



The effect of Section 21 of the Insolvency Act, No 24 of 1936 on the solvent spouse's assets and the realisation of the solvent spouse's assets

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What happens when the estate of either of two spouses is sequestrated?

- [Section 21](#) of the Insolvency Act says that the separate assets of the spouse whose estate has not been sequestrated vest:
  - in the Master; and
  - Ultimately in the Trustee.
- Here we will look at:
  - To whom does it apply?
  - Who bears the onus?
  - What did the Constitutional Court say in the Harksen matter?
  - How drastic is the effect of the section?
  - Does the section have a future?

- Section 21 has a number of subsections. Briefly, they cover:
  - Section 21(1) – the effect of sequestrating one spouse’s estate
  - Section 21(2) – releasing the assets of the solvent spouse
  - Section 21(3) – realising the assets of the solvent spouse
  - Section 21(4) – application to court by solvent spouse
  - Section 21(5) - (9) – the solvent spouse’s creditors
  - Section 21(10) – the solvent spouse as a trader
  - Section 21(11) – application on grounds of act of insolvency
  - Section 21(12) – post-release recovery of property
  - Section 21(13) – the definition of ‘spouse’

### What is the gist of Section 21(1)?

- **Applies to:**
  - spouses who are not living apart under a judicial order of separation
- **Triggered by:**
  - the sequestration of the separate estate of one
- **Affects:**
  - the “solvent spouse” (the spouse whose estate has not been sequestrated)
- **Results in:**
  - the vesting -
    - **of** - all the solvent spouse’s property (including that attached by the sheriff)
    - **as if** - it were property of the sequestrated estate
    - **in** -
      - the Master (until a provisional trustee has been appointed) or
      - the Trustee (upon the appointment of a trustee).

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

Note that in terms of the definition section 2 of the Insolvency Act, “Trustee’ means the trustee of an estate under sequestration and includes a provisional trustee”

## To whom does section 21 apply?

“Spouse” is widely defined by [section 21\(13\)](#) and covers:

- **Husband and wife:**
  - Wife or husband (in the accepted legal sense);
- **Customary marriage:**
  - Marriage according to any law or custom;
- **Common-law partners:**
  - Woman living with a man as his wife (or a man living with a woman as her husband) although not married to one another;
- **Same-sex marriages:**
  - The [Civil Union Act 17 of 2006](#) (in effect from 30 November 2006) would apply the definition of “spouse” to same-sex marriages too.

And people of the same sex who merely live together?

- Gay and cohabiting:
  - If two partners of same sex are merely living together (ie not in a civil union in terms of the Civil Union Act), section 21 would probably not apply.
- But would this distinction be constitutional?
  - Meskin suggests that this distinction may well be held to be unconstitutional in the light of the Constitutional Court decisions in *Du Toit and Another v Minister of Welfare and Population Development and Others* and *J and Another v Director General Department of Home Affairs and Others*.

### Section 21(13)

- “In this section the word “spouse” means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another.”

# The Civil Union Act 17 of 2006

To provide for the solemnisation of civil unions, by way of either a marriage or civil partnership; the legal consequences of civil unions; and to provide for matters incidental thereto.

## Preamble

- WHEREAS section 9 (1) of the Constitution of the Republic of South Africa, 1996, provides that everyone is equal before the law and has the right to equal protection and benefit of the law;
- AND WHEREAS section 9 (3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;
- AND WHEREAS section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;
- AND WHEREAS section 15 (1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion;
- AND WHEREAS the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;
- AND NOTING that the family law dispensation as it existed after the commencement of the Constitution did not provide for same-sex couples to enjoy the status and the benefits coupled with the responsibilities that marriage accords to opposite-sex couples,

What does the Civil Union Act mean for section 21?

- [Section 13 of the Civil Union Act](#) governs the legal consequences of a civil union.
- It says any reference in in any law (including the common law), to:
  - **Marriage** = includes a civil union
  - **Husband, wife or spouse** = includes a civil union partner.

### 13. Legal consequences of civil union

- (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
- (2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to -
  - (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
  - (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

How would a solvent spouse have his or her assets released?

- **Who bears onus?**
  - The solvent spouse must take steps to obtain the release of his or her assets.
- **Who must be approached?**
  - Application would be made to the trustee of the insolvent spouse.
- **What if the solvent spouse is sequestrated?**
  - If the solvent spouse is subsequently sequestrated, the right to obtain release vests in his or her trustee.

What does [section 21\(2\)](#) say about releasing assets?

- The trustee must release any property of the solvent spouse which is proved to have been:
  - that spouse’s property immediately before:
    - marriage to the insolvent; or
    - before 1 October 1926. or
  - acquired by that spouse under a marriage settlement; or
  - acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent; or
  - safeguarded in favour of that spouse by section 28 of this Act or by the Insurance Act No 37 of 1923; or
  - to have been acquired with any such property as aforesaid or with the income or proceeds thereof.

- (2) The trustee shall release any property of the solvent spouse which is proved:-
  - (a) to have been the property of that spouse immediately before her or his marriage to the insolvent or before the first day of October, 1926; or
  - (b) to have been acquired by that spouse under a marriage settlement; or
  - (c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent; or
  - (d) to be safeguarded in favour of that spouse by section twenty-eight of this Act or by the Insurance Act, 1923 (Act No. 37 of 1923); or
  - (e) to have been acquired with any such property as aforesaid or with the income or proceeds thereof.

### What is the spouse obliged to do in proving title?

- **Bear onus:**
  - The solvent spouse bears the onus of proving title to the assets.
- **Tender proof**
  - The solvent spouse has to tender appropriate proof of title.

### What is the trustee obliged to do?

- **Consider proof**
  - The trustee is obliged properly to consider the proof tendered before refusing.

A trustee can only realise the property of a solvent spouse, if:-

- There has been no release:
  - the solvent spouse has either:
    - not sought to have the property released; or
    - has been defeated in such an attempt [[Section 21\(2\)](#)];
  - and
- Notice has been given:
  - the trustee has given the solvent spouse notice.

### How must the trustee give notice?

- [Section 21\(3\)](#) requires that that trustee, before realising property that ostensibly belonged to the solvent spouse:
    - **give notice**
      - give six weeks' written notice to that spouse; and
    - **publish the notice**
      - publish the notice in:
        - » the Gazette
        - » in a newspaper circulating in the district
    - **call on creditors**
      - also invite the spouse's creditors to prove claims.
- if – that spouse is:
- **local:**
    - is in South Africa; and
  - **traceable:**
    - has an ascertainable address.

What can the trustee do with the solvent spouse's assets?

[Section 21\(1\)](#) allows the trustee to dispose of the property of the solvent spouse as if it were the property of the insolvent estate. All the usual rules apply.

But what about the creditors of the solvent spouse?

The creditors of the solvent spouse:

- **Do** - receive priority over creditors of the insolvent estate in sharing in the proceeds of the assets realised by the trustee; but
- **Do not** - share in the proceeds of the sale of the insolvent's estate's assets  
[\[Section 21\(5\)\]](#)

- (3) If the solvent spouse is in the Republic and the trustee is able to ascertain his or her address, the trustee shall not, except with the leave of the court, realize property which ostensibly belonged to the solvent spouse, until the expiry of six weeks' written notice of his intention to do so, given to that spouse. Such notice shall also be published in the Gazette and in a newspaper circulating in the district in which the solvent spouse resides or carries on business, and shall invite all separate creditors for value of that spouse to prove their claims as provided in subsection (5).

### What remedies might a solvent spouse have?

- [Section 21\(4\)](#) allows the solvent spouse to apply to the High Court for an order:
  - releasing –
    - to release any property vested in the trustee of the insolvent estate under subsection (1); or
  - staying –
    - to stay the sale of such property; or
  - declaring
    - to declare the applicant to be entitled to those proceeds (if it has already been sold but the proceeds thereof not yet distributed among creditors);
- the Court may make such order on the application as it thinks just.

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

### Who is considered a “creditor of the solvent spouse”?

- A “creditor of the solvent spouse” is:
  - someone who has a claim that would have been capable of being proved against the estate of the spouse if that spouse’s estate itself had been under sequestration – [section 21\(5\)](#).

### What is the fate of those creditors?

- The creditors of the solvent spouse **ARE** entitled to:
  - prove their claims against the estate of the insolvent spouse.
  - enjoy priority over the separate creditors of the insolvent estate in sharing in the proceeds of any property of the solvent spouse realised by the trustee.
- The creditors of the solvent spouse are **NOT** entitled to:
  - share in the property which was vested in the insolvent spouse at the date of sequestration – [section 21\(5\)](#).

- (5) Subject to any order made under subsection (4) any property of the solvent spouse realized by the trustee shall bear a proportionate share of the costs of the sequestration as if it were property of the insolvent estate but the separate creditors for value of the solvent spouse having claims which could have been proved against the estate of that spouse if it had been the estate under sequestration, shall be entitled to prove their claims against the estate of the insolvent spouse in the same manner and, except as in this Act is otherwise provided, shall have the same rights and remedies and be subject to the same obligations as if they were creditors of the insolvent estate; and the creditors who have so proved claims shall be entitled to share in the proceeds of the property so realized according to their legal priorities inter se and in priority to the separate creditors of the insolvent estate, but shall not be entitled to share in the separate assets of the insolvent estate.

What happens when property of the solvent spouse has been released by the trustee?

- Entitled to share in the proceeds
  - The separate creditors of the solvent spouse are entitled to share in the proceeds of any other property of the solvent spouse realised by the trustee and, of course, not also released by him either – [section 21\(6\)](#)
- Subject to prior excussion
  - Their entitlement is however subject to the prior excussion of the released property and of any property of the solvent spouse acquired since the sequestration.

### Why might a creditor need an excussion affidavit?

- Before making an award to a creditor, the trustee may require him to lodge an affidavit, supported by such available evidence, setting forth:
  - the result of such excussion
  - the balance of his claim which remains unpaid ([section 21\(7\)](#)).
- The creditor’s entitlement to any such share is then in respect of:
  - such balance only; plus
  - any costs incurred by such creditor in the excussion which he has been unable to recover from the proceeds of the excused property.

- (6) If any property of the solvent spouse (other than property mentioned in paragraph (d) of subsection (2)) has been released by virtue of subsection (2) or (4) the separate creditors of that spouse shall only be entitled to share in the proceeds of any property of the solvent spouse which has been realized by the trustee, after the property so released and any property of that spouse acquired by her or him since the sequestration, have been excused.
- (7) Before awarding any such creditor a share in such proceeds, the trustee may require the creditor to lodge with him, within a period to be determined by the Master, an affidavit, supported by such evidence as may be available, setting forth the result of such excussion and disclosing the balance of his claim which remains unpaid. He shall then be entitled to share as aforesaid in respect of that balance only: Provided that any creditor who has incurred costs in excussing the separate property of the solvent spouse and has been unable to recover those costs from the proceeds of that property shall be entitled to add the amount of those costs to the amount of his claim as proved.

Could a creditor be debarred from sharing in the proceeds of the realised property?

- In terms of [section 21\(8\)](#), a creditor will be debarred from sharing in the proceeds of the realised property if he fails to:
  - lodge such affidavit within the period fixed by the Master, or
  - excuss any separate property of the solvent spouse still available for satisfaction of his claim.

### What are the other rights and obligations of the solvent spouse’s creditors?

- A creditor of the solvent spouse who proves a claim against the estate of the insolvent spouse is:
  - not liable to make any contribution;
  - not entitled to vote at any meeting of creditors of the insolvent estate;
  - entitled to apply to court to set aside any direction of the creditors at any such meeting which infringes his rights.

- (8) If, during the period determined by the Master, any such creditor has failed either to lodge with the trustee such an affidavit as aforesaid, or to excuss any separate property of the solvent spouse still available for the satisfaction of his claim, he shall be debarred from sharing as aforesaid unless the court otherwise orders.
- (9) A creditor of the solvent spouse who has proved a claim as provided in subsection (5) shall not be liable to make any contribution under section one hundred and six, and shall not be entitled to vote at any meeting of the creditors of the insolvent estate held in terms of section forty, forty-one or forty-two; but any direction of the creditors of the insolvent estate which infringes the rights of any first-mentioned creditor may be set aside by the court on the application of such creditor.

- (10) If the solvent spouse is carrying on business as a trader, apart from the insolvent spouse or if it appears to the court that the solvent spouse is likely to suffer serious prejudice through the immediate vesting of the property of that spouse in the Master of the trustee, and the court is satisfied in either case that the solvent spouse is willing and able to make arrangements whereby the interest therein of the insolvent estate in the said property will be safeguarded without such a vesting, the court, either when making the sequestration order or at some later date, but subject to the immediate completion of such arrangement as aforesaid, may exclude that property or any part thereof from the operation of the order, for such period as it thinks fit. During that period the solvent spouse shall lay before the trustee the evidence available in support of her or his claim to such property and within that period the trustees shall notify the solvent spouse in writing whether or not he will release such property in accordance with subsection (2). If the property has not been so released, then upon the expiry of the said period that property shall vest in the Master or in the trustee, but subject to the provisions of this section.

- (11) If application is made to the court for the sequestration of the estate of the solvent spouse on the ground of an act of insolvency committed by that spouse since the vesting of her or his property in the Master or the trustee of the insolvent estate, and the court is satisfied that the act of insolvency alleged in that application was due to such vesting, then if it appears—
  - (a) that an application is being or, if necessary, will be made under subsection (4) for the release of any property of the solvent spouse; or
  - (b) that any property of the solvent spouse has been released since the making of the sequestration order, and that the solvent spouse is now in a position to discharge her or his liabilities,
  - the court may postpone the hearing of the said application or may make such interim order thereon as to it may seem just.

- (12) If the trustee has in accordance with the preceding provisions of this section released any property alleged to belong to the solvent spouse, he shall not be debarred thereby from proving that it belongs to the insolvent estate and from recovering accordingly.

- **The Harksens v the world etc**
  - In the late 1990s and early 2000s, the Harksen cases clogged court rolls while the German conman fought a long and ultimately futile fight to avoid extradition and sequestration.
- **What was Jeannette fighting for?**
  - Personal possessions including three expensive cars, jewellery and clothing, were seized by the trustees of her husband's insolvent estate in 1997.
  - In court papers filed in one of the many cases, Mrs Harksen said she owned:
    - 47 leather jackets;
    - 175 other jackets;
    - 70 pairs of long pants;
    - a wedding dress;
    - 200 pairs of shoes;
    - 93 pairs of trousers;
    - 236 blouses and shirts;
    - 60 mini-skirts; and
    - 198 other pieces of clothing.

- **What did Jeanette do?**
  - She applied for an order to have all her assets released and went as far as the Constitutional Court to get them back.
- **The result?**
  - The trustees eventually waived any claims against her in pursuit of her husband's hidden assets, but she had to pay R454 000 – including R104 000 for the return of her clothes.
- **And what became of Harksen?**
  - When he was last heard of, Harksen:
    - had been freed
    - was missing Cape Town
    - was married to a model
    - had launched a career as an actor

### What route to the Constitutional Court?

- In 1997 and at the request of Jeanette Harksen, Farlam J, in the CPD, referred the issue of the constitutionality of section 21 to the Constitutional Court.

### Which version of the Constitution?

- The matter was disposed of in accordance with the provisions of the interim constitution.

### Which arguments were adduced?

- It was contended that Section 21 constituted:
  - (a) unconstitutional expropriation of property; and
  - (b) unfair discrimination.
- Section 28 of the Interim Constitution deals with the first issue. The section provided:-
  - (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

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

- [Section 8](#) of the Interim Constitution dealt with unfair discrimination. The relevant parts of that section provided:-
  - (1) Every person shall have the right to equality before the law and to equal protection of the law.
  - (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

- The full text of section 8 of the Interim Constitution reads as follows:-
  - (1) Every person shall have the right to equality before the law and to equal protection of the law.
  - (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
  - (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

- (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.
- (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established

### The majority

- The majority of the Court (Chaskalson P, Langa DP, Ackermann J, Kriegler J, Madala J, Mokgoro J and Goldstone J) in a judgment by Goldstone J held that Mrs Harksen had not established that section 21 constituted unconstitutional expropriation of property and unfair discrimination as contemplated by the Interim Constitution.

### O'Regan J

- O'Regan J, in a minority judgment, disagreed.
- She held that section 21 was unconstitutional as it constituted a breach of a right not to be unfairly discriminated against, which was not proved to be justifiable in an open and democratic society based on freedom and equality.

### Sachs J

- Sachs J agreed.
- He held further that section 21 promoted a concept of marriage in which, independently of the living circumstances and careers of the spouses, their estates are merged, limiting the spouses' capacity for self realisation, free and equal of each other.

## The courts since Harksen

- The majority decision in Harksen has been [followed in a number of cases](#).

## But no decision under the 1996 Constitution

- The constitutionality of section 21 has not again come before the Constitutional Court - the matter has therefore not been decided in terms of the provisions of the Constitution of the Republic of South Africa, Act 108 of 1996.

## Next time around?

- It's debatable whether the Constitutional Court will again find that section 21 does not infringe the provisions of the Constitution.

## Debate on new Bill lights the way

- In attempting to predict the Constitutional Court's attitude, the debate which surrounded the long awaited new Bill, designed to consolidate and amend the law relating to insolvency is instructive.

## Some cases in which Harksen has been followed

- Cothill and another v Cornelius [2000] 3 All SA 101 (T)
- Janit v Van den Heever NO and another (2) [2000] 4 All SA 519 (W)
- Beddy NO v Van Der Westhuizen [1999] 3 All SA 227 (A)
- Shrosbree NO & others v Van Rooyen NO & others [2003] JOL 10822 (SE)

### Dispositions by 'associates' in section 22A

- In the new Insolvency Bill section 22A fulfils the function of the present section 21.
- In the [last draft of the Bill section 22A](#) gives a liquidator power to instruct the Sheriff to attach property if:
  - there is a disposition:
    - by - the insolvent
    - to - “an associate” of the insolvent
    - and that - may be liable to be set aside.
- The Insolvency Project Committee supported the retention of section 21 because:
  - it creates insurmountable problems if the onus is on the trustee.

What then qualifies as an associate?

'Associate' = 'spouse':

- The definition of "associate" in relation to a natural person includes, in [Section 1\(a\) of the Bill](#), the spouse of such person.

'Spouse' = marriage-like cohabitation

- The definition of "spouse" in turn includes a person of any sex living with another as if married. Section 21 was omitted.

### "associate"

- (a) in relation to a natural person means—
  - (i) the spouse of such person; or
  - (ii) any person who is by consanguinity related to such first-mentioned person or to his or her spouse, in the first, second or third degree of relationship as determined in accordance with section 1(3)(d) or (e) of the Intestate Succession Act, 1987 (Act No. 81 of 1987); or
  - (iii) the partner of such person or the spouse of such partner or any person who is related to such partner or spouse as is contemplated in subparagraph (ii); or
  - (iv) the beneficiaries of a trust of which such person is the trustee; or
  - (v) a company of which such person is a director or a close corporation of which such person is a member or any juristic person of whom such person is a manager or of which he or she has control;

### Attachment of property in possession of associate

- (1) If a liquidator suspects that a disposition of property by the insolvent to an associate of the insolvent may be liable to be set aside, the liquidator may instruct the sheriff shall to attach such property.

- (1A) The sheriff shall-
  - (i) take into his or her personal custody all cash, share certificates, bonds, bills of exchange, promissory notes and other securities and compile a specified list thereof;
  - (ii) without delay deposit in a banking account as contemplated in section 83(1)(a) or (b) all cash taken into his or her custody;
  - (iii) in so far as is possible leave all other movable property which he or she has attached, other than animals, in a properly locked storage place or appoint a suitable person to keep the said property in his or her custody, in which case he or she shall hand to such person a copy of an inventory of the property left in his or her custody and he or she shall draw that person's attention to the offence contemplated in section 101(2)(f) in respect of the unauthorised disposition of property under attachment;
  - (iv) be entitled to fees according to Tariff A in Schedule 2.

## Section 22A(2) –(4) of the new Insolvency Bill

- (2) The property must be released if the sheriff is instructed to do so by the liquidator.
- (3) The liquidator shall instruct the sheriff to release property as soon as it is evident that attachment of the property is not required to safeguard the interests of the estate in the setting aside of a disposition of property.
- (3A) An associate may apply to the court for appropriate relief if property of the associate is attached or held under attachment without reasonable cause.
- (4) Unless the court orders otherwise, the costs of attachment of the property shall form part of the costs of liquidation

## What do these changes portend?

### New litigation

- Changes to a section that has stood the test of time and has been declared constitutional will result in new litigation.

### Some solace for the solvent spouse

- The solvent spouse will be able to force the trustee to act reasonably.

## Do we really need a section 21? [Yes]

### YES

- Insolvency practitioners and creditors
  - They support the retention of section 21 because it facilitates asset recovery.

## Do we really need a section 21? [No]

NO.. some of the counter-arguments being:

- **Why in South Africa?**
  - The [absence of a similar provision in other legal systems](#) is a clear indication that insolvency practitioners and creditors can live without section 21.
- **Discrimination is common cause:**
  - All of the judges in Harksen agreed that the differentiation between solvent spouses and other persons in section 21 amounted to discrimination – the majority deciding that the discrimination was not unfair. But effect of the discriminatory provisions on the spouses of insolvents is substantial.
- **Just too excessive:**
  - Can the provisions of section 21 – which Goldstone J described as “drastic” – be said to be necessary? The same result could be achieved if “control” were taken away from the spouse temporarily. The main object is to give the trustee an opportunity to investigate transactions with persons closely associated with the insolvent.

### The fate of the *presumptio Muciana*

- Section 21 contains within it traces of the *presumptio Muciana*, which had it that everything in possession of a married woman was considered to have come from her husband or someone under his power.
- Has been abolished in:
  - West Germany
  - France
  - Belgium

## Do we really need a section 21? [No]

And some more counter-arguments:

- **So much for Harksen:**
  - There are some authoritative pronouncements to the effect that, notwithstanding the decision by the Constitutional Court in Harksen, section 21 must still be scrapped. (For example, the [Law Commission's explanatory memorandum](#) recommended doing away with it).
- **It's anachronistic:**
  - “Section 21 remains a drastic measure which should not be tolerated by modern society”.
- **It's anomalous:**
  - Why should the interests of the creditors of the insolvent spouse take precedence over those of the solvent one?
- **... But practitioners (and creditors):**
  - they mostly disagree!

- In the 1996 Explanatory Memorandum – ie before the time of Harksen – the SALC wrote: “It is submitted that section 21 should be scrapped. Conceptually it is an anachronism and there is doubt whether it will be upheld under the Constitution”.
- In a subsequent submission, SALC said: “22A.11 The Commission is of opinion that the constitutionality of section 21 is one important factor and that it is not conclusive. Insolvency practitioners and creditors support section 21 of the Insolvency Act because it facilitates recovery of assets from a solvent spouse. The absence of similar provisions in other legal systems is a clear indication that insolvency practitioners and creditors can live without section 21. The Commission prefer a less drastic alternative.”

## What some commentators said about Harksen

### Van der Walt and Botha

- “The reasons for the decision and the reasoning that substantiates it leaves the reader with a slight uneasiness”

Questions?

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