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GRIFFIER VAN DIE KONSTITUSIONELE HOF
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1997 -06- 30
BRAAMFONTEIN 2017
REGISTRAR OF THE CONSTITUTIONAL COURT

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 9/97

In the matter between:

JEANETTE HARKSEN (born TZSCHUCKE)	Applicant
and	
MICHAEL JOHN LANE N.O.	First Respondent
EILEEN MARGARET FEY N.O.	Second Respondent
THE MASTER OF THE SUPREME COURT	Third Respondent
THE MINISTER OF JUSTICE	Fourth Respondent

FILE NUMBER C827/95

MASTER'S REPORT

1. A copy of the Honourable Court's Directions has been lodged with me.

2. Although I have been cited as Third Respondent I am not opposing the relief sought and abide the decision of the Honourable Court.

3. I consider myself duty-bound to bring the following to the attention of the Honourable Court:

A. INTRODUCTION

(i) The estate of **JÜRGEN HARKSEN (the Insolvent)** was provisionally sequestrated (for the third time) on 21 September 1995. This order was made final on 16 October 1995.

(ii) **The Insolvent** stated in his statement of affairs that his assets consist of 2 Harley Davidson Motorbikes worth R120 000,00; personal clothing etc valued at R120 000,00 and an outstanding foreign claim in the amount of 1 850 000 000 Deutch Mark.

(iii) According to **Applicant's** statement of affairs her assets amount to R6 120 352,50.

(iv) In a recent Court Application (Case No 6309/97) **Applicant** alleged she is a medical doctor, who never practised as such.

(v) According to my records, **First and Second Respondents** have to date managed to realise assets to the value of R128 000,00 only.

(vi) The First Meeting of Creditors was convened by my office, in terms of **Section 40(1) of the Insolvency Act 24 of 1936 (the Insolvency Act)**, to be held before the Magistrate Wynberg on 30 November 1995.

(vii) The meeting has to date not been finalized because of an ongoing interrogation in terms of **Section 65** of the **Insolvency Act.**

(viii) The delay in the finalization of the interrogation (and the said meeting) is apparently caused by numerous objections and review applications being brought by **the Insolvent, Applicant**, creditors of **the Insolvent**, legal advisers of **the Insolvent** and **First and Second Respondents** themselves.

(ix) Since the sequestration of **the Insolvent's** estate an extraordinary number of Court actions and applications have been instituted by the various parties.

(x) In a recent circular to creditors, **First and Second Respondents** refer to 7 actions/applications instituted by them and 20 instituted by **the Insolvent** and others. I have good reason to believe that the total number is more than 27.

(xi) In terms of the judgement of **Farlam J**, in Case No 16552/96, **First and Second Respondents** did not oppose the referral application. It appears that same was not opposed because of a lack of funds.

(xii) My office, as a matter of practice, does not oppose any court application and, except for the usual report, abides the decision of a court.

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B. THE CONSTITUTION

I respectfully agree with **Farlam J** in Case No 16552/96, that this matter falls to be dealt with in terms of the **Interim Constitution, Act No 200 of 1993.**

C. THE REFERRAL

(i) In the recent decision of **Matsepe v Commissioner For Inland Revenue 1997(2) SA 895 (CC)** at paragraphs 21 to 23, the Honourable Court held that a referral may be defective where an applicant did not exercise her non-constitutional remedies.

(ii) I respectfully refer to **Catherine Smith, The Law of Insolvency, Third Edition (Catherine Smith), page 108:**

"It will be appreciated that the section constituted a serious inroad into the rights of the solvent spouse, and it therefore provides adequate measures for her protection."

(emphasis added)

(iii) It is not clear why **Applicant** did not exercise her rights in terms of **Section 21(2), (4)** and **(10)** of the **Insolvency Act.**

(iv) **Prima facie** the referral, as far as the constitutionality of **Section 21** of the **Insolvency Act** is concerned, might be defective.

D. THE CONSTITUTIONALITY OF SECTION 21 OF THE INSOLVENCY ACT

(a) The effect of a sequestration order and the vesting of assets

(i) **Section 20(1) and Section 21(1)** of the **Insolvency Act** provides that on sequestraion of the estate of an insolvent, the assets of the insolvent and his or her spouse shall vest in the Master until a trustee has been appointed and, upon the appointment of a trustee, it shall vest in him.

(ii) Where spouse are married in community of property the joint estate of the spouse vests in the trustee in terms of **Section 20(1)** of the **Insolvency Act. Catherine Smith**, page 109.

(iii) In **De Villiers NO v Delta Cables (Pty) Ltd 1992(1) SA9** at 15 I - J it was said that:

"In my view, therefore the Legislature made it perfectly clear that a transfer of **dominium** of the assets of the insolvent spouse takes place."

(iv) **A L Stander, Die eienaar van die bates van die insolvente boedel, Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR) 1996(3) 388 at 391** critisizes this remark which he said was made **obiter.** The learned writer is further of the opinion that a trustee does not become the owner of an insolvent estate. **THRHR 1996(3) 388 at 397 and 398.**

(v) **Section 28(2)** of the **interim Constitution** provides that "No deprivation of any rights in property shall be permitted otherwise than in accordance with the law."

(vi) In the decision of **Park-Ross v Director: Office For Serious Economic Offences 1995(2) SA 148** on 168 the following was said:

"The Applicants attack the provisions of Section 6 as being unconstitutional on the basis that it offends Section 28 as well as Section 13. Section 28 while it does provide that no deprivation of any rights in property shall be permitted, goes on to say that such deprivation may occur 'in accordance with the law'. It is obvious, therefore, that there may be a seizure of property persuant to a search provided that it is a permissable in accordance with a law. Section 6 would be such a law."

(vii) Although it is clear that Section 28(2) of the **interim Constitution** applies in this instance, it is, with respect, doubtful

whether **Section 21(1)** of the **Insolvency Act** constitutes an "expropriation" as provided for in **Section 28(3)** of the **interim Constitution. Chashelson et al: Constitutional Law of South Africa, paragraphs 31(6)(a) and (b).**

(b) The justification of Section 21 of the Insolvency Act

(i) In **Scher and Getz NO v Mader 1951(2) SA 585(T)** which dealt with whether a solvent spouse should be joined as a party in sequestration proceedings, **Lucas J** held at 589(A):

"The provisions of Section 21 constitute a grave and serious inroad into the rights of the solvent spouse and that such an inroad should be made on those rights without notice and an opportunity to that spouse to be heard on the matter is not likely to be presumed."

(ii) In **Enyati Resources Ltd and Another v Thorne NO and Another 1984(2) 549 (CPD)**, a matter where creditors wanted to restrain a trustee in releasing assets to the solvent spouse, **Berman AJ** said 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 and, whilst I must not be understood to suggest that the **onus** of establishing the right to release of property is made lighter by these considerations, nevertheless considerations of inconvenience, interference and possible embarrassment dictate that the trustee - once he has come to a decision to release the separate assets of the solvent spouse - must do this without delay or regard to the wishes of doubting or dissatisfied creditors."

(iii) The South African Law Commission is also sceptical as to the

constitutionality of **Section 21**. See **Discussion Paper 66, Review of the Law Insolvency Draft Insolvency Bill and Explanatory Memorandum (the Draft Bill)** pages 59, 61 and 63. On page 63 the following statement is made:

"It is submitted that Section 21 should be scrapped. Conceptually it is an anachronism and there is doubt whether it will be upheld under the Constitution."

However, see the cautionary note on page (iii) of **the Draft Bill:**

"The views, conclusions and recommendations in this paper should not, at this stage, be regarded as the Commission's final views."

(iv) **Evans, A Critical Analysis of Section 21 of the Insolvency Act 24 of 1936. THRHR 1997(1) 71** at 82 is of the opinion that **Section 6(3)** (lodgement of a statement of affairs by the solvent spouse) and **Section 21** of the **Insolvency Act** is unconstitutional. He is further of the opinion that there is sufficient protection for creditors in view of the provisions of **Sections 26, 29, 30 and 31** of the **Insolvency Act**. On page 83 the learned writer states that: "....the relationship between spouses appears to be no different to the relationship between parent and child or between immediate family members, and many others."

(v) I disagree, with respect, that the relationships between spouses are equal to that of an insolvent and other family members or third parties. **(See paragraphs (vi), (vii) and (viii) below.**

(vi) The apparent reason for the enactment of **Section 21** of the **Insolvency Act** is set out as follows in **Catherine Smith**, pages 108 and 109:

"It could and in fact frequently did happen that an unscrupulous man anticipating the sequestration of his estate would arrange to have his own assets transferred to his wife in the hopes of defrauding his creditors, and at the same time benefiting himself.

The 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. As stated authoritatively by Greenberg JP:

> one knows that before the amendment of the law in 1926, it was 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 attach the wife's title.
> - **Maudsley's Trustees v Maudsley 1940 TPD 399 404.**

In order to put a stop to such practices section 21 was enacted. This section effected an important change in the common law by vesting in the trustee of the estate of an insolvent all the property of his solvent wife and placing the onus on her of showing that the property claimed by her is in fact her separate property. It will be appreciated that the section constitutes a serious inroad into the rights of the solvent spouse and it therefore provides adequate measures for her protection.

Also see **Enyati's case** at page 588 A to D as to the duties of a trustee in this regard.

(vii) In **Brink v Kitshoff NO 1996(4) SA 197 (CC)** at 218 **O'Regan J** said the following:

"There is no question that protecting creditors is a valuable and important public purpose. There can be no dispute either that the close relationship between spouses may sometimes lead to collusion or fraud"

(viii) Also see the article by **Linda Jansen van Rensburg and Leoni Stander, Artikel 44 van die Versekeringswet Ongrondwetlik Verklaar - Bestaan Daar 'nn Leemte In ons Reg THRHR 1997(1) 119** at 123:

"Dit is duidelik dat 'n alternatiewe bepaling nodig is omvoorsiening te maak vir die leemte wat as gevolg van die ongeldigverklaring van Artikel 44 ontstaan het. Beskerming van die skuldeisers van 'n insolvente boedel (ook 'n bestorwe boedel) is noodsaaklik. Bedrog tussen eggenote is inderdaad 'n moontlikheid. Daarom moet 'n nie-diskriminerende maatreël in die plek daarvan gestel word."

E. THE CONSTITUTIONALITY OF SECTION 64(2) AND SECTION 65(1) & (2) OF THE INSOLVENCY ACT

(i) It is respectfully submitted that the reason for the enactment of the abovementioned sections, as far as it realtes to the business, affairs or property of the solvent spouse, is the protection of creditors. See paragraph 3.D(b)(vi) to (viii).

(ii) Although the provisions of Section 65 is of an oppressive nature it can, with respect, be argued that there is a need for a speedy process through which a trustee is enabled to obtain information about an insolvent's affairs and dealings and to trace the whereabouts of assets and possibly recover some assets for the financial benefit of creditors.

- **Bernstein and Others v Bester and Others NNO 1996(2) SA 751 (CC) paragraph 17.**

(iii) The abovementioned sections already provides that any person may be summoned and interrogated to give information as to the affairs, the property or the business of an insolvent.

(iv) It is respectfully submitted that because of the unique relationship between spouses, the affairs, property and business would in most cases be intertwined and therefore justify the abovementioned provisions as it now stands.

F. THE ORDER

(i) Should the Honourable Court find that **Section 21** of the **Insolvency Act** is unconstitutional, I have no objection that it be declared invalid with immediate effect.

(ii) Should the challenged provisions of **Section 64(2)** and **Section 65(1) and (2)** of the **Insolvency Act** be found unconstitutional on the basis that an enquiry in terms of **Section 65** is open for the general public, this can, with respect, be remedied with provisions similar to **Section 65 (2A)(a)** of the **Insolvency Act.**

G. COSTS

(i) **Section 21(1)** of the **Insolvency Act** compels a trustee to take in posession the assets of the solvent spouse as if they belonged to the insolvent spouse. **De La Rey, Mars, The Law of Insolvency in South Africa, eighth edition, page 165.**

(ii) It is respectfully submitted that should a trustee fail to do so, he would be neglecting a duty prescribed by the **Insolvency Act.**

(iii) At present, the assets realised in **the Insolvent's** estate only amount to R138 000,00 despite the averments of **the Insolvent** of the size of his estate. Therefore it appears that there is a real danger of a contribution in terms of **Section 106** of the **Insolvency Act**, should **First and Second Respondents** not locate and realise any further assets. A cost order against **the Insolvent's** estate will further increase this danger.

(iv) The Honourable Court is also respectfully referred to the article by **Anver Tayob and Carin Snyman: The Applicability Of The Constitution, The Jurisdiction Of The Appellate Division In Constitutional Matters And Costs In The Constitutional Court**

THRHR 1997(1) 159 at 163:

"The unique nature of constitutional matters and the overwhelming 'no order as to costs' verdicts in the Constitutional Court to date, beg the question whether the correct point of departure for costs order in constitutional matters should not rather be a 'no order as to costs' order",

and at page 164:

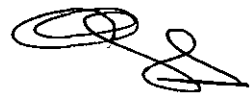
"It is submitted that a policy reflecting a general rule in constitutional matters that parties pay their own costs, except if circumstances dictate otherwise, would be more just and fair."

(v) I respectfully agree with the learned writers.

(vi) However, in **Motsepe's-case, supra,** the Honourable Court granted costs against an applicant who did not exercise her non-constitutional remedies.

4. A copy of this report has been transmitted to the **Applicant's** agent.

5. I abide the decision of the Honourable Court.



DEPUTY MASTER OF THE SUPREME COURT
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

MASTER'S OFFICE
CAPE TOWN

24 JUNE 1997