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SAME-SEX MARRIAGES, CUSTOMARY LAW, AND INSOLVENCY

OPSOMMING

Selfdegeslag huwelike, die gewoontereg, en die insolvensiereg

In hierdie aantekening word artikel 21 van die Insolvensiewet 24 van 1936, in die besonder soos dit toepassing vind op paartjies van dieselfde geslag wat hulle huwelik in ooreenstemming met hulle kultuur onderhandel en gesluit het. Die aantekening fokus veral daarop of artikel 21 van toepassing is op insolvente skuldenaars in 'n burgerlike verbintenis ingevolge die Wet op Burgerlike Verbintenisse 17 van 2006, en wat begerig is dat hulle verbintenis of huwelik erken moet word ingevolge die Wet op Erkenning van Gebruiklike Huwelike 120 van 1998. Die aangeleentheid word bespreek of artikel 21 van toepassing is op insolvente skuldenaars wat nie in 'n burgerlike verbintenis staan nie, maar wat 'n gebruiklike huwelik aangegaan het deurdat hulle *lobolo* betaal het, geskenke uitgeruil, en hulle verbintenis ooreenkomstig die inheemse gewoontereg bevestig het. Laastens ondersoek

ek of artikel 21 van toepassing sal wees op 'n poligame selfdegeslag gebruiklike huwelik. My gevolgtrekking is dat die definisie van "gade" in artikel 21(13) van die Insolvensiewet nie tussen lewende gewoontereg en amptelike gewoontereg onderskei nie, en dat dit bloot na enige gebruik verwys. Die bedoeling blyk dus te wees dat artikel 21 bestem was om van toepassing te wees op alle huwelike wat ooreenkomstig *enige gebruik* in Suid-Afrika gesluit is, ingevolge wetgewing al dan nie. 'n Moeiliker kwessie wat uitgelig word, is egter die hantering van 'n poligame selfdegeslag gebruiklike huwelik.

1 Introduction

Section 21 of the Insolvency Act 24 of 1936 (Insolvency Act) vests the assets of a solvent spouse in the trustee of the insolvent estate. Section 21(1) provides:

> "The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were the property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section."

Section 21 was intended to prevent collusion between spouses married out of community of property to the detriment of creditors of the insolvent estate and to assist the trustee in determining which assets in a spouse's possession belong to the insolvent estate, so that the creditors of the estate are not deprived of assets that belong to the insolvent estate (*Harksen v Lane NO* 1998 1 SA 300 (CC) paras 56, 57).

The application of section 21 to the insolvent estate of a spouse in a heterosexual marriage seems to be uncomplicated, as the definition of the term "spouse" in section 21(13) of the Insolvency Act refers to a "wife and a husband" and a "woman and a man". The difficulty in the application of section 21 may arise when the estate of the same-sex couple becomes sequestrated. This difficulty becomes more acute when the same-sex couple decided that they wanted a customary marriage by paying *lobolo* and celebrating their union in accordance with customary law, in terms of the Recognition of Customary Marriages Act 120 of 1998 (Recognition Act).

An example of a same-sex couple who intended to have a customary marriage by celebrating their union in accordance with customary law in South Africa was the widely publicised marriage of the media personalities Somizi Mhlongo and Mohale Motaung (see "Inside Somhale's "homosexual" traditional wedding!" https://mgosi.co.za/inside-somhales-homosexual-traditional-wedding/ (24 Feb 2020) (accessed 27-02-2024). In this case, Somizi and Mohale were *married* in 2019 and the process leading up to their wedding was televised in the Showmax series *The Union Season 1*. In season 1, the gifting ceremony started with singing and the Mhlongo family was seen walking to the Motaung family home. When the gates were finally opened, the Motaung family accepted the calf and a bottle of gin, after which the Mhlongo family was welcomed into the Motaung family home to commence the proceedings. Finally, Mohale was handed over to Somizi's family and a union between the two families was sealed with prayer and praising of ancestors to unite the two families. However, in 2020, when Mohale filed for divorce, it turned out that their union was never registered with the Department of Home Affairs, and Mohale did not have a letter proving that *lobolo* was paid for

him ("'Look at God': Somizi and Mohale were not legally married" *The South African* (15 May 2022) https://www.thesouthafrican.com/lifestyle/celeb-news/breaking-somizi-and-mohale-not-legally-married-unregistered-marriage-living-the-dream/ (acessed 27-02-2024). Although it appears that the parties were never legally married, this is an example of a changing, living customary law (Boterere & Maimela "Reconciling *lobolo* with the equality principle: The need to realign official customary law with living customary law of South Africa" 2023 *De Jure* 704 714) under which section 21 would have to be considered should the estate of same-sex parties in a customary marriage be sequestrated.

The difficulty in the application of section 21 to same-sex customary marriages may even be more problematic if the parties intend to conclude a polygynous customary marriage like their heterosexual customary marriage counterparts.

This note discusses whether the Insolvency Act, particularly section 21, applies to same-sex couples who have negotiated and celebrated their marriage in accordance with their culture. In this regard, a distinction is made between (a) a same-sex couple who has entered into a civil partnership or marriage in terms of the Civil Union Act 17 of 2006 and who also want their partnership or marriage to be recognised in terms of the Recognition Act; (b) a same-sex couple who has not entered into a civil partnership or marriage but who are in a customary marriage because they have paid *lobolo*, exchanged gifts, and celebrated in a customary manner, and thus want their marriage to be recognised in terms of the Recognition Act; and (c) a same-sex couple similar to the latter but in addition to being in a customary marriage want their marriage to be polygynous.

The following three questions will be addressed: In the first instance, whether the Insolvency Act, particularly section 21, applies to insolvent debtors who are in a civil union in terms of the Civil Union Act and who also want their partnership or marriage to be recognised in terms of the Recognition Act; secondly, whether section 21 applies to insolvent debtors who are not in a civil union but who are in a customary marriage because they have paid *lobolo*, exchanged gifts, and celebrated their union in accordance with customary law; and, thirdly, whether section 21 would apply to a polygynous same-sex customary marriage.

Since the purpose of the sequestration procedure is to distribute equitably the assets of the debtor amongst his or her creditors (Bertelsman *et al* Mars *The law of insolvency in South Africa* 10 ed (2019) 3; Smith *et al Hockly's law of insolvency, winding-up and business rescue* 10 ed (2022) 4), and section 21 is specifically intended to make sure that spouses married out of community of property do not hide assets between themselves, thus depriving creditors of assets of the insolvent estate, the answers to these questions are important as they will affect the amount of money available to creditors of the insolvent estate.

2 Section 21 and the Civil Union Act

Section 21(13) of the Insolvency Act defines a spouse as "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".

Customary law, in turn, is defined as the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people, whereas the term "customary marriage" connotes

a marriage concluded in accordance with customary law (s 1 *svv* "customary law" and "customary marriage" of the Recognition Act).

A cursory reading of section 21(13) may suggest, because of the absence of the words "same-sex partners", that same-sex partners are excluded from its ambit. Such an interpretation may then raise questions about the constitutionality of the provision. Interested parties, such as the creditors of the estate, may allege that their right to be treated equally before the law has been violated, because the assets of a solvent spouse who is married to the insolvent in terms of the Marriage Act 25 of 1961, which is heterosexual in nature, vest in the insolvent estate, in this way benefitting the creditors of the estate. Whereas the assets of a solvent partner who is in a civil union partnership with the insolvent in terms of the Civil Union Act, which may be heterosexual or homosexual, are excluded from the insolvent estate, in this way depriving the creditors of the estate and unfairly discriminating against them on the grounds of sexual orientation (s 9(3) of the Constitution of the Republic of South Africa, 1996).

However, a closer look at the wording of section 21(13), particularly the words "according to any law or custom" suggests that the legislature intended for section 21 to apply to all spouses, as same-sex partners are married, or are in a partnership, in terms of a law of South Africa – the Civil Union Act. Further, when the Insolvency Act was promulgated, same-sex marriages were not legalised in South Africa. Although the legislature could not have foreseen that in 2006 such marriages would be legalised, the legislature enabled future inclusivity by including the words "according to any law".

In addition, when the constitutionality of section 21 was questioned in *Harksen*, the Constitutional Court held that section 21 assists a trustee in determining which property in the possession of "spouses" belongs to the insolvent estate, not only in cases of collusion but also in the case of honest partners to a marriage or a "similar close relationship" (para 57). Further, Evans and Steyn suggest that since the commencement of the Civil Union Act on 30 November 2006, the definition of the term "spouse" in the Insolvency Act has by implication been amended to include persons of the same sex or of the opposite sex who have entered into a civil union (Evans & Steyn "Property in insolvent estates – *Edkins v Registrar of Deeds, Fourie v Edkins*, and *Motala v Moller*" 2014 *PER/PELJ* 6 n 3). This is also because the Civil Union Act was intended to give partners in a civil union the same legal recognition and the same legal consequences, subject to relevant contextual changes, as spouses in a civil marriage (s 13(1) of the Civil Union Act; Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* (LLD thesis, University of Pretoria 2008) 392; Mabe "Vesting of the assets of a solvent spouse and customary marriages in South Africa" 2019 *THRHR* 564 567). Moreover, section 13(2)(*b*) of the Civil Union Act states that with the exception of the Marriages Act and the Recognition Act, any reference to husband, wife, or spouse in any other law, including the common law, includes a civil union partner.

Therefore, should the estates of persons who have entered into a civil union be sequestrated, section 21 of the Insolvency Act would apply to them if their union is out of community of property. Also, should the estate of same-sex partners living together as civil union partners, although they have not entered into a civil union, be sequestrated, section 21 would apply to their estates. While this may be true, section 21(13) of the Insolvency Act still needs to be amended to include explicitly same-sex partners in the definition of the term "spouse" to avoid

difficulties of interpretation that could arise in the future which may be detrimental to the interested parties such as the creditors of the insolvent estate, the insolvent debtor, and the solvent spouse. An explicit inclusion of same-sex partners also needs to be done to avoid the dilemma faced by the courts when two statutes have to be read together to reach a balance of interests (for example, *South African Reserve Bank v Leathern NO* 2021 5 SA 543 (SCA) (aspects of insolvency law overlapped with the provisions of the Currency and Exchange Act 9 of 1933), and *Wentzel v Discovery Life Ltd* 2021 6 SA 437 (SCA) (aspects of insolvency legislation overlapped with insurance legislation)).

The second part of the question is whether section 21 would apply to a same-sex couple who has entered into a civil marriage or partnership, and who wants their partnership or marriage also to be recognised in terms of the Recognition Act, because they have paid *lobola*, exchanged gifts, and celebrated in accordance with customary law.

In this regard, the relevant question is whether parties to a civil union can conclude a marriage in terms of the Recognition Act. Section 8(2) of the Civil Union Act provides that a person in a civil union may not conclude a marriage under the Marriage Act or the Recognition Act. Parties wanting to conclude a marriage under the Recognition Act must provide proof of the termination of their civil union, such as a divorce decree or a death certificate, before they can enter into a customary marriage (s 8(4)). Therefore, once a same-sex couple has concluded a civil union, whether or not they customarily celebrated their marriage, they cannot enter into customary marriage in terms of the Recognition Act, unless they first divorce. Accordingly, as stated earlier, section 21 applies to their civil union. The question of whether section 21 applies to a same-sex customary marriage will be discussed below.

3 Section 21 and the Recognition Act

As regards the question of whether section 21 applies to insolvent debtors who have not entered into a civil marriage but regard themselves as customarily married because they have paid *lobolo*, exchanged gifts, and celebrated customarily, it is important first to determine the requirements for a valid customary marriage in terms of the Recognition Act.

Section 1 of the Recognition Act defines a customary marriage as a marriage that has been concluded in accordance with customary law. There are three requirements to be met in order to conclude a customary marriage: the parties must be older than 18 years; they must consent to marry according to customary law; and "the marriage must be negotiated and entered into or celebrated in accordance with customary law" (s 3).

As the first two requirements do not pose an impediment for same-sex couples to conclude a customary marriage, I shall deal only with the third requirement – the marriage must be negotiated and entered into, or celebrated in accordance with customary law. This requirement contains three key elements: (a) family participation (through the groom's family sending a letter to the bride's family to commence *lobolo* negotiations and the back and forth regarding the date); (b) the negotiation and/or payment of *lobolo* (which is negotiated between the prospective spouses' families and paid by the groom's family to the bride's family); and (c) the handing over of the bride (Osman & Baase "The recognition of same-sex customary marriages under South African customary law" 2022 *SAJHR* 1 paras 3.1, 3.1.1 and 3.1.2).

Although the Recognition Act does not explicitly preclude a same-sex customary marriage, the Act refers to *lobolo* as property in cash or kind, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage (s 1 *sv* "*lobolo*" of the Recognition Act). Thus, gender plays an important role in validating *lobolo* in that only the prospective husband or his family head must furnish *lobolo* while only the prospective wife's family head may receive the *lobolo*, to the exclusion of all others (Boterere & Maimela para 1). Thus, *lobolo* in terms of the Recognition Act has a statutory gender requirement, because it prescribes a gender requirement that must be followed during the *lobolo* practice (*ibid*).

Further, the handing over of the bride element reinforces this gender requirement, as it implies that the Recognition Act only recognises heterosexual marriages (Osman & Baase para 3.1.2). Thus, by implication, the Recognition Act appears to preclude same-sex couples from its application. However, because custom refers to living customary law (which is ever-changing) (Boterere & Maimela 709; *Mabena v Letsoalo* 1998 2 SA 1068 (T) 1069, 1074) – the actual practices of people of that culture – rather than official customary law which is written customary law, the mere fact that the gender requirement in the Recognition Act appears to exclude same-sex partners does not mean that the same-sex couple are not in a customary marriage. Osman and Baase state that the court focuses on whether the families have agreed on how the requirements of *lobolo* and handing over of the bride can be fulfilled or waived (Osman & Baase para 4). Further, it is the family which has a role in the adaptation of the requirements that determine whether a same-sex customary marriage has been concluded. Thus, the courts recognise living customary law.

Consequently, as regards the question as to whether section 21 applies to insolvent debtors who regard themselves as customarily married because they have negotiated (paid *lobolo*) and celebrated their union in accordance with customary law, it appears that it does not matter whether or not the Recognition Act recognises their marriage. This is because section 21(13) of the Insolvency Act refers to spouses as 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. As indicated above "custom" refers to the *living* customs and usages traditionally observed among the indigenous African people of South Africa.

Accordingly, although the Recognition Act appears not to apply to same-sex couples who negotiated and celebrated their union in accordance with customary law, it appears that section 21 would still apply to their estates should their estate be sequestrated, because the definition of "spouse" in section 21(13) does not exclude them from its ambit. Section 21 also does not distinguish between living customary law and official customary law. It merely refers to custom. This seems to indicate that section 21 was intended to apply to all marriages concluded in accordance with *any* custom in South Africa, whether legislated or not.

However, because section 21(1) states that the separate estate of one of the two spouses will also vest in the trustee (in addition to the vesting of the assets of the insolvent spouse), section 21 does not consider the existence of separate estates belonging to more than two spouses, where there are multiple solvent spouses in a marriage (Mabe paras 1 and 2.3.2). This is irrespective of whether the spouses are in a heterosexual or same-sex customary marriage and despite the extended meaning of the term "spouse" in the Insolvency Act which includes "a wife or a husband married according to any law or custom" (*idem* para 1).

Therefore, as regards the third question as to whether section 21 would apply to a polygynous same-sex customary marriage, because of the words "one of two spouses", section 21 appears to exclude all polygynous customary marriages and would thus not apply to same-sex couples who want their marriage to be polygynous. With the purpose of section 21 being to prevent collusion between spouses, the possible exclusion of polygynous customary marriages from the application of section 21 would not only increase collusion between spouses (because of the multiple separate estates) in such marriages but also deprive creditors of the insolvent estate of assets that may have belonged to the insolvent and could have been used for their benefit (*idem* paras 2.3.1 and 4 n 77).

4 Conclusion

In this note I discussed whether the Insolvency Act, particularly section 21, applies to same-sex couples who have negotiated and celebrated their marriage in accordance with customary law. When the Civil Union Act was promulgated, the definition of the word "spouse" in section 21(13) of the Insolvency Act was by implication amended to include persons of the same sex or of the opposite sex who have entered into a civil union. As a result, section 21 not only applies to the estate of a solvent spouse in a civil union but also to the estate of same-sex partners living together as civil union partners although they have not entered into a civil union. However, once a same-sex couple has concluded a civil union, whether or not they customarily celebrated their marriage, they cannot enter into a customary marriage in terms of the Recognition Act unless they first divorce from the civil union marriage.

Although the Recognition Act by implication appears to preclude same-sex customary marriages from its ambit, its non-recognition of same-sex customary marriages does not bar section 21 from applying to such marriages. By virtue of the word "custom" in section 21(13) of the Insolvency Act, which makes no distinction between "official" and "living" customary law, section 21 applies to same-sex customary marriages.

However, because of the words "one of two spouses" in section 21(1), it appears that all polygynous customary marriages are excluded from section 21. Accordingly, section 21 does not apply to a same-sex couple who wants their marriage to be polygynous.

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