in circumstances where the salaries and rental income were not included.[83]

It may be argued that, even though the court has discretion where the legislation is not at place, in addition to its duty to develop common law – in terms of section 39(2) of the Constitution – the court has no actual authority to formulate a definition when the

[77] Act 24 of 1936 sec 97, para 5.5.
[78] Act 24 of 1936 sec 6(1), 10(c), 12(c).
[79] 1959 (1) SA 90 (O) 94.
[80] 1948 (2) SA 555 (W) 559.
[81] 2000 (1) SA 499 (C). Hereinafter referred to as the *Fesi* case.
[82] *Fesi* case para H-I 503.
[83] *Fesi* case para G-H 504.

legislation does not provide one.[84] Therefore, this presents an instance of potential interference with the legislatures' duties. If the court is of the opinion that the legislation is lacking in definitional elements, the matter should be referred to Parliament for an amendment to the legislation in question.

Roestoff and Coetzee[85] expand on the judgment made in *Ex parte Ogunlaja* by arguing that sequestration is not intended to serve as debt relief, citing the requirement of the sequestration being advantageous to creditors. In this regard, Bertelsmann remarks that the principle of proving an advantage to creditors prior to sequestration will prevail until the amendment of South African insolvency law, as the law currently prioritises the protection of creditors' interests.[86]

It is noteworthy that the Law Reform Commission supports the retention of the advantage to creditors requirement.[87]

(iv) Discretion of the court

The court maintains discretionary power to dismiss the application regardless of whether the procedural requirements have been met.[88]

2.3.3. Compulsory sequestration

A compulsory sequestration application is brought by the creditor or creditors by way of notice of motion and a founding affidavit. The court may grant a provisional order for compulsory sequestration if it holds a *prima facie* view that firstly, the debtor owes the creditor in respect of a liquidated claim of at least R100,00[89] (or two or more creditors have in the aggregate liquidated claims for at least R200,00); secondly, the debtor has committed an act of insolvency as provided for in section 8 of the Insolvency Act or is factually insolvent;[90] and thirdly, that there is reason to believe

[84] Evans (2008) 81.
[85] M Roestoff & H Coetzee 'Consumer debt relief in South Africa: Lessons from America and England, and suggestions for the way forward' (2012) *SA Merc LJ* 24.
[86] *Ex parte Ogunlaja* 2011 JOL 27023 (GNP) para 36.
[87] In 2000, the South African Law Commission published an insolvency law review, wherein the draft of the '2000 Insolvency Bill' and '2000 Explanatory Memorandum' were presented.
[88] Act 24 of 1936 sec 6(1).
[89] The exchange rate is approximately R3,66 Rand to AUS$1,00.
[90] Act 24 of 1936 sec 8.

that it will be to the advantage of creditors if the debtor's estate is sequestrated. Due to the wording in the Insolvency Act, it is generally accepted that it is easier to prove the advantage to creditors in the case of compulsory sequestration than in the case of voluntary surrender.[91]

The application must be accompanied by a certificate of the Master given not more than ten days before the date of such application. The certificate should provide a statement to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of the proceedings, as well as the estate administration until the appointment of a trustee.[92] The debtor, relevant trade unions, and employees (if the debtor is an employer), as well as the South African Revenue Services (SARS) must also obtain a copy of the application prior to the court hearing.[93] If all the requirements prescribed by the Insolvency Act are proved, the court should grant the order. After the service of the provisional order on the debtor, the court may grant a final order of sequestration if it is satisfied that the requirements are met.[94]

(i) Security for costs

The sequestrating creditor is required to pay all the procedural fees due prior to the appointment of a trustee. These fees are payable to the Master of the High Court. If no trustee is appointed, the sequestrating creditor is liable for the total fee necessary for the discharge of the estate from sequestration.[95] The Master, upon receipt of the security, will issue a certificate confirming that the security has been given, and this is issued no more than ten days before the application for sequestration. The certificate must be available at the hearing.[96]

[91] Evans (2008) 81; See also R Krüger The South African Constitutional Court and the rule of law: The Masethla judgment, a cause for concern (2010) PER/PELJ 13(3) 468-508.
[92] Act 24 of 1936 sec 14(3).
[93] Act 24 of 1936 sec 9(4A)(a)(i)-(iv).
[94] Act 24 of 1936 sec 8-12.
[95] Act 24 of 1936 sec 9(3)(b).
[96] Standard Bank of South Africa v Bester NO 1995 (3) SA 123 (A).

(ii) Furnishing a copy of the application to interested parties

Section 9(4A) of the Insolvency Act requires the applicant to furnish a copy of the application to the debtor.[97] Previously, the debtor was not served a mandatory notice, and currently, the debtor may not receive the respondent order based on the urgency of the matter.[98] This is particularly relevant in cases where the loss of assets will be so significant as to be irreparable. It is vital that the debtor be made aware of this risk in due time of the application being made to the court.[99]

Section 9(4A)(a)(i)-(ii) of the Insolvency Act highlights the necessity of the applicant providing a copy of the application to every contextually relevant registered trade union that represents any of the debtor's employees, and to the South African Revenue Service.[100]

(iii) The commission of an act of insolvency

The applicant creditors' case may be based either on the debtor's actual insolvency, or an act of insolvency committed proving that the debtor's liabilities exceed his or her assets. This proof is not commonly available, and, as such, the commission of an insolvency act may be used in the sequestration application. Consequently, the legislature has designated certain behaviour or actions by a debtor as acts of insolvency: [101]

1. the debtor leaving the Republic;
2. the debtor being outside the Republic;
3. the debtor remaining absent therefrom;
4. the debtor departing from his or her dwelling;
5. the debtor absenting himself or herself 'with intent to evade or delay the payment of his [or her] debts'.

[97] Act 24 of 1936 sec 9(4A)(a)(i)-(iii).
[98] Act 24 of 1936 sec 9(4A)(a)(iv).
[99] Uniform Rules of Court, rules 6(2), 6(5).
[100] Standard Bank of South Africa v Sewpersadh 2005 (4) SA 148 (C).
[101] Kunst *et al Insolvency Law* (1997) para 2.1.2.1.

The meaning of each of the abovementioned acts of insolvency is that a debtor, through its conduct, has the intention to evade or delay the payment of the debt.[102]

If the sequestrating creditor can prove, to the satisfaction of the court, that the debtor has committed one of the acts of insolvency listed in section 8(a) to (h) of the Insolvency Act, then it will not be necessary to prove the actual insolvency of the debtor.[103] It should be noted that an act of insolvency needs not be committed *vis-à-vis* the sequestrating creditor.[104]

A practical problem often exists where a creditor has to prove that the debtor is factually insolvent. The creditor will often have to rely on indirect evidence, such as the debtor dishonouring a cheque or, the debtor's request for an extension of time to pay. Factual insolvency may be established, directly or indirectly, as noted in *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd & others*, and *in Cohen v Jacobs (Stand 675 Dowerglen (Pty) Ltd intervening)*.[105] It will be established directly when evidence of the debtor's liabilities and the market value of his or her assets are provided, and indirectly by evidence of facts and circumstances from which the inference of insolvency is fairly and properly deducible.[106]

(iv) Advantage to creditors

Before a court grants a final compulsory sequestration order, it must be satisfied that there is reason to believe that the debtor's sequestration will be to creditors' advantage. In this context, the term 'creditors' comprises all creditors, or at least the general body of creditors. The question is whether a substantial enough number of creditors, determined according to the value of the claims, will be advantaged by sequestration.[107]

The creditor who makes the sequestration application is required to prove that the sequestration meets the advantage to creditors requirement, even where the debtor

[102] Kunst *et al Insolvency Law* (1997) para 2.1.2.1.
[103] *De Villiers NO v Maursen Properties* (Pty) Ltd 1983 (4) SA 670 (T) 676.
[104] Sharrock et al Hockly's Insolvency law (2022) 35.
[105] 1993 (4) SA 436 (C) 443; [1998] 2 All SA 433 (W) 443. See also Nagel *et al* 527.
[106] Sharrock *et al* 42. See also Nagel *et al* 527.
[107] Sharrock *et al* 43.

has committed an act of insolvency.[108] Voluntary surrender applications do not carry such a strict onus on the part of the creditor, as voluntary surrender requires that tangible evidence be offered in support of the of the advantage to creditors requirement. Tangible proof therefore mitigates the need for the creditors to demonstrate the advantage on their own behalf. The onus of proof in compulsory sequestration procedures requires that the creditor can demonstrate a reasonable prospect of advantage of creditors if the debtor's estate is sequestrated.[109] The burden will be heavier if there is only one creditor, as the argument then extends to the need for sequestration as opposed to an individual collection or execution process.[110]

In order for the insolvent debtor to enter into the sequestration process, there is a potentially unreasonable expectation which burdens the very same debtor, as the required monetary amount may exceed the means of many South African citizens.[111] The Practice Manual of the Gauteng Division for Pretoria addresses sequestration and voluntary surrender of the estate. In order for the applicant to establish the residue and that the sequestration would be to the advantage of the creditors, in his founding affidavit the applicant must allege that he will have the cost of application R6 000,00 or R8 000,00[112] in case of the correspondent attorney being utilised. A further R700,00 should be reserved for costs in the events of postponement.[113] Furthermore, it is noted that there is a minimum administration cost of which is reserved at the onset of the process.[114] To that end, the Practice Manual of the Gauteng Division for Pretoria further presents that:

> If the court hearing an application is doubtful whether the free residue in an insolvent estate will be sufficient to render a dividend of 20c in the Rand to concurrent creditors, it may order any shortfall of such dividend to be supplemented from the applicant's attorney's taxed fees in order to ensure that proven concurrent creditors receive at least 20% of their claims. The court may further order the applicant's attorney to inform all concurrent creditors by registered mail that a dividend of 20% of all proven claims has been guaranteed by such order.

[108] *Wilkens v Pieterse* 1937 CPD 165.
[109] Sharrock *et al* 17.
[110] Act 24 of 1936 sec 6(1), sec 10(c), sec 12(1)(c).
[111] Coetzee 42-43.
[112] Para 4.5.1.
[113] Para 4.5.2.
[114] North Gauteng Practice Manual 90-92.

(v) Provisional sequestration

The sequestrating creditor must approach the court twice, firstly, to obtain the provisional sequestration order, [115] and then subsequently to have the provisional order confirmed.[116] On each occasion, the creditor must adhere to procedural requirements and present proof of the advantage to creditors requirement being met.[117]

The initial, provisional proceedings require that the court find in favour of sequestration on a *prima facie* basis.[118] At the final stage, the court must be satisfied that those requirements are proved on a balance of probabilities.[119] It must be noted that a final order cannot be granted without a provisional order as the legislation does not provide for direct access to a final order. Therefore, if the provisional order granted is nullified for any reason, the same will happen to the final order, as evidenced in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*.[120]

(vi) Final sequestration

The sequestrating creditor bears the onus of proving the requirements stated above on the return day. Procedural requirements comprise the appearance of the applicant creditor's legal representative to request that the provisional order of sequestration be made final. The date of sequestration is thereafter the date upon which the provisional sequestration order was granted, and not the date upon which the final sequestration order was granted.[121]

2.3.4. Discretion of the court

The court maintains discretionary power to grant or refuse the final sequestration order, regardless of whether the requirements have been established on a balance of probabilities. In *Julie Whyte Dresses (Pty) Ltd v Whitehead*, it was noted that the court

[115] Act 24 of 1936 sec 10.
[116] Act 24 of 1936 sec 12.
[117] Sharrock *et al* 17; 41; 43.
[118] Sharrock *et al* 43.
[119] Sharrock *et al* 43.
[120] 1996 (3) SA 1 (A) 9-10.
[121] Sharrock *et al* 57.

has an overriding discretion, to be exercised upon a consideration of all the circumstances pertinent to the case.[122]

2.3.5. Cost of proceedings

In sequestration proceedings, should the applicant succeed, then the costs are paid out of the estate's free residue.[123] If the free residue cannot cover the cost of the application in full, then the applicant is required to make a contribution, whether or not he or she has proved his or her claim.[124] However, in terms of the cost order, the court has the discretion to award costs as it deems appropriate.[125]

2.4 Rehabilitation and offences

An insolvent debtor will automatically be rehabilitated after ten years calculated from the date of sequestration.[126] The debtor may also be rehabilitated by means of a court order. The Insolvency Act provides for various conditions and different time limits before the debtor may apply for his or her rehabilitation, but the debtor generally waits at least four years to undertake the rehabilitation process.[127]

Where no creditors have proven any claims against an insolvent debtor's estate, the insolvent debtor may apply for rehabilitation within six months of sequestration. Only natural persons (individuals) who are sequestrated qualify for rehabilitation in terms of the Insolvency Act.

Subject to any conditions imposed by the court, rehabilitation ends sequestration, discharges all the insolvent debtor's pre-sequestration debts (other than those arising out of any fraud committed on his or her part), and relieves the insolvent debtor of every disability resulting from sequestration.[128]

[122] 1970 (3) SA 218.
[123] Act 24 of 1936 sec 97.
[124] Act 24 of 1936 sec 14(3).
[125] Nagel *et al* 535.
[126] Act 24 of 1936 sec 127A.
[127] Act 24 of 1936 sec 124.
[128] Nagel *et al* 35; 79; 613. Sharrock *et al* para 19.3, 217.See also Act 24 of 1936 sec 129(1).

2.5 Friendly sequestrations

An application for compulsory sequestration brought by a creditor when there is no security, nor evidence of the debt being paid is understood to be 'friendly sequestration'.[129] In *Craggs v Dedekind and others*,[130] Conradie described a friendly sequestration as follows:

> Friendly sequestrations seem to share certain characteristics. Although, like pornography, they may be hard to define, they are easy to recognise. The debt which the sequestrating creditor relies upon is almost always a loan. It is usually quite a small loan, very often made in circumstance where it would have been apparent to the whole world that the respondent was in serious financial difficulty. Despite this, the loan is customarily made without security of any sort. It is seldom evidenced by a written agreement, or even subsequently recorded in writing. The only writing that is produced to the court is the letter stating, with appropriate expressions of dismay that the debt cannot be paid, and, sometimes, for good measure, setting out details of the respondent's assets of liabilities. Very often debtor and creditor are related: fathers commonly sequestrate sons, wives sequestrate husbands and sweethearts sequestrate each other, without, I am sure, any damaging effect on their relationship.

Friendly sequestration applications are generally based on an act of insolvency in terms of section 8(g) of the Insolvency Act.[131] A debtor commits an act of insolvency in terms of section 8(g) where he or she gives written notice to any of his or her creditors that he or she is unable to pay all or any of his or her debts.[132] Therefore, the debtor's commission of this act of insolvency allows for the creditor to apply for compulsory sequestration proceedings against the debtor. It must be noted that the act of insolvency-requirement in compulsory sequestration proceedings is one of the requirements that the creditor needs to prove, in addition to the requirement to show advantage to creditors.[133]

In practice, a friendly sequestration is brought by a friend or a relative who claims against the debtor. The onus then falls on the debtor to make a notice in terms of section 8(g) of the Insolvency Act that, the debtor does not have sufficient assets to

[129] Sharrock *et al* 45.
[130] 1996 (1) SA 935 (C) 937.
[131] Nagel *et al* 531.
[132] Evans (2018) 300.
[133] Sharrock *et al* 17; 41; 43; 45. See also Evans (2018) 300.

pay the creditor. Following this notice, the creditor will approach the court for sequestration of the debtor in terms of section 8(g) of the Insolvency Act, on the basis that the debtor has committed an act of insolvency.[134]

Due to the close-range relationship between the applicant and the debtor in friendly sequestration, the court has put in place exceptionally stringent rules which aim to manage the separation of powers in terms of the legislative and judicial branches of government. This has been explored in literature and case law, to ascertain the extent of the boundaries which may be crossed in the attempt to manage the separation of powers. In the literature, in particular the Practice Manual of the South Gauteng Division, sets out the following requirements in order to succeed on the relief of friendly sequestration:

> Sufficient proof of the existence of the debt which gives rise to the application must be provided. The mere say so of the applicant and the respondent will generally not be regarded as sufficient.
>
> The respondent's assets must be valued by a sworn appraiser on the basis of what the assets will probably realise on a forced sale. Mere opinions, devoid of reasoning as to what the assets will probably realise, will not be regarded as compliance herewith. The valuation must be made on oath and the appraiser must be qualified as an expert witness in the normal manner.
>
> Where the applicant seeks to establish advantage to creditors by relying on the residue between immovable property valued as aforesaid and the amount outstanding on a mortgage bond registered over the immovable property, proof of the amount outstanding on the mortgage bond at the time of the launching of the application is required. The mere say so of the applicant and the respondent will generally not be regarded as sufficient.
>
> Where the applicant seeks to establish advantage to creditors by relying on a sum of money paid into an attorney's trust account to establish benefit for creditors, an affidavit by the attorney must be attached to the application in which he confirms that the money has been paid into his trust account and will be retained there until the appointment of a trustee.[135]

It must be noted that the requirements noted above have not been taken from the Insolvency Act. However, the North Gauteng Practice Manual also sets out requirements which are not taken from the Insolvency Act, which may also then overstep the boundaries of the separation of powers in friendly sequestration. The

[134] Nagel *et al* 33; 62; 531.
[135] Signed by Judge President Mlambo in October 2018, paras 5.1-5.4.

purpose of the Practice Manual was clarified by the Supreme Court of Appeal (SCA) in *Ex parte The National Director of Public Prosecution*.[136] In the aforementioned judgment, the SCA held that the practice directive is subordinate to any relevant statute.[137] Furthermore, the court held that the practice directive essentially is to manage the day-to-day function of the court, and it should not supplement the legislation or uniform rules.[138]

In support of the case noted above, in *Vermeulen v Hubner*,[139] Van Dijkhorst J held that debtors in cooperation with creditors abuse the procedure of friendly sequestration. To address this, the court prescribed formalities similar to those applied in voluntary surrender. However, the *Vermeulen* judgment was criticised by Flemming in *Sellwell Shop Interiors v Van der Merwe,*[140] as it was stated that a court is not empowered to overturn or extend the existing legislature. This was based on reference to *Klemrock (Pty) Ltd v De Klerk, Epstein v Epstein*, *Craggs v Dedekind*, *Van Rooyen v Van Rooyen*; *Esterhuizen v Swanepoel,* and *Brinkman v Botha & Others*.[141]

In *Klemrock (Pty) Ltd v De Klerk*[142] Nicholas J noted that friendly sequestrations must be closely scrutinised by the court 'for it must be satisfied that this form of sequestration has not been resorted to by design and as a device simply to bypass creditors and prevent them from enforcing their rights'. Based on *Dunlop Tyres (Pty) Ltd v Brewitt*, the court refused to countenance a friendly sequestration unless it was fully satisfied of 'a valid and subsisting indebtedness … an underlying transaction … that the indebtedness remains [and a] clear and unequivocal proof of advantage to creditors'.[143]

In *Meskin & Company v Freidman*[144] Roper stated:

[136] (905/2017) [2018] ZASCA (86). Hereafter referred to as the *NDPP* case.
[137] *NDPP* case para 31.
[138] *NDPP* case para 31.
[139] Case number 1165/1990 (T) (unreported). Hereafter referred to as the *Vermeulen* case.
[140] Case number 27527/1990 (W) (unreported).
[141] 1973 (3) SA 925 (W); 1987 (4) SA 606 (C); 1996 (1) SA 935 (C); [2002] 2 All SA 485 (SE); 2004 (4) SA 89 (W); [2004] JOL 13093 (C).
[142] 1973 (3) SA 925 (W) para 3.
[143] [1999] JOL 4663 (W) 3.
[144] 1948 (2) SA 355 (W) para 5.

> In my opinion the facts put before court must satisfy itself that there is a reasonable prospect, not necessarily a likelihood but a prospect which is not too remote, that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient.

In *R v Meer*[145] the court held that in order to avert and guide against the abuse of the friendly sequestration procedures, the court should pay more attention to the following two elements:

> … firstly, by paying more regard to the element of advantage to creditors in the petition, especially in cases which savour of friendly sequestration under section 8(g); [and] secondly, by refusing to grant repeated adjournments of the *rule nisi* unless satisfied, on affidavit, that such would be to the advantage of creditors.

These elements which have been added as requirements for friendly sequestrations in the above matters are not part of legislation. This is, in my opinion, a clear intrusion with the duties of the legislatures.

In the case of *Mthimkhulu v Rampersad and another (BOE Bank Ltd intervening)*[146] it was noted that there is required compliance with seven requisites before a friendly sequestration order should be granted. The presiding judge insisted that there must be, *inter alia*,[147]

> … sufficient proof of the debt in the form of a paid cheque, documentation evidencing withdrawal from a savings account or a deposit into the respondent's account at or about the time the respondent is said to have received the money and (r)easons must be given for the fact that the applicant has no security for the debt. A Court is naturally suspicious of an unsecured loan being made to a debtor at a time when he was obviously in dire financial straits.

This study posits that in protection of the abuse of the sequestration process through the friendly sequestration, the court has usurped the powers of the legislature by setting up rules and practice directives which are not legislated in order to prevent the abuse of friendly sequestration. The cases quoted above are a typical example of the

[145] [1957] 3 All SA 193 (N) para 198.
[146] [2000] 3 All SA 512 (N). Hereinafter referred to as the *Mthimkhulu* case.
[147] *Mthimkhulu* case para 517.

court usurping the powers of the legislature, disregarding the doctrine of separation of powers.

2.6 The effects of sequestration

The immediate effect of the sequestration order is that the insolvent person loses control of his or her estate. The estate vests with the Master of the High Court until an appropriate trustee is appointed.[148] Once the insolvent debtor has been notified of the final sequestration order, and also his or her spouse if they are married out of community of property, they are required to lodge statements of affairs with the Master of the High Court within a period of seven days after receipt of the notice.[149] The insolvent debtor must hand over all documents and records pertaining to his or her affairs which have not been taken by the Sheriff of the Court in terms of section 19 of the Insolvency Act.[150]

'Property' is defined, in section 2 of the Insolvency Act, to mean movable or immovable property situated anywhere within the Republic, and includes contingent interests in property other than the contingent interests of a *fideicommissary* heir or legatee.[151] As noted in *Bank of Lisbon and South African Ltd v The Master* and *Le Roux v Viana NO,* 'movable property' comprises every kind of property and every right or interest which is not immovable property (including incorporeal rights),[152] while 'immovable property' is defined as land and every right or interest in land or minerals which is registrable in any office in the Republic intended for the registration of title to land or the right to mine.[153]

In brief, the insolvent estate includes all property, movable or immovable, owned by the insolvent debtor at the date of sequestration and all property subsequently acquired after sequestration. There are separate rules that apply to property situated

[148] Act 24 of 1936 sec 20(1)(a). See also Nagel *et al* 540.
[149] Act 24 of 1936 sec 16(2)(b).
[150] Act 24 of 1936 sec 16(2)(a). See also Nagel *et al* 540.
[151] See *Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (W) 805 for the meaning of 'contingent interest' in this context. It does not include an interest that is dependent on a third party choosing whether to give something at a future date. On 'property', see *Estate Botha v Estate Nel and Botha* 1936 NLR 619; *De Villiers NO v Kaplan* 1960 (4) SA 476 (C) 479; *Wasserman v Sackstein NO* 1980 (2) SA 536 (O).
[152] 1987 (1) SA 276 (A) 285; 2008 (2) SA 173 (SCA).
[153] Act 24 of 1936 sec 2; *Van Zyl NNO v Turner NO* 1998 (2) SA 236 (C) 242.

in a foreign jurisdiction – under these circumstances, the rules of private international law apply.[154]

Certain assets are excluded or exempted from sequestration, primarily comprising the insolvent debtor's essential means of subsistence. This broadly includes clothes, bedding, the whole or part of his or her household furniture, tools, and other assets as determined by the Master or the relevant creditors.[155] Further exemptions may apply in terms of

1. property held in trust by the insolvent debtor in his or her capacity as trustee, which is protected by section 12 of the Trust Property Control Act 57 of 1988;
2. the full amount of the benefits of life insurance policies as determined by section 63 of the Long-Term Insurance Act 52 of 1998;
3. pension benefits;[156]
4. compensation for loss or damage suffered because of defamation or personal injury;[157] and
5. salary or wages earned after sequestration, in so far as such money is needed for the support of the insolvent and his dependants.[158]

2.7 Spouses

In respect of marriage in community of property, both spouses are insolvent debtors as the joint estate is sequestrated. In circumstances where spouses are married out of community of property or are cohabiting without being legally married, it would appear that the only estate that is affected by the sequestration order is the insolvent debtor's estate. However, in terms of section 21 of the Insolvency Act, both of the spouses' property vests in the Master of the High Court, and ultimately in the trustee, subject to certain conditions which are outlined in section 21(2) of the Insolvency Act.[159] Section 21(2) reads as follows:

> The trustee shall release any property of the solvent spouse which is proved –

[154] Nagel *et al* 10.
[155] Act 24 of 1936 sec 82(6).
[156] Act 24 of 1936 sec 23(7).
[157] Act 24 of 1936 sec 28(8).
[158] Act 24 of 1936 sec 23(5), 23(9).
[159] Act 24 of 1936 sec 21(1), 21(2).

(a) to have been the property of that spouse immediately before her or his marriage to the insolvent or before the first day of October, 1926; or
(b) to have been acquired by that spouse under a marriage settlement; or
(c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent; or
(d) to be safeguarded in favour of that spouse by section twenty-eight of this Act; or
(e) to have been acquired with any such property as aforesaid or with the income or proceeds thereof.

Should the solvent spouse fail to meet the above requirements, then the property will vest permanently in the trustee and be available to pay the creditors of the solvent, and then the insolvent, estate.[160]

2.8 Civil proceedings and execution

As a rule, civil proceedings instituted by or against the insolvent debtor's estate will be suspended until a trustee is appointed in terms of section 20(1)(b) of the Insolvency Act. Such matters may proceed after the appointment of a trustee, unless the trustee acknowledges, or settles the debt, or submits the dispute to arbitration.[161] Unless the court directs otherwise, execution of any pre-sequestration judgment is stayed in terms of section 20(1)(c) of the Insolvency Act. The Sheriff may, therefore, not continue with any sales in execution of attached assets and, where estate assets have already been sold, the proceeds will become part of the insolvent estate assets.

2.9 Voidable dispositions and related remedies

The appointed trustee may take legal action to set aside any improper disposition of property made by the insolvent debtor prior to the sequestration of the debtor's estate. The trustee may rely on the common law action of *Actio Pauliana*, if any alienation defrauded or prejudiced the creditors,[162] or he or she may rely on the provisions of the Insolvency Act.[163] If the trustee fails to institute an action, any creditor may do so in the name of the trustee, and indemnify the trustee against all costs.[164]

[160] Kunst *et al* para 21.
[161] Act 24 of 1936 sec 75, sec 78.
[162] A Boraine 'Towards codifying the Actio Pauliana' (1996) *SA Merc LJ* 213.
[163] Act 24 of 1936 sec 26-33.
[164] Act 24 of 1936 sec 32(1).

All the transactions referred to in the Insolvency Act address 'dispositions' of rights to property as defined in section 2 of the Insolvency Act.[165] The Insolvency Act provides for the following categories of voidable dispositions: dispositions without value; voidable preferences; and undue preferences and collusion.[166]

The Draft Insolvency Bill proposes the introduction of special rules for dispositions made to associates. Associates are conceptualised and operationally defined as persons incompetent to acquire property from insolvent estates.[167] The Bill further proposes the introduction of time limits in cases of dispositions without value and undue preferences, and proposes a new definition of the term 'disposition',[168] which means any transfer or abandonment of rights to property and includes a sale, mortgage, pledge, delivery, payment, release, compromise, donation, suretyship or any contract therefor. Commentary was invited on the question of the introduction of a presumption of insolvency for the purposes of voidable dispositions, closing on 8 February 2019.[169]

2.10 Unexecuted contracts

The contractual obligations of parties are not voided or terminated due the sequestration of one of the contracted parties.[170] The interests of the general body of creditors take precedence over the interests of an individual creditor due to the *concursus creditorum*. A trustee may thus elect to perform contractually obligated duties, but he or she should act in the best interests of the creditors.[171]

In *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd*, it was demonstrated that a trustee's decision not to perform in terms of the contractual obligations constitutes a breach of contract, namely repudiation.[172] The solvent party will usually accept the repudiation by cancelling the contract whereafter

[165] The definition of 'disposition' is very wide and includes any transfer or abandonment of rights to property. See Sec 1.
[166] Sec 26-31, sec 46.
[167] SALRC Report Draft Insolvency Bill cl 18, cl 20, cl 83.
[168] SALRC Report Draft Insolvency Bill cl 18(1), cl 20(1).
[169] SALRC Report Draft Insolvency Bill cl 81-82.
[170] Nagel *et al* 556.
[171] Evans (2008) 198.
[172] 1988 (2) SA 546 (A) 45.

he or she will then be entitled to recover the property in which he or she retained ownership.[173] In respect of payments made by the solvent party, and damages suffered as a result thereof, the solvent party merely has an unliquidated concurrent claim.[174]

Furthermore, the Labour Relations Act addresses the sequestration of the estate of an employer in such a manner as to address service contracts being suspended.[175] Such contracts may either be transferred to the new business owner, as stipulated in section 197A of the Labour Relations Act[176], or the contracts will finally terminated as provided for by section 38 of the Insolvency Act. In the latter case, the employee is entitled to claim compensation from the insolvent estate for any loss suffered in the event of termination. Although employees are entitled to unemployment insurance fund payments during the period of suspension of their contracts of employment, South African law does not provide for a fund that would compensate employees for salary in arrears in the case of insolvency of the employer.[177] Instead, employees may claim compensation up to R12 000,00 for salary or wages not exceeding three months' compensation due prior to the date of sequestration.[178] Claims which exceed these limits are of a concurrent nature. If the business or undertaking of such an insolvent employer is transferred to a new owner as a going concern, the contracts of service are automatically transferred in terms of section 197A of the Labour Relations Act.[179]

[173] Nagel *et al* 554-557.
[174] SALRC Report Draft Insolvency Bill cl 62(4)(e), cl (11).
[175] Act 24 of 1936 sec 35-38; sec 84. See also S van Eck & A Boraine 'The insolvency and labour package: how successful was the integration' (2003) *ILJ* 1840.
[176] Act 66 of 1995.
[177] Nagel *et al* 567.
[178] Act 24 of 1936 sec 98A.
[179] Act 24 of 1936 sec 38, sec 98A.

2.11 Alternative mechanisms

2.11.1 Administration orders

Administration orders are regulated by section 74 of the Magistrates' Courts Act.[180] These orders comprise a rescheduling of payment, where the debtor is financially over-committed.[181] In *Madari v Cassim,*[182] Caney J accurately described the nature of these orders:

> Administration orders under sec. 74 of the Magistrates' Courts Act have been described, I think correctly, by the learned authors of Jones and Buckle on the Civil Practice of the Magistrates' Courts, as a 'modified form of insolvency'. This is designed, it seems to me, as a means of obtaining a *concursus creditorum* easily, quickly and inexpensively, and is particularly appropriate for dealing with the affairs of debtors who have little assets and income and genuinely struggle to cope with financial misfortune which has overtaken them. Creditors have certain advantages under such an order, including the appointment of an independent administrator and the opportunity of examining the debtor. They are not debarred from sequestrating the debtor if the occasion to do so arises.

Administration orders aim to facilitate procedural expedition when a debtor is unable to satisfy a judgment debt, or to meet his or her financial obligations, and in the instance where he or she does not have sufficient assets to satisfy a judgment or obligations.[183] Administration orders require that total amount of all debts due should not exceed the amount determined by the Minister, and be published by notice in the Government Gazette.[184] This amount is currently set at R50 000,00.[185]

The process of obtaining an administration order comprises an application to the Magistrates' Court,[186] seeking an order for the administration of the estate and payment of debts in a manner affordable to the debtor, such as in instalments,[187]

---

[180] Act 32 of 1944 (hereinafter referred to as the MCA).
[181] A Boraine & M Roestoff 'Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform (1)' (2014) *Journal of Contemporary Roman-Dutch Law* 357-358.
[182] 1950 (2) SA 35 (D) 38.
[183] MCA, sec 74(1)(a).
[184] MCA, sec 74(1)(b).
[185] GN R217 in GG 37477 of 27 March 2014. See H Coetzee 'A comparative reappraisal of debt relief measures for natural person debtors in South Africa' unpublished LLD thesis, University of Pretoria, 2016.
[186] MCA, sec 74A(1).
[187] MCA, sec 74(1).

coupled with a full statement of affairs.[188] A hearing then takes place wherein the court considers the request to grant an administration order.[189] If granted, an administrator is appointed[190] and the amount that the debtor is obligated to pay to the administrator is set.[191]

The debtor may be questioned about his or her assets, liabilities, and present and future income, in addition to the debtor's spouse's income. Furthermore, the debtor may be questioned about his or her standard of living and possibilities of economising.[192] Creditors may not generally commence enforcement proceedings for an outstanding debt once the order is in place,[193] and if such proceedings have been instituted, they will be suspended by the administration order.[194] The appointed administrator will ensure ordered payments are paid to the relevant creditors at least once every three months.[195] In certain circumstances, the court may authorise the conversion of an asset into cash to cover the procedural costs.[196] Once the costs of administration and listed creditors have been paid in full, the administrator lodges a certificate with the Clerk of the Court, whereupon the order lapses.[197]

2.11.2 Debt review

The National Credit Act[198] introduced measures to prevent overspending by consumers and, more importantly, to prevent money lenders from lending money to consumers who cannot afford either to pay the loan amount, or the interest on the loan. In particular, the NCA introduced the concepts of 'over-indebtedness' and 'reckless credit'. Section 86 of the NCA provides for a specific debt relief measure known as debt review or debt counselling to address the aforementioned concepts. The Supreme Court of Appeal in *Collett v FirstRand Bank Ltd*[199] found that 'the

[188] MCA, sec 74A(1), sec 74A(2).
[189] MCA, sec 74C.
[190] MCA, sec 74E.
[191] MCA, sec 74C(1)(a).
[192] MCA, sec 74B(1)(e).
[193] MCA, sec 74P(1).
[194] MCA, sec 74P(2).
[195] MCA, sec 74J.
[196] MCA, sec 74K.
[197] MCA, sec 74U.
[198] Act 34 of 2005 (hereafter referred to as the NCA).
[199] 2011 (4) SA 508 (SCA) 514.

purpose of the debt review is not to relieve the consumer of his [or her] obligations but to achieve either a voluntary debt re-arrangement or a debt re-arrangement by the Magistrates' Court'.

Debt review commences when the consumer applies to a debt counsellor for an evaluation to determine whether the consumer is over-indebted.[200] The debt counsellor must then determine whether the consumer is over-indebted.[201] If a consumer is found to be over-indebted, the debt counsellor must recommend to the Magistrates' Court that the consumer's obligations be re-arranged,[202] or request that the Court declare one or more of the credit agreements to be reckless credit.[203] In *National Credit Regulator v Nedbank Ltd and Others,*[204] it was determined that a debt counsellor who refers a matter to the Magistrates' Court in terms of section 86(7)(c) and 86(8)(b) of the NCA has a duty appear in support of restructuring process.

Once the Magistrates' Court has made an order rescheduling the consumer's debt, the consumer must act in accordance with the order. A credit provider may terminate a debt review if the consumer does not abide by the debt review order and may then proceed to enforce the debt.[205] Debt review does not offer a discharge to the consumer – section 3(g) of the NCA specifically states that one of the purposes of the Act is to 'provide[…] mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations'.

2.11.3 Developments in debt relief

While this study does not examine general debt relief mechanisms, they form part of the investigation into the constitutionality of insolvency law, as the loss of an insolvent debtor's estate comprises the discharge of unpaid pre-sequestration debts. It must be noted, however, that the concept of debt relief is relevant to the study inasmuch as there may be options available to debtors that are preferred by creditors, because they

[200] NCA, sec 86.
[201] NCA, sec 86(6); Regulations in terms of the National Credit Act 34 of 2005. No 489 of 31 May 2006, reg 24(6).
[202] NCA, sec 86(7)(c)(ii).
[203] NCA, sec 86(7)(c)(i).
[204] 2009 (4) SA 505 (GNP).
[205] NCA, sec 86(10). See M Roestoff & H Coetzee 'Consumer debt relief in South Africa: lessons from America and England and suggestions for the way forward' (2012) *SA Merc LJ* 67-68.

do not involve a discharge to debt. In *Ex Parte Ford*,[206] the court was faced with three separate applications for voluntary surrender on an unopposed basis. The court observed the similarities in these three applications and noted that the liabilities of the applicants comprised of debt owed to financial institution, loans, and overdraft – all of which are covered by the NCA.[207] As a result, the court held that the more appropriate mechanism to use was the NCA rather than the sequestration process.[208] The court refused to grant the application for voluntary surrender.[209]

The South African insolvency law has been critiqued for its lack of debt relief which incorporates a discharge to individuals who struggle socio-economically.[210] The lack of debt relief in this regard may be regarded as conservative, as international standards of insolvency law aim to contribute positively to socio-economic developments. As it currently stands, discharge of debt remains the privilege of debtors who demonstrate an advantage to creditors by virtue of the presence of available assets in the insolvent estate. This position is arguably problematic when considering the constitutional right to equality.[211]

The National Credit Amendment Act of 2019 introduced a debt intervention process, but this process has not yet been implemented. This intervention process entails a discharge of unpaid debts. The process allows for an individual to be declared over-indebted, following an application to the National Credit Regulator (NCR), as per the procedure set out in section 86A(1) of the NCA. It is necessary to note that the prescribed maximum limit of debt, which comprise only of unsecured NCA debts, for such an applicant is R50 000,00.[212]

A vital provision of the debt intervention procedure is embedded in section 87A(6) of the NCA, where provision is made for the actual discharge of debt. This development is significant, as it introduces the possibility of a discharge of debt by means of an insolvency procedure for consumers who do not qualify for the sequestration

[206] 2009 (3) SA 376 (WCC) 378. Hereafter referred to as the *Ford* case.
[207] *Ford* case 378.
[208] *Ford* case 383-384.
[209] *Ford* case 385.
[210] H Coetzee & R Brits 'Extinguishing of debt in terms of the debt intervention procedure: some remarks on 'arbitrariness' in D van der Merwe, D (ed) *Magister: Essays vir/for Jannie Otto* (2020) 11.
[211] Coetzee & Brits 12.
[212] NCA, sec 171(2A)(b).

procedure set out in the Insolvency Act. The section provides that the NCA may 'declare the total of the amounts contemplated in section 101(1) under the qualifying credit agreements as extinguished', following a review of the NCR's recommendation for discharge and ascertaining whether the applicant still has inadequate income or assets to allow for a section 86A(6)(d) rearrangement of debt.[213] In addition, section 88A(6) of the NCA establishes an important feature when it comes to debt being extinguished.[214] It provides that:

> [The NCA] ordered that the debt underlines a credit agreement is extinguished, the credit provider may not exercise or enforce by litigation or other judicial processes any right under that credit agreement or arising from that order, in respect of the portion of the debt that the order applies to.

In the context of the intervention imposed by section 88 of the NCA to extinguish the debt, then the question arises as to whether the process of extinguishing a debt can amount to deprivation of a creditor's claim in contravention of section 25(1) of the Constitution. This question is delt with on assumption that it is a settled debate that a debt forms part of a property, as the Constitutional Court gave a broad definition on both deprivation and property.[215] According to Britz and Coetzee, deprivation will only be arbitrary in the context of section 25, if the law in question fails to provide reasons for such a deprivation.[216] Therefore, in the context of section 25(1) of the Constitution, section 88A(6) constitutes a law of general application, and the question of whether such conduct is arbitrary is therefore, moot.

The only remaining question is whether such conduct is justifiable under section 36 of the Constitution, and this addressed in Chapter 3.

[213] NCA, sec 86A(6)(d).
[214] NCA, sec 88A(6).
[215] First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance para 57; National Credit Regulator v Opperman para 66; Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape paras 73-76.
[216] H Coetzee & R Brits 19.

2.12 Conclusion

This chapter provided an overview of some of the pertinent provisions of the Insolvency Act, in order to contextualise the concepts of sequestration and insolvency of debtors. The study comprised of an overview of the Insolvency Act, followed by an exploration of relevant concepts, including sequestration, voluntary surrender, preliminary formalities, and debt relief mechanisms. These concepts were explored through presentation of the acts and legislation in question, alongside relevant case law, as well as peer-reviewed journal articles. The Insolvency Act was explored to ground the concepts of sequestration prior to the analysis of the Act's constitutionality in the next chapter. Therefore, the latter two concepts are critically analysed in Chapter 3.

Chapter 3: An analysis of the constitutionality of the Insolvency Act

3.1 Introduction

Chapter 3 builds on the overview of the Insolvency Act, presented in Chapter 2, through a critical analysis of the constitutionality of selected sections of the Act. The analysis aims to investigate the issue of arbitrary deprivation of property. Having laid the foundation in Chapters 1 and 2, this chapter analyses section 20 and section 21 of the Insolvency Act through a critical application of section 25 of the Constitution, in order to answer the research questions presented in Chapter 1.

3.2 The definition of 'property'

The Insolvency Act provides broad definitions of the term 'property', as the term encompasses both immovable and movable property which is situated within the Republic of South Africa.[217] The Insolvency Act further accepts that the definition of property includes contingency property other than the contingent interests of the *fidei commissary* heir or legatee.[218] The definition provided in the Insolvency Act is wider than the definition provided in terms of common law.[219]

In the context of section 2 of the Insolvency Act, Meskin and Kunst note that movable property comprises of 'every kind of property and every right or interest which is not immovable property', while immovable property, in this context means, 'land and every right or interest in land or minerals which is registrable in any office in the Republic intended for the registration of title to land or the right to mine'.[220]

While property is defined in terms of insolvency law, the operational definition thereof when addressing the constitutionality of property rights came into question in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB v*

[217] Act 24 of 1936 sec 2.
[218] Act 24 of 1936 sec 2.
[219] PM Meskin & JA Kunst *Insolvency Law* (1994) 5.1.
[220] Meskin & Kunst 5.1.

CSARS),[221] where the Constitutional Court was confronted with the task of defining property within the context of section 25 of the Constitution. The court held as follows:

> … At this stage of our constitutional jurisprudence it is, for the reasons given above, practically impossible to furnish and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25.

The lack of a comprehensive constitutional definition of property affects the issue of property rights, set out in section 25 of the Constitution. For purposes of this study, the lack of a definition impacts the determination of property rights potentially infringed by the Insolvency Act.

In addressing this definition dilemma, Currie and De Waal provide three possible definitions of the word 'property' within the context of section 25 of the Constitution.[222] The first possible definition is found in a clause which could refer to the property itself, to those things with respect to which legal relations exist between people.[223] The second definition applies to the common law property rights which set out the relationship between individuals and property.[224] The third possible definition may be found in the clauses which refer to any relationship or interest having an exchange value.[225] Currie and De Waal further opine that to limit the constitutional definition of a property to real right would render most assets unprotected.[226] As such, it may be posited that this aligns with the decision taken by the Constitutional Court in *FNB v CSARS*, where the word 'property' was left open so as not to create unintended *lacunae*.

However, the definition of property becomes critically important in the context of the Insolvency Act, in order to determine which property must be included in the insolvent estate and which property should be excluded and exempted from the estate. It is also relevant where rights to property are at stake – as per the definition of 'disposition' in section 2 of the Insolvency Act. A contextual link to property in the context of

[221] [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (CC) para 51.
[222] I Currie I & J De Waal *The Bill of Rights Handbook* (2013) 535.
[223] Currie & De Waal 535.
[224] Currie & De Waal 535.
[225] Currie & De Waal 535.
[226] Currie & De Waal 535.

sequestration are dispositions. The study will use dispositions without value to illustrate the aforementioned.

Dispositions without value are relevant to the study, as certain dispositions that may have been entered into prior to the order of sequestration may, under certain circumstances, be set aside by the court upon request by the trustee of the insolvent estate.[227] For example, any disposition not made for value by the insolvent can be set aside by the court if the trustee can prove that the disposition was made more than two years before the sequestration application came into effect, and that immediately following the disposition, that the person disposing of the property was insolvent.[228] The court can as well set aside the disposition if it was made fewer than two years prior to sequestration, if the person who benefited by the disposition cannot prove that the assets of the insolvent exceeded his or her liabilities immediately after the disposition was made.[229]

Any exception to this rule, noted above, is where an immediate benefit under a duly registered antenuptial contract is given in good faith. The disposition cannot be set aside if it is made to the insolvent's spouse within three months from date of marriage. Furthermore, the disposition cannot be set aside if it is made to child of one of the spouses, but who was born out of the spouses' marriage within the same timeframe. The husband's estate should, however, not be sequestrated within two years from date of registration of the antenuptial contract.[230] Section 27(1) of the Insolvency Act protects any benefits that arise due to the marriage being in terms of the antenuptial contract, specifically mentioning that this benefit out of antenuptial contract must be given by a man to his wife in good faith. Furthermore, the Insolvency Act protects the benefits received by children born in a marriage that has been covered by an antenuptial contract from being set aside as a disposition without value in terms of section 26(1) of the Insolvency Act.[231]

[227] Act 24 of 1936 sec 26, sec 29, sec 30, sec 31.
[228] Nagel *et al* 571. See also sec 26(l)(a).
[229] Act 24 of 1936 sec 26(l)(a), sec 26(l)(b).
[230] Act 24 of 1936 sec 27. See the discussion on sec 27 in chapter 1 above.
[231] Nagel *et al* 572.

In an attempt to resolve the potentially negative impact of the definitions of property in terms of section 2 of the Insolvency Act, with specific reference to dispositions not made for value, the right to inherit provides the analytical context for the presentation of conflicting decisions by the court.

3.3 Conflicting court judgements

In *Kellerman NO v Van Vuuren and Others,*[232] the applicant brought an application in his capacity as the trustee of the insolvent estate of the second respondent, with the aim to set aside a repudiation by the insolvent of his rights to inherit in his late father's estate.[233] From the proceeding's documentation, the court found that the repudiation was deliberately done in order to avoid inheritance, as the repudiation took place on 2 September 1991, following which, two weeks later, the insolvent estate was placed under sequestration.[234]

Given these facts, the court was called upon to determine whether or not this repudiation constituted a disposition, and whether it could be set aside in terms of section 26 of the Insolvency Act. It was argued on behalf of the trustee that, upon the death of the insolvent's father, '*deis cedit'* comes into effect immediately. This means that immediately after his father's death, he has the right to inherit, and whatever he is entitled to receive would automatically become part of his estate. However, he would lose that right through repudiation of his right to inherit, and such repudiation would constitute a disposition without value in terms of section 26 of the Insolvency Act. Furthermore, it was argued that section 26 should be read together with the definition of disposition in section 2 of the Insolvency Act, as the meaning of disposition in section 2 includes the abandonment of rights to property.[235]

The case of *Van Schoor's Trustee v Executors of Muller,*[236] coupled with peer-reviewed academic publications, formed the basis for the Court's decision to refuse to

[232] 1994 (4) SA 336. Hereinafter referred to as the *Kellerman* case.
[233] *Kellerman* case para A-B at 337.
[234] *Kellerman* case para C at 337.
[235] *Kellerman* case para E-F 337.
[236] (1858) 3 Searle 131. Hereinafter referred to as the *Van Schoor* case.

grant the relief sought, and for the dismissal of the application with costs.[237] In terms of the *Van Schoor's* case, Watermeyer J held that:[238]

> A child may decline to adiate an inheritance, or may repudiate it, with the very object that the amount which would otherwise go into his estate should be lost to his creditors. This is not considered in law an alienation in fraud of creditors; as there can be no alienation of what is omitted to be acquired (Voet 42.8.16). If the child on the brink of insolvency may decline to adiate absolutely, he may decline, where he has an election between the acceptance of the 'legitimate' free, and of the whole inheritance burdened, to accept the latter instead of the former, although the acceptance of the 'legitimate' might be more in accordance with the interests of his creditors.

The *Kellerman* case expands on the reference to Voet, as noted in the citation above, justifying his decision as follows:[239]

> Nevertheless, it does not fall under the term 'alienation made to defraud creditors', if when a debtor might be able to acquire something, he does not act in such a way as to acquire it. That is because this edict of the *praetor* applies to those who cut down their risks, and not those who do not avail themselves of a condition for acquiring, that is to say to act in such a way that they do not become richer. Nor are those persons properly understood to alienate who merely pay no attention to a right of possession.

Goldblatt J expands his justification above, still in the context of the initial reference to Voet, as follows:[240]

> This is so even though the debtor who rejects the inheritance was such that a legitimate portion was due to him according to the laws out of that inheritance. The reason for this is that it is quite certain that the legitimate portion is no more accrued than did the rest of the inheritance to the son or other person like him during the lifetime of him out of whose goods it was to be furnished. Thus, when conferred after the death of the father, it could also have been rejected just as much as the rest of the inheritance, and he who rejects is not in that way cutting down anything out of his estate, but is acting for the sole purpose that he may not acquire a thing which in accord of what has already been said, is not forbidden to him.

[237] *Kellerman* case para A-B 339.
[238] *Van Schoor* case 131.
[239] *Kellerman* case para A 338.
[240] *Kellerman* case para B 338.

The court concluded that, based on the above reasoning, this issue of repudiation had been codified 100 years ago, and since then the principle has not been repealed.[241] As such, there are two options available to the legatee: adiation or repudiation. Should the legatee decide to repudiate, the right to inherit does not automatically transfer into the insolvent estate, as such, once a party repudiates, the right to inherit does not form part of the insolvent estate unless the party decides to adiate. The court further noted that it would be wrong of it to set aside the precedent with a decision made by a single judge, as the position has been held in the division for more than a century.[242]

It is notable that in *Boland Bank Bpk v Du Plessis,*[243] the finding was based on a 1991 judgment, rather than the position noted previously. It is not apparent from the judgment itself why it was only reported in 1995. This was an opposed application for a provisional order of sequestration. In the application, the applicant relied on section 81 of the Insolvency Act which reads as follows:

> A debtor commits an act of insolvency …if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one credit above another.

The insolvent debtor, who was the respondent in this case, repudiated an inheritance from her father before sequestration. The court held as follows: [244]

> It is clear that in defining 'property' in [section] 2 of the Insolvency Act 24 of 1936 the Legislature had the possibility of an inheritance in mind and that it deliberately excluded only the conditional rights of a *fideicommissary* heir or a *fideicommissary* legatee. It can be inferred therefrom that an ordinary heir was not excluded and that an ordinary heir's right to inherit was deliberately not excluded by the Legislature as falling outside the definition of 'property'. (At 115B-C.) The definition of 'property' is therefore such that the disposition of the conditional right to inherit of an ordinary heir is brought within the ambit of [section] 81 of the Insolvency Act and is accordingly an act of insolvency (at 115D/E and 116H/I and 116I/J).

De Klerk found that the respondent had committed an act of insolvency as defined in section 81 of the Insolvency Act.[245] De Klerk explained that his judgement was based

[241] *Kellerman* case para G 337.
[242] *Kellerman* case para H-I 338.
[243] 1995 (4) SA 113 (T). Hereinafter referred to as the *Boland Bank* case.
[244] *Boland Bank* case 114 A.
[245] *Boland Bank* case 114 D-H 115 F-G.

on his obligatory interpretation of the Insolvency Act. This judgement stands in contrast to the example of the *Kellerman* case mentioned above.

A further example of the 1995 precedent being upheld is the case of *Klerck and Scharges NNO v Lee and Others.*[246] After the summons was issued, the defendant raised a special plea and the matter was heard as per Rule 33 of the Uniform Rules.[247] The defendant was appointed as the sole heir and the executor of the estate of her parents.[248] Prior to sequestration, the defendant repudiated her rights of inheritance and the plaintiff contended that the defendant's repudiation of her right of inheritance constituted a disposition without value. The plaintiff further contended that such a decision should be set aside in terms of section 26 of the Insolvency Act. The court was called upon to determine whether the conduct of the defendant to repudiate constituted a disposition in terms of section 26 of the Insolvency Act.[249] The court relied on the *Kellerman case* and rejected the *Boland* decision,[250] holding that the repudiation in this case does not constitute a disposition without value in terms of section 26 of the Insolvency Act.[251] The court in *Klerck* case relying on Voet held that refusal to inherit does not amount to disposition, and by doing so, the court agreed with the *Kellerman* decision. The court distinguished between renunciation of the right to inheritance and repudiation of inheritance and came to a conclusion that repudiation of inheritance amounts just to refusal of the right to accept a property. As a result, the court came to a conclusion that adiation does not amount to disposition in terms of section 26 of the Insolvency Act.[252]

Even though the same question was considered in *Simon NO and Others v Mitsui and Co Ltd and Others,*[253] the court upheld the *Boland* decision. In contrast, and to the point of conflicting judgements, in *Durandt NO v Pienaar NO and Others,*[254] the court followed the *Kellerman* decision and refused to set aside the repudiation as a disposition without value in terms of section 26 of the Insolvency Act. In *Durandt* case

[246] 1995 (3) SA 340 (SE). Hereinafter referred to as the *Klerck* case.
[247] *Klerck* case 341 A-B.
[248] *Klerck* case 341 B-C.
[249] *Klerck* case 341 C.
[250] *Klerck* case 342-343 H-J; A-D.
[251] *Kellerman* case para E-F 343.
[252] *Klerck* case 343 A-F.
[253] 1997 (2) SA 475 (W). Hereinafter referred to as the *Simon* case.
[254] 2000 (4) SA 869 (C). Hereinafter referred to as the *Durandt* case.

inheritance was adiated two years before the sequestration of the insolvent. Then the court was called to determine whether such an adiation could not be set aside in terms of section 26 of the Insolvency Act. The court, having considered all the decisions quoted above, refused to set aside the repudiation as a disposition without value in terms of section 26 of the Insolvency Act.[255]

Noting the conflicting judgments provided above, the Supreme Court of Appeal settled this question in *Wessels NO v De Jager NO en 'n Ander*.[256] In this matter, the insolvent's wife, who was married out of community of property, took out an insurance policy on her own life after her own sequestration but before her rehabilitation, and she nominated the insolvent as a beneficiary. Immediately thereafter, the wife died without a will and the insolvent husband repudiated the inheritance. The court *a quo* found that the benefit of the insurance did not form part of the insolvent estate and, therefore, it did not automatically vest in the trustee.[257]

On the basis of the *Van Schoor's* case, the court held that the right of inheritance does not automatically vest in the trustee.[258] Ultimately, the court confirmed the decisions of *Kellerman* and *Scharges* discussed above, and held that the decision held in *Boland* was not correct.[259] This means that, as stated in *Kellerman,* the legatee has two options, either to adiate or repudiate the inheritance. Should the legatee adiate, it follows that the inheritance becomes part of the insolvent estate and property of the dead in terms of section 2 of the Insolvency Act. Following from this premise, once the estate repudiates, the property is excluded in terms of section 2 of the Insolvency Act.

The broad definition of property which includes contingent interests in the context of the Insolvency Act is problematic inasmuch as the analysis of its constitutionality requires specific definitions of property which correspond to the definitions provided in section 25(1) of the Constitution.

[255] *Durandt* case 871 A-F.
[256] 2000 (4) SA 924 SCA. Hereinafter referred to as the *Wessels* case.
[257] *Wessels* case 925 F-G.
[258] *Wessels* case 927-928 A-B.
[259] *Wessels* case at 929 B.

3.4 Section 25 of the Constitution

Section 25 of the Constitution provides for circumstances in which an individual may be legally deprived of his or her property. Section 25(1), section 25(2), and section 25(4) provide that:

> 25. Property –
> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application –
> (a) for a public purpose or in the public interest; and
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
> (3) …
> (4) For the purposes of this section –
> (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
> (b) property is not limited to land.

According to Currie and De Waal, the primary purpose of section 25 of the Constitution is to protect an individual from unauthorised interference with his or her private property.[260] This means that interference with private property should be regulated by law of general application and not be arbitrary, and this section protects the rights of the individual as follows:[261]

> Claims to an immunity against uncompensated expropriation of private property. As will be explained further below, in most jurisdictions expropriation is the compulsory taking over of property by the state. An immunity against uncompensated expropriation means therefore that the state cannot lawfully take over property unless it pays for it.
>
> A claim of eligibility to hold property. The best example of the recognition of such a claim in a human rights instrument is art 17 of the Universal Declaration of Human Rights: Everyone has the right to own property alone as well as in association with others. A constitutional property right giving effect to such a claim would be a right not to be excluded from the class of property-holders.

[260] Currie & De Waal 535.
[261] The Constitution of South Africa, 1996, sec 25 (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005).

> It is not a claim that one is entitled to become a property-holder if one does not have property. For example, [section] 28(1) of the interim Constitution provided that every person shall have the right to acquire and hold rights in property. This right would have been violated by, for example, a law that prevented black people or women from owning land.
>
> A claim to have property. This claim is premised on the argument that all people have a moral right to have at least enough property to enable them to survive or to lead a dignified existence. This means that if they do not have property, it should be provided for them, usually by the state. This claim would make the constitutional property right a second-generation or socio-economic right.[262]

Section 25(1) of the Constitution therefore provides that a person may be deprived of property on condition that the deprivation is authorised by a law of general application.[263] In addition, where deprivation is arbitrary, the deprivation is not permitted in terms of section 25(1). Sequestration, as set out in section 20 and section 21 of the Insolvency Act, must therefore be examined against the provisions of arbitrary deprivation of property, as well as whether the relevant sections of the Insolvency Act fall within the law of general application.

While arbitrariness takes two forms, namely procedural arbitrariness or substantive arbitrariness, if applicable, either form requires the determination of two factors. Firstly, whether the relevant sections of the Insolvency Act constitute a limitation of the right not to be deprived of property; and secondly, that such a limitation of the right to property is justifiable under section 36 of the Constitution. Should the deprivation not meet the conditions set out by the Constitution, it is seen as unconstitutional.[264]

In *FNB v CSARS*,[265] the court set out the structure of analysing the direct application of section 25 of the Constitution in the form of the following questions:

(a) Does that which is taken away from FNB by the operation of section 114 amount to 'property' for purpose of section 25?
(b) Has there been a deprivation of such property by the Commissioner?
(c) If there has, is such deprivation consistent with the provisions of section 25(1)?
(d) If not, is such deprivation justified under section 36 of the Constitution?

[262] Currie & De Waal 535.
[263] Currie & De Waal 535.
[264] Currie & De Waal 534; 535.
[265] *FNB* para 46. See also Currie & De Waal 534.

(e) If it is, does it amount to expropriation for purpose of section 25(2)?

(f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?

(g) If not, is the expropriation justified under section 36?

According to Currie and De Waal, the questions set out above indicate that expropriation is part of deprivation, and that deprivation is a wider term which includes expropriation. In other words, expropriation is a narrow sense of interference with property.[266] Section 25 of the Constitution thus contains two important concepts, namely 'deprivation' and 'expropriation'. These concepts are distinguished in *FNB v CSARS*:[267]

> In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If section 25 is applied to this wide *genus* of interference, 'deprivation' would encompass all species thereof and 'expropriation' would apply only to a narrower species of interference.

It should be noted that expropriation falls outside of this study's scope. Within the context of this dissertation, the applicable term will therefore be deprivation.

In terms of section 25(1) of the Constitution, deprivation is only allowed if it takes place in terms of a law of general application. However, there may be a question about the constitutionality of a law of general application permitting the arbitrary deprivation of property. *FNB v CSARS* serves as the *locus classicus* for the investigation into the arbitrary deprivation of property based on the interpretation of deprivation to mean 'any interference with the use, enjoyment or exploitation of private property'.[268]

In *FNB v CSARS*, the Constitutional Court held that any interference with the use of enjoyment or exploitation of the property or limitation of the property, may be regarded as a deprivation and it should be tested against the requirement of section 25(1) of the Constitution.[269] However, in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the*

[266] Currie & De Waal 535.
[267] *FNB v CSARS* para 57.
[268] *FNB v CSARS* para 57. See also Currie & De Waal 538.
[269] *FNB v CSARS* para 57. See also Currie & De Waal 538.

Executive Council for Local Government and Housing, Gauteng,[270] the Constitutional Court held that the question of deprivation requires substantial interference or limitation which exceeds the scope of normal restriction on the use of the property in question, based on the Constitution.[271]

In other words, the party who claims that there has been arbitrary deprivation of property cannot just prove that the deprivation is arbitrary, the party must also prove that the arbitrary deprivation is unjustifiable under section 36 of the Constitution.[272]

3.5 Procedural and substantive arbitrariness

Having defined property[273] above, it becomes inevitable to distinguish between procedural arbitrariness and substantive arbitrariness within the context of section 25(1) of the Constitution. According to Currie and De Waal, section 25 of the Constitution requires that deprivation be authorised by law of general application. It flows from above that if there is no authorisation from the law of general application, such a deprivation is arbitrary.[274]

The Constitutional Court stipulated that arbitrary deprivation is effected in a procedurally unfair manner (procedural arbitrariness) and where the law in question does not provide sufficient reason for the deprivation (substantive arbitrariness).[275] This means that in order for deprivation to be valid, it should be both substantive and procedurally fair.[276]

In *FNB v CSARS*, the Constitutional Court stated that, in terms of section 25(1), deprivation can only be arbitrary in circumstances where the law does not provide

[270] 2005 (1) SA 530 (CC) para 32. Hereafter referred to as the *Mkontwana* case. See also Currie & De Waal 538. See also *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 (1) SA 293 (CC) paras 30, 39-43; *South African Producers Organisation v Minister of Minerals and Energy NO* 2017 (10) BCLR 1303 (CC) paras 42-48.
[271] *Mkontwana* case para 32.
[272] Currie & De Waal 535-540.
[273] See para 3.2 above.
[274] Currie & De Waal 540.
[275] *FNB v CSARS* para 100.
[276] C Fritz & R Brits 'Does the "pay now, argue later" approach in the Tax Administration Act 28 of 2011 infringe on a taxpayer's right not to be deprived of property arbitrarily?' (2020) *South African Journal on Human Rights* 36.

sufficient reasons for a particular deprivation. In substantiating its reasoning, the court held that the issue of sufficient reason should be established as follows: [277]

(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under section 25.

In essence, a deprivation is substantively arbitrary where there are not enough reasons for such a deprivation. This means that before deprivation could take place, the court would have contextually ascertain the reasons for such a deprivation. For example, in the case of *FNB v CSARS,* the court, when it considered the degree of interference caused by section 114 of the Customs and Excise Act[278] which creates a

[277] *FNB v CSARS* para 100.
[278] Act 91 of 1994.

statutory lien over the property of a defaulting tax payer in favour of SARS, the court held that:[279]

> … Section 114, however, casts the net far too wide. The means it uses sanctions the total deprivation of a person's property under circumstances where (a) such person has no connection with the transaction giving rise to the customs debt; (b) where such property also has no connection with the customs debt; and (c) where such person has not transacted with or placed the customs debtor in possession of the property under circumstances that have induced the Commissioner to act to her detriment in relation to the incurring of the customs debt.

In essence, this means that the reason for deprivation should be examined and be justifiable under the law. This question also applies in situation were both sections 20 and 21 of the Insolvency Act are invoked. The deprivation under these two sections should be justifiable under the applicable law.

Regarding substantive arbitrariness, the court held that the deprivation of property can only be arbitrary within the context of section 25 of the Constitution when the law of general application referred to in subsection (1) does not provide sufficient reasons for a particular deprivation.[280] In other words, in order to determine substantive arbitrariness, a reasonability test should be undertaken. In this regard, it is necessary to remain cognisant of the ruling in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo),*[281] which holds that there is an inherent conflict between substantive arbitrariness and the Constitutional right to lawful, reasonable, and procedurally fair administrative action.[282] That is the foundation for the requirement of a reasonableness standard.

The standard of reasonableness applies to section 145 of the Labour Relations Act,[283] and may be contextualised as an administrative decision which is reviewable if it is one which a reasonable decision-maker could not reach in similar circumstances.[284] It

[279] Act 91 of 1994 para 108.
[280] *FNB v CSARS* para 100.
[281] [2007] 12 BLLR 1097 (CC).
[282] Section 33(1) of the Constitution states: 'Everyone has a right to administrative action that is lawful, reasonable, and procedurally fair'.
[283] Act 66 of 1995.
[284] The CC in *Sidumo* made reference to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 44, and held that the reasonableness standard was dealt with in the context of section 6(2)(h) of the Promotion of Administrative Justice Act

is submitted that, although the *Sidumo* facts are distinguishable from the facts under investigation in this study, the principle of reasonableness is relevant to this research in the context of deprivation. This is due to the fact that deprivation itself, and its objectives, must be tested against reasonableness and rationality, and this includes the relationship between the means employed and the end sought by the legislature.

The relationship between the purpose of deprivation, the nature of the property, and the extent of deprivation in respect of the property are the guidelines which are set out in *National Credit Regulator v Opperman and Others*.[285] The underlying principle is that there is a direct correlation between the extent of the deprivation, the strength of the property interest, and the strength of the state's purpose.[286] This means that the person who executes the decision to deprive another person of property should be implementing the statute as it is. The deprivation at stake, in this context, is any deprivation caused by the Insolvency Act, which must also pass the limitation set out by section 36(1) of the Constitution.[287]

The above is based on section 25(8) of the Constitution, which provides that any departure from the provisions of section 25 has to be 'in accordance with the provisions of section 36(1)'.[288] This means that any departure from the provisions of section 25 must be in accordance with the provisions of section 36(1) of the Constitution. Section 36(1)(d) requires that attention be given to the relationship between the limitation and its purpose. In terms of section 36(1)(a), any available less restrictive means to reach the intended outcome has to be considered.

The conceptual juxtaposition between the definitional elements presented in the *FNB v CSARS* case and the *Mkontwana* case was resolved in *National Credit Regulator v*

3 of 2000 where O'Regan J said: '(A)n administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decisionmaker could not reach'.
[285] 2013 (2) SA 1 (CC) para 68. Hereafter referred to as the *NCR* case.
[286] *NCR* case para 68.
[287] *NCR* case para 73.
[288] Section 25(8) provides: 'No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)'.

Opperman.[289] Here, the Constitutional Court found that interference would constitute deprivation if it has a legally relevant impact on the parties' interests.

As noted above, arbitrary deprivation is effected through procedurally unfairness (procedural arbitrariness) and insufficient legal justification for the deprivation (substantive arbitrariness).[290] This means that in order for deprivation to be valid, it should be both substantively and procedurally fair.[291] In the context of this research, this fairness is based on the purpose of the Insolvency Act which governs sequestration. The analysis of the provisions relating to sequestration in the previous chapter has led to the understanding that a sequestration order will only be granted if sequestration is to the advantage of creditors.[292] The Insolvency Act lays down 'advantage to creditors' as a prerequisite for sequestration applications. This requirement is a fundamental characteristic of the South African insolvency law, and thus addresses arbitrariness.[293]

3.6 Relevant insolvency provisions

3.6.1 Loss of the insolvent debtor's estate

The immediate effect of a sequestration order is that the insolvent's property is vested in the Master, and thereafter, the estate vests in a trustee.[294] Perhaps, it is important to mention that the position in terms of liquidation of a company is different, in that the company remains the owner of its property only the control over the company vests in the Master, then the liquidator.[295] The constitutionality of sections 20 and 21 of the Insolvency Act must be examined where the insolvent debtor is (and the property of the solvent spouse) deprived of his or her property when the property vests in the Master and ultimately in a trustee. The issue of constitutionality is based on section 25 of the Constitution.

[289] 2013 (2) SA 1 (CC) para 18.
[290] *FNB v CSARS* para 100.
[291] C Fritz & R Brits 'Does the "pay now, argue later" approach in the Tax Administration Act 28 of 2011 infringe on a taxpayer's right not to be deprived of property arbitrarily?' (2020) *South African Journal on Human Rights* 36.
[292] Act 24 of 1936 sec 12(1)(c).
[293] Boraine & Roestoff 356.
[294] Act 24 of 1936 sec 20, sec 21.
[295] Act 61 of 1973 sec 361(1).

In addition, it is also necessary to investigate the status of ownership of the property when vesting in the Master takes place, with specific reference to whether the transfer of ownership of property is temporary or permanent. The question of constitutionality is formulated through assessing whether the transfer of ownership to the Master and ultimately to a trustee constitutes an arbitrary deprivation of property in contravention of section 25(1) of the Constitution. If the deprivation of property is arbitrary in terms of the transfer to the Master and the trustee, the arbitrariness would impact the determination of ownership, especially in terms of repudiation or contract execution.[296]

Section 16 of the Insolvency Act provides that the Registrar of the Court must, immediately after the final order of sequestration has been granted, make sure that the final order is served to the insolvent spouse and the solvent spouse, 'whether they reside together or not'.[297] Section 16 of the Insolvency Act further requires the solvent spouse to hand his or her statement of affairs and books over to the Master within a period of seven days after receipt of the final order. Immediately upon receipt of this court order, the insolvent spouse is expected to hand over all books and records relating to his or her affairs to the Sheriff of a particular jurisdiction where he or she was sequestrated.[298] Section 16 of the Insolvency Act also requires that the solvent spouse provide the Master with his or her statement of affairs and books.[299]

All the statements are expected to contain the value, price, and market value of the items which are contained in the statement. Section 19 of the Insolvency Act empowers the Deputy Sheriff, upon receipt of the court order, to make an inventory or a list of all the immovable and movable property of the insolvent.[300] In this manner, all assets are duly accounted for.

Section 20 of the Insolvency Act deals with the effect of sequestration on the estate of the insolvent. The section determines that the consequences of a sequestration order are: [301]

[296] *De Villiers NO v Delta Cables* (Pty) Ltd 1992 (1) SA 9 (A). Hereinafter referred to as the *De Villiers* case.
[297] Act 24 of 1936 sec 16(1).
[298] Act 24 of 1936 sec 16(2)(a).
[299] Act 24 of 1936 sec 16(3).
[300] Act 24 of 1936 sec 19(1).
[301] Act 24 of 1936 sec 19(1).

(a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee to vest the estate in him;

(b) to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent save such proceedings as may, in terms of section twenty-three, be instituted by the insolvent for his own benefit or be instituted against the insolvent: Provided that if any claim which formed the subject of legal proceedings against the insolvent which were so stayed, has been proved and admitted against the insolvent's estate in terms of section forty-four or seventy-eight, the claimant may also prove against the estate a claim for his taxed costs, incurred in connection with those proceedings before the sequestration of the insolvent's estate;

(c) as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs.

Section 20 of the Insolvency Act therefore, empowers the Master, and ultimately the trustee, to take control of the estate of the insolvent debtor, and thus restricts creditors from exercising any rights against the insolvent property or Sheriff. However, in terms of the Insolvency Act, the insolvent is not only deprived of control over the assets, similar to the situation where a company is liquidated.[302] Section 20(1)(a) of the Insolvency Act provides that the effect of sequestration of the insolvent estate shall be to divest the insolvent of the estate and vest it in the Master until the appointment of a trustee. Upon the appointment of the trustee, the estate vests in the trustee.

The Appellate Division has endeavoured to define the process of vesting insolvent estates in terms of section 20(1)(a) of the Insolvency Act. This definition was noted in *De Villiers v Delta Cables* as follows:[303]

> It has always been accepted that a trustee becomes the owner of the property of the insolvent. The Legislature did not say so in so many words, but transfer of *dominium* is clearly inherent in the terminology employed in s 20(1)(a) which provides that a sequestration order shall divest the insolvent of his estate and vest it first in the Master and later in the trustee. (In order to obviate repetition I shall henceforth refer only to a vesting in the trustee.) Section 21(1) employs very much the same terminology. It also provides for a vesting in the trustee. True, the subsection does not speak of a divesting, but it goes on to provide that the property so vests

[302] Sec 361(1) of 1973 Act. Control of the estate is transferred to the liquidator but the estate remains vested in the company.
[303] *De Villiers* case paras H-J.

> 'as if it were property of the sequestrated estate'. This can only mean that the property of the solvent spouse vests in the trustee to the same extent as does the property of the insolvent. In my view, therefore, the Legislature made it perfectly clear that a transfer of *dominium* of the assets of the solvent spouse takes place. (Cf the Afrikaans text of s 21(1) which speaks of the 'oorgaan' of such assets.) He or she thus no longer retains any of the attributes of ownership of the property concerned.

It is clear from the above that the insolvent loses ownership of the estate once the sequestration order is given. The order results in the deprivation of the assets of the insolvent.

It's necessary to note that the judgement above does not address the possible contravention of section 25 of the Constitution by section 20 of the Insolvency Act. Section 25 of the Constitution permits deprivation under two circumstances. Firstly, it must be authorised by the law of general application, and in this instance, section 20 of the Insolvency Act is the law of general application. Secondly, it must not be arbitrary.[304] The question of the law of general application is an uncomplicated question to answer; the more complex question relates to arbitrariness.

Deprivation will be arbitrary if it is procedurally and substantively unfair.[305] Whether the decision is arbitrary depends on each case, therefore, there is no blanket approach.[306] If it is found that the deprivation is arbitrary, the deprivation must be explored to ascertain whether it is justifiable as per section 36(1) of the Constitution. In other words, whether the arbitrary deprivation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.[307]

3.6.2 Discussion

(i) Overview

The accurate interpretation of section 20 of the Insolvency Act requires a contextual understanding of sections 21, 23, and 24 as these sections address the practical application of sequestration. It is this study's view that the aforementioned sections

[304] Brits 38.
[305] Brits 38.
[306] Brits 39.
[307] Brits 39.

speak to the same intention. This intention is to ensure that all the proceeds of the insolvent estate are received and collected to the fair benefit of creditors. Section 20(2)(a) and section 20(2)(b) of the Insolvency Act stipulate which properties are included and excluded from the insolvency process. Section 20(2)(b) specifically refers to section 23 of the Insolvency Act.

Section 23(1) provides that: 'Subject to the provision of this section and section ***twenty-four***, all property acquired by the insolvent shall belong to his estate'. Furthermore, section 24(2) of the Insolvency Act provides that:[308]

> Whenever an insolvent has acquired the possession of any property, such property shall, if claimed by the trustee of the insolvent's estate, be deemed to belong to that estate unless the contrary is proved; but if a person who became the creditor of the insolvent after the sequestration of his estate, alleges (whether against the trustee or against the insolvent) that any such property does not belong to the said estate and claims any right thereto, the property shall be deemed not to belong to the estate, unless the contrary is proved.

Section 20 of the Insolvency Act addresses the permanent transfer of an insolvent estate to a trustee. What the latter section provides for is the crux of the research problem of this study. This study submitted that section 20 of the Insolvency Act deprives the insolvent party of his or her property. Thus, this study advances the argument that there appears to be a conflict between section 20(1) of the Insolvency Act and section 25(1) of Constitution based on the concept of deprivation. The question here is whether the section 20(1) deprivation is arbitrary, and if so, whether section 20(1) contravenes the Constitution. Where arbitrariness is proved to exist, the question is whether it is justified and reasonable. If it is found to be justified, whether it does not contravene section 36 of the Constitution.

(ii) Procedural and substantive arbitrariness

As already stated above, a deprivation can only be arbitrary in circumstances where the law which authorises such a deprivation does not give reasons.[309] In terms of section 20 of the Insolvency Act, the reason is to ensure that the insolvency process

[308] The Constitution of South Africa, 1996, sec 24(2) (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005).
[309] Currie & De Waal 534,535.

does not deprive the creditor's rights. As such, section 20 is procedurally and substantively fair. However, it may still be questioned whether section 20 can be described as arbitrary or not, its deprivation needs to be justifiable under section 36 of the Constitution.[310]

(iii) Section 36 of the Constitution

Section 36 of the Constitution provides that any limitation which is imposed in the Bill of Rights, which include in this case the deprivation of property, such a limitation should be reasonable and justifiable in an open and democratic society.[311] Then, the question is whether the deprivation of a property imposed by section 20 of the Insolvency Act is reasonable and justifiable in an open and democratic society.

This study posits that deprivation in terms of section 20 of the Insolvency Act is justifiable. Section 20 of the Insolvency Act ensures that the sequestration process is not conducted in a haphazard manner, as it sets out the process after the order of sequestration of an individual, more specifically as to how the property should be divested into the control of the Master, and ultimately to the trustee upon his or her appointment.

(iv) Re-vesting of assets in the insolvent by way of a vesting order

The insolvent retains an interest in his or her estate because 1) if there are unsold assets, the insolvent may request that these be revested in him or her by way of a vesting order, and 2) the insolvent has an exempted estate filled with assets that are not subject to be sold to pay the creditors.[312]

In South Africa, rehabilitation from sequestration is governed by the Insolvency Act. Rehabilitation relieves the insolvent individual from the constraints of sequestration and pre-sequestration debts, as these debts are discharged. Debts which are found to have been incurred through the insolvent debtor's fraudulent practices are not discharged.[313] Rehabilitation is the only way by which unpaid pre-sequestration debts

[310] Currie & De Waal 540.
[311] Currie & De Waal 534-540.
[312] Act 24 of 1936 sec 21, sec 25, sec 129.
[313] Sharrock *et al* 217.

are discharged.[314] It should be noted that rehabilitation of an individual and discharge of pre-sequestration debts may take a period of between six months and ten years.[315] In *Ex parte Ford*, the court held that the primary objectives of the Insolvency Act is not to grant a relief to debtors, as the primary purpose is to benefit the creditors.[316]

The Practice Manual of the Gauteng Division provides as follows in respect of the rehabilitation application:[317]

1. an application for rehabilitation will not be read by the presiding judge if the master's report is not in the court file. The presiding judge will only accept the master's report from the bar in exceptional circumstances made out in an affidavit;
2. if the applicant avers that a contribution paid by a creditor has been repaid to the creditor, adequate proof thereof must be provided;
3. the applicant, as I required by section 127 of Act 24 of 1936, must state what dividend was paid to the creditors. It is not acceptable to attempt to comply with this requirement by attaching the distribution account which the presiding judge is expected to analyse and interpret;
4. as the date of the hearing of an application for rehabilitation has been advertised, any postponement of the application will be to a specific date.

The court's approach to rehabilitation is exemplified in two cases, namely, *Ex parte Snooke,*[318] and *Ex parte Harris.*[319] In *Ex parte Snooke* the decision is from the Free State High Court, and it was decided that:[320]

> An insolvent has no right to be rehabilitated and the court's powers in this regard are clearly discretionary. It may refuse the application, postpone it or grant it, either unconditionally or subject to certain conditions. See: s 127(2) of the Act and inter alia *Ex parte* Fourie [2008] 4 ALL SA 340 (D &CLD) at paras [22] to [25] and *Ex parte* Le Roux 1996 (2) SA 419 (C) at 423 & 424. The essential enquiry is whether in the light of all the relevant facts, i.e. the applicant's interests, the interests of creditors, whether or not they have proved claims, and the commercial public at large, applicant is a fit and proper person to participate in commercial life free of any constraints and

[314] Act 24 of 1936 sec 129(1). See also Sharrock *et al* 217.
[315] A Boraine *et al* 'The pro-creditor approach in South African insolvency law and the possible impact of the Constitution' (2015) 3 *NIBLeJ* 5.
[316] *Ford* case para 21.
[317] *Ford* case para 15.12.
[318] 2014 (5) SA 426 (FB). Hereinafter referred to as the *Snooke* case.
[319] [2016] 1 All SA 764 (WCC).
[320] *Snooke* case para 33.

> disabilities. The onus is on the applicant to show that the discretion should be exercised in his favour.

Based on the decision presented above, the insolvent debtor has no right to rehabilitation, and the court has the discretion whether or to grant rehabilitation. This discretion is based on section 124 of the Insolvency Act which addresses an application prior to the expiration of ten years. It is necessary to note the court's emphasis on the applicant proving that the process is in the interest of, and to the advantage of, the creditors.[321]

The second decision was made by the Western Cape division in *Ex parte Harris.* The court held that 'in his application for rehabilitation, Harris must satisfy the court that he is a fit and proper person to be permitted to trade with the public on the same basis as any other honest business person'.[322] In this case, it may be posited that the court undertook a merits-based approach, bearing in mind the discretion granted to the court by virtue of section 127 of the Insolvency Act.[323]

(v) Summary of findings

The vital component to this process is that section 20 of the Insolvency Act does not permit arbitrary deprivation of property. Therefore, section 20 of the Insolvency Act specifies that the insolvent estate is divested to the Master and then to a trustee.[324] The purpose of divestment is to ensure proper and fair distribution of the assets of the insolvent estate as well as ensuring that the sequestration process is in the interest and to the benefit of the creditors.[325]

As such, section 20 of the Insolvency Act constitutes deprivation (relinquishing the ownership of property). This deprivation is not, arbitrary, however. As the deprivation is not arbitrary, it is not necessary to analyse the deprivation in terms of its justifiableness and reasonableness, as set out in section 36 of the Constitution.

---

[321] *Snooke* case para 33.
[322] *Ex parte le Roux* 1996 (2) SA 419 (C); *Ex parte Greub v The Master* 1999 (1) SA 746 (C).
[323] *Snooke* case para 33.
[324] Evans (2018) 197-202.
[325] Evans (2018) 197-202.

3.6.3 The property of the solvent spouse

Section 21 of the Insolvency Act addresses the effect of sequestration on the property of the solvent spouse, whether or not the solvent spouse resides with the insolvent spouse. In terms of the latter section, the property of the solvent spouse vests in the Master until a trustee is appointed, and then the property vests in the trustee as if it were the property of the insolvent spouse.[326] Section 21(2) stipulates conditions upon which the property of the solvent spouse shall be released, for example, if it is proven that the property was acquired before the marriage. Section 21(4) provides the insolvent spouse with a remedy to approach the court for the release of the property, and it is noted that the court has been given a wide discretion in terms of this section to intervene in circumstances where the property of the solvent spouse vests in the trustee of the insolvent estate. Section 21(4) and section 24(10) of the Insolvency Act make provision for judicial intervention in order to protect the interests of the solvent spouse under certain conditions. Section 21(4) reads as follows: [327]

> The solvent spouse may apply to the court for an order releasing any property vested in the trustee of the insolvent estate under subsection (1) or for an order staying the sale of such property or, if it has already been sold, but the proceeds thereof not yet distributed among creditors, for an order declaring the applicant to be entitled to those proceeds; and the court may make such order on the application as it thinks just.

Section 21(10) makes provision for the court to prevent the property of the solvent spouse from vesting immediately in the Master or a trustee in circumstances where the solvent spouse is a trader, or where the solvent spouse shows that he or she is likely to suffer serious prejudice if the property were to be immediately vested in the Master or trustee. As previously noted, section 21(10) of the Insolvency Act allows the court the discretion to make an order to protect the property of the solvent spouse for any period it deems necessary. However, during this period, the solvent spouse is required to prove his or her claim to the property. Should the solvent spouse's claim be successful, the property will then be released to the solvent spouse. Should the solvent spouse's application fail, the property will vest in the Master or trustee.[328]

---

[326] Act 24 of 1936 sec 21(1).
[327] *Harksen* case *para 13.*
[328] *Harksen* case para 13.

Finally, by virtue of section 21(12), where a trustee has released property to the solvent spouse, the trustee shall not be debarred from proving that the property is part of the insolvent estate and has an obligation to recover the property.[329]

The provisions of section 21 of the Insolvency Act were found not to infringe the provisions relating to expropriation of property in terms of the Interim Constitution.[330] It was found that section 21 is intended to discourage or prevent collusion between spouses as this would disregard the interests of creditors of the insolvent estate.[331] The question at hand, however, is whether section 21(1) of the Insolvency Act constitutes *deprivation* of property under the Constitution of 1996, in other words, whether the effects of section 21 of the Insolvency Act, which regulates the transfer of ownership of the property of the solvent spouse to the Master or trustee, qualifies as deprivation of property.

Before proceeding to deal with the issue of deprivation, and although deprivation in the context of section 21(1) was not overtly addressed in the *Harksen* judgment, it is important to refer to the case as it discussed the rationale of section 21 of the Insolvency Act. The constitutionality of sections 21, 64, and 65 of the Insolvency Act were challenged for the first time in the *Harksen* case, on the basis that these sections were invalid. It was argued that these sections amounted to expropriation of property, and were inconsistent with section 28 of the Interim Constitution.

Section 28 of the Interim Constitution determined the following:

(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking

[329] *Harksen* case para 14.
[330] In *Harksen* the Constitutional Court had to decide on the constitutionality of section 21 of the Insolvency Act based on section 8 (equality clause) and section 28 (property clause) of the Interim Constitution.
[331] *Harksen* case para 56; *De Villers v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A) 131. See also Bertelsman *et al* 202; *Sharrock et al* 79; Smith *The law of insolvency* (1988) 109.

> into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

The challenge brought before the Constitutional Court on behalf of Mrs Harksen was that section 21(1) of the Insolvency Act constituted expropriation of the property of the solvent spouse and that no compensation was forthcoming as determined by the Constitution. As such, it was argued that section 21(1) was inconsistent with section 28(3) of the Interim Constitution.[332] It was argued that the latter section had the effect of unreasonably and unjustifiably transferring ownership of the property from the solvent spouse to the Master and ultimately to the trustee upon the appointment of the trustee. The Constitutional Court rejected this argument and found that section 21 of the Insolvency Act did not amount to expropriation.[333]

The Constitutional Court's determination of section 21 of the Insolvency Act amounting to constructive expropriation is based on the understanding that expropriation is a transfer of property rights in the public interest which protects the property holder against the consequences of insolvency. As such, it is not unconstitutional. The definition of deprivation, however, which comprises any interference with the use, enjoyment or exploitation of private property, may be argued to amend the judgment, as the unreasonable and unjustifiable transfer of ownership of property interferes with the property owner's access and use of the property.[334] This is based on the arbitrary deprivation of property rights set out in section 25(1) of the Constitution. For the sake of making an argument, this study proposes to change the argument presented in Harksen and phrase it in the context of arbitrary deprivation instead of expropriation.[335]

The court, after making a distinction between deprivation and expropriation, continued to decide the case based on the expropriation argument (in terms of section 28(3) of the Interim Constitution). The court held that section 21 of the Insolvency Act did not contain direct reference to expropriation, as the transfer envisaged in section 21 of the

[332] *Harksen* case para 30, 36, 37, 38.
[333] *Harksen* case paras 36-38.
[334] *Harksen* case paras 32-33.
[335] *Harksen* case para 30, 36, 37, 38. See also Brits 79.

Insolvency Act was a temporary transfer. Furthermore, section 21(2) of the Insolvency Act provided remedies to the solvent spouse to prove her ownership.[336]

Section 21(1) of the Insolvency Act constitutes a law of general application. In the *Harksen* case, the court held that the effect of section 21 of the Insolvency Act is to transfer ownership of the property of the solvent spouse to the Master, and ultimately to the trustee upon his or her appointment.[337] The court pointed out that the purpose of section 21 is not to permanently divest the property of the solvent spouse to the Master or trustee, and the effect is temporary – it is done to ensure that the creditors are not defrauded by spouses and section 21(1) placed the onus on the solvent spouse to prove his or her claim to the property.[338]

3.6.4 Discussion

If the word "expropriation" in the argument made in Harksen can be replaced with the words "deprivation or arbitrary deprivation", the question is whether section 21 of the Insolvency Act results in deprivation rather than expropriation of property of the spouse", it is possible to ask whether section 21 of the Insolvency Act results in the deprivation of property of the spouse. Considering the decision in Harksen that expropriation was temporary, the question becomes whether the temporal effects of section 21 of the Insolvency Act constitute deprivation.

At present, there is no judgment that has challenged section 21 of the Insolvency Act on the issue of deprivation.[339] However, in *FNB v CSARS,*[340] the court held that deprivation is a broad and all-inclusive term which includes any interference with property rights in terms of section 25 of the Constitution. In addition, the term expropriation should be understood as a narrow interference, and the court held that expropriation should be understood as deprivation, while not all deprivations are expropriation.[341]

[336] *Harksen* case para 30, 36, 37, 38. See also Brits 80.
[337] Brits 80.
[338] *Harksen* case para 36.
[339] Brits 80-83.
[340] *FNB v CSARS* para 46.
[341] *FNB v CSARS* para 46.

According to Brits, section 25 of the Constitution broadly defines deprivation to mean any interference with the use of, enjoyment, or exploitation of private property.[342] Furthermore, for interference to qualify as a deprivation, it must have a significant legal impact.[343] Therefore, for deprivation to occur, one does not have to necessarily lose ownership, because as long as there is interference of significant value, it should be sufficient to qualify as deprivation.[344] If one accepts the broad definition of section 25(1) as per Brits' argument, then section 21 of the Insolvency Act constitutes deprivation, as the owner of the property loses not only ownership, enjoyment, use and ability to use property to generate income – whether the loss is temporary or permanent, the effects of the loss may be significant enough to cause a significant legal and financial impact on the solvent spouse.[345]

The necessary question, according to Brits, is whether deprivation of section 21 of the Insolvency Act complies with the requirements of section 25(1) of the Constitution In other words, is deprivation of a spouse of an insolvent authorised by the law of general application, and does the law permit for arbitrary deprivation of property of the other spouse when another is insolvent. If section 21 of the Insolvency Act violates property rights, the question becomes whether the violation imposed by section 21 of the Insolvency Act is justifiable under section 36(1) of the Constitution. If it cannot be justified, then section 25 of the Constitution would be contravened.[346]

The *Harksen* case demonstrated the court's determination that the expropriation or deprivation is temporary and that the solvent spouse may approach a court to protect his or her property rights.[347] However, as expropriation constitutes a permanent transfer of ownership, temporary interference with property rights, set out in terms of deprivation, would not be grounds for the solvent spouse to approach the court to protect the property rights.

As such, whether the loss or interference is permanent or temporary is arguably irrelevant in terms of classifying the application of section 21 of the Insolvency Act as

[342] Brits 83.
[343] Brits 83. See also *Harksen* case para 40.
[344] Brits 83.
[345] Brits 83.
[346] Brits 84.
[347] *Harksen* case para 40.

an act of deprivation. The question of permanence or temporary loss becomes relevant for the application of section 36 of the Constitution, which addresses the reasonable and justifiable deprivation. However, as the court indicated the application of section 21 of the Insolvency Act to constitute expropriation, permanence is assumed, and the test of section 36 of the Constitution becomes unnecessary.

If the solvent spouse can prove ownership, then the trustee must release the property of the solvent spouse, on the bases of the conditions set out in section 21(2) of the Insolvency Act. It is noted that the court plays a procedural role due to its discretionary powers in respect of deprivation in terms of section 21 of the Insolvency Act.[348]

The court's discretionary power allows for the assessment of its procedural fairness in terms of the application of section 21 of the Insolvency Act. This study posits that the application of section 21(1) and section 21(2) of the Insolvency Act is procedurally unfair toward the solvent spouse, at least to the extent that it places the onus on the solvent spouse to prove that the properties which have been divested to the trustee are not part of the insolvent estate. The solvent spouse has the burden of proof of ownership.[349] The unfairness is based on the fact that the burden of proof should fall on the party applying for the sequestration, or at least on the insolvent spouse. This right may be hampered by the process itself, including lack of resources to fund litigation, as at this stage the sequestration process had already started.

According to Currie and De Waal, a deprivation is substantively arbitrary if there are no sufficient reasons for it.[350] This means that the first enquiry should be to establish the rationale for deprivation. As such, it is expected that there should be a well-founded justification for deprivation.[351] The formulation of the rationality principle is presented in *Carephone (Pty) Ltd v Marcus NO*[352] by a full bench of the Labour Appeal Court:

[348] Currie & De Waal 544.
[349] *Snyman v Rheeder NO* 1989 (4) SA 496 (T) at 5051-J.
[350] Currie & De Waal 543.
[351] Currie & De Waal 544.
[352] *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) para 37 (hereinafter referred to as the *Carephone* case).

> Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?

Decisions must be based on substantive proof and within mandated discretionary powers. Without this context, decisions may be arbitrary due to unfair and unreasonable deprivation of property.[353]

In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*,[354] the Constitutional Court held that the question whether a decision is rationally related to the requirements of sequestration orders which primarily comprise the advantage to creditors based on the onus of proof brought by the applicant. Decisions which prove to be unjust, unreasonable, and potentially arbitrary thus undermine a constitutional principle. Rationality requires that the court act within its discretionary parameters, based on the legislature to avoid unconstitutional rulings.[355]

The purpose of section 21 of the Insolvency Act may thus be posited to ensure that spouses do not defraud their creditors.[356]

Furthermore, section 25(1) of the Constitution provides that deprivation must be authorised by law of general application. In other words, the administrator who seeks to deprive someone property must be armed with the appropriate statutory authority.[357] This study argues that section 21 of the Insolvency Act constitutes a law of general application. This means that the process of divesting property in terms of section 21 of the Insolvency Act to the Master, and a trustee, is lawful as it is authorised by the law of general application.

Section 21 of the Insolvency Act may be misconstrued to only being applicable to civil marriages where there are only two spouses. It seems not to accommodate

---

[353] Currie & De Waal 543. See also *Carephone* case para 37.
[354] (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241, paras 85-90. (Hereinafter referred to as the *Pharmaceutical* case). By notice in the Gazette this case prescribes the rules referred to in sec 56 (3)(c), as well as procedural requirements for notice of occupational injuries and diseases, claims for compensation, or any matter relevant to the Act.
[355] *Pharmaceutical* case paras 85-90.
[356] *Pharmaceutical* case para 57.
[357] Currie & De Waal 539-540.

polygamous marriages as these are not specifically mentioned in the section. Accordingly, section 21(13) of the Insolvency Act defines a spouse to mean:

> … not only a wife or husband in the legal sense, but also 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.

Upon analysis, it may be argued that section 21(13) of the Insolvency Act closes any uncertainty on the issue of the number of spouses that are involved in the marriage. As a result, when there are more than two spouses in a marriage and one spouse's estate becomes insolvent, all other spouses may be affected. Section 7(6) of the Recognition of Customary Marriage Act[358] acknowledges that a husband may have more than one spouse and a polygamous marriage may be entered into in terms of the antenuptial contract. It is common cause that marriages concluded in terms of an antenuptial contract fall out of community of property. Section 21 of the Insolvency Act applies to marriages out of community of property.

It should then be asked, if section 21 of the Insolvency Act requires all polygamous spouses' estates to vest in the Master and trustee, subject to the conditions outlined in section 21(2) of the Insolvency Act, or whether section 21 of the Insolvency Act requires only the first wife's assets to vest in the Master. This is not apparent from the Act; however, section 21(13) of the Insolvency Act recognises that a wife or a husband may be by virtue of marriage according to any law or custom. Therefore, if only one spouse's estate were to vest to the exclusion of other spouses which are recognised by customary law, this may become problematic. This argument serves to illustrate the vast application of section 21 to numerous marriages and unions recognised by the South African Law; and its potential section 25 implications once other equality arguments have been settled. I do not delve into the constitutionality of whether all marital dispensations are dealt with equally under section 21, but only note the point.

In terms of section 36 of the Constitution, deprivation is constitutional if it is found to be reasonable and justifiable. The same requirements may be applied to section 21 of the Insolvency Act. It is justifiable for legislature to ensure fair process, and that is

[358] Act 120 of 1998.

exemplified by section 21 of the Insolvency Act, because this section provides for the prevention of spousal collusion and fraud. Furthermore, section 21(3) of the Insolvency Act prevents the trustee from realising the property of the solvent spouse who does not reside or is not residing at the same address as the insolvent debtor without the leave of the court. Finally, section 21(4) of the Insolvency Act provides a remedy for the solvent spouse, which comprises approaching the court to prove ownership of the property.

The right to approach the court which is provided by section 21(4) of the Insolvency Act, may not be always simple due to many factors which include lack of necessary resources. One should remember that at this stage, in terms of section 21(1), the property has already been vested into the control of the Master or trustee. Practically the solvent spouse does not have much on the table. Therefore, the circumstances around the right to approach the court in terms of section 21(1) may not be conducive due to financial resources. Therefore, the constitutionality of section 21(1) may be in doubt, as in my opinion, it may limit the right to access to court in terms of section 34 of the Constitution.

3.7 Conclusion

Chapter 3 provided the analysis of the constitutionality of the Insolvency Act. The research problem which was analysed in this chapter comprised the conflict between section 20 and section 21 of the Insolvency Act and section 25(1) of the Constitution, in terms of arbitrary deprivation.

As section 20 of the Insolvency Act specifies that the insolvent estate is divested to the Master and then to a trustee with the express purpose of ensuring the proper and fair distribution of assets, the deprivation brought about by sequestration in this regard is not arbitrary. As such, it is not necessary to prove whether the deprivation is reasonable or justifiable as per section 36 of the Constitution.

Section 21 of the Insolvency Act may be argued to cause property deprivation to the solvent spouse. This deprivation was explored by the court in *FNB v CSARS*[359] to

[359] *FNB v CSARS* para 46.

address constitutionality. In terms of section 21 of the Insolvency Act, the court found that this form of interference with property rights is expropriation, not deprivation, due to the narrow interference of the definition. Expropriation was found not to be arbitrary, and thus section 21 of the Insolvency Act is not in contravention of section 25(1) of the Constitution. As such, there is no need to investigate its reasonable and justifiable application as per section 36 of the Constitution.

Chapter 4: Conclusion and recommendations

4.1 Introduction

This chapter provides an overview of the study content presented, and provides the findings, and proposed solutions, to the research questions. Chapter 4 addresses the problem statement and questions presented in Chapter 1, and concludes the research.

4.2 Problem statement

This study aimed to investigate the impact of the constitutional arbitrary deprivation of property clause set out in section 25(1) of the Constitution on the provisions of sequestration in section 20 and section 21 of the Insolvency Act.

The problem that this research aimed to address is the constitutionality of the provisions of the Insolvency Act that relate to the sequestration of the estate of an individual. This study submitted that the provisions affect the property rights of an individual, as a result were unlikely to pass the deprivation test as set out in section 25 of the Constitution.

Chapter 3 presented a critical analysis of the submission raised in the problem statement. That analysis covered the definition of what property has been interpreted to be; it explored what has been regarded as constituting property rights; it further explored the contemporary constitutionally informed interpretation of arbitrary deprivation; and lastly, it addressed what courts have recently interpreted to be reasonable and justifiable arbitrary deprivation. From Chapter 3's analysis, it is clear that courts have the discretion to contextually define property as they see appropriate. What is apparent from the analysis, and what must be realised is that courts do not just make use of their discretionary powers. To interpret 'deprivation of property' their discretionary mandate is informed by legislation and the Constitution.

The critical analysis presented in Chapter 3 is based on the fact that,in *FNB v CSARS*, the Constitutional Court held that any interference with the use of enjoyment or exploitation of the property or limitation of the property, may be regarded as a deprivation and it should be tested against the requirement of section 25(1) of the

Constitution.[360] As such, the court's discretion in the interpretation of definitions regarding property poses the risk of arbitrary deprivation, as evidenced through conflicting court judgements in the cases of *Kellerman*,[361] *Van Schoor,*[362] *Boland Bank,*[363] *Klerck*,[364] and *Durandt*.[365]

This risk, as well as the issue of arbitrary deprivation is concluded based on the Constitutional Court's ruling that deprivation requires substantial interference or limitation which *exceeds the scope of normal restriction* on the use of the property in question, based on the Constitution,[366] as presented in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng*.[367]

The Insolvency Act is a law of general application, and it aims to ensure the interests and advantage of creditors. As noted in Chapter 3, section 25(1) of the Constitution requires that deprivation occur in accordance with the law of general application, which means that the deprivation must follow a fair procedure and be substantively fair. This requirement is due to protection of property rights set out in section 25 of the Constitution. Substantive fairness requires that the deprivation not be arbitrary.[368] Furthermore, deprivation was found not to equate to expropriation, and is, as such temporary.[369]

Expropriation was addressed in relation section 21 of the Insolvency Act, as the *Harksen* case demonstrated the court's determination that the expropriation or deprivation is temporary and that the solvent spouse may approach a court to protect his or her property rights. As expropriation constitutes a permanent transfer of

[360] *FNB v CSARS* para 57. See also Currie & De Waal 538.
[361] *Kellerman* case para A-B 339.
[362] *Van Schoor* case 131.
[363] *Boland Bank* case 114 A.
[364] *Klerck* case 341 A-B.
[365] *Durandt* case 871 A-F.
[366] *Mkontwana* case para 32.
[367] 2005 (1) SA 530 (CC) para 32. Hereafter referred to as the *Mkontwana* case. See also Currie & De Waal 538. See also *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 (1) SA 293 (CC) paras 30, 39-43; *South African Producers Organisation v Minister of Minerals and Energy NO* 2017 (10) BCLR 1303 (CC) paras 42-48.
[368] Currie & De Waal 540.
[369] Brits 83. See also *Harksen* case para 40.

ownership, temporary interference with property rights, set out in terms of deprivation, would not be grounds for the solvent spouse to approach the court to protect the property rights. However, iIt remains this study's argument that it is unfair for a solvent spouse regulated in section 21 of the Insolvency Act to have to be required to apply to court to prove ownership of his/her property on the basis that the other spouse is insolvent to rectify vested property under certain conditions.

4.3 Research outcomes

This study set out to answer the primary research question of whether interference with property rights as per section 20 and section 21 of the Insolvency Act qualifies as a prohibited deprivation in terms of the section 25(1) of the Constitution.

Having critically analysed sections 20 and 21 of the Insolvency Act this study submits that both sections are constitutional inasmuch as, section 20 of the Insolvency Act constitutes deprivation (relinquishing the ownership of property), the deprivation is not arbitrary, and therefore is justifiable and reasonable based on section 36 of the Constitution. This secondary constitutional test is not necessary based on the lack of arbitrary deprivation.

The Insolvency Act is considered to be a law of general application, and it governs the two processes through which a debtor's estate may be sequestrated, namely voluntary surrender and compulsory sequestration. This answers the secondary research question of the effect of the relevant sections of the Insolvency Act on an individual's property rights.

The alignment between the relevant sections of the Insolvency Act and section 25(1) of the Constitution is demonstrated through the formal procedures set out in the Act to govern sequestration. This indicates that the process is non-arbitrary, as the two processes directly aim to fulfil the purpose of the Insolvency Act, through specific procedural steps which require compulsory compliance. This ensures due process and prevents the undermining of the constitutional rights of both the insolvent debtor and the creditors in question. This also limits arbitrary deprivation of property, as the arbitrariness is determined in terms of deprivation for public purpose or public

interest.[370] If the deprivation is not made in the public interest, it may be found arbitrary in terms of section 25 of the Constitution. It may be argued that the sequestration of an insolvent debtor is not a process which serves the public interest, however, if the arbitrary deprivation is justifiable and reasonable, then it is constitutional in terms of section 36 of the Constitution. Inasmuch as sequestration is a process which aims to repay creditors what is owed to them by the insolvent debtor, it is a justifiable process, and provided that the process follows the conditions set out in the Insolvency Act, by the court, it is substantively and procedurally reasonable. This is substantiated by the fact that the sequestration order will only be granted if sequestration is to the advantage of creditors.[371] The Insolvency Act lays down advantage to creditors as a prerequisite for sequestration applications.

To address the question of legislative refinement and enhancement, the study raised the issue of broad definitions and discretionary interpretation. The Insolvency Act provides broad definitions of property. Due to the broad definitional elements, the Insolvency Act provides the court with discretion in terms of the application of the term. As it stands, the broad definition encompasses both immovable and movable property which is situated within the Republic of South Africa.[372] This definition further includes contingency property other than the contingent interests of the *fidei commissary* heir or legatee.[373] This definition provided in the Insolvency Act is wider than the definition provided in the common law.[374]

While the Constitutional Court has noted that it would be unwise to attempt to refine the definition of property in accordance with section 25 of the Constitution, noted in *FNB v CSARS,*[375] there is scope for the refinement of the definition of property. The refinement may be justified as it would aid in the determination of the inclusion and exclusion and exemption of property from an insolvent estate.

[370] Currie & De Waal 533.
[371] Sec 12(1)(c).
[372] Act 24 of 1936 sec 2.
[373] Act 24 of 1936 sec 2.
[374] Meskin & Kunst 5.1.
[375] [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (CC).

However, from an insolvency law perspective it is recommended that there be some refinement of the broad definition of the term 'property'.

4.4 Conclusion

The property rights enshrined under section 25 of the Constitution, is important and should be protected whenever there is a possibility of it being infringed not only by the insolvency law but by any other law.

The Insolvency Act is a law of general application, and it aims to ensure the interests and advantage of creditors. As noted in Chapter 3, section 25(1) of the Constitution requires that deprivation occur in accordance with the law of general application, which means that the deprivation must follow a fair procedure and be substantively fair.

While property right infringements are unconstitutional, the deprivation brought about by sequestration, set out in section 20 and section 21 of the Insolvency Act have been found to substantively fair, as expressed in the Constitutional Court's ruling that deprivation requires substantial interference or limitation which *exceeds the scope of normal restriction* on the use of the property in question, based on the Constitution.[376]

[376] *Mkontwana* case para 32.

Bibliography

Books

Currie, I; De Waal, J *The Bill of Rights Handbook* (2013) 6th ed JUTA: Cape Town

De la Rey, E; Roestoff, M; Stander, L; Bertelsmann, E; Calitz, J; Evans, RG; Harris, A; Kelly-Louw, M; Loubser, A; Smith, A; Steyn, L *Mars: The law of insolvency in South Africa* (2019) 10th ed JUTA: Cape Town

Kunst, JA; Boraine, A; Burdette, D *Insolvency Law* (1997) LexisNexis: Durban

Hoexter, C; *Administrative law in South Africa* (2012) 2nd ed JUTA: Cape Town

Nagel, CJ *et al Commercial Law* (2019) 6th ed LexisNexis: Durban

Sharrock, R; Smith, D; Van der Linde; K *Hockly's Insolvency Law* (2022) 10th ed JUTA: Cape Town

Case Law

Absa Bank Ltd v De Klerk 1999 (4) SA 835 (SE)

Absa Bank v Rhebokskloof (Pty) Ltd & Others 1993 (4) SA 436 (C)

Bank of Lisbon and South African Ltd v The Master 1987 (1) SA 276 (A)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC)

Boland Bank Bpk v Du Plessis 1995 (4) SA 113 (T)

Brink v Kitshoff NO 1996 (4) SA 197 (C)

Brinkman v Botha & Others [2004] JOL 13093 (C)

Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC)

Cohen v Jacobs (Stand 675 Dowerglen (Pty) Ltd intervening) [1998] 2 All SA 433 (W)

Collet v FirstRand Bank Ltd 2011 (4) SA 508 (SCA)

Craggs v Dedekind and others 1996 (6) SA 935 (C)

De Lange v Smuts NO 1997 (11) BCLR 1553 (C)

De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC)

De Villers v Delta Cables (Pty) Ltd 1992 (1) SA 9 (A)

De Villiers NO v Kaplan 1960 (4) SA 476 (C)

De Villiers NO v Maursen Properties (Pty) Ltd 1983 (4) SA 670 (T)

Dunlop Tyres (Pty) Ltd v Brewitt [1999] JOL 4663 (W)

Durandt NO v Pienaar NO and Others 2000 (4) SA 869 (C)

Epstein v Epstein 1987 (4) SA 606 (C)

Estate Botha v Estate Nel and Botha 1936 NLR 619

Esterhuizen v Swanepoel and sixteen others cases 2004 (4) SA 89 (W)

Ex parte Anthony 2000 (4) SA 116 (C)

Ex parte Arntzen 2013 (1) SA 49 (KZP)

Ex parte Bouwer 2009 (6) SA 382 (GNP)

Ex parte Ford 2009 (3) SA 376 (WCC)

Ex parte Fourie [2008] 4 All SA 340 (D)

Ex parte Greub v The Master 1996 (1) SA 746 (C)

Ex parte Harris 2016 (1) All SA 764 (WCC)

Ex parte Kelly 2008 (4) SA 615 (T)

Ex parte Le Roux 1996 (2) SA 419 (C)

Ex parte Mattysen et Uxor 2003 (2) SA 308 (T)

Ex parte Ogunlaja [2011] JOL 27029 (GNP)

Ex parte Pillay 1955 (2) SA 309 (N)

Ex parte Shmukler-Tshiko [2013] JOL 29999 (GSJ)

Ex parte: John William Snooke (752/2014) [2014] ZAFSHC 96; 2014 (5) SA 426 (FB)

Ex parte Van den Berg 1962 (4) SA 402 (O)

Fesi v Absa Bank Ltd 2000 (1) SA 499 (C)

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB v CSARS) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (CC)

Harksen v Lane NO and Others (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC)

Julie Whyte Dresses (Pty) Ltd v Whitehead 1970 (3) SA 218 (D)

Kellerman NO v Van Vuren and Others 1994 (4) SA 336 (T)

Klemrock (Pty) Ltd v De Klerk 1973 (3) SA 925 (W)

Klerck and Scharges NNO v Lee and Others 1995 (3) SA 340 (SE)

Le Roux v Viana NO 2008 (2) SA 173 (SCA)

Lotzof v Raubenheimer 1959 (1) SA 90 (O)

Lynn and Main Inc v Naidoo 2006 (1) SA 59 (N)

MacGillivray v Edmundson 1958 (3) SA 387 (SR)

Madari v Cassim 1950 (2) SA 35 (D)

Masethla v President of the Republic of South Africa 2008 1 BCLR 1 (CC)

Meskin & Co v Friedman 1948 (2) SA 555 (W)

Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng 2005 (1) SA 530 (CC)

Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A)

Mthimkhulu v Rampersad (BOE Bank Ltd, intervening creditor) [2000] 3 All SA 512 (N)

National Credit Regulator v Nedbank Ltd and Others 2009 (4) SA 505 (GNP)

National Credit Regulator v Opperman and Others 2013 (2) SA 1 (CC)

Niewenhuizen v Nedcor Bank Ltd [2001] 2 All SA 364 (O)

Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd 2011 (1) SA 293 (CC)

Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC)

R v Meer 1957 (3) SA 614 (N)

Sellwell Shop Interiors v Van der Merwe 27527/1990 (W) (unreported)

Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others (CCT 216/14) [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC)

Sidumo and Another v Rustenburg Platinum Mines Ltd and Others [2007] 12 BLLR 1097 (CC)

Simon NO and Others v Mitsui and Co Ltd and Others 1997 (2) SA 475 (W)

Snyman v Rheeder NO 1989 (4) SA 496 (T)

South African Producers Organisation v Minister of Minerals and Energy NO 2017 (10) BCLR 1303 (CC)

Standard Bank of South Africa v Bester NO 1995 (3) SA 123 (A)

Standard Bank of South Africa v Sewpersadh 2005 (4) SA 148 (C)

State v. Makwanyane and Another 1996 (3) SALR 165 (CC)

State v. Zuma and Others 1995 (3) SALR 391 (CC)

Stern and Ruskin NO v Appleson 1951 (3) SA 800 (W)

Stratford and Others v Investec Bank Limited and Others [2014] ZACC 38; 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC).

The National Director of Public Prosecution (Ex Parte Application (905/2017) [2018] ZASCA 86

Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturs (Pty) Ltd 1988 (2) SA 546 (A)

Trust Wholesalers and Woollens (Pty) Ltd v Mackan 1954 (2) SA 109 (N)

Vermeaulen v Hubner 1165/1990 (T) (unreported)

Van Rooyen v Van Rooyen [2002] 2 All SA 485 (SE)

Van Schoor's Trustee v Executor of Muller (1858) 3 Searle 131

Van Zyl NNO v Turner NNO 1998 (2) SA 236 (C)

Walker v Syfret 1911 AD 141

Wasserman v Sackstein NO 1980 (2) SA 536 (O)

Wessels NO v De Jager NO en 'n Ander 2000 (4) SA 924 (SCA)

Wilkins v Pieterse 1937 CPD 165

Chapter in book

Coetzee H & Brits R 'Extinguishing of debt in terms of the debt intervention procedure: some remarks on 'arbitrariness' in D van der Merwe, D (ed) *Magister: Essays vir/for Jannie Otto* (2020) LexisNexis: Durban

Journal Articles

Boraine, A 'Towards codifying the Actio Pauliana' (1996) *South African Mercantile Law Journal (SA Merc LJ)* 213

Boraine, A; Roestoff, M 'Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform (1)' (2014) *Journal of Contemporary Roman-Dutch Law (THRHR)* 351

Boraine, A; Roestoff, M; Evans, R; Steyn, L 'The pro-creditor approach in South African insolvency law and the possible impact of the Constitution' (2015) 3 *Nottingham Insolvency and Business Law eJournal* 5

Boraine, A; Van Heerden, C 'To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgements' (2010) *Potchefstroom Electronic Law Journal (PELJ)* 112

Brits, R 'The impact of the constitutional property law on insolvency law in South Africa' (2021) *International Insolvency Review* 34

Coetzee H, 'Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African exposition' (2016) *International Insolvency Review* 42

Evans, R, 'Waiving of rights to property in insolvent estates and advantage to creditors in sequestration proceedings in South Africa' (2018) *De Jure* 298-317.

Fritz, C; Brits, R 'Does the 'pay now, argue later' approach in the Tax Administration Act 28 of 2011 infringe on a taxpayer's right not to be deprived of property arbitrarily?' (2020) *South African Journal on Human Rights* 36

Kawadza, H 'Taming the mechanics of mortgage foreclosures: The case *of Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ)' (2019) *De Jure* 102

Mabe, Z, 'Section 27 of the Insolvency Act 24 of 1936 as a Violation of Equality Clause of the Constitution of South Africa: A Critical Analysis' (2016) *Potchefstroom Electronic Law Journal* 19

Mabe, Z 'Vesting of the assets of a solvent spouse and customary marriages in South Africa' (2019) *Journal of Contemporary Roman-Dutch Law* 564

Roestoff, R 'Insolvency restrictions, disabilities and disqualifications in South African consumer insolvency law: A legal comparative perspective' (2018) *Journal of Contemporary Roman-Dutch Law* 393

Roestoff, R '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)' (2020) *Journal of Contemporary Roman-Dutch Law* 442

Roestoff, R; Coetzee, 'Consumer debt relief in South Africa; Lessons from America and England; and suggestions for the way forward' (2012) *South African Mercantile Law Journal* 53

Smith, BS; Robinson, JA 'An embarrassment of riches or a profusion of confusion? an evaluation of the continued existence of the Civil Union Act 17 of 2006 in light of the prospective domestic partnerships legislation in South Africa' (2010) 36 *Potchefstroom Electronic Law Journal* 37

Steyn, L 'Reform of South African Insolvency Law' (2001) *International Insolvency Review* 141

Van Eck, S; Boraine, A 'The insolvency and labour package: how successful was the integration' (2003) *Industrial Law Journal* 1840

Van Heerden, C; Boraine, A 'The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law' (2009) *Potchefstroom Electronic Law Journal* 22

Webb, H, 'The Constitutional Court of South Africa: Rights interpretation and comparative constitutional law'. (1998) *Journal of Constitutional Law* 205-283.

Legislation

Administration of Estates Act 66 of 1965

Civil Union Act 17 of 2006

Close Corporations Act 69 of 1984

Companies Act 61 of 1973

Companies Act 71 of 2008

Constitution of the Republic of South Africa, 1996

Customs and Excise Act 91 of 1964

Insolvency Act 24 of 1936

Labour Relations Act 66 of 1995

Long-Term Insurance Act 52 of 1998

Magistrates' Courts Act 32 of 1944

Marriage Act 25 of 1961

Matrimonial Property Act 88 of 1984

National Credit Act 34 of 2005

Recognition of Customary Marriage Act 120 of 1998

Trust Property Control Act 57 of 1988

Reports

South African Law Reform Commission *Report on the review of the law of insolvency: Draft Insolvency Bill and explanatory memorandum* Project 63 (2015) (copy on file with author)

Department of Justice and Constitutional Development *NEDLAC Interim Report* (July 2003; November 2006)

Rules and practice notes

Gauteng and the Cape Legal Education and Development (LEAD) *Insolvency Law Practice Manual* (2012)

Practice Manual of the Gauteng Division: North Gauteng

Practice Manual of the Gauteng Division: South Gauteng

Legal Education and Development (LEAD) *Insolvency Law Practice Manual* (2012)

Erasmus *Superior Court Practice* Uniform Rules of Court (loose-leaf 2021; JUTA: Cape Town)

Theses and dissertations

A Coetzee ‘A comparative reappraisal of debt relief measures for natural person debtors in South Africa’ unpublished LLD thesis, University of Pretoria, 2016

RG Evans ‘A critical analysis of problem areas in respect of assets of insolvent estates of individuals’ unpublished LLD thesis, University of Pretoria, 2008

TC Kgarabajang ‘The impact of the National Credit Act 34 of 2005 on insolvency law’ unpublished LLM dissertation, University of Pretoria, 2011