CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 9/97

JEANETTE HARKSEN (BORN TZSCHUCKE)

Applicant

versus

MICHAEL JOHN LANE NO	First Respondent
EILEEN MARGARET FEY NO	Second Respondent
THE MASTER OF THE SUPREME COURT	Third Respondent
THE MINISTER OF JUSTICE	Fourth Respondent

Heard on: 26 August 1997

Decided on: 7 October 1997

JUDGMENT

GOLDSTONE J:

Introduction

[1] In this case the constitutionality of certain provisions of the Insolvency Act 24 of 1936, as amended ("the Act"), comes before us by way of a referral from Farlam J in the Cape of Good Hope Provincial High Court[1] made in terms of section 102(1) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution").

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1 *Harksen v Lane & Others* (C) Case No 16552/96, 25 March 1997, unreported.

[2] The referral came about in consequence of the sequestration of the estate of Mr Jürgen Harksen ("Mr Harksen"). The final sequestration order was granted in the Cape of Good Hope Provincial Division of the Supreme Court (as it then was) on 16 October 1995. The applicant in these proceedings, Mrs Jeanette Harksen ("Mrs Harksen"), was at that time married out of community of property to Mr Harksen. The first and second respondents are the trustees in the insolvent estate of Mr Harksen ("the trustees"). The third respondent is the Master of the Cape of Good Hope Provincial High Court ("the Master"). The fourth respondent is the Minister of Justice ("the Minister").

[3] There was no appearance in this Court on behalf of the trustees, the Master or the Minister. We were informed by the trustees that there were insufficient funds in the insolvent estate to allow them to brief counsel. They, as did the other respondents, informed the Court that they will abide its decision on the questions referred to it. Mr W Trengove SC and Mr D Spitz appeared on behalf of an amicus curiae, the Council of South African Banks. We are indebted to the amicus, and especially to its counsel, for the most helpful heads of argument they filed and oral submissions they made at the hearing of the referral.

[4] As indicated above, the sequestration of the insolvent estate of Mr Harksen commenced in October 1995, during the period of operation of the interim Constitution. Section 4(1) of the interim Constitution provided that:

> "This Constitution shall be the supreme law of the Republic and any law or act

> inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency."

Section 7(2) provided that:

> "This Chapter shall apply to all law in force . . . during the period of operation of this Constitution."

In accordance with these sections any provision of a law inconsistent with the bill of rights became invalid and of no force and effect upon the coming into operation of the interim Constitution.[2]

[5] The Constitution of the Republic of South Africa, 1996 ("the 1996 Constitution") came into force on 4 February 1997. Although the matter was referred to this Court on 25 March 1997, the application for the referral was launched on 18 December 1996, prior to the coming into operation of the l996 Constitution. It was therefore "pending" on the date on which the 1996 Constitution came into operation. Item 17 of schedule 6 to the 1996 Constitution provides that:

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2 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 28.

> "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

[6] In the present case it was accepted by counsel that there were no "interests of justice" which required the referral to be decided in accordance with the 1996 Constitution. I can find no ground for holding that such interests obtain in this case. It follows that the provisions and procedures of the interim Constitution apply to the matter referred and the constitutionality of the impugned sections must be decided with reference thereto.

The Relevant Provisions of the Act

[7] In this case the sections of the Act which are impugned are sections 21, 64 and 65. They are alleged to be inconsistent with certain provisions of the bill of rights to the extent that they impact on the property and affairs of a solvent spouse upon the sequestration of the estate of an insolvent spouse. At the outset, it is convenient to set out the relevant provisions of the Act.

[8] In terms of section 20(1) of the Act, the effect of the sequestration of the estate of an insolvent is to divest the insolvent of his or her estate and to vest it in the Master until a trustee has been appointed. Thereafter the estate vests in the trustee. Section 21(1) of the Act 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 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."

There then follow a number of provisions[3] which are designed to protect the legitimate interests of the solvent spouse.

[9] In terms of the section[4] "spouse" refers not only to a wife or husband in the legal sense but also to a wife or husband married according to any law or custom, as well as women and men living with each other as if they were married.

[10] Section 21(2) provides that once the solvent spouse proves that his or her property falls into one of the following categories, the trustee shall release it:

(a) property of the solvent spouse acquired before her or his marriage to the insolvent or before 1 October, 1926;

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3 See ss 21(2), (3), (4) and (10).

4 Section 21(13).

(b) property acquired by the solvent spouse under a marriage settlement;

(c) property acquired by the solvent spouse during the marriage by a title valid as against creditors of the insolvent;

(d) those policies of life insurance which are protected by the provisions of the Insurance Act 27 of 1943;

(e) property acquired with, or with the income or proceeds of, property referred to above.

[11] The category of property acquired by the solvent spouse during the marriage by a title valid against creditors of the insolvent was substantially widened by section 22 of the Matrimonial Property Act 88 of 1984. In terms thereof, donations between spouses, formerly invalid, were made legal and therefore enforceable. Some of the effects of that development on section 21 of the Act were considered by Kriegler J in *Snyman v Rheeder NO*.[5] At the outset, the learned Judge referred to a passage from the judgment of Greenberg JP in *Maudsley's Trustee v Maudsley*.[6] Part of that passage reads as follows:

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5 1989 (4) SA 496 (T) at 504H-506B.

6 1940 TPD 399 at 404.

"Apart from authority I see no reason why the words 'title valid as against creditors' should have any special meaning, and why they should not mean a title which under the provisions of the law are so valid. In other words, there is nothing in sec. 21(c) which creates any new ground of validity or invalidity and all that is effected by sec. 21 in relation to property which is claimed by the solvent spouse to fall under sec. 21(c) is that the *onus* is cast on the spouse to prove the validity whereas under the law before 1926 the *onus* rested on the trustee to prove the invalidity. One knows that before the amendment of the law in 1926, it was a common practice for traders (and perhaps others) to seek to avoid payment of their debts by putting property in their wives' names; on insolvency the burden rested on the trustee to attack the wife's title. If sec. 21 is regarded as merely shifting the *onus* on to the solvent spouse, it nevertheless affords some relief in the direction of preventing the evil to which I have referred. If one goes further and interprets sec. 21 as creating new substantive grounds for attacking the property of a spouse, this would amount to depriving such spouse of the benefits of the law of marriage out of community of property, and in my opinion very clear wording would be required to effect this object."

Kriegler J went on to say at 505H - 506B:

"Ek meen dat die geleerde Regterpresident se opmerkings besonder van pas is nou dat die regsverbod teen skenkings tussen egliede opgehef is. Daar moet versigtig omgegaan word met gewysdes wat gehandel het met die eertydse regsposisie. Die toets is nou subtieler aangesien die ware doel met 'n skenking nou ook ondersoek moet word.

Artikel 21(2)*(c)* vereis steeds bewys van 'n regsgeldige titel. Die gesonde verstand verg nog steeds dat sodanige bewys wel deeglike bewys moet wees vanweë die aanspraakmaker se eksklusiewe kennis van die tersaaklike gegewens asook vanweë die verstaanbare versoeking tot verdoeseling. Maar 'n skenking kan nou sodanige titel verleen. Daar moet beklemtoon word dat die vereiste van goeie trou nog steeds bly staan. Dit moet 'n ware skenking wees. 'n Skyntransaksie sal nog steeds nie aan die solvente eggenoot 'n regsgeldige titel verleen nie. Die vraag of 'n egte skenking nietemin deur die bepalings van art 26, 29, 30 of 31 van die Insolvensiewet getref kan word en of dit 'n aanspraak ingevolge art 21(2)*(c)* gebaseer op 'n skenking sou kon fnuik,

> hoef nie hier uitgemaak te word nie. Ook nie die moeiliker vraag of 'n skenking aangeveg kan word as 'n vervreemding sonder teenwaarde soos bedoel in art 26 van die Wet nie."

It is also unnecessary for the purpose of this judgment to consider these interesting questions referred to by Kriegler J which concern the relationship between section 21(2) and the provisions in the Act relating to dispositions by the insolvent which may be set aside under sections 26, 29, 30 and 31 of the Act.[7] What is now relevant is that since donations between spouses are no longer illegal the category of property which the solvent spouse may reclaim has been widened considerably.

[12] In terms of section 21(3), if the solvent spouse is in the Republic and the trustee is able to ascertain her or his address, the trustee may not, without the leave of the High Court, realize property which ostensibly belongs to the solvent spouse until the expiry of six weeks written notice to that spouse of his or her intention to do so. That notice must be published in the Government Gazette and a newspaper circulating in the district where the solvent spouse resides or carries on business. The notice must invite all separate creditors of that spouse to prove their claims in the insolvent estate. Section 21(5) makes provision for such creditors of the solvent spouse to share in the proceeds of such property in priority to the separate creditors of the insolvent estate. It should be

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[7] Those sections relate to dispositions not made for value (s 26); those having the effect of preferring one creditor above another which constitute voidable preferences (s 29); those intended to prefer one creditor above another which constitute undue preferences (s 30); and those made in collusion with another person and having the effect of prejudicing creditors or preferring one above another (s 31). Creditors also have their common law right to have transactions made in fraud of their rights set aside (the *actio Pauliana*).

emphasised that these provisions are intended, firstly, to protect the solvent spouse from a trustee alienating property in which that spouse has good title as against the creditors of the insolvent estate; and, secondly, to protect creditors of the solvent spouse who acted to their prejudice by dealing with the solvent spouse in respect of property ostensibly hers or his and in fact that of the insolvent spouse.

[13] Sections 21(4) and (10) make provision for judicial intervention to protect the property of the solvent spouse in certain circumstances. Section 21(4) reads thus:

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

Section 21(10) makes provision for the High Court to order that property of the solvent spouse will not immediately vest in either the Master or the trustee if the solvent spouse is carrying on business as a trader, apart from the insolvent spouse, or if the solvent spouse is likely to suffer serious prejudice by reason of an immediate vesting. The court may make such an order for such period as it thinks fit only if it is satisfied that the solvent spouse is willing and able to make arrangements safeguarding the interest of the insolvent estate in such property. During that period the solvent spouse must prove her or his claim to the property. The trustee will then either release the property to the solvent spouse or, if it is not released, upon expiry of the period the property shall vest in the Master or the

trustee.

[14] Finally, as far as section 21 is concerned, subsection (12) provides that if the trustee in error releases any property alleged to belong to the solvent spouse, he or she shall not be debarred from subsequently proving that it belongs to the insolvent estate and recovering it.

[15] In terms of section 16(1), the registrar of the court which grants a final order of sequestration shall cause a copy of the order to be served by the deputy sheriff on the solvent spouse, who, in terms of section 16(3), is obliged within seven days to lodge a statement of his or her affairs with the Master.[8]

[16] I turn now to consider the provisions of sections 64 and 65 of the Act. In terms of section 64(1), the insolvent must attend the first and second meetings of the creditors of the insolvent estate unless he or she has previously obtained written permission from the presiding officer to be absent. Such permission may be granted after consultation with the trustee.

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8 Section 19 of the Act obliges the deputy sheriff to attach and seal the movable property of the insolvent estate immediately upon receiving a copy of the provisional sequestration order and to take into her or his possession all books and records of the insolvent. It would appear to me that these provisions do not apply to the property of the solvent spouse. Section 21(1) empowers the Master or trustee, and not a deputy sheriff, to deal with the property of the solvent spouse in accordance with the vesting of that property in them. Whereas the deputy sheriff is obliged to make an inventory of the insolvent's property on its attachment, the solvent spouse is only obliged to submit the inventory of his or her property within seven days of the notice referred to in s 16(1).

[17] Section 64(2) grants the presiding officer the authority to summon any person who is known or upon reasonable ground believed to be or to have been:

(a) in possession of any property which belonged to the insolvent, the insolvent's estate *or to the spouse of the insolvent* before or after the sequestration of his or her estate; or

(b) indebted to the estate.

[18] This includes the summoning of persons (including the insolvent's spouse) who in the opinion of the presiding officer may be able to give any material information concerning the business, affairs or property of the insolvent *or the insolvent's spouse*. This may pertain to the period before and after sequestration of the insolvent's estate.

[19] At such a meeting the presiding officer, the trustee and any creditor who has proved a claim against the estate, or the agent of any of them, may interrogate under oath any person so called concerning all matters relating to the property, business and affairs of the insolvent *and his or her spouse* in respect of the period before or after the sequestration of the estate. The presiding officer has the discretion to disallow questions which are either irrelevant or which may unnecessarily prolong proceedings.[9]

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9 Section 65(1).

[20] Section 65(2) goes on to provide that persons summoned to produce books or documents may invoke the law relating to privilege as applicable to a witness summoned to produce a book or document or giving evidence in a court of law.

[21] In terms of section 65(2A)(a), the presiding officer shall order that where a person testifying is obliged to answer questions which may incriminate him or her, or where he or she is to be tried on a criminal charge and the evidence may prejudice him or her at such trial, the proceedings take place *in camera*. Moreover, no information regarding such questions and answers may be published in any manner whatsoever, nor may such answers be admissible in subsequent criminal proceedings, except where the criminal charges involve perjury.

[22] Section 66(2) of the Act empowers the presiding officer to commit to prison a person summoned to appear under section 64 who fails to do so without a reasonable excuse. Section 66(3) empowers the presiding officer to commit to prison, inter alia, any person who:

> "[R]efuses to answer any question lawfully put to him under the said section [section 65] or does not answer the question fully and satisfactorily".[10]

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10 In *D M De Lange v F J Smuts NO and Others*, unreported judgment of Conradie J in the Cape of Good Hope Provincial High Court delivered on 29 August 1997, the provisions of s 66(3) of the Act were held to be unconstitutional and invalid. In terms of s 167(5) of the 1996 Constitution, the judgment has been referred to this Court for confirmation of the order of invalidity.

[23] Section 139(1) of the Act provides:

> "Any person shall be guilty of an offence and liable to a fine not exceeding R500 or to imprisonment without the option of a fine for a period not exceeding six months if he is guilty of an act or omission for which he has been or might have been lawfully committed to prison in terms of subsection (2) or (3) of section 66."

The legal effect and consequences of these provisions, to the extent that they are now relevant, will be considered below.

The Facts

[24] Pursuant to the statutory vesting of her property in the Master and then the trustees, the latter caused the property of Mrs Harksen to be attached. According to her statement of affairs, that property has a value of R6 120 352,50. None of it has been released by the trustees to Mrs Harksen and it would appear that no application for such release has been made by her.

[25] Mrs Harksen was summoned, under sections 64 and 65 of the Act, to subject herself to interrogation at the first meeting of the creditors in the insolvent estate of Mr Harksen, and to produce at the meeting:

> "all documentation relating to [her] financial affairs and the financial affairs of Jürgen Harksen."

For reasons not now pertinent, the magistrate who presided at the meeting of creditors set

aside the summons. However, on 9 December 1996, Farlam J set aside the ruling of the magistrate and directed Mrs Harksen to subject herself to the interrogation and to produce the documents referred to in the summons.[11] That order precipitated the present proceedings impugning the constitutionality of section 21 of the Act and those portions of sections 64 and 65 that provide for enquiries into the estate, business, affairs or property of the spouse of an insolvent person.

Necessity to Exhaust Non-Constitutional Remedies

[26] It was submitted on behalf of the amicus curiae that the referral was not appropriate because Mrs Harksen had not exhausted her non-constitutional remedies. In this regard we were referred to the judgment of this Court in *Motsepe v Commissioner for Inland Revenue*.[12] At para 21, Ackermann J said:

> "The referral may very well be defective for another reason. This Court has laid down the general principle that 'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed', and has applied this principle specifically to section 102(1) referrals and *obiter* to applications for direct access. On an objective assessment of the present case it was unnecessary to decide the constitutional issue because Mrs Motsepe could, by following

11 *Lane and Another NNO v Magistrate, Wynberg* 1997 (2) SA 869 (C).

12 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC). In that case, a taxpayer impugned the constitutionality of s 92 of the Income Tax Act 58 of 1962 which provides that it is incompetent for any person to question the correctness of a statement filed by the Commissioner for Inland Revenue under s 91(1)(b) of the Act where a taxpayer fails to pay tax due by her or him. That statement may be filed by the Commissioner in a court of competent jurisdiction and has the effect of a civil judgment (s 91(1)(b)). However, the statement does not preclude a taxpayer from lodging an objection and appeal against the assessment upon which the statement of the Commissioner is founded (ss 81, 83).

> the objection and appeal procedures provided for in the Act, have avoided the barriers imposed by ss 92 and 94 of the Act and the sequestration application could have been decided in the light of the outcome of such procedures." (Footnote omitted)

Neither in the *Motsepe* case nor in the decisions referred to by Ackermann J did this Court lay down any hard and fast rule to the effect that in no case should referrals be made to this Court where non-constitutional remedies have not been exhausted. In any event, the present case is distinguishable. In *Motsepe* there was no attack by the taxpayer upon the constitutionality of the objection and appeal procedures available, that is, the non-constitutional remedies. The only remedy open to Mrs Harksen for reversing the automatic vesting of her property in the trustees was to bring an application to court under section 21, one of the sections which she seeks to have declared unconstitutional. Furthermore she would have had to submit herself to interrogation under the other sections of the Act, which she now similarly seeks to impugn. This is therefore not a case in which there were in fact any non-constitutional remedies open to her. This objection to the referral is thus without merit.

The Constitutionality of the Impugned Sections of the Act

[27] It will be convenient to consider initially the attack made on the constitutionality of section 21 of the Act. Thereafter I shall consider the objections directed at sections 64 and 65.

Section 21 of the Act

[28] On behalf of Mrs Harksen, her counsel, in impugning the constitutionality of section 21 of the Act, relied upon the provisions of both section 8 ("the equality clause") and section 28 ("the property clause") of the interim Constitution. I propose to consider the property clause first.

The Property Clause

[29] Section 28 of the interim Constitution provides as follows:

> "(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
>
> (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
>
> (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected."

[30] The submission on behalf of Mrs Harksen was that the provisions of section 21(1) of the Act constitute an expropriation of the property of the solvent spouse without any provision for compensation as required by section 28(3). The starting point of the argument is that the vesting constitutes a transfer of ownership of the rights in the

property of the solvent spouse to the Master and, on appointment, to the trustee.[13] Reliance was placed upon the decision of the Appellate Division in *De Villiers NO v Delta Cables (Pty) Ltd.*[14] In that case Van Heerden JA discussed at some length whether the vesting of the property of the solvent spouse in the Master or a trustee, in terms of section 21(1) of the Act, had the effect of transferring ownership in that property to them. As appears from the judgment,[15] it was found not to be necessary finally to decide that question. However, Van Heerden JA, with the concurrence of the other four members of the court, expressed the firm view that full ownership in the solvent spouse's property did in fact pass to the trustee of the insolvent estate. For the purpose of this judgment I shall assume that to be the effect of section 21.

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13 The ordinary meaning of the word "vests" connotes the acquisition of ownership. See *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 175. Also, s 21(1) states that property of a solvent spouse so vests "as if it were property of the sequestrated estate".

14 1992 (1) SA 9 (A).

15 Id at 16H-I.

[31] The word "expropriate" is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation.[16] Whilst expropriation constitutes a form of deprivation of property, section 28 makes a distinction between deprivation of rights in property, on the one hand (subsection (2)), and expropriation of rights in property, on the other (subsection (3)). Section 28(2) states that no deprivation of rights in property is permitted otherwise than in accordance with a law.[17] Section 28(3) sets out further requirements which need to be met for expropriation, namely, that the expropriation must be for a public purpose and against payment of compensation.

[32] The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law. In *Beckenstrater v Sand River Irrigation Board*,[18] Trollip J said:

> "[T]he ordinary meaning of 'expropriate' is 'to dispossess of ownership, to deprive of

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16 See *Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 (A) at 972D; *Davies and Others v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZS) at 232A-B.

17 It is not necessary now to consider or decide the meaning of "a law" as used in this context and its relationship to the other provisions of the bill of rights.

18 1964 (4) SA 510 (T) at 515A-C.

> property' (see e.g. *Minister of Defence v. Commercial Properties Ltd. and Others*, 1955 (3) S.A. 324 (N) at p. 327G); but in statutory provisions, like secs. 60 and 94 of the Water Act, it is generally used in a wider sense as meaning not only dispossession or deprivation but also appropriation by the expropriator of the particular right, and abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right. That is the effect of cases like *Stellenbosch Divisional Council v. Shapiro*, 1953 (3) S.A. 418 (C) at pp. 422-3, 424; *S.A.R. & H. v. Registrar of Deeds*, 1919 N.P.D. 66; *Kent, N.O. v. S.A.R. & H.*, 1946 A.D. 398 at pp. 405-6; and *Minister van Waterwese v. Mostert and Others*, 1964 (2) S.A. 656 (A.D.) at pp. 666-7."

[33] The Zimbabwean Constitution also provides that property may not be compulsorily acquired, save under a law which requires the acquiring authority to pay fair compensation.[19] In *Hewlett v Minister of Finance and Another*,[20] Fieldsend CJ considered the meaning of "acquire" in those sections of the Constitution. He referred[21] to the following dictum of Innes CJ in *Transvaal Investment Co Ltd v Springs Municipality:*[22]

> ". . . juristically, the word 'acquire' connotes ownership; the ordinary legal meaning implies the acquisition of *dominium*. To acquire a thing is to become the owner of it. No doubt it may be used in a wider sense so as to include the acquisition of a right to obtain the *dominium*; but the narrower meaning is the accurate and more obvious one."

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19 Sections 11(c) and 16(1) of the Constitution of Zimbabwe.

20 1982 (1) SA 490 (ZS).

21 Id at 502B-C.

22 1922 AD 337 at 341.

Fieldsend CJ continued:[23]

> "It is true, too, that 'compulsory acquisition' is used in both English and Roman-Dutch law to denote the expropriation of property by an authority - whether State, local or public utility - usually for some public purpose, most commonly in relation to land. It is, of course, common cause that property in s 16 is not limited to land.
>
> Cases relied upon by Mr *Kentridge* clearly establish that it is not every deprivation of a right which amounts to a compulsory acquisition of property, as for example regulation of a landlord's rights which in effect diminished his rights (*Thakur Jagannatha Baksa Singh v United Provinces* 1946 AC 327 (PC)), regulations which limited an owner's right to build above a certain height on his land (*Belfast Corporation v OD Cars Ltd* 1960 AC 490), and legislation allowing licensed pilots to provide pilotage only if they were employed by the port authority (*Government of Malaysia v Selangor Pilot Association (supra)).*
>
> It is perhaps of some significance to note that in almost all the post-colonial constitutions granted by Britain in Africa the section reciting the fundamental freedoms protected refer to the right not to be *deprived* of property without compensation whereas the sections giving actual protection provide that no property of any description shall be *compulsorily taken possession of* and no interest in or right [over] property of any description shall be *compulsorily acquired* except on certain conditions including compensation. This is clear recognition that there is a distinction between deprivation and acquisition, and also an indication that not every deprivation of property must carry compensation with it. Indeed government could be made virtually impossible if every deprivation of property required compensation."

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23 Above n 20 at 502D-H.

In *Davies and Others v Minister of Lands, Agriculture and Water Development,*[24] Gubbay CJ cited the aforesaid passages with approval and held[25] that section 11(c) of the Zimbabwe Constitution does not afford protection against deprivation of property by the State "where the act of deprivation falls short of compulsory acquisition or expropriation."

[34] The Constitution of India originally had a property clause[26] which recognised the distinction between compulsory acquisition and requisition which was held to be a less intrusive form of deprivation of property. In *H.D. Vora v State of Maharashtra,*[27] it was said by Bhagwati J:

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24 1997 (1) SA 228 (ZS).

25 Id at 232D-E.

26 Article 31.

27 1984 AIR 866 (SC) at 869.

> "The two concepts [compulsory acquisition and requisition] . . . are totally distinct and independent. Acquisition means the acquiring of the entire title of the expropriated owner whatever the nature and extent of that title may be. The entire bundle of rights which was vested in the original holder passes on acquisition to the acquirer leaving nothing to the former . . . . The concept of acquisition has an air of permanence and finality in that there is transference of the title of the original holder to the acquiring authority. But the concept of requisition involves merely taking of 'domain or control over property without acquiring rights of ownership' and must by its very nature be of temporary duration."

(It is unnecessary to consider whether there is a difference between the concept of *requisition* used in the Indian provision and *deprivation* used in the interim Constitution.)

[35] While the legal effect of section 21(1) may be to "transfer" ownership of the property of the solvent spouse to the Master or trustee, in order to determine whether or not such a "transfer" constitutes an expropriation of that property for the purposes of the property clause, regard must be had to the broad context and purpose of section 21 as a whole. Apart from the question as to whether the transfer of the property of the solvent spouse is for a "public" purpose, to regard the vesting under section 21(1) as an expropriation, in my opinion, is to ignore the substance of the provision. The purpose and effect is clearly not to divest, save temporarily, the solvent spouse of the ownership of property that is in fact his or hers. The purpose is to ensure that the insolvent estate is not deprived of property to which it is entitled.[28] The fact that the onus of establishing his or

[28] In *Van Schalkwyk v Die Meester* 1975 (2) SA 508 (N) at 510E-F, it was held that the vesting provision was

her ownership of the property is placed upon the solvent spouse should not in any way be confused with the purpose of the provision. In any vindicatory action the claimant has to establish ownership. The onus of proof had to be placed on either the Master or the trustee or on the solvent spouse. Having regard to which of those parties has access to the relevant facts, the onus was understandably and justifiably placed on the solvent spouse.

[36] Again, on the assumption that the effect of section 21 is to "transfer" ownership of the property of the solvent spouse to the Master or the trustee, the section does not contemplate or intend that such transfer should be permanent or for any purpose other than to enable the Master or the trustee to establish whether any such property is in fact that of the insolvent estate. Again, there is no intention to divest the solvent spouse permanently of what is rightfully hers or his or to prejudice the solvent spouse in relation to her or his property. Hence the provisions enabling the solvent spouse to seek the assistance of the court in order to obtain the release of that which is his or hers and to seek the protection of the court in the event of the trustee wishing to sell such property prior to

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designed to protect property which rightfully belonged to the insolvent estate from alienation by the solvent spouse, malicious damage or destruction by the solvent spouse or a third party, accidental damage or destruction, fraudulent abandonment by the solvent spouse and theft by third parties.

its release. So, too, the provision enabling the court to order the exclusion of property of the solvent spouse from the operation of a vesting order in the event that such spouse is a trader or is likely to suffer serious prejudice by reason of an immediate vesting. The whole thrust of section 21 is merely to ensure that property which properly belonged to the insolvent ends up in the estate. The statutory mechanism employed is temporarily to lay the hand of the law upon the property of both the insolvent spouse and the solvent spouse and to create a procedure for the release by the trustee or the court of that which in fact belongs to the solvent spouse.

[37] In all the circumstances which I have described, the provisions of section 21 do not have the purpose or effect of a compulsory acquisition or expropriation of the property of the solvent spouse whether by a public authority or at all. I am of the opinion therefore that there is no basis for regarding the effect of section 21 as an expropriation of the rights in the property of the solvent spouse.

[38] It follows that it is unnecessary to decide whether for the purposes of section 21 of the Act the Master or a trustee constitutes a public authority or whether the vesting is for a public purpose.

[39] If the provisions of section 21 do not amount to an expropriation then it follows that they do not contravene the provisions of section 28(3) of the interim Constitution.

Counsel for Mrs Harksen informed us during argument that they do not rely on the provisions of sections 28(1) or (2) of the interim Constitution. That carried with it the concession that if section 21 of the Act does not amount to an expropriation of the property of the solvent spouse then its constitutionality is not impugned at all by section 28. It follows that the attack on section 21 founded upon the property clause falls to be dismissed. Having reached this conclusion it is unnecessary to consider the application of the limitations clause in this context.

The Equality Clause

[40] It was further submitted on behalf of Mrs Harksen that the provisions of section 21 of the Act were in violation of the equality clause of the interim Constitution.[29] More particularly it was contended that the vesting provision constitutes unequal treatment of solvent spouses and discriminates unfairly against them; and that its effect is to impose severe burdens, obligations and disadvantages on them beyond those applicable to other

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29 Section 8 provides:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
> (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
> (b) . . .
> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

persons with whom the insolvent had dealings or close relationships or whose property is found in the possession of the insolvent. Moreover, to the extent that section 21(10) favours solvent spouses who are "traders", it discriminates against solvent spouses who are not "traders". It was submitted further that section 21(2), which entitles a solvent spouse to claim the return of what in fact belongs to him or her, does not save the provision. There may be a number of innocent reasons why the solvent spouse is not able to establish that the property belongs to him or her. Counsel for Mrs Harksen suggested that the provisions of section 21 constituted a violation of both sections 8(1) (a denial of equality before the law and equal protection of the law) and 8(2) (unfair discrimination).

[41] Attacks on legislation which are founded on the provisions of section 8 of the interim Constitution raise difficult questions of constitutional interpretation and require a careful analysis of the facts of each case and an equally careful application of those facts to the law. It was stated in the majority judgment in *Prinsloo v Van der Linde and Another*[30] that this Court:

> "should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises."

Without in any way departing from that cautious approach, it appears to me that it would

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30 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 20.

be helpful now to take stock of this Court's equality jurisprudence. In this regard I shall draw particularly on our judgments in the *Prinsloo* case and in *President of the Republic of South Africa and Another v Hugo*.[31]

Section 8(1) Analysis

[42] Where section 8 is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of section 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section 8(1).

Section 8(2) Analysis

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31 1997 (6) BCLR 708 (CC).

[43] Differentiation that does not constitute a violation of section 8(1) may nonetheless constitute unfair discrimination for the purposes of section 8(2). The foregoing is my understanding of the judgment in *Prinsloo*.[32] It was there stated in the majority judgment that:

> "If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to s 33, or else constituted discrimination which had to be shown not to be unfair, the Courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct. . . . The Courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory 'in the constitutional sense'.
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> . . . .
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> Taking as comprehensive a view as possible of the way equality is treated in s 8, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination." (Footnotes omitted).

32 Above n 30 at paras 17 and 23.

In dealing with differentiation which does not involve unfair discrimination the Court stated:[33]

> "It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element. . . .
>
> It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as 'mere differentiation'. In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. . . .
>
> Accordingly, before it can be said that mere differentiation infringes s 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe

33 Id at paras 24 - 26.

> s 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element . . . is present." (Footnotes omitted)

[44] If the differentiation complained of bears no rational connection to a legitimate governmental purpose which is proffered to validate it, then the provision in question violates the provisions of section 8(1) of the interim Constitution. If there is such a rational connection, then it becomes necessary to proceed to the provisions of section 8(2) to determine whether, despite such rationality, the differentiation none the less amounts to unfair discrimination.

[45] The determination as to whether differentiation amounts to unfair discrimination under section 8(2) requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to "discrimination" and, if it does, whether, secondly, it amounts to "unfair discrimination". It is as well to keep these two stages of the enquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in section 8(2), which by virtue of section 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.[34]

What Constitutes Discrimination

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[34] See *Hugo* at n 31.

[46] Section 8(2) contemplates two categories of discrimination. The first is differentiation on one (or more) of the fourteen grounds specified in the subsection (a "specified ground"[35]). The second is differentiation on a ground not specified in subsection (2) but analogous to such ground (for convenience hereinafter called an "unspecified" ground) which we formulated as follows in *Prinsloo*:

> "The second form is constituted by unfair discrimination on grounds which are not specified in the subsection. In regard to this second form there is no presumption in favour of unfairness.[36]
>
> . . . .

35 The expression "grounds specified" is used in subsection (4).

36 Above n 30 at para 28.

> Given the history of this country we are of the view that 'discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. . . . [U]nfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. [37]
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> . . . .
>
> Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well.[38]

There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.

[47] The question whether there has been differentiation on a specified or an unspecified ground must be answered objectively. In the former case the enquiry is directed at determining whether the statutory provision amounts to differentiation on one

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37 Id at para 31.

38 Id at para 33. For purposes of the decision in *Prinsloo* it was not necessary to investigate further the concept of such other differentiation.

of the grounds specified in section 8(2). Similarly, in the latter case the enquiry is whether the differentiation in the provision is on an unspecified ground (as explained in para 46 above). If in either case the enquiry leads to a negative conclusion then section 8(2) has not been breached and the question falls away. If the answer is in the affirmative, however, then it is necessary to proceed to the second stage of the analysis and determine whether the discrimination is "unfair". In the case of discrimination on a specified ground, the unfairness of the discrimination is presumed, but the contrary may still be established. In the case of discrimination on an unspecified ground, the unfairness must still be established before it can be found that a breach of section 8(2) has occurred.

[48] Before proceeding to the second stage of the enquiry, it is necessary to comment briefly on one aspect of the specified and unspecified grounds of differentiation which constitute discrimination. In the above quoted passage from *Prinsloo* it was pointed out that the pejorative meaning of "discrimination" related to the unequal treatment of people "based on attributes and characteristics attaching to them". For purposes of that case it was unnecessary to attempt any comprehensive description of what "attributes and characteristics" would comprise.

[49] It is also unnecessary for purposes of the present case, save that I would caution against any narrow definition of these terms. What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and

elsewhere) to categorize, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.

What Constitutes Unfair Discrimination

[50] The nature of the unfairness contemplated by the provisions of section 8 was considered in paras 41 and 43 of the majority judgment in the *Hugo* case[39]. The following was stated:

> "[41] The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and

39 Above n 30.

> respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.
>
> . . . .
>
> [43] To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination."

In para 41 dignity was referred to as an underlying consideration in the determination of unfairness. The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner. However, as L'Heureux-Dubé J acknowledged in *Egan v Canada,*[40] "Dignity [is] a notoriously elusive concept . . . it is clear that [it] cannot, by itself, bear the weight of s.15's task on its shoulders. It needs precision and elaboration." It is made clear in para 43 of *Hugo* that this stage of the enquiry focuses primarily on the experience of the "victim" of discrimination. In the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination.

[51] In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

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[40] (1995) 29 CRR (2d) 79 at 106.

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair;[41]

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental

41 Above n 31 at para 47.

human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving "precision and elaboration" to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge as our equality jurisprudence continues to develop. In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair.

[52] If the discrimination is held to be unfair then the provision in question will be in violation of section 8(2). One will then proceed upon the final leg of the enquiry as to whether the provision can be justified under section 33 of the interim Constitution, the limitations clause. This will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality.

[53] At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause

(section 33 of the interim Constitution).

The Enquiry in the Present Case

[54] I turn now to consider the constitutionality of section 21 of the Act in the light of the foregoing analysis.

1 *Differentiation*

[55] That section 21 differentiates between the solvent spouse of an insolvent and other persons who might have had dealings with the insolvent is patent. It becomes necessary, therefore, to consider the governmental purpose of the section, whether that purpose is a legitimate one and, if so, whether the differentiation does have a rational connection to that purpose.

[56] A similar provision appeared (without the extended definition of "spouse") in a 1926 amendment to the Insolvency Act 32 of 1916. Its successor is section 21 of the Act. In *De Villiers NO v Delta Cables (Pty) Ltd* [42] Van Heerden JA said:

> "The main object of s 21(1), read with s 21(2) and (4), is, no doubt, to prevent or at least to hamper collusion between spouses to the detriment of creditors of the insolvent spouse."

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42 Above n 14 at 13I.

That the provision soon appeared to have a salutary effect appears from the observation of Greenberg JP in *Maudsley's Trustees v Maudsley* [43] to the effect that:

> "One knows that before the amendment of the law in 1926, it was a common practice for traders (and perhaps others) to seek to avoid payment of their debts by putting property in their wives' names; on insolvency the burden rested on the trustee to attack the wife's title."

43 1940 TPD 399 at 404.

As Professor Smith points out, where a trader so acted:[44]

> "[t]he onus was then on the trustee to prove that the transactions in question were in fact simulated ones, a particularly difficult task because the proprietary rights as between spouses are usually matters within their own peculiar knowledge and it might not be possible for a trustee to separate the property of one from that of the other."

44 Smith *The Law of Insolvency* 3 ed (Butterworths, Durban 1988) at 108.

[57] Since the introduction of the section 21 provision in 1926, the position of women in our society has changed radically and for a number of years section 21 of the Act has served a much wider purpose than that referred to by Greenberg JP in the *Maudsley*[45] case. More and more women have become economically active and contribute out of their own income or investments to the property of a common household.[46] The consequence is that nowadays, in the case of honest spouses, who are married out of community of property, it is not infrequently a matter of complexity for the spouses themselves to determine which property in their possession belongs to each of them; or, indeed, which is held in co-ownership because both contributed to the purchase price. Having regard to the close identity of interests between many married couples,[47] they do not always make nice calculations and keep accurate records of their respective contributions to property they acquire. If it is difficult for them to do so, then so much more difficult and complex is it for a trustee who comes as a complete stranger to the financial affairs of the spouses. The provisions of section 21 thus assist a trustee in the important determination of 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

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45 Above at para 56.

46 When, in 1926, the provision was inserted into the 1916 Act there can be no doubt that it was directed at property ostensibly owned by women married out of community of property. It could hardly have been otherwise as there were relatively few women at that time who had an independent income. Its purpose was not aimed at disadvantaging or prejudicing women as such. Its language was gender neutral and as more women began to have their own income its effect applied more frequently to husbands. Counsel for Mrs Harksen, correctly, in my view, did not suggest that section 21 resulted in gender discrimination.

47 In *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 47 this Court recognised the existence of a close special relationship between spouses and acknowledged that it may sometimes lead

marriage or similar close relationship. This statutory mechanism is an appropriate and effective one.

[58] In his attack on the rationality of section 21(1), counsel for Mrs Harksen relied upon the statement of Berman AJ in *Enyati Resources Ltd and Another v Thorne NO and Another*[48] to the effect that:

> "The divesting of the property of the solvent spouse and the vesting thereof in the hands of the Master (and thereafter in the hands of the trustee) constitute a drastic and arbitrary invasion upon, and inroad into, the proprietary right of citizens . . . ."

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to collusion or fraud.

48 1984 (2) SA 551 (C) at 557H.

Whilst in no way wishing to minimise the inconvenience, potential prejudice and embarrassment that the provisions of section 21 of the Act may cause to a solvent spouse, and even accepting that those consequences may be described as "drastic", I cannot agree that they are arbitrary or without rationality. In my opinion, the legislature acted rationally in taking the view that the common law and the statutory remedies relating to impeachable transactions[49] were insufficient to enable the Master or a trustee to ensure that all the property of the insolvent spouse found its way into the insolvent estate. In particular, it must be acknowledged that remedies other than that provided by section 21 cast an onus on the Master or the trustee to establish ownership of property claimed from the solvent spouse. If a claim were to be contested, inevitable delays inherent in the legal system would result. Those delays, certainly in cases of collusion, could well be fatal to the recovery of property rightfully belonging to the insolvent estate. I am not overlooking the power of the High Court to grant relief by way of an interim interdict to protect the property or relief elsewhere provided in the Act. However, that relief would require some evidence from the Master or trustee which might not necessarily be available without a time consuming enquiry.

[59] In respect of the question of onus it was stated in *Prinsloo*:[50]

> "In any civil case, one of the parties will have to bear the *onus* on each of the factual

49 See n 7 above.

50 Above n 30 at para 36.

> matters material to the adjudication of the dispute. So, in the case of an aquilian claim for damages arising from a veld fire, one of the parties will bear the *onus* concerning negligence. As long as the imposition of the *onus* is not arbitrary, there will be no breach of s 8(1). In rare circumstances, it may be that the allocation of *onus* will impair other constitutional rights and a challenge will then arise. That is not the case here."

As we have seen, section 21 has the effect of transferring an onus from the Master or a trustee to the solvent spouse. As was stated earlier,[51] there is a good reason for transferring such onus to the solvent spouse in the circumstances of an insolvency of the insolvent spouse. Often facts necessary for the determination of the question of ownership will be peculiarly within the knowledge of the solvent spouse. It is thus rational that the onus should be cast upon the solvent spouse. As Didcott J said in his separate concurring judgment in the *Prinsloo* case:[52]

> "In our adversarial system of civil litigation one side or the other has to bear the *onus* of proof. Differentiation between the parties in that regard is thus inevitable. So is the disadvantage under which the side carrying the load often labours. Its location for specific issues depends not on doctrinaire considerations, but on wholly pragmatic ones."

[60] For reasons set out above there can be no doubt as to the existence of a rational connection between the differentiation created by section 21 of the Act and the legitimate governmental purpose behind its enactment. Moreover, in my opinion, reasonable procedures were introduced to safeguard the interests of the solvent spouse in his or her

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51 Above at para 57.

52 Above n 30 at para 56.

property. It follows that section 21 does not violate the provisions of section 8(1) of the interim Constitution.

2 *Discrimination*

[61] The next question is whether the differentiation between solvent spouses and other persons who had dealings with insolvents constitutes discrimination. The differentiation is not on one of the specified grounds. Whether it constitutes discrimination on one of the unspecified grounds is an objective enquiry. In my opinion, this enquiry yields an affirmative result. Other persons who had dealings with the insolvent or whose property is found in the possession of an insolvent are not affected in the same way. Their property does not become vested in the Master or the trustee and they are not burdened with the onus of proving what is their property before it is released to them. They are not prevented from disposing of their property unless and until they prove their ownership either to the satisfaction of a trustee or a court of competent jurisdiction. The differentiation does arise from their attributes or characteristics as solvent spouses, namely their usual close relationship with the insolvent spouse and the fact that they usually live together in a common household.[53] These attributes have the potential to demean persons in their inherent humanity and dignity. In this regard it might also be

53 I do not agree with the submission made on behalf of Mrs Harksen by her counsel that the effect of section 21 is to discriminate against a solvent spouse on the basis of personal intimacy.

mentioned that they have a relationship with the insolvent spouse similar to that of children or other persons who live under the same roof. The disadvantages of section 21 do not apply to the last mentioned categories. It follows that the provisions of section 21 of the Act do discriminate against the solvent spouse of an insolvent.

3 Unfair Discrimination

[62] The discrimination complained of by Mrs Harksen does not fall within the fourteen specified grounds contained in section 8(2). Mrs Harksen thus bears the onus of persuading us on a balance of probabilities that the discrimination is unfair and hence outlawed by section 8(2). In the determination as to whether that onus has been discharged we must have regard to the considerations referred to in para 51 above. I shall consider each in turn.

The Position of Complainant in Society

[63] The group here affected, namely solvent spouses, is not one which has suffered discrimination in the past and is not a vulnerable one. To adopt the words of O'Regan J in the *Hugo* case,[54] they are not a "vulnerable . . . group adversely affected by . . . discrimination".

54 Above n 31 at para 112.

The Nature of the Provision

[64] In this case the power was exercised by Parliament which has the right and duty to protect the public interest. In the Act, the legislature gave effect to that duty by protecting the rights of the creditors of insolvent estates. That is the purpose of section 21. That purpose is not inconsistent with the underlying values protected by section 8(2).

The Effect of the Discrimination on Solvent Spouses

[65] In the consideration of the effect of section 21 one must assume that Masters and trustees will act reasonably and honestly and not wish to claim for insolvent estates that which solvent spouses are able to establish belongs to them. One must also assume that in an appropriate case the courts will intervene where they do not so act.[55] It must also be borne in mind that the statutory vesting of the property of the solvent spouse does not have as a consequence that such property is necessarily removed from the possession of the solvent spouse. It is attached by the sheriff of the magistrate's court or by a deputy sheriff. They, as it were, place the hand of the law on the property and, of course, it may not be alienated or burdened by the solvent spouse prior to its release. Where the solvent spouse claims property as his or hers and fails to adduce evidence to establish that claim on a balance of probabilities then the insolvent estate is entitled to the property. The legal

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55 This would apply, for example, to applications made under ss 21(4) and (10) of the Act for the release of property claimed by the solvent spouse. See also *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC); and *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC).

presumption is that property was owned by the insolvent and not by the solvent spouse. The effect is hence that the solvent spouse has not been divested of what was her or his property. And one must remember that the facts in issue will be peculiarly within the knowledge of the spouses themselves.

[66] In the event that the solvent spouse has to resort to litigation, there is inconvenience and a degree of potential embarrassment to the extent that the litigation may become public. There is also inconvenience and a burden in that the solvent spouse will usually require legal assistance. Some solvent spouses may not have the funds to employ a lawyer and in that way suffer further potential prejudice. But that is an inevitable consequence of a dispute between a trustee of an insolvent estate and a solvent spouse as to ownership of property.

[67] In my judgment the cumulative effect of these criteria, and in particular the impact of the inconvenience or prejudice on solvent spouses in the context of the Act, and having regard to the underlying values protected by section 8(2), does not justify the conclusion that section 21 of the Act constitutes unfair discrimination. Looked at from the perspective of solvent spouses, it is the kind of inconvenience and burden that any citizen may face when resort to litigation becomes necessary. Indeed it could arise whenever a vindicatory claim (whether justified or not) is brought against a person in possession of property. Again, the inconvenience and burden of having to resist such a claim does not

lead to an impairment of fundamental dignity or constitute an impairment of a comparably serious nature.

[68] It follows, in my opinion, that Mrs Harksen has not established that the provisions of section 21 of the Act, especially in its context, constitute unfair discrimination.

Sections 64 and 65

[69] Another complaint made by Mrs Harksen is that the provisions of sections 64 and 65 of the Act offend against her constitutional rights under the equality clause, the property clause, the privacy clause (section 13) and, because of the criminal sanction created by section 139 of the Act, her rights to freedom and security of the person (section 11(1)) under the interim Constitution.

[70] The arguments put before the Court by counsel for the applicant concerning the unconstitutionality of section 21 on the grounds that it infringes the equality and property clauses of the bill of rights were repeated in respect of sections 64 and 65 of the Act. For the same reasons that I would reject these challenges to section 21 of the Act, I would reject the similar challenges to sections 64 and 65 of the Act. More particularly, leaving section 21 aside, no creditor can have a legitimate complaint to being called as a witness under sections 64 and 65. Mrs Harksen's complaint concerns her being questioned about her own property and affairs. On the basis that it is constitutional to vest the property of a

solvent spouse temporarily in the Master or trustee, it follows that the solvent spouse similarly can have no legitimate complaint to being interrogated concerning her or his own property and affairs to the extent that they are relevant to the insolvent estate.

[71] As far as reliance is placed upon sections 11(1) and 13 of the interim Constitution, it is necessary to have regard to the scope of questions which the provisions of sections 64 and 65 of the Act require a person summoned to answer. It is also necessary to ascertain the nature of the offences created by section 139 of the Act.

[72] Section 65(1) of the Act provides that a person summoned under section 64 may be interrogated:

> " . . . concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, and concerning the business, affairs or property of his or her spouse: Provided that the presiding officer shall disallow any question which is irrelevant . . . ."

Thus the first limitation upon the questions which may be put to the person summoned relates to their relevance to the purpose of the meeting. That purpose is clearly the affairs of the insolvent estate. It follows that to the extent that persons may be required to answer questions concerning the business, affairs or property of the solvent spouse, the information sought must be relevant to the estate of the insolvent spouse.

[73] A second and even wider limitation is to be found in the provisions of section 139 read with section 66(3) of the Act. As already stated,[56] section 66(2) empowers the presiding officer to commit to prison a person summoned to appear under section 64 and who fails to appear at the meeting without a reasonable excuse. Similarly, under section 66(3) the presiding officer may commit to prison a person who refuses to answer a question *"lawfully put"* under section 65 or who does not answer the question fully and satisfactorily.

[74] In *Bernstein and Others v Bester and Others NNO*[57] this Court considered the meaning and implications of the offence created by section 418(5)(b)(iii)(aa) of the Companies Act 61 of 1973, as amended. The Companies Act makes it a punishable offence for a person summoned for examination at a meeting of creditors of an insolvent company "*without sufficient cause to answer fully and satisfactorily any question lawfully put to him* . . .". It was claimed in that case also that a number of the rights protected under the bill of rights were invaded by those provisions. The following passages from

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56 Above at para 22.

57 Above n 55 at para 61.

the judgment of Ackermann J (on behalf of the whole Court) are applicable to the present attack on sections 64 and 65 of the Act:

> "There is no other provision in s 417 or s 418, or for that matter in any other provision of the Act which expressly or by necessary implication compels the examinee to answer a specific question which, if answered, would threaten any of the examinee's chap 3 rights. It must, in my view, follow from this that the provisions of ss 417 and 418 can and must be construed in such a way that an examinee is not compelled to answer a question which would result in the unjustified infringement of any of the examinee's chap 3 rights. Fidelity to s 35(2) of the Constitution requires such a construction and fidelity to s 35(3) read with s 7(4) of the Constitution requires an appropriate remedy; in the present case that the examinee should not be compelled to answer a question which would result in the infringement of a chap 3 right."[58]

The conclusion was expressed as follows:

> "Nothing could be clearer, in my view, than this. If the answer to any question put at such examination would infringe or threaten to infringe any of the examinee's chap 3 rights, this would constitute 'sufficient cause', for purposes of the above provision, for refusing to answer the question unless such right of the examinee has been limited in a way which passes s 33(1) scrutiny. By the same token the question itself would not be one 'lawfully put' and the examinee would not, in terms of this very provision, be obliged to answer it. The answer to this leg of Mr *Marcus*' argument is that there is, on a proper construction of these sections, and in the light of this Court's order in *Ferreira v Levin*, no provision in s 417 or s 418 of the Act which is inconsistent with the examinee's right to privacy in terms of s 13 of the Constitution now under consideration."[59]

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58 Id at para 60.

59 Id at para 61.

[75] In *Nel v Le Roux NO and Others*[60] a similar conclusion was reached with regard to the provisions of section 205 of the Criminal Procedure Act 51 of 1977 which also obliges examinees referred to therein to answer questions on penalty of a criminal sanction. It is there provided that such an examinee is not obliged to testify or to answer any particular question he or she has "*a just excuse*" for refusing or failing to do so. It was held by this Court that in the relevant context there was no material difference between the expression "a just excuse" in section 189 of the Criminal Procedure Act and "*sufficient cause*" in section 418 of the Companies Act.[61]

[76] The position is no different in the present context with respect to the sections of the Act now under consideration. A presiding officer may not commit to prison any person who with "*reasonable cause*" refuses to attend a meeting or a person who refuses to answer a question not "*lawfully put to him*". A question which would constitute an invasion of a constitutional right of an examinee cannot be said to be one "*lawfully put*". To paraphrase the words of Ackermann J in *Nel v Le Roux NO and Others,*[62] if a presiding officer at a meeting of creditors held under the Act finds that, in answering any question, the examinee's rights under chapter 3 of the interim Constitution would be

60 Above n 55.

61 Id at para 7.

62 Id at para 9.

infringed he or she should hold that this did not constitute a question "*lawfully put*" to the examinee and that a refusal to answer such a question did not therefore constitute conduct punishable by imprisonment under section 66(3) and therefore would not constitute an offence under section 139(1).

[77] In my opinion this analysis provides the answer to the submissions on behalf of Mrs Harksen in respect of the alleged invasion of the rights contained in sections 11(1) and 13 of the interim Constitution. They fall to be dismissed.

[78] Mr Trengove, on behalf of the amicus curiae submitted that the costs incurred by it should be paid by Mrs Harksen. I do not agree. In this case, but for the intervention by the amicus, this Court would inevitably have appointed counsel to make submissions on the constitutionality of the impugned provisions. Mrs Harksen would not have been burdened with a costs order against her in that eventuality. In my opinion, the fact that the Council of South African Banks, in order to protect their own interests, decided to consult their attorneys and seek to intervene should not prejudice Mrs Harksen.

Order

[79] The following order is made:

1. It is declared that the provisions of section 21 and the impugned parts of sections

64 and 65 of the Insolvency Act 24 of 1936 are not inconsistent with the interim Constitution.

2. The case is referred back to the Cape of Good Hope Provincial High Court to be dealt with in the light of this judgment.

3. There is no order as to costs.

Chaskalson P, Langa DP, Ackermann J and Kriegler J concur in the judgment of Goldstone J.

O'REGAN J:

[80] I have had the opportunity of reading the judgment of Goldstone J in this matter. I am unable to agree with the order that he proposes for the reasons that I give in this judgment.

[81] At issue in this case, is the question of whether certain provisions of the Insolvency Act 24 of 1936 ("the Act") are inconsistent with the provisions of the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution"). The provisions under challenge are sections 21, 64 and 65. Section 21 provides that all the property, movable and immovable, of the spouse of a person whose estate has been provisionally sequestrated shall automatically vest, first in the Master, and then in the trustee of the insolvent estate. Section 21(2) provides that a trustee shall release any property so vested

once it has been proved that it is property which falls within one of the listed categories, which include property which the solvent spouse owned before the marriage; property which was received by the spouse under a marriage settlement; and property which was acquired during the marriage by a title valid as against creditors of the insolvent. Section 21(4) provides that a solvent spouse may apply to court for the release of vested property. It is clear that the spouse carries the burden of proof to establish that the property is indeed his or hers.[1] Finally, section 21(10) provides that a solvent spouse may either at the time of the provisional sequestration order or thereafter approach the court to exclude property for a period determined by the court from the effect of the vesting in circumstances where the solvent spouse is a trader or where he or she is likely to suffer serious prejudice as a result of the vesting. Such spouse will have to satisfy the court that he or she is willing and able to make arrangements to safeguard the interest of the insolvent estate in such property.

[82] Sections 64 and 65 provide for meetings of creditors. Section 64(2) provides as follows:

> "The officer who is to preside or who presides at any meeting of creditors may summon any person who is known or upon reasonable ground believed to be or to have been in possession of any property which belonged to the insolvent before the sequestration of his estate or which belongs or belonged to the insolvent estate or <u>to the spouse of the insolvent</u> or to be indebted to the estate, or any person (including the insolvent's spouse)

1 *Maudsley's Trustees v Maudsley* 1940 TPD 399 at 404; *Snyman v Rheeder NO* 1989 (4) SA 496 (T) at 505I–J.

> who in the opinion of said officer may be able to give any material information concerning the insolvent or his affairs (whether before or after the sequestration of his estate) or concerning any property belonging to the estate or concerning the business, affairs or property of the insolvent's spouse, to appear at such meeting or adjourned meeting for the purpose of being interrogated under section *sixty-five*."

Section 65(1) provides that:

> "At any meeting of the creditors of an insolvent estate the officer presiding thereat may call and administer the oath to the insolvent and any other person present at the meeting who was or might have been summoned in terms of sub-section (2) of section *sixty-four* and the said officer, the trustee and any creditor who has proved a claim against the estate or the agent of any of them may interrogate a person so called and sworn concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, and concerning the business, affairs or property of his or her spouse . . .".

The applicant objected to the portions of these provisions which I have underlined.

[83] The applicant objected to section 21 on two constitutional grounds: section 8 (the right to equality) and section 28 (the right to property) and to the identified portions of sections 64(2) and 65(1) on the grounds that they are in breach of section 13 (the right to privacy) and section 8.

Challenge to section 21 on the basis of the right to property

[84] The applicant challenged section 21 on the ground that it was in conflict with the provisions of section 28(3) of the Constitution. For the reasons given by Goldstone J (at

paras 29–39 of his judgment) I agree that this challenge was ill-founded. I would emphasise, however, that counsel for the applicant stated during argument that the applicant did not seek to rely on the provisions of section 28(1) or (2) of the interim Constitution. Our finding, therefore, is that section 21 of the Act is not in breach of section 28(3) of the interim Constitution.

Challenge to section 21 on the basis of the right to equality

[85] The applicant also argued that because the vesting provisions of section 21 apply only to spouses, broadly defined,[2] and not to other persons, these provisions were in breach of section 8 of the interim Constitution. I agree with the approach to section 8 adopted by the majority in Goldstone J's judgment in this case. My disagreement with the majority lies with the application of that approach, not with the approach itself. In order to determine whether a provision falls foul of section 8, two enquiries are necessary. The first requires us to consider whether there is a rational connection between the legislative or executive purpose and the differentiation which is challenged. If there is no such rational connection, then the provision or conduct will be in breach of section 8. If there is, a second enquiry is necessary to decide whether the differentiation is in breach of section 8(2).

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[2] Section 21(13) defines 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."

[86] Goldstone J has held that there is a rational connection between the differentiation occasioned by section 21 and the legislative purpose which underpinned it (at paras 55–60 of his judgment). I accept that the primary purpose of section 21 is that identified by the Appellate Division[3] which is to prevent collusion between spouses to the disadvantage of the creditors of the insolvent spouse.[4] I also accept that there is a rational connection between this purpose and the provisions of section 21.

[87] The second question that needs to be considered is whether section 21 is in breach of section 8(2) of the Constitution. Section 8(2) provides that:

> "No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."

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3 Now the Supreme Court of Appeal in terms of section 166(b) of the Constitution of the Republic of South Africa, 1996.

4 *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 13I; see also *Maudsley's Trustees v Maudsley* 1940 TPD 399 at 404.

The applicant argues that section 21 discriminates on the basis of marital status and on the basis of personal intimacy. The additional argument relating to personal intimacy arises from the extended definition of "spouse" contained in section 21(13) which provides that:

> "In this section the word 'spouse' means 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."

This definition extends the provisions of section 21 to marriages not generally recognised as marriages in our law.[5] It may well be that the concept of "marital status" is sufficient to capture such marriages within its ambit as well, but as will be seen, it is not necessary in this case to reach a conclusion regarding that question. For if section 21 is unconstitutional because it discriminates unfairly on the ground of marital status, it will have to be declared invalid on that basis. It would be superfluous to consider any further challenge.

[88] The effect of section 21 of the Act is that the provisional or final sequestration of the estate of an insolvent will result automatically in the estate of the insolvent's spouse being vested first in the Master and then in the trustee of the insolvent estate. This vesting

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5 The difficulties that the breadth of this provision occasions are illustrated by the facts in *Chaplin NO v Gregory (or Wyld)* 1950 (3) SA 555 (C) at 566A, in which the court held that it could not make an order vesting in the trustee of the insolvent estate the property of a woman with whom the insolvent lived, because the insolvent was in fact still married to another woman.

is without doubt invasive of the interests of the solvent spouse. As Berman AJ said in *Enyati Resources Ltd and Another v Thorne NO and Another* 1984 (2) SA 551 (C) at 557H:

> "The divesting of the property of the solvent spouse and the vesting thereof in the hands of the Master (and thereafter in the hands of the trustee) constitute a drastic and arbitrary invasion upon, and inroad into, the proprietary right of citizens . . .".

No such vesting occurs in relation to other family members, no matter how closely entwined their affairs may be with the affairs of the insolvent. Nor does it occur to the property of business associates. There can be no doubt in my mind therefore that the basis for the differential treatment is the marital status of the spouse.

[89] However, "marital status" is not one of the specified grounds contained in section 8(2) of the interim Constitution. That it is not specified, does not mean that such differentiation cannot constitute unfair discrimination in terms of section 8(2). It does mean that the provisions of section 8(4) of the Constitution do not assist the applicant. That clause states:

> "*Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

If "marital status" were a listed ground, then differential treatment based on it would immediately be presumed to be sufficient proof of unfair discrimination. The court would

still have to consider on the facts before it whether the discrimination was "unfair". To do so, the court would have to consider the impact of the conduct upon the individuals or group concerned. Factors relevant to that exercise would include the identity of the individual, and his or her membership of a group previously disadvantaged by or vulnerable to discrimination, as well as the nature of the interests affected by the discrimination.

[90] As "marital status" is not a listed ground, the applicant will first have to establish that the ground upon which the differentiation has been effected is one which may give rise to unfair discrimination. The primary prohibition in section 8(2) outlaws unfair discrimination. It contains a list of grounds which may result in such discrimination, but that list is expressly not exhaustive. Indeed, the section stipulates that the list provided shall not derogate from the generality of the provision. In interpreting section 8(2), the primary question is always whether the conduct complained about constitutes "unfair discrimination".

[91] In *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 42, we held that:

> "Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such

> forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of s 8 and, in particular, ss (2), (3) and (4)."

And in *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 31, we reasoned that "discrimination" as contemplated by section 8(2) needs to be understood in the context of the history of this country.

> "Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity." (Footnote omitted.)

We have interpreted section 8(2) as a clause which is primarily a buffer against the construction of further patterns of discrimination and disadvantage. Underpinning the desire to avoid such discrimination is the Constitution's commitment to human dignity. Such patterns of discrimination can occur where people are treated without the respect that individual human beings deserve and particularly where treatment is determined not by the needs or circumstances of particular individuals, but by their attributes and characteristics, whether biologically or socially determined.

[92] In this case, disadvantages are imposed upon solvent spouses because they are married (or deemed to be in a marriage relationship in terms of the provisions of section

21(13)). Although marital status is not a ground specified in section 8(2), it does seem to me that it is a ground which may give rise to the concerns contemplated by section 8(2). In *Miron v Trudel* (1995) 29 CRR (2d) 189, the Canadian Supreme Court concluded that the exclusion of unmarried partners from accident benefits available to married partners was in breach of the equality provision of the Canadian Charter of Rights and Freedoms. McLachlin J held that the unifying principle to determine what grounds would constitute a breach of the Canadian Charter was the following:

> ". . . the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual." (At 207.)

She went on to find that:

> ". . . discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognised grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from *Charter* consideration on the ground that its recognition would trivialize the equality guarantee." (At 208.)

I agree that marital status is a matter of significant importance to all individuals, closely related to human dignity and liberty. For most people, the decision to enter into a permanent personal relationship with another is a momentous and defining one. It requires related decisions concerning the nature of the relationship and its personal and

proprietary consequences. In my view, these considerations are sufficient to accept that marital status may give rise to the concerns of section 8(2). Accordingly, given the disadvantages conferred by section 21 on the basis of marital status, the applicant has established discrimination for the purposes of section 8(2). Of course, having decided that the provision in this case does amount to discrimination for the purposes of section 8(2), it is still necessary to decide whether the applicant has shown that the provision amounts to *unfair* discrimination.

[93] I agree with Goldstone J that to determine whether the discrimination has been unfair, it is necessary to consider the impact of the discrimination on the applicant and others in her situation (at paras 51 and 53 of his judgment). To determine whether the impact was unfair it is necessary to look at the group affected by the discrimination, at the nature of the power in terms of which the discrimination was effected and also at the nature of the interests which have been affected by the discrimination. This test is similar to the test adopted by L'Heureux-Dubé J in *Egan v Canada* (1995) 29 CRR (2d) 79 at 113-14 to determine what constitutes "discrimination" for the purposes of section 15 of the Canadian Charter of Rights and Freedoms.

[94] In this case, the group affected is married people, and, in particular, spouses of insolvents. Historically, the relationship of marriage in South Africa is one whose consequences have been closely governed by the law: African customary law and

common law were the primary sources of the rules relating to marriage but in both cases those rules were affected by statutory enactments over the years. In the past, discrimination on grounds of marital status generally occurred in two ways. First, people who lived together in close personal relationships but without getting married, or who were married according to religions or customs not afforded recognition, were denied benefits ordinarily afforded to married couples. Secondly, women who were married were often the subject of discrimination. Many of the laws governing marriage were based on an assumption that women were primarily responsible for the maintenance of a household, and the rearing of children, while men's responsibilities lay outside the household. These rules therefore both reflected and entrenched deep inequalities between men and women.[6] Not infrequently women's experience of marriage therefore was (and sometimes still is) one of subordination, both in relation to the rules regulating matrimonial property (whether customary or common law) and in relation to the division of labour within the household. A strong social expectation that married women would not work outside the household also translated into patterns of discrimination against married women outside of the marriage relationship, particularly in the labour market.

[95] The historical patterns of discrimination in the context of marital status are therefore quite complex. In the case before us, the discrimination facially affects all spouses in marriages recognised by law as well as people in some relationships which are

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6 See, for a full discussion, June Sinclair *The Law of Marriage* vol 1 (Juta Ltd, Kenwyn 1996) chapter 1.

not ordinarily afforded the consequences of marital status, but which are similar to marriage relationships and deemed to be such by section 21(13). Neither of the two groups who have historically been the subject of patterns of discrimination due to marital status is therefore singled out for consideration. The applicant did not seek to establish that the provisions under challenge were indirectly discriminatory on the ground of gender. Although I have little doubt that at times provisions discriminating on the grounds of marital status will implicate a pattern of discrimination rooted in one of the patterns established in our past, I cannot conclude that that is the case here.

[96] On the other hand, the effect of the discriminatory provisions on the spouses of insolvents is substantial. All property, movable and immovable, whether the subject matter of a bequest or marriage settlement, whether the personal, business or trading effects of the spouse entirely unrelated to the affairs of the insolvent or of an intrinsically personal nature such as clothing and personal effects, is as a result of the provisions of section 21 automatically vested in the Master and then the trustee. This may happen suddenly and without notice to the spouse of the insolvent.

[97] The Appellate Division has held obiter that the effect of the vesting is to transfer full dominium in the property from the spouse to the Master or trustee (*De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 15I–J). Even if the effect of the vesting were not to result in the transfer of full dominium to the Master or trustee, but only some

of the incidents of dominium, it is clear that the implications for the solvent spouse would remain severe. The solvent spouse loses rights to dispose of and control the property. He or she may not alienate, encumber or lease such property, for example, while it is subject to the vesting. If the trustee chooses, the spouse may also lose the use and enjoyment of the property. As well as the tremendous personal inconvenience and difficulty caused, the vesting may have grave implications for a spouse who carries on his or her own business or professional career.

[98] It is not surprising therefore that judges and commentators alike have considered the effect of the provisions to be extremely invasive on the rights of the spouse of an insolvent.[7] The South African Law Commission noted in its Review of the Law of Insolvency that:

> "Although section 21 endeavours to limit prejudice to the insolvent's spouse (compare subsections (2), (3), (10) and (11)), the possible hardships (financially (sic) and otherwise) brought about by the sudden vesting of property in the Master are not really eliminated."[8]

The SA Law Commission concluded that the provision was an anachronism and

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7 See, for example, Berman AJ in *Enyati Resources Ltd and Another v Thorne NO and Another* 1984 (2) SA 551 (C) at 557H, quoted in text above; SA Law Commission Working Paper 41 Project 63 *Review of the Law of Insolvency: Voidable dispositions and dispositions that may be set aside and the effect of sequestration on the spouse of the insolvent* (1991); RG Evans "A critical analysis of section 21 of the Insolvency Act 24 of 1936" (1996) 59 *THRHR* 613–625 and (1997) 60 *THRHR* 71–83 at 83.

8 SA Law Commission Discussion Paper 66 Project 63 *Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum* (1996) at 59, para 11.11.

recommended that it be abolished.[9] Similarly, the Cork Committee in the United Kingdom rejected a proposal that the assets of both spouses should be pooled upon the insolvency of one spouse. Although this proposal was not identical to section 21, it had some similarities to it. The Committee stated:

> "We reject this proposal as an unjustified interference with individual property rights, which would produce an unfair result in many cases, and which in many respects would be a reversion to outmoded concepts of matrimonial property which have long since been abandoned. If the proposal were adopted, elementary notions of fairness would require that the other spouse's own property, not derived directly or indirectly from the debtor, should be exempt. This would not only lead in many cases to an uncertain and unsatisfactory inquiry, but would in effect tend to reintroduce the Victorian concept of 'the wife's separate property' which was abandoned almost a century ago. We regard the proposal as entirely out of line with modern attitudes to the proprietary rights of husband and wife."[10]

Both the South African Law Commission and the United Kingdom's Cork Committee considered that such provisions were overly invasive of the interests of the spouse of the insolvent and constituted an anachronism in the context of modern matrimonial property law.

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9 Id at 63, para 11.16.

10 Report of the Review Committee *Insolvency Law and Practice* Cmnd 8558 (1981) at 280, para 1229.

[99] It is true that section 21(10), which permits the spouse to approach a court for an order excluding certain property from the effect of the vesting, does mitigate the effects of the provision to some extent. It does not in my view vitiate the onerous implications of the section however. An automatic vesting of all property occurs regardless of the relationship between the spouses or the nature of the property concerned unless the spouse undertakes litigation to prevent it. Even then, unless the court is satisfied that the spouse is able and willing to safeguard the interest of the insolvent estate, such an exclusion may not be ordered (*Van Schalkwyk v Die Meester* 1975 (2) SA 508 (N) at 510). A spouse must be able to safeguard the estate against all reasonably possible contingencies including alienation of the property by the solvent spouse; intentional damage to or destruction of the property by the spouse or a third party; accidental damage to the property; fraudulent abandonment of the property by the spouse and theft of the property. It is not always easy for a spouse to satisfy a court that he or she will be able to provide the necessary protection. (See *Van Schalkwyk v Die Meester*, above, at 510.)

[100] In my view, there can be no doubt that the interests of the solvent spouse are adversely affected by the provisions of section 21. How grave such invasion will be will depend upon the circumstances and facts of each insolvency. There is no doubt, however, that in every insolvency where a spouse's property vests in the Master or trustee, that spouse's interests are impaired. The extent of the impairment is substantial and sufficient

to constitute unfair discrimination.

[101] Now that I have concluded that section 21 constitutes unfair discrimination as contemplated in section 8(2), it is necessary to consider whether the infringement occasioned by section 21 is justifiable in terms of section 33 of the interim Constitution. We have held that section 33 requires us to consider the proportionality between the invasion caused by the infringing provision and the importance, purpose and effects of that provision.[11] It is necessary therefore to consider more fully the purpose and effects of section 21 of the Act.

11 See *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104.

[102] As stated above, the purposes of section 21 are to assist the trustee to finalise the estate of the insolvent, and in particular to protect the interests of the insolvent's creditors against collusion between spouses. As was stated in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 47, "[t]here is no question that protecting creditors is a valuable and important public purpose." In addition, as was also acknowledged in that case, there can be no doubt that the close relationship between spouses may in some circumstances lead to collusion.[12] However, it is plain that section 21 catches within its net all spouses of insolvents, even those spouses innocent of collusion, and even those whom the trustee and creditors accept to be innocent of collusion. All spouses of insolvents will have to take steps to have their property excluded from the vesting or released by the trustee in order to recover their property. Not only does the provision ensnare all spouses within its net, but all property as well. No matter how remote the relationship between a piece of property and the estate of the insolvent, that property will nevertheless vest in the trustee of the insolvent unless the spouse of the insolvent takes steps to have it excluded or released. The scope of the provision is indeed sweeping in relation to spouses.

[103] On the other hand, the provision does not affect a range of people who may be in a similarly questionable relationship with the insolvent, such as other close family members, personal friends or business associates. In that sense, the provision is under

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[12] The possibility of collusion between spouses was also acknowledged in *Maudsley's Trustees v Maudsley* 1940 TPD 399 at 404; and *Snyman v Rheeder NO* 1989 (4) SA 496 (T) at 505.

inclusive in that it does not seek to prevent collusion by other people who may be equally well placed to act fraudulently. The section is therefore over broad given its purpose in relation to spouses and their property and too narrowly drawn in relation to other people.

[104] It may be that the provisions of section 21 would be acceptable if it were shown to achieve its aim of frustrating collusion between spouses. Little evidence was placed before the Court to indicate how effective the provision was in achieving such aim. It may be that such evidence is impossible to obtain. I am prepared to accept that the provision may deter collusion between spouses in at least some cases. However, it also seems plain to me that a calculated plan by fraudulent spouses would not easily be waylaid by a trustee's use of section 21. For, where spouses are set on a path of fraudulent conduct, they may dispose of any movable property without the trustee ever being aware of such property. Cash, jewellery and other valuable movables could easily be kept from the knowledge of the trustee. I find it hard to conclude in the circumstances that the sweeping nature of the provision is justified.

[105] I am bolstered in my conclusion that section 21 is not justifiable, by the fact that many jurisdictions apparently regulate the law of insolvency without reliance on any such provisions. In the United Kingdom, for example, following upon the publication of the Cork Report, the Insolvency Act, 1986 was enacted. The key technique employed by that legislation to prevent collusive conduct is to provide for a range of voidable transactions.

Transactions entered into that constitute preferential transactions or "undervalue" transactions, are voidable if entered into within a certain period of the insolvency. Where those transactions are between the insolvent and an associate, which includes spouses, relatives and business partners, the time period within which they may be set aside is considerably longer.[13] There is also a specific provision that in the circumstances of a loan by the solvent spouse to the insolvent spouse, the solvent spouse will only be repaid after all other creditors have been paid in full.[14]

[106] The approach adopted in the United Kingdom to voidable transactions has been recommended for South Africa by the SA Law Commission.[15] Such an approach recognises that a range of people other than spouses may be responsible for collusive conduct, and also seeks to create a balance between the interests of the spouse of an insolvent and other similarly situated people and the interests of creditors of the insolvent

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13 See sections 339–342 of the Insolvency Act, 1986.

14 Id at section 329.

15 See SA Law Commission Project 63 above n 8 at para 1.1 and 11.15.

estate.

[107] In Canada, as well, the primary mechanism to address collusion is the "reviewability" of transactions.[16] Transactions that are not at arm's length are deemed to be reviewable and persons who share a blood relationship or are related by marriage or adoption are deemed not to transact at arm's length.[17] A further rebuttable presumption deems all property in the possession of the insolvent at the time of the insolvency to belong to him or her. Any person claiming such property must institute litigation to recover the property and must prove ownership.[18]

[108] In Australia, too, there are no provisions equivalent to section 21. Once again, the insolvency legislation renders certain transactions voidable in the interests of creditors. Sections 120–123 of the Australian Bankruptcy Act 1966–1973 govern transactions entered into by the insolvent prior to bankruptcy which are void or voidable at the instance of the trustee. In New Zealand, too, the question of collusion appears to be

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16 See Part IV of the Bankruptcy and Insolvency Act, RSC 1985. The provisions of this legislation are supplemented by provisions of provincial legislation, for example, sections 4 and 5 of the Ontario Assignments and Preferences Act, RSO 1990 relating to suspect transactions, and by provisions of the common law, in regard to which see *Koop v Smith* (1915) 25 DLR 355 (SCC). For a full discussion, see Robert A Klotz *Bankruptcy and Family Law* (Carswell, Toronto 1994) at 197-200.

17 Sections 3 and 4 of the Bankruptcy and Insolvency Act, RSC 1985. In *Skalbania (Trustee of) v Wedgewood Village Estates Ltd* (1989) 60 DLR (4th) 43 (BCCA), a majority of the court held that the presumption deeming related persons not to transact at arm's length was irrebuttable and did not infringe either the right to equality or liberty under the Charter. But see *Re Battiston Brothers Construction Ltd* (1986) 3 BCLR (2d) 135 (BCSC).

18 Section 81 of the Bankruptcy and Insolvency Act, RSC 1985.

regulated primarily through the mechanism of voidable transactions.[19] In both Australia and New Zealand, the legislation contains provisions similar to that existing in the United Kingdom concerning loans by the solvent spouse to the insolvent spouse.[20]

19 Sections 54–57 of the Insolvency Act, 1967.

20 Section 111 of the Australian Bankruptcy Act, 1966–1973; and section 43 of the New Zealand Insolvency Act, 1967.

[109] In Germany, there is a presumption that movable property in the possession of the insolvent spouse or in possession of both spouses is the property of the insolvent spouse. This provision, while bearing some similarity to section 21, is far narrower in scope – it contains no automatic vesting provision; it is restricted only to movable property and where the goods are for the exclusive personal use of one of the spouses, the goods will be deemed to be the property of that particular spouse.[21] Indeed, there is only one legal system that I have been able to identify where a provision similar to section 21 operates, that is the Netherlands. Articles 61 and 62 of the *Faillissementswet* of 1893 (as amended) stipulate that all property of a solvent spouse will fall within the insolvent estate and will be under the control of the curator from whom the spouse may reclaim property that is his or her exclusive property.

[110] This brief survey of foreign jurisdictions suggests that a variety of mechanisms are used to achieve purposes similar to those that motivate section 21. Most common is the mechanism of the voidable transaction, often accompanied by provisions which render transactions between spouses and people similarly situated particularly suspect or suspect for longer periods of time prior to the insolvency. The absence of provisions equivalent to section 21 in many foreign jurisdictions suggests that such provisions are not an essential component of insolvency law.

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21 Art 1362 of the German Civil Code (BGB).

[111] In summary, in determining whether section 21 meets the test for justifiability set by section 33, I must weigh the infringement of section 8(2) against the purpose and effect of section 21. As to the first, I have concluded that there is unfair discrimination against spouses. Although the extent of the infringement is not extremely offensive or egregious, it nevertheless constitutes a significant limitation of that right. On the other hand, although the purpose of section 21 is an important one, the relationship between purpose and effect is not closely drawn. In particular, the balance between the interests of the spouse of the insolvent and the interests of the creditors of the insolvent estate seems to favour the interests of creditors disproportionately. The absence of similar provisions in other legal systems seems to support the conclusion that that balance has not been achieved. In the circumstances, I conclude that section 21 does not meet the test of section 33 and is therefore inconsistent with the provisions of the interim Constitution.

Challenge to the provisions of sections 64 and 65

[112] The applicant argues that to the extent that these provisions permit the investigation of the spouse's business, affairs or property at the meetings of creditors, they are inconsistent with the right to equality and the right to privacy in the Constitution. The amicus contends that the provisions are not unconstitutional. According to the amicus the primary purpose of the extended enquiry aspects of sections 64 and 65 is to enable the trustee fully to investigate and untangle the affairs of the spouses and, in

particular, to enable the trustee to identify and recover all the assets of the insolvent estate.

[113] If the focus of the provisions remains the estate of the insolvent, and not an enquiry into the independent affairs of the solvent spouse, there can be little constitutionally objectionable in the provisions.[22] There can be no doubt that a trustee needs to be given considerable leeway to identify and recover all the assets in an insolvent estate. The trustee is generally in a position of ignorance when he or she is appointed as to those affairs, and an enquiry into those affairs in the widest sense will often be needed to ensure that the trustee's task is properly completed. I do not think that a spouse can complain about questions being asked concerning his or her property, business or affairs if such questions are relevant in some way to the insolvent estate itself. Any person who has knowledge of the estate may be called upon to answer such questions.

[114] Complaint both under section 8 and section 13 of the interim Constitution could only arise, it seems to me, if questions could be asked of the spouse or someone else relating to the business, affairs or property of the spouse which bore no relevance to the insolvent estate at all. The question then is whether, upon a proper reading of sections 64 and 65 of the Act, this could happen. It is true that the provisions under challenge

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[22] See *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at paras 51–92. See also *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at paras 7–9.

expressly permit the business, affairs or property of the spouse of the insolvent to be the subject of investigation at creditors' meetings. The provisions contain no express qualification to suggest that such investigation will be permitted only to the extent that it is relevant to the investigation of the insolvent estate.

[115] There has been no reported judgment of any court considering the scope of the enquiry in relation to the estate of the solvent spouse. On the other hand, it is plain that it has long been recognised that the subject matter of the investigations that take place at creditors' meetings is "the affairs of the insolvent taken in the very widest sense."[23] And that the relevance of any particular question put to a witness will be determined by the subject matter of the enquiry.[24] Section 65(1) also provides that a presiding officer must disallow questions which are irrelevant. It is also clear from the subsection and from the reported decisions that the person presiding at creditors' meetings has wide powers to call and interrogate witnesses on all relevant matters.[25]

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23 *Yiannoulis v Grobler and Others* 1963 (1) SA 599 (T) at 601C; *Agyrakis and Another v Gunn and Another* 1963 (1) SA 602 (T) at 604–5; *Pretorius and Others v Marais and Others* 1981 (1) SA 1051 (A) at 1062H–1063D.

24 *Yiannoulis v Grobler* n 23 at 601C.

25 *Spain NO and Another v Officer designated under Act 24 of 1936, section 39(2), and Others* 1958 (3) SA 488 (W) at 492–4.

[116] The challenged provisions need to be read in the context of the Act as a whole and in particular in the context of a clear understanding that the purpose of creditors' meetings is to facilitate the final sequestration of the estate of the insolvent. Where the business, affairs or property of a spouse is relevant to that exercise, it is clear that such matters may be the subject of interrogation. However, where such affairs are not relevant, and it is clear that they are not relevant, then questions concerning such affairs will not be permissible at a creditor's meeting. In my view, therefore, sections 64(2) and 65(1) do not permit questions to be put to the spouse of an insolvent at a creditors' meeting concerning matters falling beyond the affairs of the insolvent estate, where it is clear from the information in the possession of the trustee that those matters do indeed fall outside the subject matter of the enquiry which is the "affairs of the insolvent in the widest sense". That interpretation of the provisions seems to be consistent with the purpose and intention of the Act. If, however, I am wrong, there is no doubt that the interpretation I have proposed is an interpretation that sections 64(2) and 65(1) are reasonably capable of bearing. Therefore it is that meaning that should be adopted in the light of the provisions of section 35(2) of the interim Constitution which provides:

> "No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation."

This approach, it seems to me, is consistent with the approach adopted by this Court in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at paras 62–3 and *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at paras 8–9. For these reasons, therefore, I agree with Goldstone J that the challenge to the provisions of sections 64(2) and 65(1) of the Act should fail.

[117] In conclusion, therefore, I find that section 21 is inconsistent with the provisions of the interim Constitution, but that the provisions of sections 64(2) and 65(1) of the Act are not.

Madala J and Mokgoro J concur in the judgment of O'Regan J.

SACHS J:

[118] In my view, section 21 of the Insolvency Act 24 of 1936 (the "Act") represents more than an inconvenience to or burden upon the solvent spouse. It affronts his or her personal dignity as an independent person within the spousal relationship and perpetuates a vision of marriage rendered archaic by the values of the interim Constitution,[1] thereby being unfair in terms of section 8(2) of the interim Constitution. It is in this one crucial

[1] References to the "interim Constitution" are to the Constitution of the Republic of South Africa Act 200 of 1993.

respect that I find myself unable to concur in what I consider to be an otherwise admirable exposition and analysis of the issues by Goldstone J. I agree with his analysis of the law, and disagree only with the way he applies it in the circumstances of the present case.

[119] Goldstone J holds that the differentiation between solvent spouses and other persons who had dealings with insolvents is disadvantageous to the former and that the disadvantage relates to the attributes or characteristics of solvent spouses, thereby discriminating against them.[2] He goes on, however, to find that the inconvenience or prejudice suffered by solvent spouses in the context of the Act does not lead to an impairment of their fundamental dignity or constitute an impairment of a comparably serious nature.[3] He accordingly concludes that the applicant has not established that the discrimination was unfair. I shall briefly explain why, accepting his overall approach to the matter, I find that in fact the dignity and the fundamental rights of personality of solvent spouses are adversely affected in a manner which is unfair and violates section 8(2).

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2 At para 61 above.

3 At para 67 above.

[120] Manifestly patriarchal in origin,[4] section 21 promotes a concept of marriage in which, independently of the living circumstances and careers of the spouses, their estates are merged. If the focus of the legislation had been on members of households rather than on spouses and had related to household property rather than to whole estates, then the inconvenience such merging caused would have been substantial but would not have raised issues of unfairness. As it is, its reach is too narrow in respect of the classes of persons affected and too wide in relation to the members of the group selected and the range of property which automatically vests to be considered purely as a pragmatic device to deal with collusion of spouses or confusion of goods. Its underlying premise is that one business mind is at work within the marriage, not two. This stems from and reinforces a stereotypical view of the marriage relationship which, in the light of the new constitutional values, is demeaning to both spouses.

[121] Take the case of Jill, a cabinet minister, judge, attorney, doctor, teacher, nurse, taxi driver or research assistant. She has a career, income and estate quite separate from that

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4 This is evidenced by the language used in the interpretation of the section. Greenberg JP in *Maudsley's Trustees v Maudsley* 1940 TPD 399 at 404 said:

> " One knows that before the amendment of the law in 1926, it was a common practice for traders (and perhaps others) to seek to avoid payment of their debts by putting property in their wives' names; on insolvency the burden rested on the trustee to attack the wife's title."

The assumption is that husbands acquire property and use their wives as repositories so as to deceive creditors. So strong is the assumption that even in argument in the present case the solvent spouses were generally referred to in the feminine.

of her spouse Jack, who for his part has his own career, income and estate. If Jack falls down and breaks his financial crown, it is only on manifestly unfair assumptions about the nature of marriage that Jill should be compelled by the law to come tumbling after him. Their marriage vows were to support each other in sickness and in health, not in insolvency and solvency.

[122] The question, then, is not whether the trustee acts fairly in his or her application of the law, but whether the law itself, in selecting out a group defined in terms of marital relationship, is fair in its rationale, reach and impact. Any appraisal of fairness must, of course, include a balancing of fairness to the creditors with fairness to the solvent spouse. The less the solvent spouse is targeted because of assumptions made about spousal relationships and the more as a result of legitimate concern for the interests of the creditors, the less scope is there for an inference of unfairness. On this question, it is significant that the Act provides adequate mechanisms for securing assets as well as for setting aside voidable dispositions in terms of section 26, voidable preferences in terms of section 29, undue preferences in terms of section 30 or collusive transactions in terms of section 31, without gratuitously intruding on spousal autonomy by virtue of section 21. The conclusion one must draw is that the *raison d'etre* of the legislation is a blunderbuss application of the stereotype and not a fine-tuned satisfaction of the claims.

[123] Nor is the degree of inconvenience the critical factor. Rather, what is most

relevant to the question of unfairness is the assumption which puts together what constitutional respect for human dignity[5] and privacy[6] requires be kept asunder. This is one of those areas where to homogenise is not to equalise, but to reinforce social patterns that deny the achievement of equality as promised by the Preamble[7] and section 8[8]. The intrusion might indeed seem relatively slight. Yet an oppressive hegemony associated with the grounds contemplated by section 8(2) may be constructed not only, or even mainly, by the grand exercise of naked power. It can also be established by the accumulation of a multiplicity of detailed, but interconnected, impositions, each of which, de-contextualised and on its own, might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them. The path which this Court embarked upon in *Prinsloo v Van der Linde and Another*[9] and *President of the Republic of South Africa and Another v Hugo,*[10] and as confirmed in the judgment of Goldstone J in the present matter, requires it to pay special regard to patterns of advantage and

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5 Section 10 of the interim Constitution reads: "Every person shall have the right to respect for and protection of his or her dignity."

6 Section 13 of the interim Constitution reads: " Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to . . . the seizure of private possessions . . . ."

7 It reads, in pertinent part:

> " Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a . . . constitutional state in which there is equality between men and women . . . so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".

8 See above n 29 at para 40 of Goldstone J's judgment.

9 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

10 1997 (6) BCLR 708 (CC).

disadvantage experienced in real life which might not be evident on the face of the legislation itself. As Wilson J pointed out in *R v Turpin*:

> ". . . it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context. . . . A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."[11]

The larger historical context is well articulated by O'Regan J. I am satisfied that the present case points to a form of disadvantage affecting what one might call the moral citizenship (independence and self-fulfilment) of persons who happen to be married.

[124] The incremental development of equality jurisprudence presaged by *Prinsloo* requires us to examine on a case by case basis the way in which a challenged law impacts on persons belonging to a class contemplated by section 8(2). In particular, it is necessary to evaluate in a contextual manner how the legal underpinnings of social life reduce or enhance the self-worth of persons identified as belonging to such groups. Being trapped in a stereotyped and outdated view of marriage inhibits the capacity for self-realisation of the spouses, affects the quality of their relationship with each other as free and equal

11 (1989) 39 CRR 306 at 335-36.

persons within the union, and encourages society to look at them not as "a couple" made up of two persons with independent personalities and shared lives, but as "a couple" in which each loses his or her individual existence. If this is not a direct invasion of fundamental dignity it is clearly of comparable impact and seriousness.

[125] Counsel were unable to point to any other open and democratic society where solvent spouses are singled out for this kind of treatment.[12] Given contemporary international values, I am not surprised, and join with O'Regan J in registering my dissent.

12 A comparative study by O'Regan J at paras 105-110 points only to the Netherlands as a country with a similar law.

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