

**THE EFFECT THAT SECTION 21 OF THE
INSOLVENCY ACT HAS ON PERSONS
MARRIED IN TERMS OF THE
ISLAMIC LAW**

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OPSOMMING

In die geval van die sekwestrasie van 'n insolvente persoon se boedel bepaal artikel 21 van die *Wet op Insolvensie*, Wet 24 van 1936, dat die Meester beskik oor die afsonderlike boedel van die solvente gade, en met die aanstelling van 'n trustee dat so 'n trustee daaroor beskik, asof dit die eiendom van die gesekwestreerde boedel was. Die bestaansreg van artikel 21 word bevraagteken deur verskeie outeurs, sowel as deur die Suid-Afrikaanse Regskommissie.

Die definisie van "gade" kom veral onder kritiek. Een vraag wat byvoorbeeld pertinent gevra kan word is of artikel 21 ook van toepassing is op huwelike wat slegs binne die Islamitiese reg aangegaan is. Dit kan problematies wees as gevolg van die feit dat huwelike wat slegs ingevolge die Islamitiese reg aangegaan is, onderhewig is aan die wette van Islam. Hierdie wette is nie noodwendig dieselfde as en in ooreenstemming met die wette wat 'n siviele huwelik bereël nie.

Die doel van hierdie navorsing was om die effek te bepaal wat artikel 21 van die Wet het op die *de facto* reg tot eiendom van die solvente gade. Voorts was die doel om te bepaal watter effek artikel 21 kan hê op paartjies wat getroud is slegs ingevolge die Islamitiese wet van *Shari'ah*.

Om konstruktiewe voorstelle te maak was dit nodig om die grondwetlikheid van artikel 21 te ontleed, sowel as om die voorstelle te oorweeg wat vervat is in die Konsepwet op Insolvensie, en die presedent wat deur internasionale jurisdiksies gevolg word.

Die Islamitiese perspektief rakende skuld en insolvensie is ook ontleed, om duidelikheid te kry oor die effek wat artikel 21 het op Moslems wat slegs ingevolge die Islamitiese reg getroud is.

Die gevolgtrekking wat in hierdie studie gemaak word is dat artikel 21 van die Wet nie die toets slaag van artikel 36 van die *Grondwet* nie. Dit is derhalwe strydig met die bepalings van die *Grondwet van die*

Republiek van Suid-Afrika. Artikel 21 maak inbreuk op 'n persoon se *de facto* reg tot eiendom en op die gelykheidsklausule. Die navorser stem saam met regter Sachs, wat in die *Harksen*-saak aangevoer het dat artikel 21 'n konsep van huwelik bevorder wat, ongeag die lewensomstandighede van die gades, die samevoeging van hulle boedels tot gevolg het. Gades word dan vasgevang in 'n stereotipiese en uitgediende siening van die huwelik, wat hulle bevoegdheid vir selfaktualisering onderdruk, die gehalte van hulle verhouding met mekaar en ander as vrye en gelyke persone binne die huweliksverbintenis beïnvloed en wat die samelewing aanmoedig om hulle nie te sien nie as 'n "paartjie" bestaande uit twee persone met onafhanklike persoonlikhede en gedeelde lewens nie, maar as 'n "paartjie" waarin elkeen sy of haar individuele bestaan verloor.

Daar is voorgestel dat die volgende Islamitiese wette gebruik behoort te word as 'n alternatief vir artikel 21:

- (a) Die vrou se eiendom bly haar eie eiendom;
- (b) Die trustee word onder geen omstandighede toegelaat om op die vrou se eiendom beslag te lê nie;
- (c) Die insolvente persoon is alleen aanspreeklik vir sy skuld;
- (d) Die moontlikheid van onderhandse samewerking tussen die gades en bedrog moet op 'n ander manier verreken word;
- (e) Die beginsels van *zakaat* moet van toepassing gemaak en streng gevolg word.

Daar word aangevoer dat bogenoemde toereikende beskerming sal bied vir die krediteure van die insolvente gade.

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1 Problem statement

For a considerable period of time, section 21 of the *Insolvency Act*¹ has been the subject of debate for both the courts and academics.² This section regulates the position of a solvent spouse³ during the sequestration of the insolvent's estate. One of the results of the sequestration of the estate of one of two spouses is that all the property of the spouse whose estate has not been sequestrated (solvent spouse) vests in the Master and thereafter in the trustee⁴ of the sequestrated estate, as if it was the property of the sequestrated estate. The trustee is then empowered to deal with such property as if it were the property of the insolvent, subject to the further provisions of section 21.

Section 21 has, however, not been received without criticism.⁵ The definition of "spouse" is especially subject to criticism. One question that pertinently comes to mind, for example, is whether section 21 is also applicable to marriages concluded in terms of the Islamic law only? This can be problematic due to the fact that marriages concluded in terms of Islamic law only are governed by the laws of Islam. These are not necessarily the same and therefore, not consistent with the laws that govern a civil marriage.

While section 21 of the act has been described as a drastic provision,⁶ it was predicted that it would only be a matter of time before the constitutionality of this provision would be tested in the Constitutional

1 24 of 1936. Hereinafter referred to as the Act.

2 See eg *De Villiers v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A); *Snyman v Rheeder* 1989 4 SA 496 (T); Smith *The Law of Insolvency* 108; Hockly *The Law of Insolvency* 165; SA Law Commission *Review of the Law of Insolvency: Voidable Dispositions and Dispositions that may be set aside and the Effects of Sequestration on the Spouse of the Insolvent* Working Paper 41 Project 63 (1991); Evans 1996 *THRHR* 613-625 and 1997 *THRHR* 71-81.

3 That is the spouse married out of community of property to the insolvent.

4 Once he has been appointed.

5 Evans 1996 *THRHR* 614.

6 SA Law Commission *Review of the Law of Insolvency: Voidable Dispositions and Dispositions that may be set aside and the Effects of sequestration on the Spouse of the Insolvent* Working Paper 41 Project 63 (1991).

Court.⁷ This then proved to be the case when the matter of *Harksen v Lane*⁸ was referred to the Constitutional Court.⁹ It was argued by the applicant that the vesting of her assets in the trustee, in terms of section 21 of the act, was unconstitutional in that it infringed upon her fundamental right to equality and to property. Supported by various authorities,¹⁰ the court reached the conclusion that section 21 was not unconstitutional. The court stated that the main object of section 21 was to prevent collusion between spouses to the detriment of the creditors of the solvent spouse, thereby to protect the rights of creditors of the insolvent estate. For purposes of the *Harksen* case, the Constitutional Court accepted that the purpose and effect of section 21 is **not** to dispossess or expropriate (except temporarily) the solvent spouse from her property or estate. However, in *De Villiers NO v Delta Cables (Pty) Ltd*¹¹ it was *obiter* decided that the solvent spouse loses ownership due to the fact that her property rights are temporarily transferred to vest in the trustee. The question that then arises is whether such vesting of the solvent spouse's property in the trustee of the insolvent spouse is justifiable? It is submitted that the nature of the vesting of the separate property of the solvent spouse in the trustee is open to critique. From this researcher's point of view, the principal point of critique is still the infringement on the solvent spouse's *de facto* right to property and the adverse effect that this transfer of property rights holds. It is the opinion of some authors¹² that counsel for the applicant in this case argued on the wrong grounds. **Would the court have decided differently if it was argued that section 21(1) breaches the *de facto* right to property of the solvent spouse?**

7 Evans 1997 *THRHR* 71-81.

8 *Harksen v Lane* 1998 1 SA 300 (CC), hereinafter referred to as the *Harksen* case.

9 1997-03-25 Case no 16552/96.

10 *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T); *Hewlett v Minister of Finance* 1982 1 SA 490 (ZS); *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZS).

11 1992 1 SA 9 (A).

12 Evans 1998 *Stell LR* 360; Jansen van Rensburg and Stander 1998 *TSAR* 340.

As a result of the above question not been answered currently dissatisfaction with section 21 of the act exists.¹³ The reason for this dissatisfaction is because section 21 of the act creates a conflict of interest between the separate creditors of the insolvent and solvent spouse. This conflict is founded on the premise that the interests of the insolvent estate and its creditors should take preference over those of the solvent spouse.¹⁴ Is such a premise just and equitable?

In order to answer the above questions, the aim of this research will be to determine the true effect that section 21 of the Act has on the *de facto* right to property of the solvent spouse. Specific attention will be paid to the effect that section 21 may have on couples married in terms of the Islamic law of *Shari'ah*¹⁵ only.¹⁶ Consequently, an explanation of section 21 is carried out in Chapter Two. An analysis of the proposals as contained in the Draft Insolvency Bill¹⁷ follows in Chapter Three. The constitutionality of section 21 is discussed in Chapter Four. A brief exposition of certain international jurisdictions follows in Chapter Five. In Chapter Six, clause 22A of the 2000 Draft Bill is discussed. In Chapter Seven the Islamic perspective will be set out. Chapter Eight contains the

13 She is directly disadvantaged. She can suffer financial losses especially if she is a business woman.

14 For the sake of continuance, it will be accepted that the solvent spouse is the wife and that the insolvent spouse is the husband, unless otherwise stated.

15 *Shari'ah* is the Arabic word literally meaning to take to the watering hole. It denotes the laws of Islam as contained in the *Holy Qur'an* and the *Sunnah* of the Prophet. It is noted that Muslims, as a token of respect, say "peace be upon him" after the name of the prophet is mentioned.

16 It is important to distinguish between Muslim couples who are married in terms of Islamic law only, and Muslim couples who are married in terms of the Islamic law and who have simultaneously concluded a civil marriage. The marriage of the former couples are null and void and are not presently recognised as a marriage in terms of the South African law, while the marriage of the latter couples will be recognised by virtue of the conclusion of the civil marriage. See *Ismail v Ismail* 1983 1 SA 1006 (A) and *Seedat's Executors v The Master (Natal)* 1917 AD 302, wherein it was held that marriages solemnised in accordance with Islamic law only did not enjoy the status of a marriage in accordance with the civil law because they were "potentially polygamous".

17 SA Law Commission *Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum* Working Paper 66 Project 63 (1996). Herein-after referred to as the "1996 Draft Bill" and "1996 Memorandum", the consecutive Bill will be referred to as the 1999 Draft Bill and 1999 Memorandum, and the latest report of the Commission will be referred to as the 2000 Draft Bill and 2000 Memorandum respectively.

effect of section 21 on a Muslim spouse. A solution is suggested in Chapter Nine, followed by the conclusion in Chapter Ten.

2 Section 21

2.1 Introduction

In terms of section 21, the property of the solvent spouse vests in the insolvent's trustee. The trustee is empowered to deal with such property as if it were the property of the insolvent. This right of the trustee is subject to the further provisions of section 21. For the purposes of section 21, "spouse" has an extended meaning. Firstly, it means the conventional husband and wife who are married out of community of property.¹⁸ Furthermore, it includes a wife or husband by virtue of a marriage according to any law or custom.¹⁹ Lastly, it also includes a woman living with a man as his wife or a man living with a woman as her husband, although not legally married to each other.²⁰ The court in *Chaplin NO v Gregory (or Wyld)*²¹ decided that on the sequestration of a married man or woman living with a third person,²² only the property of the legal spouse and not that of both the spouse and the third person, vests in the trustee. This decision seems to be in direct contrast with the purpose of section 21. A greater possibility of collusion between the insolvent and the third person, with whom he/she is then living, exists, while the legal spouse is subjected to the unfair deprivation of property rights.

It is important to note that a category which is not included in the meaning of "spouse" is couples of the same sex who are living together

18 If the couple were married in community of property a "solvent" spouse would not exist, due to the fact that the joint estate would be sequestrated. The end result would be that both spouses would be insolvent and s 21, accordingly, would have no application.

19 Persons married in terms of Islamic, Hindu or Jewish law only are, therefore, all included in the definition of spouse as contained in the Act.

20 S 21(13).

21 *Chaplin v Gregory (or Wyld)* 1950 3 SA 555 (C).

22 That is not the legal spouse.

as "husband and wife". Section 21 relates only to sequestrations where the sexual preference of the two parties involved are heterosexual. This is unfair because collusion, to the detriment of the creditors, can also arise here, even though the parties are homosexual. The fact that homosexual persons are not being treated by the same comb, can be deemed to be against the spirit and ethos of *The Constitution of the Republic of South Africa*,²³ which states that no one will be discriminated against as a result of his/her sexual preference.²⁴ The definition of spouse in terms of section 21 is, therefore, not constitutionally correct. This is also clear from the court's decision in *Chaplin v Gregory (or Wyld)*,²⁵ where the court had a homosexual relationship in mind and commented that:

By introducing this subsection the legislature quite obviously intended to bring into the net those persons who, while not legally married, were occupying the *de facto* position of husband and wife. The method by which this was done was, to say the least, a clumsy one.

It is of importance to note that couples married in terms of Islamic law only, enjoy no legal recognition of their marriages in terms of the South African law due to the potential polygamous nature of the Islamic marriage.²⁶ However, when one takes into account the meaning of "spouse" as contained in section 21, it is clear that couples married in terms of the Islamic law fall within that meaning. Therefore, section 21 of the Act is also applicable to couples married in terms of Islamic law only. It can then be argued that Islamic marriages enjoy only **partial recognition** in South African law.

2.2 Purpose and goal of section 21

Prior to the amendment of the *Insolvency Act* 32 of 1916 by the *Insolvency Amendment Act* 29 of 1926, debtors frequently attempted to

23 Act 108 of 1996, hereinafter "the Constitution".

24 S 9(3) of the *Constitution*.

25 1950 3 SA 555 (C) 564.

26 Rautenbach and Goolam *Regspluralisme in SA* 117.

avoid payment of their debts by transferring their assets to a spouse, thereby defrauding their creditors while simultaneously benefiting themselves.²⁷ Particularly in marriages entered into by antenuptial contract,²⁸ or in cases where two people were merely living together as man and wife, it could be tempting to place estate assets beyond the reach of creditors by means of simulated transactions.

Upon sequestration, the trustee then carries the onus of proving that such transfers were simulated transactions. This was a heavy burden which rested on the trustee by virtue of the fact that proprietary rights of assets between spouses are normally matters falling within their particular knowledge.²⁹ The trustee could experience great difficulty in distinguishing which spouse owned what, sometimes making it impossible for the trustee to separate the property of one spouse from the other.

The legislator contended that this was unfair towards the creditors as well as towards the trustee of the insolvent estate. The trustee is an outsider and as such, is a total stranger that is brought into the picture and does not have any aid at his side to assist him. This practice was halted by the enactment of section 21, which enactment simultaneously altered the common law. It was the purpose of this section to relieve the trustee of the onus to show that the property claimed by the solvent spouse was in fact her separate property. Therefore, section 21 places the onus on the solvent spouse.³⁰ It is not unreasonable to expect the

27 Evans 1998 *Stell LR* 366.

28 Spouses may donate assets to each other in terms of an ante-nuptial contract. This may have a detrimental effect to the creditors of the insolvent spouse due to the fact that the assets of the insolvent are being lawfully transferred to the solvent spouse. This may result in the unfair treatment of the creditors, due to the fact that even though the assets are practically those of the insolvent's, the donation in terms of the ante-nuptial contract does not allow for the vesting of these assets in the trustee of the insolvent spouse.

29 Smith *The Law of Insolvency* 108. See also Sharrock, Van der Linde & Smith *Hockly's Law of Insolvency* 65-66 and Meskin *Insolvency Law* par 5.30.1 page 5-88.

30 De Wet and Van Wyk *SA Kontraktereg en Handelsreg* 455; Smith *The Law of Insolvency* 108; Joubert 1992 *TSAR* 345-351; *Coetzer v Coetzer* 1975 3 SA

solvent spouse to keep records of the receipts and cheque counterfoils, so as to lessen the *onus* that rests upon her to prove the true ownership of various assets.³¹ The rationale behind section 21 of the act was explained as follows in *Maudsley's Trustee v Maudsley*.³²

All that is effected by sec 21 in relation to the 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 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 referred to. If one goes further and interprets section 21 as creating new substantive grounds for attacking the property of a spouse, this would amount to depriving such a spouse of the benefits of the law of marriage out of community of property, and very clear wording would be required to effect this object.

This passage is often cited as justification for the enactment of section 21 without much further consideration.³³ It is clear that section 21 does not merely shift the onus onto the solvent spouse but **also has a severe effect on property rights of individuals**. What in fact is the consequence of section 21 of the Act if not to attack the property of a spouse, thereby depriving such a spouse of the benefits of the law of marriage out of community of property? If the Court in *Maudsley's* case was not satisfied that the wording of section 21 intended to effect such

931 (E); *Snyman v Rheeder* 1989 4 SA 496 (T); *De Villiers v Delta Cables* 1992 1 SA 9 (A).

31 The court in *Harksen v Lane* 1998 1 SA 300 (CC) 327F-G stated that there was a good reason for s 21 to transfer an onus from the Master or a trustee to the solvent spouse since facts necessary for the determination of the question of ownership would be peculiarly within the knowledge of the solvent spouse. It was thus rational that the onus should be cast upon the solvent spouse.

32 1940 TPD 399 401.

33 See the opinions of the writers in the previous paragraph.

estate³⁸ **subject to the provisions of section 21**. This does not in any way mean that the estate of the solvent spouse is being sequestered.

Although the property of the solvent spouse vests in the trustee of the insolvent, it does not become the insolvent's property.³⁹ A *concursum creditorium* is formed in respect of the solvent spouse's estate.⁴⁰ Subsequent to such vesting, any disposition of the property, or the purported grant of a right in regard thereto by the solvent spouse is as ineffective as against the trustee. Therefore, the spouse cannot confer ownership upon a third party to whom she donates and delivers an unreleased asset. Likewise a person to whom the solvent spouse delivers such an asset pursuant to a contract of pledge does not obtain a real right. In the event of a spouse having performed any juristic act regarding her property prior to the sequestration of the insolvent's estate, the position is frozen as of that date. Stated differently, a creditor cannot by virtue of anything done by the spouse acquire a further or different right to unreleased property after that date.

2.4 Release of property

The vesting of the solvent spouse's property in the trustee may have serious consequences for her.⁴¹ She is, however, not totally without any remedy. The wife can approach the court, subject to certain conditions as set out in the act, for an order postponing the vesting of some or all of her assets in the trustee. This can be achieved in terms of section 21(10) of the Act.⁴² If she succeeds with the onus of proof which she bears, the court will then postpone the vesting of the applicable assets in

38 In accordance with s 21(1) of the *Insolvency Act*.

39 This flows from the solvent's right to apply for the release of the property under ss 21(2), 21(4) and 21(10) of the Act as well as the application of ss 21(3) and 21(5). See also *Stand 382 Saxonwold CC v Kruger* 1990 4 SA 317 (T).

40 *De Villiers v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A). The solvent spouse, therefore, temporarily loses her right to deal with her property, due to the fact that property rights **temporarily** vest in the trustee.

41 Her assets vest in the trustee and she will not be able to exercise her rights of ownership over such assets, until they have been released by the trustee.

42 Discussed in more detail hereunder.

an attack on the property of the solvent spouse, later judgments would, in fact, interpret the wording in this fashion when ruling that the vesting provisions of section 21 result in the transfer³⁴ of ownership of the property, which ostensibly belongs to the solvent spouse.³⁵ This indeed took place in *De Villiers v Delta Cables*.³⁶ The court *obiter* stated that it has always been accepted that the trustee becomes the owner of the property of the insolvent. The legislature did not say so in so many words, but a transfer of *dominium* is clearly inherent in the terminology employed in section 20(1)(a), which provides that a sequestration order shall divest the insolvent of his estate and vest it first in the Master and later in the trustee. The court explains that section 21(1) employs much the same terminology. It also provides for the vesting in the trustee. The court admits that the subsection does not speak of divesting, but it goes on to provide that the property so vests "as if it were the property of the sequestrated estate". According to the *De Villiers* case, this can only mean that the property of the solvent spouse vests in the trustee to the same extent as the property of the insolvent does. Therefore, the legislature made it clear that a transfer of *dominium* of the assets of the solvent spouse takes place. He or she, therefore, no longer retains any of the attributes of ownership of the property concerned.³⁷ Although this was an *obiter* judgement, the researcher is in agreement with the view of the court.

2.3 Effect of section 21

The trustee has the right to deal with the solvent spouse's property in the same manner as the property falling within the insolvent spouse's sequestrated estate, as if such property belongs to the sequestrated

34 To the trustee of the insolvent estate.

35 See *De Villiers v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A); *Snyman v Rheeder* 1989 4 SA 496 (T). The researcher is in agreement.

36 *De Villiers v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A).

37 *De Villiers v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A) at 15 and 16.

the trustee. She must then apply to the trustee for the permanent release of such property⁴³ in terms of section 21(2).⁴⁴

Should the trustee refuse to release any property claimed by the solvent spouse in terms of section 21(2), she may apply to the court for relief.⁴⁵ It is not necessary that the solvent spouse first obtain the trustee's decision in terms of section 21(2) before applying to court under section 21(4).⁴⁶ It is also not necessary that the solvent spouse first obtain temporary release in terms of section 21(10) before applying to the trustee⁴⁷ or court⁴⁸ for relief.

Should the wife not apply for the release of her assets, the trustee will be able to sell the assets that ostensibly belong to the solvent spouse, after placing a notice in the *Government Gazette* and in a newspaper circulating in the district in which the solvent spouse resides or carries on business.⁴⁹ He must invite all separate creditors for value of the solvent spouse to prove their claims as provided in section 21(5). The trustee does not, by giving notice of the sale, concede that the property in question actually belongs to the solvent spouse. The *onus* remains on the solvent spouse to establish that the property falls within one of the categories mentioned in section 21(2) of the act.⁵⁰

Section 21(10), therefore, makes provision for the solvent spouse to apply to court for the **temporary release** of the property attached by the trustee in terms of section 21.⁵¹ Thereafter, the solvent spouse must,

43 S 21(2) places the onus on her to **satisfy the trustee** that the property is in fact hers.

44 Will be discussed in more detail hereunder.

45 In terms of s 21(4) she may apply for one of the following orders: an order releasing such property; an order staying the sale of such property; or if property is sold already, for an order that the proceeds should be paid to her.

46 See *Hawkins v Cohen* 1994 4 SA 23 (W). Discussed in more detail hereunder. *Snyman v Rheeder* 1989 4 SA 496 (T).

47 S 21(3).

48 S 21(4).

49 S 21(3).

50 *Constandinou v Lipkie* 1958 2 SA 122 (O).

51 The solvent spouse must convince the court that she is able to provide, immediately, sufficient security for the interest that the insolvent estate may

during the period fixed by the court, lay before the trustee⁵² evidence in support of her claim to such property. This is done by means of an affidavit. The trustee must then notify her in writing whether or not he will release the relevant property.⁵³

Where the solvent spouse applies to the trustee for **permanent release** of her assets,⁵⁴ she must prove one or more of the following in order to reclaim her assets.⁵⁵

(a) Property owned before marriage to the insolvent

Property which was the solvent spouse's property immediately before her marriage to the insolvent, or before 1 October 1926, must be released.⁵⁶ Gifts given to the solvent spouse by the insolvent spouse prior to the marriage will also have to be released. It is possible that the release may be impeached as a voidable disposition, but these gifts will have to be released first.

(b) Property acquired under a marriage settlement

Another category of property which must be released is property acquired by the solvent spouse under a marriage settlement.⁵⁷ Thereafter, a gift in whatever form in consideration of a marriage⁵⁸ is also property which must be released. According to Meskin,⁵⁹ one is concerned here with undertakings contained in antenuptial agreements to make donations of property. There are no

have. See Meskin *Insolvency Law* 5-87 and *Van Schalkwyk v Die Meester* 1975 2 SA 508 (N) on 511.

52 In terms of s 21(2) or before the court in terms of s 21(4).

53 S 21(2).

54 The *onus* rests upon her, the solvent spouse.

55 *Snyman v Rheeder* 1989 4 SA 496 (T); Sharock, Van der Linde and Smith *Hockly's Law of Insolvency* 57-58; *Maudsley's Trustee v Maudsley* 1940 TPD 399.

56 S 21(2)(a).

57 S 21(2)(b); *Turnbull v Van Zyl* 1974 1 SA 440 (C).

58 *Hahlo SA Law of Husband and Wife* 294.

59 Meskin *Insolvency Law* 5-89.

prerequisites applicable for the validity of such donations in terms of an antenuptial contract.⁶⁰

Where the undertaking has not been implemented before the sequestration of the insolvent spouse's estate, *ex hypothesi* there will have been no acquisition by the solvent spouse of the property and, accordingly, section 21(2)(b) can have no implications.⁶¹ The solvent spouse is protected by section 21(2)(b) where, at the date of sequestration of the estate of the insolvent spouse, the undertaking in the antenuptial contract has been executed, even if such undertaking may have been void for vagueness.⁶²

(c) Property acquired by a valid title during the marriage

This is indeed the most controversial ground for the release of assets. The trustee is obliged to release the property which was acquired by the solvent spouse during her marriage with the insolvent by a title valid against the creditors of the insolvent.⁶³ This would include property bought by the solvent spouse from her own earnings or the proceeds of her personal property and donations received by her from her friends, family⁶⁴ and even

60 It appears that limitations contained in s 27 are not applicable here. In the event that the trustee suspects fraud in respect of the antenuptial contract, the property must be released and reclaimed at a later stage in terms of s 26.

61 As to whether the solvent spouse has a claim against the estate in competition with creditors, see *Meskin Insolvency Law* par 5.13.3.

62 *Enyati Resources Ltd v Thorne* 1984 2 SA 551 (C) at 559-561 (this point was not dealt with in the subsequent appeal: see 1989 2 SA 314 (C) at 319); but *Turnbull v Van Zyl* 1974 1 SA 440 (C) in which it was held that the property donated in terms of an antenuptial contract was not protected under s 21(2)(b) where the relevant undertaking in such contract was void for vagueness and accordingly constituted a donation between spouses invalid as against the insolvent spouse's creditors (at 445). Of course, this particular conclusion would no longer follow if the right of s 22 of the *Matrimonial Property Act* 88 of 1984 was taken into account. As a result of the donation, the solvent spouse would be able to show title valid as against the donor's creditors in terms of s 21(2)(c) of the Act.

63 S 21(2)(C). A full discussion of this falls beyond the realm of this dissertation.

64 *Bernard v Klein* 1990 2 SA 306 (W).

from her husband. The donation must be *bona fide*.⁶⁵ Where it appears that the insolvent and his spouse embarked on a scheme to place property beyond the reach of the insolvent's creditors, valid title is not established.⁶⁶ The actual intention of the parties to the transaction is what concerns the court. The validity of the true transaction has to be examined in order to determine whether a title valid against the creditors has been established. The onus is on the solvent spouse to prove that the transaction was a valid one conferring valid title.⁶⁷

- (d) Property protected under the *Insurance Act 27 of 1943*.⁶⁸

It may be submitted that this will also include the protected policy by virtue of section 63 of the *Long Term Insurance Act 52 of 1998*.

- (e) Property acquired with the proceeds of the above.⁶⁹

If the solvent spouse gives a plausible explanation establishing her title to the property and if the trustee fails to provide any contradictory evidence, she will be held to have discharged her onus.⁷⁰

In terms of the Act the trustee's obligation to release such property is imperative and peremptory. A disgruntled creditor cannot intervene in the release by a trustee of the solvent spouse's property. In this context the court stated in *Enyati Resources Ltd v Thorne*:⁷¹

I can neither recall nor find any authority on principle (nor have I been referred to any) which permits a disgruntled

65 If it is merely a simulated transaction designed to defraud, the trustee may disregard it; see also *Snyman v Rheeder* 1989 4 SA 496 (T).

66 See *Jooste v De Witt* 1999 2 SA 355 (T).

67 *Beddy v Van der Westhuizen* 1999 3 SA 913 (SCA).

68 S 21(2)(d). It is noted that this section has not been amended and still refers to the *Insurance Act of 1923*. This above-mentioned act, as well as the *Insurance Act 27 of 1943* were repealed by the *Long Term Insurance Act 52 of 1998* with effect from 1 January 1999.

69 S 21(2)(e).

70 Joubert 1992 TSAR 345.

71 *Enyati Resources Ltd v Thorne* 1984 2 SA 551 (C) 558.

creditor to intervene in the release by a trustee to the solvent spouse of the insolvent of that spouse's separate property and to interdict the trustee from doing so, once he (the trustee) has *bona fide* come to a decision that the solvent spouse is entitled thereto. To my mind, no right to do so exists.

If the spouse fails to satisfy the trustee that she is entitled to the release of any such property, she may apply to court for an order either for the release of such property or for a declaration that she is entitled to the proceeds thereof if it is sold.⁷² If it has been sold, she must apply before the proceeds are distributed. The court may make an order it considers to be just.⁷³ As a general rule the court will allow such property to be released if it is satisfied that one of the grounds set out in section 21(2) exists.⁷⁴ If the trustee has released any property allegedly belonging to the solvent spouse, he is not debarred from proving afterwards that it belongs to the insolvent estate and from recovering such property.⁷⁵ The latter, however, applies only to cases where the trustee has released property in error. Where the court has, therefore, made an order regarding the ownership of the property, the matter is disposed of and the trustee will not be able to recover property released by the court under section 21(12).

3 Section 21 of the act and the Draft Insolvency Bill⁷⁶

3.1 Introduction

During 1987, the South African Law Commission commenced an investigation of the law of insolvency in its entirety and a Project Committee was appointed to conduct and direct the review as Project

72 S 21(4). She may immediately make use of the provisions of s 21(4) and need not follow the procedures as set out in s 21(2) first. In this regard see *Hawkins v Cohen* 1994 4 SA 23 (W).

73 S 21(4). *Coetzer v Coetzer* 1975 3 SA 931 (E); *Foot v Vorster* 1983 3 SA 179 (O) 190.

74 *Constandinou v Lipkie* 1958 2 SA 122 (O).

75 S 21(12).

76 See the 1996 Draft Bill and 1996 Memorandum; 1999 Draft Bill and 1999 Memorandum and the 2000 Draft Bill and 2000 Memorandum.

63. A series of working papers for discussion followed by reports⁷⁷ which culminated in the draft bill, were subsequently published.⁷⁸

While referring to criticism expressed against section 21 by leading academics,⁷⁹ as well as practical difficulties created by certain judgments,⁸⁰ the Law Commission concluded that the section should be scrapped as it is conceptually an anachronism. At the time that the first Insolvency Draft Bill was drafted, doubt existed as to whether the section would be upheld under the *Constitution*.⁸¹ The Constitutional Court, however, had the opportunity in the meantime to rule on the constitutionality of section 21 of the act.⁸² The majority judgment, delivered by Justice Goldstone⁸³ and based on the provisions of the *interim constitution*, upheld the constitutionality of section 21.⁸⁴

77 SA Law Commission *The prerequisites for or alternatives to sequestration* Working Paper 29 Project 63 (1989); SA Law Commission *The qualifications, appointment and removal of liquidators* Working Paper 30 Project 63 (1990); SA Law Commission *The effect of insolvency assets, civil proceedings and contracts* Working Paper 33 Project 63 (1991); SA Law Commission *Rehabilitation* Working Paper 39 Project 63 (1991); SA Law Commission: *Dispositions that are void or can be set aside and the effect of sequestration on the insolvent's spouse* Working Paper 41 Project 63 (1991); SA Law Commission *Insolvency interdicts* Working Paper 35 Project 63 (1992); followed by the SA Law Commission *Insolvency Interdicts* Interim Report Project 63 (1992); SA Law Commission *Appeals against sequestration orders* Interim Report Project 63 (1993); SA Law Commission *Protection of the financial markets in the event of insolvency* Interim Report Project 63 (1994).

78 See the 1996, 1999 and 2000 Draft Bills respectively.

79 See Jansen van Rensburg and Stander 1998 TSAR 340; Joubert 1992 TSAR 345-351; Evans 1996 THRHR 613; Boraine TSAR 1998 621.

80 Joubert 1992 TSAR 345 (n104) where the author points out anomalies and injustices arising from the appellate decision in *De Villiers v Delta Cables* 1992 1 SA 9 (A). Oelofse, in a submission to the Commission (Memorandum par 11.14), submitted that ss 21(3) and (5) confuse the intended application of s 21 as, in view of the decision in *Constandinou v Lipkie* 1958 2 SA 122 (O), the trustee is entitled to distribute the proceeds of the property which *actually* belongs to the estate. The abolishment of the prohibition of donations between spouses by the *Matrimonial Property Act* 88 of 1984 also defeated the purpose of s 21.

81 *Constitution of the Republic of South Africa* 108 of 1996.

82 *Harksen v Lane* 1998 1 SA 300 (CC).

83 Confirmed by Justice Chaskalson, Justice Langa, Justice Ackerman, Justice Kriegler, Justice Madala, Justice Mokgoro and Justice O'Regan.

84 *Harksen v Lane* 1997 1 BCLR 1489 (CC) 1519F.

3.2 Important definitions

It is important to explore and establish the fate of section 21 under the tenor of the different Draft Bills. Clause 1 of the 1996, 1999 as well as 2000 Draft Bills contains the definitions of core terms.

A definition of "associate" was introduced in 1996 for purposes of the provisions on impeachable dispositions. If a disposition was made to an associate,⁸⁵ a different time limit or onus regarding the setting aside of the particular voidable disposition in question could apply. A person will be an associate of the insolvent if he or she satisfies the prescribed test either at the time the disposition was made or at the date of liquidation. The definition does not state when a person will be regarded as controlling a juristic person. This may lead to uncertainty as *de facto* or *de iure* control is required. It is also uncertain who would be regarded as an officer, especially of a closed corporation.

It is pleasing to note that the definition of "spouse"⁸⁶ has been amended to include also a person of any sex living with another as if married. Furthermore, it is clear that an insolvent could have more than one spouse – a spouse in the legal sense **as well as** another person meeting

85 The Cork Report (see the *Insolvency Law and Practice: Report of the Review Committee* under the chairmanship of Sir Cork, Cmnd 8558 London, 1982 which resulted in the *Insolvency Act* of 1986) in par 1033 cited the reasons for invoking special rules for related parties as follows: "If the law of insolvency is to reflect the social and economic conditions of modern society, and is to be accepted as fair and just by the general public, then it cannot treat husband and wife, or persons living together as man and wife, or other closely connected persons, as if they were unrelated parties accustomed to dealing with each other at arms length. Nor can it treat companies which are members of the same group, or other closely associated companies as if they were wholly unrelated. Special relationships call for special provisions to be made." This proposal, in other words the extension of the word associate so as to include others and not only a spouse, will bring the system more in line with international trends, see the definitions of "connected persons" and "associate" in 429 and 435 respectively of the *Insolvency Act* of 1986 (England) and "affiliates" and "insiders" in s 10(2) and (9) of the *Bankruptcy Code* (USA).

86 "Spouse" means a spouse in the legal sense and even if there is such a spouse, also spouse according to any law or custom or a person of any sex living with another as a spouse.

the definition.⁸⁷ Although the new definition is broader than the present one, its scope of application is completely different in view of the proposed scrapping in the *1996 Draft Bill* of section 21, which vests the property of the solvent spouse in the trustee.⁸⁸ The term "spouse" in this sense is used in the definition of an associate and also in clause 96(5).⁸⁹

However, in some instances the draft bill refers to "spouse" in a context indicating that only a spouse in the legal sense as intended, for example, in clause 19⁹⁰ which refers to a duly registered antenuptial contract between spouses.⁹¹

3.3 The fate of section 21

Section 21 was not re-enacted in the *1996 Draft Bill*. It does, however, appear in the *1999 Draft Bill* and the *2000 Draft Bill* in an amended form.⁹² With the risk of repetition it must be emphasised that the predecessor of section 21 was enacted to put a stop to practices, common at the time, where traders and other persons sought to avoid payment of their debts by transferring property into their wives' names.⁹³ On insolvency the burden rested on the trustee to impeach the wife's title. As previously stated, the provision was, therefore, introduced to shift the burden of proof to the solvent spouse. This remains a drastic and arbitrary invasion upon and inroad into the proprietary rights of a

87 The problem regarding the situation where a husband was separated from his wife but lived with a concubine that arose in *Chaplin v Gregory (or Wyld)* 1950 3 SA 555 (C) 566, will, therefore, be solved.

88 A full discussion regarding the new definition of spouse falls beyond the scope of this research.

89 Of the *1996* and *2000 Draft Bills*. This clause requires particulars of the spouse's income and the household expenses to be supplied by an insolvent when applying for rehabilitation.

90 *1996 Draft Bill*; *1999 Draft Bill* and *2000 Draft Bill*.

91 This clause prevents a disposition without value from being set aside if it was made in terms of an antenuptial contract to a spouse or a child to be born of the marriage. This aspect is currently dealt with in s 27 of the act which section probably discriminates on the basis of gender in the sense that only a disposition by a husband to his wife is protected.

92 See Clause 22A of the *2000 Draft Bill*.

93 See *Maudsley's Trustee v Maudsley* 1940 TPD 399 404.

citizen.⁹⁴ The point of view of the Law Commission in the 1996 Draft Bill that section 21 should be scrapped must still be upheld.⁹⁵ It is firmly believed that section 21 of the Act remains a drastic measure, which should not be tolerated in modern society. The problem of questionable dispositions made to the insolvent's spouse has been addressed by the introduction of specific provisions facilitating the setting aside of dispositions made to an associate, including a spouse, which provides for longer time periods within which such dispositions may be set aside.⁹⁶ A new kind of voidable disposition has been introduced in clause 22 of the 2000 bill, regarding the recovery of contributions to pension funds in respect of the new obligations undertaken by the insolvent within two years before the liquidation. Clause 22 does not exclude application of the common law or other impeachable dispositions provisions of the act in case of contributions being made fraudulently or collusively.⁹⁷

Some academic scholars support the Law Commission's stance on not re-enacting section 21 in the *1996 Draft Bill*,⁹⁸ in spite of the fact that the constitutional court has now found this section to be constitutional.⁹⁹

4 The constitutionality and section 21

4.1 A South African approach

In October 1997, the Constitutional Court decided on the constitutionality of section 21. After the sequestration of her husband's estate, Harksen's property was attached by the trustee of the insolvent estate. She was also summonsed for interrogation at the meeting of the insolvents

94 See *Enyati Resources Ltd v Thorne* 1984 2 SA 551 (C) 557.

95 Par 11.6 of the Memorandum.

96 Jansen van Rensburg 1997 TSAR 687.

97 However, where the disposition in question is not fraudulent or collusive, the common law and other provisions are by implication excluded. For example, it will be impossible to rely on the voidable preference provision in order to recover contributions under the R 10 000 limit.

98 Boraine 1998 TSAR 621.

99 *Harksen v Lane* 1998 1 SA 300 (CC).

estate's creditors. Harksen challenged the constitutionality of section 21, section 64 and section 65 of the *Insolvency Act*.¹⁰⁰ This matter was referred to the Constitutional Court by the Cape Provincial Division. For the purposes of this research, the focus will be only on the question of the constitutionality of section 21 of the Act.

Harksen argued that section 21 of the Act infringed the property clause¹⁰¹ and her right to equality.¹⁰² She argued that the automatic vesting of her property in the trustee constituted **expropriation** of that property without any provision for compensation as required by the property clause.

The court reasoned that although section 21 of the Act differentiated between the solvent spouse and other persons who had dealings with the insolvent, the section had a rational and legitimate purpose.¹⁰³ Therefore, it was the view of the court that section 21 did not amount to an infringement of the right to equal protection before the law. Although this section discriminated against the solvent spouse, the discrimination was not "unfair" because it was not aimed at a vulnerable group which had suffered in the past. The discrimination was also not "unfair" because the values underlying it were consistent with the values protected by the equality clause itself. Furthermore, the burden imposed by the provision did not lead to an impairment of the solvent spouse's dignity, nor did it constitute an impairment of a comparably serious nature.¹⁰⁴

The court added that the law relating to impeachable transactions was inadequate to protect creditors and section 21 of the Act was, therefore, necessary to ensure that "all property of the insolvent spouse found its

100 *Insolvency Act* 24 of 1936.

101 S 28 of the *interim Constitution* (s 25 of the *Constitution*).

102 S 8 of the *interim Constitution* (s 9 of the *Constitution*).

103 Namely to prevent an insolvent potentially defrauding creditors by hiding assets in the solvent spouse's estate.

104 This submission is consistent with that of the Cork Commission. See fn 85 above.

way into the insolvent estate". The court further supported the imposition of the onus on the solvent spouse to prove ownership of the property in order to obtain its release, pointing out that the facts pertaining to ownership often fell within the peculiar knowledge of the spouses and it would, therefore, be illogical to place the burden of proof on the Master or the trustee as was done in the past.¹⁰⁵

The court believed it to be necessary to distinguish between the terms "expropriation" and "deprivation". The former involved the acquisition of rights in property by a public authority while the latter implied "a deprivation of rights in property falling short of compulsory acquisition of rights by that authority".¹⁰⁶ Section 21 of the Act resulted only in a temporary vesting of ownership in the trustee and this was held to fall short of expropriation. The court emphasized that there was "no intention to divest the solvent spouse permanently of what is rightfully his or hers or to prejudice the solvent spouse, in relation to his or her property".¹⁰⁷

Judge Goldstone pointed out the provisions which allow the solvent spouse to seek the assistance of the court in obtaining release of the property belonging to her and to prevent the trustee from selling such property prior to its release. He further held that section 21 of the Act did not constitute expropriation because its purpose was to ensure that the insolvent estate was not deprived of property to which it was entitled.¹⁰⁸ It was stated that the insolvent spouse's assets under control of the trustee do indeed belong to her, except temporarily.

Judge Sachs in his strongly worded dissenting judgment,¹⁰⁹ took the view that the provision had the effect of cementing a stereotyped view of

105 *Harksen v Lane* 1998 1 SA 300 (CC) at par 36b 37 at 317F-318C.

106 *Harksen v Lane* 1998 1 SA 300 (CC) at par 31 and 38 at 315D-E and 318F-G.

107 *Harksen v Lane* 1998 1 SA 300 (CC) at par 60 at 327F-G.

108 *Harksen v Lane* 1998 1 SA 300 (CC) at par 32 and 33 at 314H and 315B-E.

109 Justice Goldstone was not in agreement with any of the other judges.

marriage in which the estates of the partners are merged, irrespective of their actual living circumstances. He gave the following example:

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 of her spouse Jack, who on 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 law to come tumbling after him.

The court reached the conclusion that section 21 of the Act was not in conflict with the property clause. According to the opinion of some authors,¹¹⁰ it must be noted that the Council for the applicant in this case argued on the wrong grounds. It should have been argued that section 21(1) of the Act breaches the *de facto* right to property of the solvent spouse. The validity of this argument will be examined hereunder.

4.2 The constitutional right to acquire and hold property¹¹¹

Every person shall have the right to acquire and hold property and to the extent that the nature of the rights permits, to dispose of such rights.¹¹² This is known as the **guarantee clause**. The **deprivation clause**¹¹³ states that no deprivation of any rights in property shall be permitted otherwise than in accordance with a law.¹¹⁴ Even though fundamental rights are guaranteed in the *Constitution*, it must be borne in mind that these rights are not absolute. These rights may be in conflict with one another and will, therefore, be subject to the general **limitation clause**.¹¹⁵ In terms of this clause, once it has been established that a

110 Jansen van Rensburg and Stander 1998 *TSAR* 341.

111 *The Constitution*.

112 S 25 of the *Constitution*; De Waal, Currie and Erasmus *Bill of Rights Handbook* 410; Van der Merwe *Sakereg* 173; Kleyn and Boraine *Silberberg and Schoeman's The Law of Property* 162.

113 In terms of s 28 of the *interim Constitution* and s 25 of the *Constitution*.

114 For example by means of parliamentary legislation.

115 S 36 of the *Constitution*; De Waal, Currie and Erasmus *Bill of Rights Handbook* 145 146.

law of general application infringes¹¹⁶ a right protected by the bill of rights, the state or the person relying on the law may argue that the infringement constitutes a legitimate limitation of the right. Section 36(2) states that only laws conforming to the test for valid limitations in section 36(1) can restrict rights legitimately. However, this subsection adds that rights can be justifiably limited in terms of "any other provision of the Constitution". Therefore, when section 25 of the *Constitution* is read in conjunction with section 36,¹¹⁷ it becomes clear that the state action can only limit private rights in property if these rights are authorized by a law which applies generally and if the limitations are reasonable and justifiable in an open and democratic society, based on freedom and equality. Another condition is that it does not destroy the institution of private property as such.¹¹⁸

It can be argued that section 21 of the Act is not a law of general application. This is clear from *Chaplin v Gregory*.¹¹⁹ In this case, a man was legally married to a women. He did, however, not live with his wife, but with another women. Upon the sequestration of his insolvent estate, the trustee claimed that due to the effect of section 21 of the Act, the assets of the women to whom he was legally married were vested in the trustee. The court decided that the property of the legal spouse only, and not that of both the legal spouse and the third person vests in the trustee.

From the above case¹²⁰ it is clear that in certain circumstances section 21 only applies to the solvent **husband or wife**. No such vesting occurs in relation to any other family member, for example a child or a sibling or a concubine, no matter how closely entwined his/her affairs may be with the affairs of the insolvent. Nor does it occur in the case of the property

116 But only when the infringement is for a compelling good reason.

117 Of the *Constitution*.

118 *S v Makwanyane* 1995 3 SA 391 (CC) par 104; Van der Walt 2001 *SAJHR* 171-172.

119 *Chaplin v Gregory (or Wyld)* 1950 3 SA 555 (C).

120 *Chaplin v Gregory (or Wyld)* 1950 3 SA 555 (C).

of business associates who have a close relationship with the insolvent person and while the possibility of collusion and fraud does indeed exist. If the property of the concubine is not affected and if the concubine is the person with whom the man currently lives and holds house with, then the goal of section 21 is not achieved.

Section 21, therefore, does not apply generally to all persons closely related or doing business with the insolvent and as such, the deprivation of the solvent spouse's property is not justifiable in an open and democratic society based on equality and freedom. It, therefore, follows that the Constitutional Court erred in its decision, due to the fact that an infringement does in fact occur of the *de facto* right to property.

4.3 The constitutional right to equality

The right to equality¹²¹ can be regarded as another point of conflict. This aspect has been addressed by the Constitutional Court. It was decided that the differentiation did not infringe upon a person's right to equality. It is important to dissect the court's decision so as to determine whether the court's point of view is justifiable in an open and democratic society based on equality and freedom.

The right to equality entails that all citizens are equal and that they all enjoy equal protection from the law. Neither the state nor any other person may discriminate unfairly against other citizens on the grounds of race, religion, gender, sex, marital status, pregnancy and ethnical or social origin.¹²²

121 S 9 of the *Constitution*.

122 A detailed discussion of the right to equality falls beyond the scope of this research.

The right to equality is infringed upon when an unjust differentiation between categories of people exist.¹²³ To establish if an unjust differentiation exists, a two-stage analysis has to be carried out. First it must be established if the differentiation amounts to discrimination. Thereafter it must be established whether the discrimination is unfair.¹²⁴

Discrimination is a particular form of differentiation. Unlike "mere differentiation", discrimination is differentiation on illegitimate grounds. The equality clause does not prevent discrimination, but rather unfair discrimination.¹²⁵ Unfair discrimination "principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity".¹²⁶ In *Harksen v Lane*,¹²⁷ the court held that the following factors must be taken into account in determining whether discrimination has an unfair impact:¹²⁸

- (a) The position of the complainants in society and whether they have been victims of past patterns of discrimination. Differential treatment that burdens people in a disadvantaged position is more likely to be unfair than burdens placed on those who are relatively well-off.
- (b) The nature of the discriminating law or action and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose of the law or action is to achieve a worthy and important societal goal.
- (c) The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.

123 De Waal, Currie and Erasmus *Bill of Rights Handbook* 202; *Harksen v Lane* 1998 1 SA 300 (CC) par 53; Jansen van Rensburg and Stander 1998 *TSAR* 337; Evans 1998 *Stell LR* 364.

124 De Waal, Currie and Erasmus *Bill of Rights Handbook* 202; *Harksen v Lane* 1998 1 SA 300 (CC) par 53; Jansen van Rensburg and Stander 1998 *TSAR* 337-338; Evans 1998 *Stell LR* 364.

125 De Waal, Currie and Erasmus *Bill of Rights Handbook* 213; *Harksen v Lane* 1998 1 SA 300 (CC) par 53; Jansen van Rensburg and Stander 1998 *TSAR* 337; Evans 1998 *Stell LR* 364.

126 *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) par 46.

127 *Harksen v Lane* 1998 1 SA 300 (CC).

128 *Harksen v Lane* 1998 1 SA 300 (CC) par 52.

According to the court, 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 the 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.¹²⁹ If the discrimination is unfair, the provision will be unconstitutional unless it can be justified by the limitations clause.¹³⁰

In applying the test as set out above to section 21 of the *Insolvency Act*, the court found that section 21 does discriminate between solvent spouses and other persons who had dealings with the insolvent. Section 21 does not affect other persons who transacted with the insolvent or whose property is found in the possession of the insolvent. Therefore, the next question to be considered was whether the discrimination is unfair. In this instance, the discrimination does not fall into one of the specified grounds mentioned in section 8¹³¹ of the *interim Constitution*. The applicant, therefore, bears the onus of persuading the court on a balance of probabilities that the discrimination is unfair. In determining whether the onus had been discharged, the court first had to consider the position of the complainant in society. The court found that the group affected by the provision, namely the solvent spouses, has not suffered discrimination in the past and is not a vulnerable one. Secondly, the nature of the provision was considered. Here the court stated that the legislature gave effect to parliament's right and duty to protect the public interest by protecting the right of creditors of the insolvent estate. The court ruled that this purpose of section 21 is not inconsistent with the underlying values protected by section 8(2)¹³² of the *interim Constitution*. There is, therefore, no discrimination. It is the

129 *Harksen v Lane* 1998 1 SA 300 (CC) par 52.

130 <http://www.law.wits.ac.za/judgements/harksum.html> 30 May 2004.

131 S 8 of the *interim Constitution* and s 9 of the *Constitution* make provision for every person to be treated equally before the law, while they also prohibit discrimination on a number of grounds, including sex.

132 This section prohibits discrimination on a number of grounds, including sex.

opinion of some authors¹³³ that the court over emphasised the rights of the insolvent's creditors. The creditors of the insolvent estate are not necessarily also creditors of the solvent spouse. As such, the creditors of the solvent spouse may be unfairly disadvantaged. Furthermore, in an analogous situation where insolvent companies are concerned, the rights of creditors may be weighed up against the risks that they have contracted to bear. Why then not use this risk also as a criterion where natural persons are concerned?

O'Reagan, while agreeing with Goldstone's approach to section 8, disagreed with the application thereof. She found that solvent spouses are disadvantaged merely because they are married or deemed to be married. Marital status may, therefore, be a ground which may result in the concerns contemplated in section 8(2). In view of the disadvantages caused by section 21 of the Act on the basis of marital status, O'Reagan held that the applicant established discrimination as envisaged by section 8(2). It had then to be established whether section 21 amounts to unfair discrimination. In determining the unfairness of the discrimination, the judge considered the impact of the discrimination on the applicant and others in her situation. To determine whether the impact was unfair, the judge looked at the group affected by the discrimination, the nature of the power in terms of which the discrimination was effected, as well as the nature of the interests which were affected by the discrimination.

The group affected in the present case is married people, specifically the spouses of insolvents. On the face of it, the discrimination in the case under discussion affects all spouses in legally recognised marriages, as well as persons in similar relationships who are deemed to be married. The vesting provision results in the solvent spouse losing (although only temporarily) the rights to control and to dispose of her property. All in all, this results in considerable inconvenience and grave implications for a

133 Evans 1998 *Stell LR* 368; Borraine 1998 *TSAR* 621.

spouse in an own business or professional career. The judge was, therefore, not surprised by the condemnation of section 21 by judges and academics alike.¹³⁴ Having found that section 21 constitutes unfair discrimination as contemplated in section 8(2), O'Reagan proceeded to consider whether the infringement caused by section 21 could be justified in terms of section 33 of the *interim Constitution*.¹³⁵ Here the judge considered the importance, purpose and effects of section 21. The judge conceded that the purpose of section 21 in assisting the winding up of the insolvent estate and the protection of creditors' interest against collusion between spouses was an important one. What the judge regarded as objectionable is the fact that section 21 affects all spouses of insolvents, including those whom the trustee and creditors' accepted to be innocent of collusion. Property, however remote the relationship between it and the insolvent estate, is also netted by these provisions.¹³⁶

At the other end of the scale, however, a considerable range of people in similarly close relationships with the insolvent are not at all affected by section 21. In this respect O'Reagan concluded that:

This section is broad given its purposes in relation to spouses and their property and too narrowly drawn in relation to other people.¹³⁷

O'Reagan's comparative survey of a number of foreign jurisdictions showed that other means are available to achieve purposes similar to those envisaged by section 21.¹³⁸ The judge consequently found that the circumstances do not permit section 21 to meet the test of section 33

134 See par 98 of O'Reagan's judgement.

135 S 36 of the *Constitution*.

136 An example of such remote assets would be a diamond ring that the solvent spouse inherited from her grandmother long before the insolvency of her husband and the sequestration of his estate; or a farm that she inherited a week before or a day before from her grandfather.

137 See par 103 of O'Reagan's judgement.

138 The idea of voidable transactions being the most notable.

and that section 21 is, therefore, inconsistent with the provisions of the *interim Constitution*.

Again, the researcher is of the opinion that section 21 does not meet the test of section 33 of the *interim Constitution* and subsequently section 36 of the *Constitution*. The researcher agrees with judge O'Reagan that the Constitutional Court erred in its decision with regards to the infringement of an individual's right to equality.

A brief analysis of how the situation is addressed in other jurisdictions follows hereunder, which will reiterate the unfair consequences of section 21.

5 An international view

5.1 Introduction

In an article which appeared in the Sunday Times,¹³⁹ it was stated that South Africa is the only¹⁴⁰ country in the world where the solvent spouse of a sequestrated spouse has no protection for own property.¹⁴¹ It is, therefore, important to view foreign jurisdictions to see how other countries handle the assets of solvent spouses. The purpose of this research is to establish whether a similar provision, such as section 21 of the *Insolvency Act*, exists in foreign jurisdictions. In the event that such a provision does not exist, it is of legal importance to establish how the position of the solvent spouse is regulated.

139 Venon *Sunday Times* (1998-01-28) 1.

140 The researcher cannot agree until a detailed research has been carried out on all the countries. Researcher hereof is not aware of any such research.

141 The solvent spouse does enjoy some protection from the law, due to the fact that property rights are only temporarily lost. The solvent spouse may also apply for release in terms of s 21.

5.2 *English law*

The first question is whether English law has a similar matrimonial property regime such as the marriage out of community of property system in South Africa, due to the fact that section 21 applies to marriages contracted out of community of property. The English law does not have any matrimonial property regime.¹⁴² The general property rules are, therefore, applicable to the assets of spouses.¹⁴³ In the absence of a matrimonial property regime, the assumption can, therefore, be made that the property that belongs to the husband is his separate property. That which belongs to the wife, is her separate property.¹⁴⁴

The trustee can apply to the court for an order against any transaction concluded five years prior to the liquidation that results in a disposition under the actual value¹⁴⁵ of the asset.¹⁴⁶ The underlying reason for this provision is described as follows:

Persons must be just before they are generous: debts must be paid before gifts can be made.¹⁴⁷

Property that has been transferred to an associate within two years prior to the liquidation and which transfer has been advantageous for the associate, can also be questioned by the trustee.¹⁴⁸ In this case, the disposition need not be under the actual value of the asset. Associate for purposes of section 341(1)(b)¹⁴⁹ is described as follows;

¹⁴² Miller *Family Property* 17; Bromley *Family Law* 418; Dewar *Law and the Family* 116.

¹⁴³ Miller *Family Property* 17; Kiralfy *Comparative Law of Matrimonial Property* 185; Schweltnus *The legal implications of cohabitation in SA* 148.

¹⁴⁴ Miller *Family Property* 17; Bromley *Family Law* 424.

¹⁴⁵ For a full discussion on transactions under the actual value see Jansen van Rensburg *Die regposisie van die solvente eggenoot* 172-174.

¹⁴⁶ S 341(1)(a) of the *Insolvency Act* of 1986, hereafter referred to as the *Insolvency Act*; Grier and Floyd *Personal Insolvency* 128; Gordon-Saker and Stubbs *Insolvency : Procedure Notes* 122.

¹⁴⁷ Fletcher *The Law of Insolvency* 207.

¹⁴⁸ S 341(b) of the *Insolvency Act*.

¹⁴⁹ See also the *Insolvency Act*.

A person is an associate of an individual if that person is the individual's husband or wife, or is a relative, or the husband or wife of a relative of the individual or of the individuals' husband or wife.¹⁵⁰

In the case where the advantaged person was an associate of the insolvent, a presumption exists that the insolvent was influenced by a desire¹⁵¹ to place the associate in a better position with the liquidation of the insolvent, as opposed to the position that the associate would have been in if the advantage was not given.¹⁵² The trustee of the insolvent estate can apply to the court for an order to the effect that the position be restored to the position as if the transaction was not concluded.¹⁵³ The court is then empowered to grant any order in its discretion that is necessary to restore the position.¹⁵⁴

From the above, it is clear that the solvent spouse is an associate of the insolvent. It is interesting to note that the definition of associate also includes persons other than the solvent spouse, such as relatives, employer, employees and partners.¹⁵⁵ It is, however, a pity that persons who co-habit with each other are not included in the definition, due to the fact that it is possible to enter into transactions 'influenced by desire' with such persons as well.¹⁵⁶

A trustee will also be able to oppose a property settlement order granted in terms of section 24 of the *Matrimonial Causes Act* of 1973. The

150 Hailsham *Halsbury's Laws of England* 10. The definition of associate further includes employers or employees of the insolvent and partners of the insolvent. See also Boyce et al *Debt and Insolvency of Family Breakdown* 126; Berry and Bailey *Bankruptcy: Law and Practice* 240. See also Jansen van Rensburg *Die regposisie van die solvante eggenoot* 177.

151 Influenced by a desire to place others in a better position does not mean the same as the intention of placing others in a better position.

152 S 340(5) of the *Insolvency Act*; Grier and Floyd *Personal Insolvency* 130-131; Gregory *Bankruptcy of Individuals* 175; Frieze *Insolvency Law* 35; Fletcher *The Law of Insolvency* 209; *Re DKG Contractors Ltd* 1990 BCC 903.

153 S 340(1) of the *Insolvency Act*.

154 S 340(2) of the *Insolvency Act*. See also Hailsham *Halsbury's Laws of England* 352-353; Greenville *Bankruptcy* 166.

155 Hailsham *Halsbury's Laws of England* 10.

156 In South Africa too, s 21(2) may refer to married persons only, despite the wide definition that is given to "spouse". See s 21(2) and *Chaplin v Gregory (or Wyld)* 1950 3 SA 555 (K). See par 2.1 above.

purpose of such an order is to divide the property of children, spouses and family.¹⁵⁷ Section 39 of this act states that such an order is still subject to the *Insolvency Act* and the results thereof. The trustee can, therefore, still oppose the order as a disposition without value,¹⁵⁸ or as an advantage to an associate.¹⁵⁹ The underlying reason for this section is to prevent the insolvent, as soon as he/she realises that he/she is in financial difficulty, from instituting divorce proceedings against the other spouse, so as to place the spouse in a better financial position.

The court may also make an order in cases where assets are disposed of by the insolvent with the aim of defrauding the creditors. The description of such a transaction is similar to that of a disposition under the actual value.¹⁶⁰ The requirements in obtaining such an order differ from those required by the court in making an order in cases of disposition under the actual value. This is clearly set out in section 339 of the *Insolvency Act*.

In light of the above, it is clear that the property of the solvent spouse may be touched. It is, however, clear that in all of the above stated circumstances the trustee needs to apply to the court for an order if he/she wishes to attach the property of the solvent spouse. The trustee is then compelled to prove certain requirements before the court will grant the order of attachment.¹⁶¹

There is no similar provision such as section 21 of the South African *Insolvency Act* in the English law. Under no circumstances does the trustee of the insolvent estate obtain control over the separate assets of

157 Greenville *Bankruptcy* 140 173.

158 S 339 of the *Insolvency Act*.

159 S 340 of the *Insolvency Act*.

160 Grier and Floyd *Personal Insolvency* 137; Gregory *Bankruptcy of Individuals* 182.

161 A very heavy burden indeed; see *Maudley's* case referred to above. See also Jansen van Rensburg *Die regsposisie van die solvante eggenoot* 172-180 for the requirements of each of the applications.

the estate of the solvent spouse, before an order is granted by the court in terms of the provisions discussed above.

The approach adopted in the United Kingdom with regard to voidable transactions has been recommended for the South African situation by the Law Commission.¹⁶²

5.3 *The laws of Netherlands*

Similar to the South African law, but in contrast contrasting to the English law, a matrimonial property system exists in the Netherlands law.¹⁶³ The laws of the Netherlands distinguish between marriages concluded in community of property and marriages which are subject to marriage conditions.¹⁶⁴

Legislation exists in the Dutch law that rules the position of the solvent spouse. The *Faillissementswet*¹⁶⁵ as well as the *Burgerlijk Wetboek* contain provisions related to the solvent spouse. All assets, movable or immovable fall into the insolvent estate.¹⁶⁶ The solvent spouse may reclaim the assets that form part of his or her separate estate.¹⁶⁷ However, should the trustee doubt the ownership of the assets of the solvent spouse, the solvent spouse will have to prove ownership in terms of section 61 *bis* 2 to 5.¹⁶⁸ In the event that the solvent spouse does not succeed in proving ownership in accordance with the prescribed

162 See SA Law Commission: *Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum* Working Paper 66 Project 63 (1996).

163 Chorus et al *Introduction to Dutch Law* 45; Melis *Familierechtelijke Betrekkingen* 128; Kraan *Huwelijksvermogensrecht* 13; Pitlo, Van der Burght and Rood-de Boer *Het Personen- en Familierecht* 263.

164 De Bruijn *Het Nederlandse Huwelijksvermogensrecht* 153; Chorus et al *Introduction to Dutch Law* 46-47; Melis *Familierechtelijke Betrekkingen* 128 139. A full discussion of the different matrimonial property regimes found in the Dutch law falls beyond the scope of this research.

165 From 1893 as amended. Hereinafter referred to as the *Faillissementswet*.

166 Kraan *Huwelijksvermogensrecht* 101. In the South African law, the solvent estate comes under the control of the trustee. S 21 of the *Insolvency Act*.

167 S 61 of the *Faillissementswet*; Kraan *Huwelijksvermogensrecht* 101.

168 Dorhout Mees *Nederlands Handels- en Faillissementsrecht* 31. This differs from the South African law, in accordance with South African law, the solvent spouse must apply to the trustee or at the court of exemption of the property in terms of S 21(2) and (4) of the *Insolvency Act*.

grounds, then such property falls into the insolvent estate.¹⁶⁹ The purpose of section 61 is to prevent the transfer of property to the spouse by the spouse who anticipates insolvency.¹⁷⁰ The coercion of spouses is, therefore, limited by section 61.¹⁷¹

Similar to the South African law, Dutch law also contains provisions that regulate the position of the solvent spouse's separate estate.¹⁷² A certain difference that exists between the South African law and the Dutch law is that the trustee in the Dutch law only has access and control rights to the insolvent estate.¹⁷³ The need for the transfer of property rights in the South African law, seen in light of the fact that the insolvency law systems of the two countries share common grounds in many respects, is strongly debatable.¹⁷⁴

5.4 Australia and New Zealand

It must be noted that both in Australia and New Zealand the legislation contains provisions similar to that existing in the United Kingdom concerning laws with regards to donations by the solvent spouse to the insolvent spouse.¹⁷⁵ As is the case in English law, there is no similar provision such as section 21 of the South African *Insolvency Act* in Australian and New Zealand law.

5.5 Conclusion

It appears that three out of the four important foreign jurisdictions, as discussed above, are of the opinion that a provision such as section 21 of the Act is unnecessary. The general view is that the provision of

169 Van Zeben and Van den Ende *Faillissementswet* I.2.61-2.

170 Van Zeben and Van den Ende *Faillissementswet* I.2.61-3. This is similar to the purpose of s 21 of the *Insolvency Act*.

171 De Bruijn *Het Nederlandse Huwelijksvermogensrecht* 698. The same motivation that is applicable to s 21 of the *Insolvency Act* is applicable here.

172 S 21 of the *Insolvency law*.

173 S 23 of the *Faillissementswet*.

174 Stander 1996 *THRHR* 391 392.

175 S 111 of the *Australian Bankruptcy Act* 1973 and s 543 of the *New Zealand Insolvency Act* 1907.

voidable dispositions provides sufficient protection to the creditors of the insolvent. The researcher is in agreement with this view. It must be emphasised that the interests of the creditors is not irrelevant at all, but it seems that they have already been furnished with protection¹⁷⁶ and, therefore, section 21, seems to serve as a double protection. This is unfair against the solvent spouse.

6 Clause 22A of the 2000 Draft Bill

6.1 Introduction

Section 21 has been re-enacted in the *2000 Draft Bill*. However, this re-enactment is in an amended form and is contained in clause 22A. It is the opinion of some authors that this provision is not as drastic as section 21.¹⁷⁷

6.2 The effect of clause 22A

Clause 22A makes provision for (a) a liquidator to instruct a sheriff to attach property that an insolvent has disposed of to his/her associate.¹⁷⁸ This instruction is, however, subject to the suspicion that it was a disposition of property by the insolvent. It is submitted that this cannot be considered to be any less drastic than the provisions of section 21. The reason being that the liquidator will, in practice, simply always instruct a sheriff to attach the property of the solvent spouse. This instruction will be founded on the grounds that the liquidator suspects something. The solvent spouse, therefore, loses control of her property, even though only temporarily. This has the exact result of section 21.

(b) The property must be released by the sheriff upon receiving the instruction from the liquidator. Such instruction will be given once it has

176 See clauses 18 and 20 of the Concept *Insolvency Act*. See also Jansen van Rensburg 1997 *TSAR* 674-688.

177 Stander 2001 *TRW* 101.

178 Associate also includes the spouse of the insolvent in accordance with the definition clause.

been established that the attachment is not necessary to protect the interests of the insolvent estate. It is submitted that such an instruction will not take place quickly in practice, due to the fact that the liquidator will require a **reasonable time** in which to investigate the circumstances with regard to the assets. It is also possible that the liquidator may use this provision in order to attach the property and then at his/her own leisure give the instruction to release the attached property. It has been suggested¹⁷⁹ that a time period be included in the provision within which the liquidator must decide whether to release the attached property or not.

(c) Only once it is evident that the attachment of the property is not necessary to secure the interests of the insolvent estate, will the liquidator instruct the sheriff to release the attached property. It must be noted that during the period of attachment and before the application for rescission has been finalised, the solvent spouse will still be disadvantaged by the temporary loss of property. Section 21 makes provision for this disadvantage in terms of subsection (10), whereby the solvent spouse may apply for **temporary release** and subsection (2), whereby the solvent spouse may apply for the **permanent release** of her property. The solvent spouse herself can, therefore, initiate performance quickly. She does not have to wait for the decision of the curator. The new position can, therefore, not be seen as a relief to the current position.

(d) This clause makes provision for the associate to apply to the court for appropriate relief in cases where the property of the associate is attached or is held under attachment without reasonable cause. It has been suggested¹⁸⁰ that this will not be the rule followed in practice, despite the exception. The burden of proving an absence of "a

179 Stander 2001 TRW 101.

180 Stander 2001 TRW 101.

reasonable cause" will be very difficult. This is so because it is expected of the liquidator to act with caution and in the best interest of the insolvent estate. He or she will have to investigate all the aspects that affect the insolvent estate closely. This process can be time consuming. The question that then arises is whether the same burden of proof as required by section 21 is once again required by the solvent spouse.

6.3 Conclusion

The effect that clause 22A has on the solvent spouse is the same as that of section 21, even though clause 22A is considered as a less drastic provision.¹⁸¹ It is suggested that the impeachable disposition is the correct place to deal with the relevant assets of the solvent spouse,¹⁸² however, it is submitted that that minor amendments, as suggested by the Law Commission, will have to be made. If this is carried out, the problem with regard to fraud will be dealt with sufficiently.

In order to comprehend the effect that section 21 has on Muslim South Africans, it necessary to understand the Islamic perspective. Therefore, in Chapter Seven, the Islamic perspective is set out, followed by the effect that section 21 has on Muslim spouses in Chapter Eight. Chapter Nine contains a suggested solution and is followed by the conclusion in Chapter Ten.

181 Stander 2001 *TRW* 101.

182 In this regard, see Stander 2001 *TRW* 102.

7 The Islamic Perspective

7.1 *An introduction to the Islamic law*¹⁸³

Islamic law is divine law since it is based on the totality of the commands of *Allah*¹⁸⁴ as embodied in the Holy *Qur'an*.¹⁸⁵ The most fundamental meaning¹⁸⁶ and concept of Islam and Islamic law is *Tawhid*, which means belief in the unity and oneness of Almighty God.

A further important aspect of the nature of Islamic law is that it is inextricably intertwined with the belief system¹⁸⁷ and the moral values¹⁸⁸ of Islam. The Islamic way of life advocates that the human being is the trustee of *Allah* on planet earth and that the primary duty of every human being is to fulfil God's trust.¹⁸⁹ As *Allah's* trustee, the human being lives his or her life according to clearly established spiritual and moral values and principles. These values and principles are found in the sources of *Shari'ah*.

The *Qur'an* describes the objectives of the *Shari'ah* as follows:¹⁹⁰

O mankind, a direction has come to you from God; it is a healing for the ailments in your hearts and it is a guidance and a mercy for the believers.

The *Shari'ah* aims at safeguarding people's interest in this world and the next.¹⁹¹ In order to attain these objectives, the three primary objectives of the *Shari'ah* are to:

183 *Shari'ah* is the Arabic word used to denote the laws of Islam. Hereinafter referred to as *Shari'ah*.

184 An Arabic word encapsulating the oneness and magnificent qualities of God Almighty, one supreme being, God.

185 The *Qur'an* is the book revealed to the Prophet Mohammed (peace and blessing be upon him). For consistency all Qur'anic references have been taken from Abdullah Yusuf Ali's translation (Yusuf Ali 1977).

186 Meaning serving as a foundation or core, primary rule or principle.

187 Aqidah.

188 Akhlaq.

189 Rautenbach and Goolam *Regspluralisme in SA* 15.

190 The *Qur'an* Chapter 10 verse 75.

191 Rautenbach and Goolam *Regspluralisme in SA* 15.

- (a) educate the individual;
- (b) establish justice (*Adl or qist*);
- (c) consider the public interest (*maslahah*).

The second and the third objectives are of particular interest. *Adl* literally means placing things in the right place. The second objective is, therefore, to establish a balance by fulfilling rights and obligations and by eliminating excess and disparity in all spheres of life. This in essence is distributive justice and social justice. The concept of justice characterises the *Qur'anic* message, for example, "When you judge between human beings, judge with justice"¹⁹² and again, "When you speak, speak with justice".¹⁹³

Elsewhere the *Qur'an* demands justice alongside benevolence (*ihsan*), for example, "Surely *Allah* enjoins justice and doing good to others".¹⁹⁴ The juxtaposition of justice and benevolence opens the scope to considerations of equity and fairness.

Muslim scholars¹⁹⁵ are in agreement that the overriding objective of the *Shari'ah* is the public interest, which is wide enough to compromise all measures that are beneficial to society. The five essential benefits are life, faith, intellect, property and lineage.

7.2 The *Qur'anic* injunctions relating to debt

Islam aims to erect a society free from excessively rich or poor people, because it seeks to establish social justice and honourable living for all its members. *Allah* tells us in the *Qur'an* that "wealth and children are an ornament of life of the world".¹⁹⁶ There are a number of verses in the *Qur'an* that deal with debt and the repayment thereof. In Islam, debt is a

¹⁹² The *Qur'an* Chapter 4 verse 58.

¹⁹³ The *Qur'an* Chapter 6 verse 152.

¹⁹⁴ The *Qur'an* Chapter 16 verse 90.

¹⁹⁵ See Doi *Shari'ah* 11; Hammudah *The Family Structure in Islam* 15-18.

¹⁹⁶ *Qur'an* Chapter 18 verse 46.

trust which should be returned to its owner.¹⁹⁷ The *Qur'an* has guided Muslims in respect of lending and borrowing in Chapter Two in the following manner:

O you who believe! When you deal with one another, in lending for a term named, write it down,¹⁹⁸ and let a scribe write it down justly between you, and let not the scribe refuse to write according to what *Allah* has taught him. Let him fear *Allah*, his Lord, and diminish nothing from it.¹⁹⁹ But if the person who owes, be insane or infirm or unable himself to dictate, then let his guardian dictate justly. And call to witness two witnesses of your men, but if both be not men then a man and two women of those who agree upon a witness, so if one of the two makes an error, the one thereof shall remind the other, and let not witnesses refuse when they are called on. And be not weary of writing it down, be it small or big, with the term thereof. This is the most equitable in the sight of *Allah* and the most confirmatory of testimony and nearest that you may doubt, except when it be a ready merchandise that you circulate between you,²⁰⁰ for then there shall be no blame on you if you do not write it down. And call witnesses when you bargain with one another, and let not the scribe come to harm, nor the witnesses, and if you do,²⁰¹ verily it will be wickedness in you. Fear *Allah* and *Allah* teaches you, and *Allah* is the *Allah* - All Knower.²⁰²

This verse on the injunction of debt and its repayment is amongst the detailed verses of commandments. The above verse says:

1. When money or something is lent for a specific term, it should be written down in a document;
2. The scribe who is called upon to write should not refuse since *Allah* has gifted him with the art of writing. He should write exactly what is dictated;
3. The person taking oath should dictate;
4. Supposing such a person is ignorant of the ordinances or statutes and if he does not know what dictation is or cannot dictate well or he is of an immature age or senile or a foreigner

197 See Imaam al-Bukhari, Bukhari vol III.

198 In a document.

199 From what he owes.

200 Hand to hand and not in credit.

201 Cause harm to the scribe and the witnesses.

202 *Qur'an* Chapter 2 verse 282.

who is ignorant of the language of the land, then his guardian or agent should dictate justly;

5. Two witnesses from amongst the Muslims should be called upon to witness the deed. They must be adult and of unimpaired reason and should be of good character. The disputes, if any, are to be decided on the testimony of these witnesses and not on the strength of the written document, the role of which is only secondary or subsidiary;
6. If two male witnesses are not available, then one Muslim male and two Muslim women²⁰³ should be invited as witnesses. When we compare this with the Jewish code where the testimony of a woman is inadmissible, it is evident that Islam has taken a more practical view about the witnesses.²⁰⁴
7. In the entire affair, the parties concerned should fear *Allah* and do justice.

In another verse of the *Qura'n Allah* says:

Oh you who believe, do not eat your wealth among yourselves unjustly, except that it be a transaction with mutual happiness.²⁰⁵

This prohibition of unjustly eating wealth includes dishonouring debt.²⁰⁶ *Allah* and the prophet of *Allah* have announced serious warnings and punishments for dishonouring debts. The following quotations from the *Sunnah*²⁰⁷ can be considered:

1. And whosoever does that (unjustly eats the wealth of others) we will soon burn him in the fire.²⁰⁸
2. Hadhrat Abudullah Ibn Umar narrated that the Prophet of *Allah* said every sin of a martyr is forgiven but debts.²⁰⁹

203 According to an Egyptian author, Shaikh Muhammed Abduhu, the stipulation that two women may be substituted for one male witness does not imply any reflection on woman's moral or intellectual capabilities: it is obviously due to the fact that generally women are less familiar with business procedures than men, and therefore, more liable to commit mistakes in this respect. See also Rashid *Tafsir al-Manar* 228.

204 Cohen *Every Man's Talmud* 326. It says "the witnesses must be men, not women or minors". See also Singer *Jewish Encyclopedia* 177.

205 *Qur'an* Chapter 4 verse 29.

206 <http://www.alinaam.org.za/fataawa/bliquidate.html>.

207 Refers to what the prophet of Islam did, said or approved of.

208 *Qur'an* Chapter 4 verse 29.

209 Karim *Al Hadis Mishkaat-ul-Masabih* 204, hereinafter referred to as *Mishkaat*.

3. According to Abu Hurairah, when the *janaza*²¹⁰ of a deceased who owed money to people was brought to the Prophet, the Prophet would enquire as to whether the deceased estate had wealth in the form of money or not, so as to honour the debts of the deceased. It was only once the debts were honoured that the prophet would perform the *janaza*. The deceased would then be buried.
4. According to Abu Hurairah, the prophet of *Allah* said that the undue delay of a wealthy person in paying his debts is oppression.²¹¹

From the above verses of the *Qur'an* and the *Sunnah* of the prophet, it is clear that the rules of Islam with regard to debt are clear. Every attempt should be made to pay the creditors the full amount that is due to them.

7.3 Basic principles of Shari'ah with regard to insolvency

7.3.1 Introduction

In a true Islamic state²¹² it is the responsibility of the ruler²¹³ to secure payments of debts.²¹⁴ If a debtor has some wealth and refuses to honour his debts, the ruler will imprison him²¹⁵ until he arranges for his belongings to be sold in order to honour his debts.²¹⁶

If he refuses to sell his belongings, the ruler himself will then sell all his belongings and distribute the proceeds to the creditors on a pro-rata basis²¹⁷ in relation to their debts.²¹⁸ The ruler may leave only one set of

210 Arabic word referring to the prayer before the deceased is buried.

211 Karim *Mishkaat* 251, Me'raaj.

212 There is no country which can be regarded as an Islamic state. The reason for this is that all "Islamic countries" such as Malaysia, Iran, Iraq, Saudi Arabia and Egypt are governed in accordance with secular laws and not in accordance with the laws of *Shari'ah*.

213 In a true Islamic state, where the government follows the rules of *Shari'ah*, the ruler would be the person appointed by the Muslims to administer the affairs of the Muslims. In insolvency law, the equivalent role to that of a ruler will be played by the Master of the High Court or a judge.

214 <http://www.alinaam.org.za/fataawa/bliquidate.html> 21 April 2004.

215 This is in conflict with s12 of the Constitution of South Africa, because it infringes on a persons right to freedom and security. See *De Lange v Smuts* 1998 3 SA 785 (CC); Stander 1996 *THRHR* 485-491.

216 Raddula *Mukhtal* 150 HM Saeed.

217 It is not clear whether some creditors enjoy preference above others. It may be submitted that all creditors will share equally in the proceeds. This assumption

clothing for the debtor to cover his body.²¹⁹ Who is then responsible to take care of the maintenance and upkeep of the family members of the debtor? It seems that Islam has addressed this problem. The debtor is entitled to receive *Zakaat*²²⁰ from other Muslims, upon whom it is compulsory to give. This will then be used for the maintenance and upkeep of the family of the debtor.²²¹ The ruler even has the right to take all the debtor's cash and pay the creditors without the consent of the debtor.²²² According to Abu Hanifa,²²³ after the litigation process²²⁴ and after the debtor being declared insolvent, the debtor is still not absolved from his debts.²²⁵ The prophet Mohammed said that the person with the right (creditor) has a hand and a tongue.²²⁶ The hand and the tongue in the above *hadith*²²⁷ refer to the constant demand of the creditor for the payment of the debt. The creditors have the right to take the earnings of the insolvent debtor and divide it among all the creditors.²²⁸ It is clear that nothing is excluded from the insolvent estate

is based on the spirit of Islam, taking into account the rules with regard to payment of debt.

- 218 It is unclear at what stage a person is declared insolvent and when this declaration takes place. It would appear that the ruler in an Islamic state will be responsible for such a declaration.
- 219 Hamilton *The Hidayah* Chapter of Hajr.
- 220 *Zakaat* (alms) is the name of what a Muslim returns out of his or her wealth to the neediest of Muslims for the sake of the Almighty *Allah*. It is called *Zakaat* because the word *Zakaat* is from the root word *Zakaa* which means to increase, purify and bless. The obligation of *Zakaat* is mandatory on every Muslim who possesses the minimum *nisaab* (amount of money), whether the person is a man, woman, young, old, sane or insane.
- 221 Karim *Mishkaat* 204.
- 222 Therefore, the role of the ruler in this regard can be likened to that of the trustee in the South African insolvency law.
- 223 A prominent Islamic jurist.
- 224 The litigation in this case will deal with the possible recovery of debts.
- 225 It is not entirely clear as to whether litigation takes place first, or whether the debtor is declared insolvent first. It is submitted that the litigation process takes place first, and then the person is declared insolvent. This submission is based on the premise of Abu Hanifah, that the debtor will remain liable for payment of his/her debts even after the litigation process and after the debtor is declared insolvent.
- 226 Nasbur *Raayah Zailaee* 166 Majlis –Ilmi.
- 227 *Hadith* is something that the prophet of Allah (peace and blessings be upon Him), did, said or approved of.
- 228 Hamilton *The Hidayah* Chapter of Hajr. Therefore, it is submitted that the debtors will share equally and that no preference exists amongst them.

in terms of the Islamic law. This position is, therefore, not consistent with that of the insolvency law in South Africa.

The *Shari'ah* rules that apply to a *mufalis*²²⁹ can be summarised as follows:

1. When one becomes a *mufalis*, his creditors have a right to demand their money and put a "ban" on him. This simply means that no businessman is allowed to trade with the insolvent. This has the effect that no other person who incur losses by selling goods or merchandise to a person that is not in a position to pay for the commodities.
2. If a *mufalis* has some merchandise or money, a *qadhi*²³⁰ cannot sell the *mufalis*' goods. It is clear that the *mufalis* does not lose ownership of his assets. The rule is that the *mufalis* will be jailed until his creditors are paid,²³¹ while still retaining ownership of his assets. The *mufalis* will have the burden on him to make means to sell the goods and pay his creditors (while he is in prison).
3. When a *mufalis* has cash in one currency and his creditors are demanding their money in a different currency, the *qadhi* can take the *mufalis*'s money and pay the creditors after transacting the necessary money exchanges.
4. If an imprisoned *mufalis* refuses to pay and refuses to make the necessary arrangements for the selling of his assets in order to honour his debts, his creditors can approach the *qadhi*. They may then request that the merchandise be given to them in order to be sold to recover their debts. The *qadhi* will then place a full

229 *Mufalis* is the term given to a person who cannot pay his debts because he does not have sufficient wealth. This is similar to the description of an "insolvent" in South African law.

230 This is an Arabic word meaning judge in an Islamic Court. His role can, in the insolvency law, be likened to that of the trustee.

231 It is noted that this will be considered to be unconstitutional in South Africa. See note 211 above.

ban on the *mufalis*. From this moment the *mufalis* will not be able to conduct any affairs.²³² The *qadhi* now has the right to take possession of the *mufalis*'s wealth and use it to pay the creditors.²³³

5. The expenses of the *mufalis*'s wife and small children are paid from the sale of his goods.²³⁴
6. If a *mufalis* is found to have nothing, he will remain imprisoned. Any of his possessions that are found can be used to pay his creditors.²³⁵
7. The *mufalis* will be jailed for two to three months, depending on how quickly he confesses that he is in possession of any wealth. While in prison he cannot be released for any reason except when he is to attend the *Janazah*²³⁶ of his parents, grandparents and children and on condition that somebody stands as a guarantor for him. This seems to be a punitive measure entrenched in the law. It appears that the reason of the imprisonment of the *mufalis*, is to encourage him to admit and confess as quickly as possible as to whether he indeed possesses assets.
8. If it is found after a thorough investigation that the *mufalis* really has no wealth, he will be released from prison and allowed to trade and to find employment. All earnings from his trade or employment will be used to pay off his creditors. In this time, the

232 It is submitted that it is at this point that a *mufalis* can be considered to be declared insolvent. As such he will have the same status of an insolvent person in South African law. This assumption is justified by the limited capacity that the *mufalis* now has.

233 Therefore, the *qadhi* fulfils the role of the trustee of an insolvent estate in South Africa.

234 This is possible only if a surplus amount remains after all the creditors have been paid in full. In the event of there being no surplus remaining, then the maintenance needs of the wife and children of the *mufalis* are addressed by the mandatory injunction of *Zakaat*.

235 See fn 215 above.

236 The funeral prayer that is read before the deceased is buried.

mufalis should not be stopped from trading or from finding employment beyond of his home town.²³⁷

9. If the *mufalis* fails to pay his debts in this world, he will surely have to repay them in the hereafter, unless the creditors forgive him for the non-repayment of his debts.

From the above it is clear that the rules and principles of insolvency in the secular system do not corroborate with the laws and principles of insolvency in *Shari'ah*. If a debtor still owns assets, which include, for example, a house, a car, etc. he is not an insolvent person according to *Shari'ah*. He should sell his assets and honour his debts. However, if a person is honestly insolvent, he should seek the forgiveness of his creditor and make every attempt to pay the debt. He should also record the debt in his will.²³⁸ The prophet of *Allah* also advised the creditor to be lenient to his debtors. If possible he should grant respite for late payments or remit the entire or part of his debt. Perhaps it will be useful to note that the principle of usury and interest does not exist in the Islamic *Shari'ah*.²³⁹

It is also of utmost importance to note that in accordance with the *Shari'ah*, no provision is made for the assets of the solvent spouse to vest in the insolvent estate. Therefore, a provision similar to section 21 of the Act is alien and foreign to Islam.

237 The person is similar to an un-rehabilitated insolvent in South African law.

238 This will have the effect that the debt will have to be paid upon the death of the debtor. For a detailed discussion on the Islamic law of succession, see Doi *Shari'ah* 271-342.

239 For a full discussion on this see Doi *Shari'ah* 375-387.

8 The effect of section 21 of the Act on a Muslim spouse

8.1 Introduction

Section 21 generally applies to spouses of the insolvent married out of community of property. Islamic law, like South African law, does not recognise the concept of merger of personalities of the parties. Furthermore, Islamic law does not recognise the merging of assets of spouses upon their marriage at all. Accordingly, the concept of marriage in community of property and a joint undivided estate is foreign to the Islamic marriage. Spouses to an Islamic marriage maintain separate estates. Each spouse retains sole ownership and control of his or her property, whether movable or immovable and whether acquired before or after the marriage. It does not matter when, where and from whom they received it. In this regard, the *Qur'an* states that "to men is allotted what they earn and to women what they earn". The Islamic matrimonial property regime is, therefore, the same as the South African system of marriage by antenuptial contract excluding accrual.²⁴⁰ Under Islamic law, a woman, whether married or unmarried, enjoys an absolute legal right to earn, acquire or inherit property. Her wealth and property is independent of any male control.²⁴¹ Again, this is the same as a civil marriage governed by an antenuptial contract and, therefore, the concept of separate estates is not foreign to South African law.

At this point it may be fruitful to reiterate that "spouse" in section 21 of the Act is not restricted to the conventional husband and wife. It also includes 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.²⁴²

240 Due to this, s 21 is also applicable to spouses who have entered into an Islamic marriage.

241 For a full discussion on the Islamic Law of Marriage see Rautenbach and Goolam *Regspluralisme in SA* 61-74.

242 S 21(13). See par 2.1 above.

From the above it is clear that the South African Muslim "spouse" married in terms of Islamic law only,²⁴³ will be subjected to the provisions of section 21 of the Act. The South African Muslim spouse, like any other South African citizen, is entitled to the rights granted in the Bill of rights as contained in Chapter two of the *Constitution*.²⁴⁴ Does section 21 allow Muslim spouses the opportunity to make use of their guaranteed rights as contained in the South African *Constitution*? These rights will now be analysed and in doing so, the constitutionality of section 21 will be tested again.

8.2 A constitutional analysis - section 21 and the Muslim spouse

Section 1 of the *Constitution* states that the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, the achievement of equality and advancement of human rights and freedom, non racialism and non-sexism.

When discussing the constitutional effect that section 21 of the *Insolvency Act* has on a Muslim spouse, a number of the sections of the Bill of Rights such as equality,²⁴⁵ freedom of religion, belief and opinion,²⁴⁶ freedom of association,²⁴⁷ and the right to property²⁴⁸ come to mind. The constitutional effects with regard to equality and property²⁴⁹ have already been discussed. It is submitted that no further discussion is required at this stage. It is, however, in order to determine whether section 21 possibly infringes on a persons right of property and equality.

243 At present the Islamic marriage has no legal recognition in South African Law. It is regarded as being null and void because of its potentially polygamous nature. A draft bill has been prepared by the South African Law Commission in order to promulgate a statute that will give recognition to Muslim Personal law. See in this regard SA Law Commission *Islamic Marriages and Related Matters* Discussion Paper 101 Project 59 (1996).

244 *Constitution of the Republic of South Africa* 108 of 1996

245 This right is guaranteed in terms of s 9 of the *Constitution*.

246 This right is guaranteed in terms of s 15 of the *Constitution*.

247 This right is guaranteed in terms of s 18 of the *Constitution*.

248 This right is guaranteed in terms of s 25 of the *Constitution*.

249 See Chapter 4 above.

The *Shari'ah* clearly states that a wife²⁵⁰ has a right to property, which remains her²⁵¹ own. Does section 21 then not infringe upon her right to practice on the principles of her religion?

8.3 The interpretation of the constitutional rights

The preamble to the *Constitution* declares: "We, the people of South Africa, believe that South Africa belongs to all who live in it, united in our diversity." Secondly, section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital state, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, language and birth. Thirdly, section 10 provides that everyone has inherent dignity and the right to have his or her dignity respected and protected. Fourthly, section 31 of the *Constitution* provides that:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community -
 - (a) to enjoy their culture, practice their religion and use their languages; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Finally, in terms of section 185, a commission for the promotion and protection of the rights of cultural, religious and linguistic communities is to be established as a state institution supporting constitutional democracy. The primary objects of the commission are:

250 Or husband.

251 Or his.

- (a) to promote respect for the rights of cultural, religious and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
- (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for community or communities in South Africa.

Section 15(1) of the *Constitution* provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion. It is submitted that the provisions in the Bill of Rights are formulated in general and abstract terms. Their application to particular situations and particular circumstances will necessarily be a matter for argument and controversy.²⁵² The *Constitution* itself does not prescribe how it should be interpreted. Section 39 contains an interpretation clause, which pertains to the Bill of Rights.²⁵³ It is, however, further submitted that the instructions contained in section 39, important as they may be, are themselves sufficiently abstract and require interpretation.²⁵⁴ Due to the fact that the interpretation, application and limitation of fundamental

252 "Necessarily" means that controversy and the need to argue about and eventually come to a decision about the proper interpretation of the Bill of Rights is unavoidable. The rights are not formulated as detailed sets of rules designed to deal with specific, envisaged situations. Rather, the Bill of Rights lays down general comprehensive moral standards that government must respect, but leaves it to judges to decide what these standards mean in concrete circumstances.

253 (1) When interpreting the Bill of Rights, a court, tribunal or forum -
 (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 (b) Must consider international law;
 (c) May consider foreign law.
 (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit and objects of the Bill of Rights;
 (3) The Bill of Rights does not deny the existence of any other rights or freedom that are recognised or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill.

254 For example, s 39(1) requires a court interpreting the Bill of Rights to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom". There can be few instructions more in need of interpretation than this.

rights is not and indeed cannot be regulated completely by the text of the *Constitution*, the Constitutional Court has laid down guidelines as to how the *Constitution* in general and the Bill of Rights in particular should be interpreted.²⁵⁵ It can, therefore, be said that the constitutional interpretation is, therefore, about establishing the context or perhaps painting the picture within which a particular constitutional provision must be viewed. The values of human dignity, equality and freedom must, therefore, permeate the interpretation process. In this sense constitutional interpretation is **primarily** concerned with the literal meaning of the statute.²⁵⁶ In the Cape High Court case of *Ryland v Edros*,²⁵⁷ Judge Farlam analysed the significance of these values in the context of South African family law. The court stated that one of the values of an open and democratic society is that the values of all sections of society must be taken into account and given due weight. In the context of family law issues, a number of other constitutional provisions merit enunciation. In light of the court decision, it is submitted that in the context of family law or personal law issues, the aforementioned constitutional provisions will undoubtedly play a significant role in the process of interpretation. The values of human dignity, equality and freedom are uppermost in the provisions. It is these values which must, as stated earlier, permeate the interpretation process.

Therefore, after taking into account the nature and extent of the rights that a Muslim spouse has been granted with regard to property in Islamic law, it is a firm contention that when the right to freedom of religion, belief and opinion²⁵⁸ is weighed against the right of the creditors of the insolvent spouse, in terms of South African law, the solvent spouse's

255 *S v Zuma* 1995 2 SA 643 (CC) par 17.

256 *S v Zuma* 1995 2 SA 643 (CC); *S v Makwanyane* 1995 3 SA 391 (CC) par 9.

257 *Ryland v Edros* 1997 1 BCLR 77 (C).

258 S 15 of the *Constitution*.

right to freedom of religion, belief and opinion,²⁵⁹ the right to property will and should take preference. The limitation of this right in terms of section 36 of the *Constitution* in favour of the insolvent spouse's creditors at the cost of the solvent spouse's, will not be justifiable in an open and democratic society based on equality and freedom.²⁶⁰ It is believed that the solvent spouse cannot be deprived of her assets or the use thereof, although only temporarily) and bear the risk of serious prejudice because of the vesting of her assets in the trustee of her insolvent spouse. The object of section 21 is to prohibit fraud between spouses. It is because of this that the interests of the creditors of the insolvent spouse enjoy a preference over the interests and *de facto* property rights of the solvent spouse. It is submitted that the fraud between spouses should be addressed in another way.

9 A suggested solution

It is true that the Constitutional Court upheld the constitutionality of section 21 in the *Harksen* case, but section 21 still poses a problem. It is a drastic provision that needs to be reconsidered. With regards to the drastic shortcoming of section 21 with regard to the interests of solvent spouses and the fact that two systems recognise this shortcoming, it be seen as a double motivation for the repealing of section 21. Section 21 is not only in conflict with the interests of solvent spouses in the South African law. It is imperative to note that Islam also sanctions and respects private ownership. This can be seen in the manner in which the religion advocates the principle of giving to each person what is due to them,²⁶¹ as well as the strict application of the principle that the Islamic law does not recognise the merging of assets of spouses upon their marriage.

259 S 15 of the *Constitution*.

260 Maintaining s 21 will not promote respect for the rights of the Muslim religious community.

261 See fn 216 above.

It is, therefore, submitted that even though the constitutionality of section 21 has been upheld,²⁶² the Islamic notions²⁶³ should be taken into account and considered, even if only for persons who have concluded a marriage in terms of the Islamic law only.²⁶⁴ Muslim has been granted the right to practice Islam by the *Constitution*.²⁶⁵ In terms of Islamic law, the property rights of individuals are guaranteed. Is it not then unreasonable and unfair to attack the *de facto* right to property of the solvent Muslim spouse by the application of section 21?

10 Conclusion

In determining whether section 21 of the Act meets the test for justifiability as set out in section 36,²⁶⁶ the infringements of sections 9, 15 and 25²⁶⁷ must be weighed against the purpose and effect of section 21.

It is submitted that an unfair discrimination does indeed exist against the solvent spouse. She is further inconvenienced in that she is temporarily deprived of her assets and the control thereof, which can result in the disadvantage, financially and otherwise, of the solvent spouse.²⁶⁸

Section 21 does not apply generally to all persons closely related or doing business with the insolvent and as such, the deprivation of the solvent spouse's property is not justifiable in an open and democratic society based on equality and freedom.²⁶⁹ It, therefore, follows that the

262 *Harksen v Lane* 1998 1 SA 300 (CC).

263 The Islamic law prescribes that a grace period should preferably be granted to a debtor in the case of insolvency if he really intends to pay back his debt.

264 It is noted that humans by nature are not always truthful. The spirit of being a Muslim entails striving to be truthful and the mere fact that each individual will be accountable one day for all their deeds, suggest that the debtor will have to answer for his untruthfulness in the hereafter, if not in this world.

265 S 15 of the *Constitution*.

266 S 36 of the *Constitution*.

267 *Constitution*.

268 For example, the business woman who will not be able to conduct her business until her property has been released.

269 See par 4.2 above.

Constitutional Court erred in its decision²⁷⁰ due to the fact that an infringement does in fact occur on the *de facto* right to property.

In view of the disadvantages caused by section 21 of the Act on the basis of marital status, it can be argued that solvent spouses are disadvantaged merely because they are married or deemed to be married.²⁷¹

Furthermore, a violation of a person's freedom of religion exists, in that section 21 regulates the laws and principles that have been prescribed by a religion,²⁷² which is not justifiable in an open and democratic society based on equality and freedom. Although the extent of the infringement is not extremely offensive or egregious, it nevertheless constitutes a significant limitation of that right.

Although the purpose of section 21 of the *Insolvency Act* is an important one, the relationship between the purpose and effect of section 21 of the Act is not closely drawn. In particular, it is viewed that the balance between the interests of the solvent spouse and the interests of creditors of the insolvent estate seem to favour unreasonably the interests of the creditors disproportionately. This is especially true if the effect of protecting the creditors of the insolvent from fraud can be achieved by other less drastic measures. It is submitted that this is indeed achievable, by means of shifting the onus and burden of proof to the trustee in terms of the impeachable dispositions.²⁷³

The absence of similar provisions as set out in section 21 in other legal systems like England, New Zealand and Australia, as well as in the *Shari'ah* law, seems to support the conclusion that the balance has not been achieved.²⁷⁴

270 *Harksen v Lane* 1998 1 SA 300 (CC).

271 See par 4.3 above.

272 See par 8.3 above.

273 Ss 26 - 31.

274 According to the minority judgement of O'Reagan in *Harksen v Lane* 1998 1 SA 300.

With regard to the circumstances, it may be concluded that section 21 of the Act does not meet the test of section 36 of the *Constitution*. It is, therefore, inconsistent with the provisions of the *Constitution* of the Republic of South Africa.²⁷⁵ Section 21 infringes on a persons *de facto* right to property as well as the equality clause.²⁷⁶ The researcher is in agreement with judge Sachs who states that section 21 promotes a concept of marriage in which, independently of living circumstances of the spouses, creates the merging of their estates. Spouses are then trapped in a stereotyped and outdated view of marriage which inhibits their capacity for self-realisation, affects the quality of their relationship with each other as free and equal 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.

Therefore, that the following Islamic laws should be used as an alternative to section 21:

- (a) The property of the wife²⁷⁷ remains to be her own property;
- (b) Under no circumstance is the trustee allowed to attach the property of the wife;
- (c) The insolvent be solely responsible for his debts;
- (d) The possibility of collusion between spouses and fraud be addressed in another manner.²⁷⁸
- (e) The principles of *zakaat* should be made applicable and should be strictly adhered to.

²⁷⁵ *Constitution of the Republic of South Africa* 108 of 1996.

²⁷⁶ S 21 is discriminatory on the grounds of sexual orientation because homosexual persons are not subjected to the application of s 21. See par 2.1 above.

²⁷⁷ It is assumed that the wife is the solvent spouse.

²⁷⁸ In this regard see Chapter 6 above.

It is submitted that section 21 be repealed, because no place exists for it in a society based equality, freedom and justice!

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