REIMAGINING A NEW WORLD OF SOUTH AFRICAN INSOLVENCY LAW: ADVANTAGE TO CREDITORS AND SECTION 39(2) OF THE CONSTITUTION

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ABSTRACT

A recent judgment in an application for a final order of compulsory sequestration provided startling justification for granting the order even if the debtor's estate has no assets that would provide a pecuniary benefit and prospect of a dividend for creditors by relying in part on s 39(2) of the Constitution of the Republic of South Africa, 1996 and extensive quotations from two Constitutional Court decisions on other topics. The connections between the scope, purport and objects mentioned in s 39(2) and the subject matter of the case were not stated by the court but left to the reader to imagine and construct. Possible lines of justification are ventured in this article. The judgment's vision of radically reimagining the South African law of insolvency is based on misapplying s 12(1)(*c*) of the Insolvency Act 24 of 1936. In possible moves towards reforming South African insolvency law by abandoning the requirement of advantage to creditors in a new statute, it would be essential for the legislature to canvass detailed, well-informed, carefully considered research and guidance by experts on South African social, economic and financial policy in the current circumstances.

Keywords: advantage to creditors, Insolvency Act, Constitution, radical law reform

I INTRODUCTION

Know when to stop. The Constitution of the Republic of South Africa, 1996 (Constitution) is not a cure-all. These are the lessons

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of *Mercantile Bank Limited A division of Capitec Bank Limited v Ross* (*Ross*).[1]

With two bumps along the way,[2] the application of standard statute and precedent resolved the dispute.[3] An intriguing detour then ventured into finding support for the decision in s 39(2) (s 39(2)) of the Constitution and six passages from two other Constitutional Court decisions about other areas of law.[4] The diversion offered an opportunity to reflect on the nature and limits of a central admission requirement of South African insolvency law, the advantage to creditors in s 12(1)(*c*) (12(2(*c*)) of the Insolvency Act 24 of 1936 (the Insolvency Act). This article summarises the court's standard approach to deciding the matter, then concentrates on the misapplication of s 12(1)(*c*), which was supposedly justified by applying s 39(2) to the grounds for sequestrating a debtor's estate.

II THE FACTS AND MAIN DECISION OF *ROSS*

In 2021, in *Mercantile Bank v Ross*, the bank clashed with Mr Ross, and the court granted a provisional sequestration order against his estate.[5] A year later, in *Mercantile Bank Limited v MMR (MBR Intervening Party)*, Ross's ex-wife convinced the court to grant her leave to intervene in the insolvency proceedings.[6] I focus on the bank's 2023 application for the final sequestration order in *Ross*[7] when Mr Ross was obliged to explain why this application should be refused. Besides his insolvency,[8] he had allegedly committed the

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1 2023 JDR 1353 (GJ).

2 Ibid at para 2. First, the applicant bank abandoned its reliance on the act of insolvency in s 8(*c*) of the Insolvency Act 24 of 1936 (the Insolvency Act). This ground centred on the debtor's transferring his sole immovable property to his ex-wife under their divorce settlement that had been made an order of court. The problems of seeking to attack this transfer are explored in J C Sonnekus 'Oordrag van onroerende eiendom kragtens 'n egskeidingsbevel tóg 'n besmette vervreemding volgens die Insolvensiewet?' 2022 *TSAR* 591–601. Secondly, the applicant's reliance on the act of insolvency in s 8(*g*) is criticised (in note 17 below) as possibly constituting unconstitutional self-help. The debtor's actual insolvency in *Ross* satisfied s 12(1)(*b*) of the Insolvency Act.

3 Essentially, the dispute had been dealt with in *Ross* supra note 1 paras 1–24. Compare how the court hearing the application for the (provisional) order of sequestration had previously stayed within the settled limits of s 12 of the Insolvency Act and had not ventured into other ideas about protecting the public against assetless debtors supposedly with the backing of s 39(2) of the Constitution (*Mercantile Bank v Ross* 2021 JDR 1953 (GJ), especially paras 38–41 read with the court's order at the end).

4 *Ross* supra note 1 paras 25ff.

5 2023 JDR 1353 (GJ).

6 2022 JDR 0681 (GJ), noted by Sonnekus op cit note 2.

7 *Ross* supra note 1.

8 See ss 10(*b*) and 12(1)(*b*) of the Insolvency Act, making insolvency an alternative to the commission of an act of insolvency.

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acts of insolvency under s 8(*g*) of the Insolvency Act by failing to pay the debt on demand[9] and under s 8(*c*) by disposing of his immovable property to the detriment of his creditors while insolvent[10] — a ground the bank later abandoned.[11]

The *Ross* court summarised the requirements that the applicant creditor must meet to obtain a final order of compulsory sequestration under s 12 of the Insolvency Act. The court may sequestrate the debtor's assets if it is satisfied on the return day that the applicant has established the claim under s 9(1) of the Act against the debtor[12] who has committed an act of insolvency or is insolvent[13] and there is reason to believe that it will be to the advantage of the debtor's creditors if his estate is sequestrated.[14] If unsatisfied at the hearing, the court must dismiss the sequestration application and set aside the provisional sequestration order or require further proof of the matters set forth in the application and postpone the hearing for a reasonable period but not indefinitely.[15]

QD Cellular (Pty) Ltd (QD) obtained loans from 2007 to 2017 from the bank. These were secured by the cession of QD's debtors' book, the registration of notarial bonds, and the signature of suretyships by two other persons and by Ross, a surety and co-principal debtor. QD's managers informed the bank in July 2019 that financial pressure had rendered QD's business unsustainable, its loan unserviceable, and its attempt to sell QD unsuccessful. After repudiating the loans in August, QD agreed that the bank could perfect its notarial bonds registered over QD's movable property. When the proceeds were credited to QD's debt to the bank, the balance outstanding on 1 February 2020 totalled R32 807 774.41. The company was consequently 'no longer a trading entity'.[16]

The bank's notice dispatched to Ross on 10 March 2020 recorded the suretyship obligations and indebtedness and 'granted the respondent an opportunity to pay the debt due to the applicant and … if he failed to do so, the notice [would] constitute a notice in terms of s 8(*g*) of the [Insolvency] Act'.[17] In response, he denied the

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[9] Under s 8(*g*) of the Insolvency Act, the debtor 'gives notice in writing to any one of his creditors that he is unable to pay any of his debts'.

[10] Under s 8(*c*) of the Insolvency Act, the debtor '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 creditor above another'.

[11] *Ross* supra note 1 para 2.

[12] See s 12(1)(*a*) of the Insolvency Act.

[13] Ibid s 12(1)(*b*).

[14] Ibid s 12(1)(*c*).

[15] Ibid s 12(2).

[16] *Ross* supra note 1 para 4.

[17] Ibid para 5. If the bank's communication has been accurately described in the judgment, this self-contained short-circuiting of the *debtor's* giving written notice

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debt to the bank and stated that on 15 August 2019, the parties had agreed to his appointment as its agent mandated to dispose of QD's movables and to collect payment from QD's trade debtors and that if this disposal and collection process realised R12 million, it would release him from his debt to the bank.[18] He claimed that the bank had interfered and prevented him from performing his mandate, proceeding to issue book debtors with letters of demand after the agreement was signed and preventing him from recovering the R12 million. The court dismantled this excuse by narrating how he had been included in selling QD's assets and received a monthly salary of R100 000 for his work in doing so.

Failure to achieve the R12 million limit prevented his release from the debt to the bank. On 1 February 2020, the amount QD owed the bank was R32 807 774.41, and he remained surety. The court found that the bank had followed s 12(1)(*a*) and (*b*) of the Insolvency Act by proving that QD owed the bank at least R100 and that Mr Ross was insolvent.

He denied that final sequestration would benefit his creditors. He had only three (Nedbank, Discovery, and the applicant) and, bar a motor vehicle, no realisable assets that could yield a 'not negligible' dividend for creditors.[19] Nor had the bank proved the rands-and-cents dividend for creditors on final sequestration.

The court discussed a trustee's investigation of the debtor's estate during the sequestration of the insolvent estate. In *Meskin & Co v Friedman* (*Friedman*), the court ruled that a trustee's right of investigation after sequestration was not enough to provide the 'advantage' intended by the insolvency legislation but was the means of achieving a material benefit for creditors, such as recovering the insolvent's property disposed of or disallowing suspect claims.[20] The court had to be convinced on the facts that there was a reasonable prospect of some pecuniary benefit resulting for creditors. It was not necessary that there should be assets in the insolvent estate for creditors to benefit from the inquiry; it was sufficient that there were reasons for thinking that the inquiry might reveal or recover some assets for creditors' benefit. In *Dunlop Tyres (Pty) Ltd v Brewitt* (*Brewitt*), the court agreed with *Friedman* that the creditor's pleadings could reasonably support the conclusion that in an inquiry under

of inability to pay his debts under s 8(*g*) of the Insolvency Act arguably infringes s 34 of the Constitution, which disapproves of self-help: see note 100 below.

18 The expression 'the applicant would be released from his indebtedness in favour of the applicant' (*Ross* ibid para 6) is a slip of the pen for 'the respondent would be released'.

19 Ibid para 17.

20 1948 (2) SA 555 (W) 559; *Ross* supra note 1 para 18. See also *Liberty Group Limited v Moosa* 2023 JDR 1157 (SCA) para 27.

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s 65,[21] a trustee might find assets distributable to creditors.[22] The Constitutional Court also held in *Stratford v Investec Bank Ltd* (*Stratford*) that the broad term 'advantage' should not be rigidified and included the vague 'not-negligible' pecuniary benefit.[23] In a hostile sequestration with multiple creditors, it was unhelpful to specify the cents in the rand or the 'not-negligible' benefit.[24]

The court rejected Ross's arguments. The bank did not need to prove that it was to the creditors' advantage or benefit and what rands-and-cents dividend would be paid to them if his estate were sequestrated;[25] the bank merely needed to believe reasonably that sequestration would benefit creditors. Each case must be assessed on its merits.[26] No burden lay on the respondents (Ross and his ex-wife) to prove that they resisted the order on genuine, reasonable grounds, but he had to prove solvency and assets far exceeding his debts to his creditors.

The bank invited Mr Ross to mortgage his sole immovable property to it in view of QD's debts. He declined. A deeds office search revealed the property as bonded to a financial institution for about R300 000. Throughout bank meetings between July and December 2019, he stayed silent about divorcing, discharging the bond, and planning to transfer the property to his ex-wife in their divorce settlement.

The bank could not investigate his assets, and he did not need to specify the sequestration dividend in rands and cents.[27] A trustee was required to investigate the suspicious transfer of the immovable property allegedly worth about R2.4 million. Ross's sudden bond settlement and property transfer raised suspicion since he knew about QD's debts for which he stood surety. There were reasonable prospects that the trustee could unearth other assets of his that could benefit creditors financially. Only the trustee could investigate him.

III THE UNEXPECTED TURN OF THE *ROSS* JUDGMENT

The court added reasons for sequestration in case it had erred,[28] holding that '[i]t should also be borne in mind that the purpose of the Insolvency Act is not only for securing the pecuniary benefit to the creditors but to protect the general body of the public from

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21 Section 65 of the Insolvency Act provides for the interrogation of the insolvent and other witnesses.
22 1999 (2) SA 580 (W) 583F–G.
23 2015 (3) SA 1 (CC) para 44.
24 Ibid.
25 *Ross* supra note 1 para 21.
26 Ibid.
27 Ibid para 24.
28 Ibid para 25.

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people who behave in this manner'[29] — by implication, how Ross had behaved here. It would be absurd to interpret s 12(2)[30] of the Act so that even when the applicant creditors had satisfied the requirements of s 12(1)(*a*) and (*b*) to yield the body of creditors a dividend, the sequestration order should be refused because sequestration would not be to the creditors' advantage: the situation that I will call 'the *Ross* scenario', for short.[31] That interpretation of s 12(2),[32] so the court held, would be 'narrow and rigid'.[33]

The court gave the following reasons.[34] It was established that in statutory interpretation, the words, context and purpose of the statute and related legislation must be considered. Section 39(2) of the Constitution requires courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation and developing common law or customary law. Six quotations from two Constitutional Court judgments followed.[35]

First, in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* (*Goedgelegen*),[36] the court interpreted s 2(1) of the Restitution of Land Rights Act 22 of 1994 purposively as constitutional remedial legislation, seeking to promote the spirit, purport and objects of the Bill of Rights.[37] A generous interpretation is better than a textual or legalistic interpretation to protect claimants best under their constitutional guarantees. In determining purpose, one may search for the mischief intended to be remedied, and the statute's social and historical background may usefully be identified. The entire statute and related provisions must be understood, 'including its underlying values'.[38] The text is often the starting point for interpretation, but for its meaning, its context must be considered even when its ordinary meaning is clear.

Five passages came from *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* (*Independent*).[39] The Constitution's leading role applies to interpretation and all other important issues.[40]

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[29] Ibid.
[30] Ibid. Compare s 12(2) paraphrased in the text accompanying note 15 above, and s 12(1) paraphrased in the text accompanying notes 12–14. Section 12(2) in para 25 of the judgment should read s 12(1), and s 12(*a*) and (*b*) should read s 12(1)(*a*) and (*b*); contrast the correct referencing in *Ross* supra note 1 para 30.
[31] This is the situation posited by the court in *Ross* supra note 1 para 25 and repeated in its conclusion about this situation in para 30.
[32] See note 30 above.
[33] *Ross* supra note 1 para 25.
[34] Ibid para 26ff.
[35] Ibid paras 27–9.
[36] 2007 (6) SA 199 (CC) para 53.
[37] The wording of s 39(2) of the Constitution was thus applied without its reference.
[38] *Goedgelegen* supra note 36 para 53.
[39] 2020 (2) SA 325 (CC).
[40] Ibid paras 1–2.

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Section 39(2) of the Constitution requires courts to take every opportunity to infuse the Constitution's main purpose into legislation.[41] Six rules follow:[42]

- a special meaning in a statute usually applies only in that statute;
- the context may require abandoning the special meaning;
- if the statute's definition would cause injustice or absurdity contradicting its purpose, ignore that definition;
- the word's definition in one statute may not necessarily apply to the same word in another statute;
- the word's ordinary meaning applies if the word is not defined in a statute;
- if a word may have a meaning promoting the spirit, purport and objects of the Bill of Rights[43] without straining the language, apply that other meaning even if it contradicts other statutes' other meanings.

It is well-established that the parts of a statute should be interpreted for maximum consistency with each other and with other current statutes.[44] The legislature's consistent approach to law-making requires harmonious interpretation of statutes on similar subject matter. Even if words are clear and should usually be given their ordinary grammatical meaning, statutory interpretation must be contextual and purposive.[45]

The Constitutional Court broadly contextualises legislation, considering internal and external contexts.[46] The internal context requires a whole-text interpretation of legislation.[47] The external context considers context as including the mischief addressed, the social and historical background, and, most pertinently, other legislation.[48] The Constitutional Court examined established rules of criminal procedure, evidence and particularly the Criminal Procedure Act 51 of 1977 in *Shaik v Minister of Justice and Constitutional Development*,[49] demonstrating the need to consider other legislation.

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41 Ibid para 2.
42 Ibid para 18.
43 See s 39(2) of the Constitution.
44 See *Independent* supra note 39 para 38.
45 Ibid para 41.
46 Ibid para 42.
47 Ibid.
48 Ibid.
49 2004 (3) SA 599 (CC).

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The *Ross* court held:[50]

> The purposive interpretation of the [Insolvency Act] is that the intention of the legislature is to protect the unsuspecting and innocent public from dealing with persons who are unable to pay their debts and whose liabilities exceed their assets and [who] are actually insolvent ….

The court's 'considered view'[51] was that in the *Ross* scenario[52] — where the requirements of s 12(1)(*a*) and (*b*) of the Insolvency Act were met, but those of s 12(1)(*c*), about the advantage to creditors, were not met because of the lack of realisable assets yielding a pecuniary benefit for creditors — the sequestration order should still be granted. In these circumstances,[53]

> [i]t would be an absurdity not to sequestrate an estate of a person who is unable to pay his debts because that would be allowing him or her to continue to enter into contracts with unsuspecting and innocent members of the public who will have no recourse against him ….

After sequestration has been ordered, innocent members of the public are protected against the insolvent's misconduct by the fact that, with his rights being restricted, he requires his trustee's consent to contract.[54] It was not permissible for Ross to assert that he lacked assets that might yield his creditors a pecuniary benefit and that his estate should, therefore, not be sequestrated.[55] The bank was entitled to the relief in its notice of motion, as it had proved a case that he could not attack.

Ross's ex-wife's intervention in the insolvency proceedings[56] had caused the bank unnecessary costs that she should pay, for the sequestration order had not concerned her since her divorce.[57] The court finally sequestrated Ross's estate, which must pay the costs of the application.[58]

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50 *Ross* supra note 1 para 30.
51 Ibid.
52 Ibid para 25, summarised in the text accompanying note 31 above; and para 30.
53 Ibid para 30.
54 Ibid para 31.
55 Ibid.
56 See the text accompanying note 6 above.
57 *Ross* supra note 1 para 33.
58 Ibid para 34.

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IV COMMENTARY

The court's reliance on s 39(2) to justify its further rationale in *Ross*[59] is the first time, to my knowledge, that this route has been taken in a reported judgment about an application for a final order of compulsory sequestration. The reasoning is incorrect. However, the opportunity arises to consider the basis of South African insolvency law.

(a) The advantage of creditors and the requirement of a pecuniary benefit

The advantage of creditors forms one of the statutory requirements for convincing the court to grant a sequestration order, whether the debtor applies for voluntary surrender[60] or the creditors apply for compulsory sequestration of the estate.[61] The idea of creditors' advantage pervades the Insolvency Act, explicitly or implicitly.[62] The general sense of the Act, as directly concerning sequestration proceedings, is to obtain a pecuniary benefit for creditors, and courts disallow applicant creditors from sequestrating a respondent's estate for other reasons.[63] Sixty-nine years ago, it was ruled that to satisfy this requirement of advantage to creditors, the petitioner has to show that on the facts before the court, 'there is a reasonable likelihood that sequestration will yield, at the least, a not negligible dividend'.[64]

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[59] See para III above.

[60] See s 6(1) of the Insolvency Act, requiring the applicant debtor to prove that 'it will be to the advantage of creditors if his estate is sequestrated'.

[61] See ss 10(*c*) and 12(1)(*c*) of the Insolvency Act, requiring 'there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated'.

[62] C H Smith 'The recurrent motif of the Insolvency Act — Advantage of creditors' (1985) 7 *Modern Business Law* 27–32; M Roestoff & H Coetzee 'Consumer debt relief in South Africa; lessons from America and England; and suggestions for the way forward' (2012) 23 *SA Merc LJ* 53 at 55 n 22.

[63] *BP Southern Africa (Pty) Ltd v Furstenburg* 1966 (1) SA 717 (O) 720G (*Furstenburg*). The purpose of the collective debt collection procedure for creditors under insolvency law 'is to pay at least a dividend of the debts to all the concurrent creditors, instead of satisfying only the claim of a few of the creditors in full' (see Andre Boraine & Roger Evans 'The law of insolvency and the Bill of Rights' para 4A2 in *Bill of Rights Compendium* October 2014– SI 34).

[64] *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) 111G–H (*Mackan*). In the requirements for voluntary surrender, '[a]lthough other factors may be taken into consideration, the primary consideration in deciding the question of benefit of creditors whether all the creditors will receive a dividend' (see Eberhard Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 10 ed (2019) para 3.4.4 and n 219). And for compulsory sequestration, '[i]n order for there to be an advantage to creditors, a pecuniary benefit in the form of a dividend, which is not immaterial, must be anticipated [n 380]. There must be a reasonable prospect of a not negligible dividend [n 381] — not necessarily a

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No such advantage would arise if creditors received nothing, or, worse, had to contribute to sequestration costs.[65] Advantage must clearly depend on the circumstances: the value and number of assets distributable, the total amount of the claims, and the costs of sequestration.[66] Sequestration is not necessarily and in itself advantageous to creditors.[67]

The sources of law need to be identified. Section 12(1) of the Insolvency Act reads:

> If at the hearing pursuant to the aforesaid rule *nisi* the court is satisfied that—
> *(a)* the petitioning creditor has established against the debtor a claim such as these mentioned in subsection (1) of section *nine*; and
> *(b)* the debtor has committed an act of insolvency or is insolvent; and
> *(c)* there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
> *(d)* it may sequestrate the estate of the debtor.

These requirements of s 12(1) are the statutory ones. It is clear that these do not contain any provisions about the need to obtain a pecuniary benefit for creditors and that, to satisfy this requirement of advantage to creditors, the petitioner has to show that on the facts before the court, 'there is a reasonable likelihood that sequestration will yield, at the least, a not negligible dividend'.[68] These elements — the pecuniary benefit and the reasonable likelihood of the sequestration yielding at least a non-negligible dividend; what I will call the benefit and prospect requirement,[69] for the sake of brevity — are the requirements developed by the courts as a way of applying the statutory requirement of advantage to creditors to the facts of

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likelihood, but a prospect which is not too remote [n 382]' (ibid para 5.10.4). See also 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) 77 *THRHR* 351 at 361; André Boraine & Melanie Roestoff 'The treatment of insolvency of natural persons in South African law: An appeal for a balanced and integrated approach' (2014) 5 *World Bank Legal Review* 91 at 94–5.

65 *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D) 591F–G (*London*). Section 106 of the Insolvency Act determines creditors' contributions towards the cost of sequestration when the free residue is insufficient.

66 *London* ibid at 591G.

67 Ibid.

68 See the text accompanying note 64 above.

69 This is a placeholder footnote for cross-referring to the text accompanying notes 86 and 141 below.

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the cases before the courts. These elements, which do not feature in s 12(1) of the Insolvency Act, are, therefore, requirements of the common law of insolvency in South Africa.

(b) Miller v Janks *as the exception, and the search for assets*

Miller v Janks is a well-known exception to the rule that the debtor's estate must contain assets that would yield creditors a pecuniary benefit.[70] An insolvent professional gambler, Miller acquired assets without needing his trustee's consent. His estate comprised only liabilities after his after-acquired assets mysteriously disappeared. His wife also acquired an immovable property after his estate had been sequestrated.

A full bench pointed out that it had been correctly conceded that, had this been the first time his estate had been sequestrated and he had possessed sums of money from his gambling or assets bought with those sums, it would have been competent to order the sequestration regarding those assets vested in him, and it would have been so desirable to investigate the disappearance of the large sums seemingly passing into and out of his hands that 'this desirability would have justified the grant of such sequestration'.[71] The court held:[72]

> If the learned Judge regarded (as he apparently did) this definition as meaning that an estate consists of both assets and liabilities, and consequently that if there were no assets but only liabilities there could be no estate, it would follow that there could not on the other hand be an estate if there were all assets and no liabilities. Were this general proposition correct, no order of compulsory sequestration could be granted where the debtor immediately prior to the application for sequestration had got rid of all his assets by a series of dispositions without value or voidable or undue preferences. Provided his disposal had been so complete as to leave him without any assets at all, he would be immune from sequestration and its consequent criminal sanctions, whereas if he divested himself of everything except a single asset worth a few pounds, his creditors could sequestrate and take the necessary steps to recover the dissipated assets for satisfaction of their claims. A debtor who has £1,000 assets and £2,000 liabilities has an estate, though one insolvent to the extent of £1,000: he does not cease to have an estate when the next day he pays over his £1,000 to his creditors and remains insolvent to the same extent.

[70] 1944 TPD 127.
[71] Ibid at 131.
[72] Ibid at 131–2.

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From this passage it is clear that an estate for the purpose of compulsory sequestration can consist only of liabilities.[73] Miller's wife's immovable property could also fall into his insolvent estate under s 21(1) of the Insolvency Act until the trustee released it if Mrs Miller proved adverse title. *Miller* showed that a sequestration order was desirable because the trustee's investigation might uncover assets that could be retrieved through the law of impeachable dispositions.[74] As the court held:[75]

> [A]ll considerations of reason and equity support the view that the creditors of a subsequently established estate should be given the assistance of a sequestration order in order to recover assets which had been, and *prima facie* should still be, but are not to be found in the new estate.

Still, Miller's second estate contained no assets at the time of the sequestration order. Dividends could not be calculated in rands and cents at that point, and the only way to obtain dividends was to find realisable property. The judgment in *Miller* shows that sequestration does not require the existence of assets before it can be ordered.

Yet the issuing of the sequestration order in *Miller* was also based on the possibility of finding assets belonging to the debtor.[76] Sequestration orders are illegal when there is no evidence or indication that the trustee will find more assets or any assets. In *Trade Discount Co v Steele* (*Steele*),[77] the court denied a sequestration order because there was no evidence that investigating the debtor's affairs would probably reveal distributable assets. In its reasoning,[78] the court labelled as 'extraordinary' the petitioning creditor's allegation that

> it is not beyond the realms of possibility that the respondent has done away with a fair amount of the assets, or their proceeds, and that therefore either of the latter may form portion of the assets of the estate.

The court held that this unusual method of claiming a benefit for creditors might be overlooked as more relevant on the return day than in the application for the rule nisi. Still, remembering that the creditor must always prove that sequestration would benefit

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73 Ibid; *Rennie NO v The Master; Glaum NO v The Master* 1980 (2) SA 600 (C) 613C.
74 See ss 26 and 29–31 of the Insolvency Act.
75 *Miller* supra note 70 at 132.
76 See Bertelsmann et al op cit note 64 para 5.10.4 and notes 384 and 402.
77 1949 (4) SA 121 (O).
78 Ibid at 122.

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creditors, the court felt that it had to observe that the allegation of the insolvent's lack of assets was 'in itself generally sufficient to indicate at least *prima facie* the absence of any such benefit'.[79] To show that sequestration would be for the benefit of creditors, the petitioner should at least allege that the investigation would reasonably likely lead to the uncovering of assets or their proceeds that would result in a benefit to creditors.[80]

It should be noted that Mr Ross's estate apparently contained assets. There was a BMW motor vehicle. He had been paid a monthly salary of R100 000 for his work in helping to sell QD's assets, and it would be important to see his bank statements. And he had disposed of his immovable property allegedly worth about R2.4 million to his ex-wife, and a trustee could investigate the circumstances in which the divorce settlement had been made an order of court that took it out of the scope of the definition of a 'disposition' in s 2 of the Insolvency Act; the trustee would, however, bear a heavy onus of proving spousal collusion.[81]

On these facts, therefore, it may have been a stretch for the *Ross* court to conclude that the debtor's estate should still be sequestrated if he lacks realisable assets capable of yielding a pecuniary benefit to his creditors and that it would be absurd not to issue the sequestration order in such circumstances.[82] As justification for this surprising extension of South African insolvency law, the court relied on s 39(2), which is discussed next.

(c) The discussion and application of s 39(2) of the Constitution

Section 39(2) reads: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' This provision has generated considerable commentary and debate among courts and constitutional experts. The present discussion draws on that body of knowledge for some insights to provide more reasoning in the discussion of the *Ross* scenario.

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[79] Ibid.

[80] Ibid at 122–3. For other cases in which no further assets would probably be discovered during the process of sequestration, compare the circumstances of *Mamacos v Davids* 1976 (1) SA 19 (C) and also those of *Channer v Channer* case no 22331/02, as discussed in *Esterhuizen v Swanepoel and Sixteen Other Cases* 2004 (4) SA 89 (W) paras 45–6.

[81] *Sackstein en Venter NNO v Greyling* 1990 (2) SA 323 (O); *Dabelstein v Lane & Fey NNO* 2001 (1) SA 1222 (SCA) 1228. The trustee would bear a heavy onus of proving the spouses' collusion in obtaining the judgment (see Sonnekus op cit note 6).

[82] *Ross* supra note 1 para 30.

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The *Ross* court followed the Constitutional Court in both *Goedgelegen* and *Independent* in applying s 39(2) to the respective sets of facts. These situations were, in *Goedgelegen*, whether private farmers' termination of labour tenancies entitled labour tenants to redress under the Restitution of Land Rights Act and, in *Independent*, whether for the purposes of compliance with the Legal Practice Act 28 of 2014, a private higher education institution accredited to offer and confer the four-year LLB, qualified as a university. Neither *Goedgelegen* nor *Independent* concerned the issue of granting a final order of compulsory sequestration. The application of their findings to the circumstances of *Ross* had to be explained. Unfortunately, it was not. The circumstances of *Ross* are, therefore, distinguishable from those of *Goedgelegen* and *Independent*.

The scope of s 39(2) is considerable:[83]

> The directive contained in s 39(2) makes it clear that legislation, the common law and customary law fall within the ambit of the Constitution. Should such law fall foul of the 'spirit, purport and objects' of the Chapter of Fundamental Rights, it may be struck down as invalid.

What does the expression 'the spirit, purport and objects of the Bill of Rights' mean? For those who like their law clear, simple and neatly defined, this is a demanding, multilayered concept without a definition. The exercise is one of gathering the meaning of the phrase 'spirit, purport and objects' from various places in the Bill of Rights and, the Bill of Rights being itself an integral part of the Constitution,[84] from the Constitution too. The *Ross* court did not explain how it understood that the 'spirit, purport and objects of the Bill of Rights'[85] could or should be relied on to justify the reinterpretation of the statutory requirement of advantage to creditors in s 12(1)(*c*) as applied by the courts to the facts of the case through the benefit and prospect requirements.[86]

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[83] Dennis Davis 'Chapter 33 Interpretation of the Bill of Rights' in M H Cheadle, D M Davis & N R L Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (2023, electronic version) 33-4 para 33.1.

[84] Fareed Moosa 'Understanding the "spirit, purport and objects" of South Africa's Bill of Rights' (2018) 4 *HSOA Journal of Forensic Legal & Investigative Sciences* 1 at 3, available at https://www.researchgate.net/publication/331059479_Understanding_the_Spirit_Purport_and_Objects_of_South_Africa's_Bill_of_Rights, accessed on 13 July 2023.

[85] For information about these concepts, see Moosa op cit note 84 and Christopher J Roederer 'Working the common law pure: Developing the law of delict (torts) in light of the spirit, purport and objects of South Africa's Bill of Rights' (2009) 26 *Arizona Journal of International and Comparative Law* 427 at 484–92.

[86] For the meaning of the phrase 'the benefit and prospect requirements', see the text accompanying note 69 above.

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Not only the importance of a purposive interpretation but also the approach to interpreting statutes in light of the Constitution were expounded by the *Ross* court through quotations,[87] but then, with only the enigmatic phrase of its being the court's 'considered view',[88] few further reasons were given. When the two passages in paras 25 and 30 of *Ross* are combined, the reasoning runs as follows: the idea of protecting the general body of the public from people who behave in this manner is later explained as being the purposive interpretation of the Insolvency Act since the legislature intends to protect the innocent general public from dealing with those who cannot pay their debts and are factually insolvent, for it would be absurd not to sequestrate the estate of such debtors who would be allowed to continue contracting with unsuspecting members of the public who would lack recourse against the debtor who lacked assets realisable for creditors' benefit.

The court did not make the relevant connections to the spirit, purport and objects of the Bill of Rights (or the Constitution) but left those for the reader to imagine and construct. For the sake of argument, I suggest lines of reasoning under s 39(2) that the court could have expounded to build out the body of its reasoning. Two aspects of the court's disapproval are identifiable. The public is taken advantage of by people concluding contracts in insolvent circumstances. And those contractants are immune from sequestration when they have no assets to yield a pecuniary benefit and the prospect of a dividend for their creditors. These aspects are discussed in turn.

(d) The idea of protecting the public

One can see the idea of the protection 'of the general body of the public from people who behave in this manner', as expressed by the court in *Ross*,[89] in various relevant pieces of legislation and supporting case law. Numerous restrictions disqualify the insolvent from holding various positions.[90] Declining to allow the insolvent to

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87 *Ross* supra note 1 paras 26–9.

88 Ibid para 30.

89 Ibid para 25, as quoted in the text accompanying note 28 above.

90 See, eg, Alastair Smith, Kathleen van der Linde & Juanitta Calitz *Hockly's Law of Insolvency, Winding-Up and Business Rescue* 10 ed (2022) para 4.4. As has been explained, '[t]he current insolvency restrictions imposed by South African law apparently are not intended to punish an insolvent but rather to protect the interests of the general public [n 12]. However, the plethora of insolvency restrictions imposed by our law today certainly indicates that an unrehabilitated insolvent is still stigmatised as someone who is dishonest, irresponsible and untrustworthy [n 13]' (see Melanie Roestoff 'Insolvency restrictions, disabilities and disqualifications in South African consumer insolvency law: A legal comparative perspective' (2018) 81 *THRHR* 393 at 394); she counted 133 statutory

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renounce his benefits under s 82(6) of the Insolvency Act to favour his estate creditors, two courts held that these provisions in s 82(6) were, among other things, enacted for the benefit of the public.[91] Similarly, courts hearing rehabilitation applications held that they had to ask 'whether the applicant is such a person as ought to be rehabilitated — is he a person who ought to be allowed to trade with the public on the same basis as any other honest man?'[92]

This antipathy towards debtors whose estates have already been sequestrated is carried back in time to form a rationale for granting the final sequestration order in the *Ross* scenario at the outset.[93] The mistake here is to confuse the *effects* of granting a sequestration order with the *reasons* for granting the order and then use the effects as reasons. The error is one of anachronism. Remember, too: the general sense of the Insolvency Act, as directly concerning sequestration proceedings, is to obtain a pecuniary benefit for creditors, and courts disallow applicant creditors from sequestrating a respondent's estate for other reasons.[94]

The rights and interests at stake also need to be considered in more detail at this point. A fundamental weakness of this line of reasoning in *Ross* is the failure to consider the existing creditors as members of the public needing protection. The innocent, unsuspecting public, so the *Ross* court reasons, needs protection against a contractant

provisions (ibid at 402 n 84). Compare, eg, s 69(8)(*b*)(i) of the Companies Act 71 of 2008 disqualifying an unrehabilitated insolvent from being a company director; the court held, 'The object of this provision is not punitive, but to protect the public and shareholders by ensuring that their interests are not endangered in any way' (see *Corporate Money Managers (Pty) Ltd v Panamo Properties 49 (Pty) Ltd* 2013 JDR 1252 (GNP) para 7). On the protection of the public, see now also Zingapi Mabe 'The constitutional disqualification for unrehabilitated insolvents from being members of Parliament' (2023) 56 *De Jure Law Journal* 25–42 passim.

[91] *Ex parte Kroese* 2015 (1) SA 405 (NWM) paras 30, 37, 44, 48, 56; *Ex parte Van Dyk* 2015 JDR 0667 (GP) paras 19–20. *Ex parte Kroese* is discussed in Roger Evans & Khanyisile Mthethwa 'Can a debtor waive rights to property envisaged in section 82(6) of the Insolvency Act 24 of 1936 in an application for voluntary surrender?' (2014) 29 *Southern African Public Law* 548–65. And see generally M Roestoff 'The income of an insolvent and sequestration under the Insolvency Act 24 of 1936' (2017) 29 *SA Merc LJ* 478–514.

[92] *Ex parte Heydenreich* 1917 TPD 657 at 658; *Ex parte Anderson* 1995 (1) SA 40 (SE) 45H–I; *Greub v The Master* 1999 (1) SA 746 (C) 752J–753B; *Ex parte Fourie* [2008] 4 All SA 340 (D) para 43; *Ex parte De Kock* 2011 JDR 1117 (GNP) para 12; *Ex parte Harris (Fairhaven Country Estate (Pty) Ltd as intervening party)* [2016] 1 All SA 764 (WCC) para 84; Bertelsmann et al op cit note 64 para 25.6.10 and n 181; Jennifer A Kunst, André Boraine & David A Burdette *Meskin's Insolvency Law* (June 2023 – SI 60) para 14.4.1 n 3. The difficulty is that this consideration of the public comes at the end of the process of sequestration, which has been opened by the court's granting of a sequestration order based on the satisfaction of all the relevant requirements.

[93] See para III above.

[94] *Furstenburg* supra note 63 at 720G and the text accompanying note 63 above.

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breaching his obligations. These innocents have rights to the performance of the breacher's obligations. These rights are personal rights to performance, rights of action: incorporeal movable property in the innocents' estates if they were sequestrated.[95] This form of property, one may argue, is a property right protected by s 25 of the Constitution, bearing in mind that for the purposes of s 25, property is not limited to land.[96] The innocents may also have transferred or delivered their own property to the debtor when performing their contractual obligations to him.[97] They are then his existing creditors, whose interests cannot be ignored by the court. A major error in this line of reasoning — it is repeated and emphasised — is the exclusion of the existing creditors of the debtor. Their interests must also be considered in the correct application of s 39(2) of the Constitution. Preventing assetless debtors from running up future debts to creditors yet to be contracted with is not properly answered by helping these debtors not to pay their existing debts owed to their current creditors by removing the present barrier to the granting of sequestration orders against these debtors' estates that will start the sequestration process ending in eventual rehabilitation and the discharge of their pre-sequestration debts.

The Insolvency Act provides a form of collective debt collection that enables creditors who wish to submit claims against the insolvent estate to obtain payment in accordance with the order of preference.[98] By continuing to contract with innocents (including existing creditors as fairly considered part of the public), the debtor concluding these contracts in insolvent circumstances defies this process when he shrugs his shoulders and says that he has no assets to pay his obligations or even to render him liable to the sequestration of his estate. Faced with such impunity, it is conceivable

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[95] See *Ormerod v Deputy Sheriff, Durban* 1965 (4) SA 670 (D) 673G–H. And a 'right of action that a client of a bank has to claim a credit sum on the client's account is also considered property within the context of the Insolvency Act' (see Bertelsmann et al op cit note 64 para 9.5 and n 39; Kunst, Boraine & Burdette op cit note 92 para 5.1 n 20; *De Hart NO v Kleynhans* 1970 (4) SA 383 (O) 387; *Herrigel NO v Bon Roads Construction Co (Pty) Ltd* 1980 (4) SA 669 (SWA) 674; and the intricacies of the right to the credit in a bank account when the surrounding circumstances are suspicious (see Smith, Van der Linde & Calitz op cit note 90 at 88–9 para 5.2)).

[96] See s 25(4)(*b*) of the Constitution.

[97] Compare the rules on uncompleted contracts, such as the cash sale of movable property (s 36 of the Insolvency Act).

[98] See Boraine & Evans op cit note 63; Bertelsmann et al op cit note 64 ch 22 on the application and distribution of assets; Smith, Van der Linde & Calitz op cit note 90 ch 16 on creditors' claims and their ranking; Kunst, Boraine & Burdette op cit note 92 para 12.4 on payments of claims: insolvent estate, para 12.5 on payments of claims: company in liquidation, and para 12.6 on payments of claims: close corporation in liquidation.

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that impatient and pugnacious creditors who have already been prejudiced by this debtor's conduct and attitude may resent insult and theft and contemplate violence.[99] Among the constitutional values, it is, therefore, necessary to mention legality, the rule of law, the maintenance of order, and the prevention of vigilantism and self-help, chaos and anarchy, which inform the right of access to courts under s 34 of the Constitution in a Rechstaat.[100]

Sections 25 and 34 and their supporting constitutional values may, therefore, provide the support missing from the *Ross* rationale. To reiterate, a major flaw in the reasoning is the failure to consider the interests of the existing creditors as members of the public.

(e) Competency and locus standi to bring the application for compulsory sequestration

At the same time, it must also be remembered who is competent to bring the application for compulsory sequestration in the first place. Not every self-appointed defender of the public may do so. Only 'a creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against' the debtor may apply.[101] In other words, it is an existing creditor, not a potential creditor, someone who might, in future, conceivably become a creditor of the debtor. And even then, not every existing creditor may bring the application, but

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[99] Violence may be regarded as a theme of much South African history.

[100] *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) paras 18, 19 ('the ordinary way of securing execution in settlement of debts due is through the court process, and the seizure of property against the will of a debtor in possession of such property for that purpose without an order of court amounts to self help. This is an infringement of s 34'), 20, and 22 ('The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes'); *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) para 43; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)* 2005 (5) SA 3 (CC) paras 40, 45. Compare Kunst, Boraine & Burdette op cit note 92 para 2.1 n 1B: 'See also *Vincemus Investments (Pty) Ltd v Laher* [2008] JOL 22629 (C) at para 10, in which the Court pointed out that "absent any proof of an abuse of the court's process, it is perfectly legitimate for a creditor to institute sequestration proceedings against a debtor for the purpose of obtaining payment of an unpaid debt …" and that "the right to enforce an unfulfilled judgment of a court is an incident of the judicial process, access whereto has been guaranteed by section 34 of the Constitution of the Republic of South Africa, 1996 (see *Chief Lesapo* [ibid])"'.

[101] See s 9(1) of the Insolvency Act. In *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) para 31, the court held: 'An applicant for sequestration must have a liquidated claim against the respondent, not because the application is one for the enforcement of the claim, but merely to ensure that applications for sequestration are only brought by creditors with a sufficient interest in the sequestration.'

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only one with a liquidated claim of the required amount.[102] And the interests that are considered are those of all or at least the general body of these *creditors*[103] (not, as *Ross* put it,[104] the 'general body of the public') and whether a 'substantial portion of the total of' those creditors according to their claims would be advantaged by the sequestration.[105] A sequestration order is also less likely to be granted when the debtor has a single creditor.[106]

The limitations of s 9(1) of the Insolvency Act thus demonstrate that not everyone (perhaps prompted by a range of motives, whether benign or malign, towards the debtor) is entitled to wave the flag of protecting the public and activate the provisions for the granting of a sequestration order that downgrades the status of the debtor.[107] It has been argued that acquiring a claim in order to furnish locus standi for a sequestration application does not in itself constitute an abuse of process but may be so if sequestration 'itself is sought for some ulterior object'.[108] The debtor may also be protected by a compensation order when the application for the sequestration order is held to be an abuse of process or malicious or vexatious.[109]

Of course, the Constitutional Court in *Stratford* referred to the non-negligible pecuniary benefit as 'nebulous' and considered it 'unhelpful' to specify the cents in the rand or the 'not-negligible' benefit in the context of a hostile sequestration possibly featuring multiple creditors.[110] Later, though, the court held:[111]

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[102] A liquidated claim is a 'monetary claim [whose] amount is fixed by agreement, judgment or otherwise' (Smith, Van der Linde & Calitz op cit note 90 para 3.1.1). This includes a liquidated claim 'which has accrued but which is not yet due' by the time of the court hearing (see s 9(2) of the Insolvency Act). But '[i]t is submitted that a claim has not "accrued" within the meaning of s 9(2) of the Insolvency Act if payment is dependent upon the performance of a reciprocal obligation in the future' (see Kunst, Boraine & Burdette op cit note 92 para 2.1 and n 37). A claim impeachable under ss 26, 29 or 30 of the Insolvency Act is not a debt for the purposes of the sequestration application before the disposition is judicially declared set aside and recoverable under s 32(3) of the Act (see *Exotic Fruit Company (Pty) Ltd v Zakharov* 2021 JDR 1653 (WCC)).

[103] *Lotzof v Raubenheimer* 1959 (1) SA 90 (O) 94A.

[104] *Ross* supra note 1 para 25.

[105] *Mackan* supra note 64 at 111B; *Fesi v Absa Bank Ltd* 2000 (1) SA 499 (C) 505C–G ('a substantial proportion' of the creditors).

[106] *Gardee v Dhanmanta Holdings* 1978 (1) SA 1066 (N) 1068G–1070B; *Lynn & Main Inc v Mitha NO* 2006 (5) SA 380 (N) para 14; *Lundy v Beck* 2019 (5) SA 503 (GJ) para 37.

[107] See *Spencer v Standard Building Society* 1931 TPD 481 at 484 on the capitis diminutio.

[108] See Kunst, Boraine & Burdette op cit note 92 para 2.1.5 and n 7. See, eg, *Lundy* op cit note 106 para 43, citing *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W) (esp. 293B–E).

[109] See s 15 of the Insolvency Act.

[110] *Stratford* supra note 23 para 44; see the text accompanying note 23 above.

[111] Ibid para 45.

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> The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in *Friedman*.[112] For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body;[113] that there is a substantial estate from which the creditors cannot get payment, except through sequestration;[114] or that some pecuniary benefit will redound to the creditors.[115]

The connecting ideas of this *Stratford* ruling[116] are 'sequestration', 'payment', 'creditors', 'substantial estate' and 'pecuniary benefit'. Jettison them, and this Constitutional Court confirmation of how to approach this area of insolvency law collapses and becomes meaningless.

A similar finding of the important ideas may be undertaken in the ruling by the Supreme Court of Appeal in *Body Corporate of Empire Gardens v Sithole* (*Sithole*):[117]

> The phrase 'advantage to creditors' is not defined in the Insolvency Act, but if the principle of concursus creditorum is taken into account, it means that there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole.[118] … This requirement is fulfilled where it is established that there is reason to believe that there will be advantage to a 'substantial proportion' or the majority of the creditors reckoned by value.[119] … Although advantage to creditors is not a rigid concept[120] … it requires proof of a tangible benefit to the general body of creditors.

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[112] Ibid n 59, linked to n 56, citing *Friedman* supra note 20 at 559.
[113] Ibid n 60, citing *London* supra note 65 at 591G.
[114] Ibid n 61, citing *Realizations Ltd v Ager* 1961 (4) SA 10 (D) 11D–E.
[115] Ibid n 62, citing *Furstenburg* supra note 63 at 720E–G. This ruling in *Stratford* ibid para 45 was recently applied in *Afrika Amina Engineering CC v Magabe* 2023 JDR 0168 (GJ) para 39; *Franck v Dyke* 2023 JDR 1198 (GJ) paras 13–15; *Body Corporate of Mionette v Lekganyane* 2023 JDR 1179 (GP) para 8.
[116] *Stratford* supra note 23 para 45.
[117] 2017 (4) SA 161 (SCA) para 10. See *Mbatha v The Body Corporate of Carlswald Crest* 2021 JDR 0213 (GP) paras 20–1; *Medbond (Pty) Ltd v De Meyer* 2021 JDR 0935 (GP) para 25 and n 9.
[118] The Supreme Court of Appeal in *Sithole* (ibid) cited *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) paras 33–5; *Ex parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP) para 13.
[119] In *Sithole* ibid para 10 n 3, the court cited Kunst, Boraine & Burdette op cit note 92 (2016) 2-20–2-24 para 2.1.4 and added *Fesi* supra note 105 at 505–6; *Mackan* supra note 64; *Samsudin v De Villiers Berrange NO* [2006] SCA 79 (RSA) (reported eventually as *Hassan v Berrange NO* 2012 (6) SA 329 (SCA)).
[120] In *Sithole* ibid para 10, the court cited *Stratford* supra note 23 para 44.

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The rationale in the *Ross* scenario would allow sequestration even where no such pecuniary benefit for the existing creditors would exist, and so it prejudices their interests as members of the public and travels far beyond these recent findings of the two senior courts of South Africa.[121] The article now turns to the second aspect of the *Ross* scenario: the debtor's lack of assets that can be realised.

(f) NINA and LILA debtors

As foreshadowed in the discussion of *Miller*,[122] it is clear that since *Stratford* and *Sithole*, the 'fact that the debtor has no assets or not sufficient assets to pay the costs of administration is [still] generally sufficient proof that sequestration would not benefit creditors'.[123] Twenty-two years ago, Evans identified the plight of the 'poor' debtors who cannot prove an advantage to creditors in sequestration proceedings, unlike 'rich' debtors who can.[124] These 'poor' debtors are the debtor with no income and no assets (the NINA debtor) and the debtor with a low income and low assets (the LILA debtor).[125] The requirement of advantage to creditors yielding a pecuniary benefit and a dividend for creditors is acknowledged in the line of articles dealing with how to provide debt relief for NINA and LILA debtors.[126]

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[121] This is a placeholder footnote for a cross-reference to the text accompanying note 142 in para V, the Conclusion to this article.

[122] See para IV*(b)* above.

[123] See *Lotzof* supra note 103 at 94A, citing *Steele* supra note 77; *Lynn & Main Inc v Naidoo* supra note 118 para 39; *Seevnarayan v Ramjathan* 2021 JDR 2726 (GJ) para 15. It is submitted that the *Ross* scenario and rationale would still fail the requirements expressed in the opinion that 'the correct position is that the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, *however small such payment may be*, unless some of the means of dealing with the debtor's predicament is likely to yield a larger such payment' (Kunst, Boraine & Burdette op cit note 92 para 2.1.4 and n 18 (original italics), quoted with approval in *Stratford* op cit note 23 para 44 (note that the para number in Kunst, Boraine & Burdette ibid is not 2.4.1 as stated in n 58 of the *Stratford* judgment)).

[124] Roger G Evans 'Friendly sequestrations, the abuse of the process of court, and possible solutions for overburdened debtors' (2001) 13 *SA Merc LJ* 485 at 508; Hermie Coetzee 'Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African exposition' (2016) 25 *International Insolvency Review* 36 at 39.

[125] Hermie Coetzee & Melanie Roestoff 'Consumer debt relief in South Africa: Should the insolvency system provide for NINA debtors? Lessons from New Zealand' (2013) 22 *International Insolvency Review* 188 at 189 and n 9.

[126] See Melanie Roestoff & Stefan Renke 'Debt relief for consumers – the interaction between insolvency and consumer protection legislation (part 2)' (2006) 27 *Obiter* 98 at 99; Coetzee & Roestoff op cit note 62 at 55–9; Coetzee & Roestoff ibid at 193–5; Hermie Coetzee 'Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary and, if not, what would?' (2017) 80 *THRHR* 18 at 20–1; Melanie Roestoff & Hermie Coetzee 'Debt

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The central point is that administration orders under s 74 of the Magistrates' Courts Act 32 of 1944 and debt review under ss 86 and 87 of the National Credit Act 34 of 2005 are still only payment plans. Neither of them provides for the discharge of pre-sequestration debts (other than those arising from the debtor's fraud) that may still be attained only through the debtor's rehabilitation at the end of the sequestration process under the Insolvency Act.[127]

(g) A constitutional challenge to advantage to creditors, based on the right to equality

Readers are invited to explore and consider Coetzee's detailed argument that the requirement of advantage of creditors infringes s 9 of the Constitution on the right to equality as well as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 in unjustifiably and unfairly discriminating against NINA and LILA debtors because of their socioeconomic status.[128] Among other things, she subjects sequestration, administration orders and debt review to an analysis in terms of the recognised steps under *Harksen v Lane NO*[129] for investigating alleged violations of the right to equality, and she finds all three of them wanting.[130] She contrasts the South African position with the one in Belgium, where the Constitutional Court held that it was unconstitutional to exclude debtors unable to pay a substantial portion of their debt from the opportunity to benefit from a legal settlement plan.[131] She argues that non-governmental organisations' experts in poverty or

relief for South African NINA debtors and what can be learned from the European approach' (2017) 50 *CILSA* 251 at 254–5 (stating, among other things, about the requirement of a pecuniary benefit as part of the advantage to creditors that, 'This entry condition obviously excludes NINA debtors from using the procedure, as they, by definition, do not own valuable or, at the very least, realisable assets'); Hermie Coetzee 'An opportunity for No Income No Asset (NINA) debtors to get out of check? – An evaluation of the proposed debt intervention measure' (2018) 81 *THRHR* 593 at 596; Hermie Coetzee & Melanie Roestoff 'Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset debtors in South Africa' (2020) 29 Special Issue 1 *International Insolvency Review* S95 at S97 and S98 (stating, among other things, that, 'It is clear that NINA debtors are completely excluded from any of the existing South African statutory debt relief measures').

[127] See s 129(1)*(b)* of the Insolvency Act; Smith, Van der Linde & Calitz op cit note 90 paras 1.2, 19.3.

[128] Coetzee op cit note 124 at 36–55. See also Zakariya Adam 'A critique of the available debt relief measures afforded to nina debtors in the wake of transformative constitutionalism and international trends' (2021) 15 *Pretoria Student LR* 279–90 (written in the context of COVID-19).

[129] 1998 (1) SA 300 (CC) esp. para 54.

[130] Coetzee op cit note 124 at 42–7.

[131] Ibid at 47.

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constitutional law could approach the High Court of South Africa as a court of first instance to hear a test case based on equality.[132] As a stopgap pending judicial direction to the legislature to reconsider the entire system, including statutory procedures for debt relief, the court could sever the advantage to creditors requirement from the other requirements for gaining access to the Insolvency Act, thus enabling every situation of insolvency to be administered under the sequestration procedure.[133]

(h) A pincer movement and the consequences of the Ross *rationale*

The statutory requirement of advantage to creditors in s 12(1)(*c*) of the Insolvency Act is thus attacked in a pincer movement. Coetzee severs it. The *Ross* court reinterprets and misapplies it. The court appeared not to understand how its further rationale for the decision conflicted with its previous line of reasoning based on applying the advantage to creditors requirement to the *Ross* facts by following *Friedman*,[134] *Brewitt*[135] and *Stratford*.[136] Instead of keeping focused only on the advantage to the general body of the existing creditors of Ross, the court then moved on to protect the general body of the public (apparently excluding the existing creditors) against assetless contractants.

Section 39(2) is an insufficient basis on which to interpret the Insolvency Act in this way. When interpreting this legislation, the court must promote the spirit, purport and objects of the Bill of Rights. Logically, though, the court must first apply the legislation correctly before it can proceed to promote the spirit, purport and objects of the Bill of Rights and not misapply the legislation under the guise of promoting the spirit, purport and objects of the Bill of Rights. The Insolvency Act was misapplied in the *Ross* rationale. The court also failed to consider the wider consequences of the proposed change to compulsory sequestration or to the other areas of insolvency law. The court simply considered it absurd not to sequestrate the assetless estate in the *Ross* scenario, even though that outcome would leave the existing creditors with no further way of recovering payment of the debtor's pre-sequestration debts if the assetless debtor were subsequently to receive a discharge of debts upon rehabilitation — an outcome radically opposed to the policy and provisions of the Insolvency Act and the body of established precedent on the Act. No

[132] Ibid at 54.
[133] Ibid at 54–5.
[134] *Friedman* supra note 20.
[135] *Brewitt* supra note 22.
[136] *Stratford* supra notes 23–24.

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consideration of advantage to creditors as a recurrent motif of the Insolvency Act was embarked on,[137] no whole-text contextualisation of the Act, and no context considered to include the social and historical background and other laws.[138]

For her part, Coetzee acknowledges that severing the advantage to creditors requirement would make it impossible to give effect to the legislative purpose of benefiting creditors.[139] She maintains that this temporary step would rescue the debt review and administration procedures from unconstitutionality, 'as all insolvent situations may then be administered through the sequestration procedure',[140] enabling the debt review and administration procedures to be used for helping debtors through temporary financial misfortunes.

V CONCLUSION

The *Ross* rationale misapplies s 12(1)(*c*) of the Insolvency Act, public protection and the absurdity of not sequestrating the assetless estate providing impetus and justification. This startling outcome differs fundamentally from the familiar, grounded pattern of an application for a final order of compulsory sequestration in which, circumspectly enforcing the statutory requirement of advantage to creditors, the court applies the common-law requirements of benefit and prospect[141] to the facts of the case. The reliance on s 39(2) does not justify the misapplication of s 12(1)(*c*). The *Ross* rationale ventures far beyond the familiar, well-established limits confirmed by the Constitutional Court in *Stratford* and the Supreme Court of Appeal in *Sithole*.[142] Turning the advantage to creditors into a principle of protecting the innocent, unsuspecting public against assetless debtors contracting in insolvent circumstances, the *Ross* rationale would bring about a radically new world of insolvency law in South Africa. At present, though, the long-settled law is that the general sense of the Insolvency Act, as directly concerning sequestration proceedings, is to obtain a pecuniary benefit for creditors, and courts disallow applicant creditors from sequestrating a respondent's estate for other reasons.[143] Equally, one would think that courts are not allowed to sequestrate a respondent's estate for other reasons, either.

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[137] Compare the view of Smith in the text accompanying note 62 above.
[138] Compare *Independent* supra note 39 para 42, as summarised in the text accompanying notes 46–48 above.
[139] Coetzee op cit note 124 at 54 and n 104, read with 55.
[140] Ibid at 55.
[141] For the meaning of this phrase 'benefit and prospect', see the text accompanying note 69 above.
[142] See the text accompanying note 121 above.
[143] *Furstenburg* op cit note 63 at 720G; see the text accompanying note 63 above.

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And the Constitutional Court held that '[i]n exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary',[144] in deference to the principle of the separation of powers. It is submitted that the same applies to interpreting legislation, especially when the proposed change would distort or remove such a fundamental concept as the advantage of creditors in the Insolvency Act.

Perhaps the long-awaited new insolvency legislation in South Africa will no longer set the advantage of creditors as one of the admission requirements for entering the sequestration process. In the movement towards such fundamental legislative change, though, it will be essential to gather data and learn from the thorough reasoning and conclusions of experts about the likely effect on the administration of credit and other relevant aspects in South Africa now if the advantage of creditors requirement were to be replaced by a new system that enabled creditors to seek the sequestration of their debtors' estates far more easily with a view to the discharging of debts in this developing and yet struggling economy. The discharge of debts forms an important feature of reforming the law of insolvency and debt relief. Whichever route or routes for attaining this discharge is or are eventually approved, the ease and conditions of doing so (including the retention or abandonment of entry requirements such as the advantage of creditors) need to be considered in a multidisciplinary approach created and formulated by experts in law and experts in other fields relating to the extension and administration of credit. Glib declarations about the absurdity of not sequestrating assetless estates are no substitute for detailed, well-informed, carefully considered research and guidance by experts in South African legal, social, economic and financial policy in the current circumstances.[145]

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[144] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 36.

[145] Compare Lord Scarman's ruling in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 at 183B–D: 'It is an attractive, ingenious suggestion — but, in my judgment, unsound. For so radical a reform can be made neither by judges nor by modification of rules of court. It raises issues of social, economic and financial policy not amenable to judicial reform, which will almost certainly prove to be controversial and can be resolved by the legislature only after full consideration of factors which cannot be brought into clear focus, or be weighed and assessed, in the course of the forensic process. The judge — however wise, creative, and imaginative he may be — is "cabin'd, cribb'd, confin'd, bound in" not, as was Macbeth, to his "saucy doubts and fears" but by the evidence and arguments of the litigants. It is this limitation, inherent in the forensic process, which sets bounds to the scope of judicial law reform'.

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