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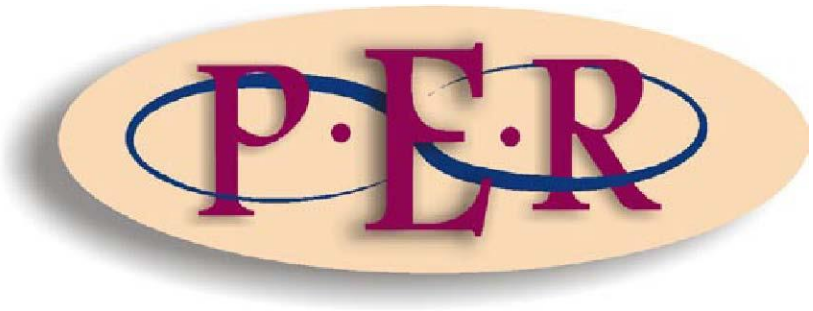

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PROPERTY IN INSOLVENT ESTATES – *EDKINS v REGISTRAR OF DEEDS*, *FOURIE v EDKINS*, AND *MOTALA v MOLLER*

RG Evans* **and L Steyn****

1 Introduction

Granting a sequestration order has the immediate result that the insolvent's property vests in the Master and later in the trustee of the insolvent estate.[1] If the insolvent has a "spouse", as defined in section 21(13) of the *Insolvency Act*,[2] the property of that spouse also vests in the Master, and subsequently the trustee, "as if it were property of the sequestrated estate".[3] In three recent judgments, including one of the Supreme Court of Appeal, issues relating to property that forms part of an insolvent estate or which belongs to the "solvent spouse" as well as the rights of a trustee in respect of such property arose and were dealt with within the confines of the relevant provisions of the *Insolvency Act*. However, a question that was pertinent but which was not considered in any of these cases related to the status of such property. In this respect the vesting provisions in sections 20 and 21 of the *Insolvency Act*[4] are of importance. The cases concerned are *Edkins v Registrar of Deeds, Johannesburg*,[5] and, on appeal, *Fourie v Edkins*,[6] as well as the separate

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1 Section 20 of the *Insolvency Act* 24 of 1936 (hereafter "the Act" or "the *Insolvency Act*").

2 Hereafter the "solvent spouse".

3 Section 21(13) of the *Insolvency Act* provides that 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". It is submitted that since the commencement of the *Civil Union Act* 17 of 2006 on 30 November 2006, the definition of the term "spouse" in the *Insolvency Act* has by implication been amended to include persons of the same sex or of the opposite sex who have entered into a civil union.

4 See generally Evans *Assets of Insolvent Estates* 207 where the nature of the vesting of the property of the insolvent and of the solvent spouse, first in the Master and, upon his appointment, in the trustee, was considered.

5 *Edkins v Registrar of Deeds, Johannesburg* 2012 6 SA 278 (GSJ) (hereafter *Edkins v Registrar of Deeds*).

6 *Fourie v Edkins* 2013 6 SA 576 (SCA) (hereafter *Fourie v Edkins*).

case of *Motala v Moller*.[7] Before considering these judgments, however, the position regarding vesting and the *dominium* of property in insolvent estates will be briefly considered.

2 Ownership of property vesting in the trustee

The ownership of property forming part of an insolvent estate and its vesting in the Master of the high court and in the trustee upon the latter's appointment have been the source of academic debate and conflicting court judgments over a lengthy period.[8] The question was always who owns and/or controls the property that forms part of an insolvent estate. As will be shown here, the answer to this question is vitally important in practice, particularly where the ownership of immovable property is in dispute in an insolvent estate. Answering the question is often crucial, particularly for third parties who enter into transactions with insolvent persons and/or their spouses. The answer is also significant not only in relation to the trustee's election to proceed with or to repudiate executory contracts,[9] but also in respect of the ranking of creditors. It may also determine the proprietary status of assets that ostensibly belong to the solvent spouse at the moment of sequestration of the insolvent spouse's estate. This question is of further practical importance because its answer may guide the actions of debtors, creditors and trustees in insolvent estates.

In this discussion the authors consider issues relating to the *dominium* of property in insolvent estates. It was thought that the question of the *dominium* of property in an insolvent estate had been finally settled by the (then) Appellate Division in *De Villiers*

7 *Motala v Moller* (GSJ) unreported case number 32654/11 (GSJ) of 11 September 2013 (copy on file with authors) (hereafter *Motala v Moller*).

8 See Joubert 1992 *TSAR* 699-706; Evans 1996 *TSAR* 719-724; Stander 1996 *THRHR* 388-398; Evans 1996 *THRHR* 613-625; Evans 1997 *THRHR* 71-83; Evans 1998 *Stell LR* 359-372; Evans *Assets of Insolvent Estates*; Bertelsmann *et al Mars The Law of Insolvency* 212 n 50. See also *Stand 382 Saxonwold v Kruger* 1990 4 SA 317 (T); *Harksen v Lane* 1998 1 SA 300 (CC) (hereafter *Harksen v Lane*).

9 These are contracts which the insolvent or the solvent spouse, as the case may be, had entered into prior to sequestration, but the performance in terms of which had not been completely carried out at the time of sequestration.

v Delta Cables.[10] Thereafter, the Constitutional Court, in *Harksen v Lane,*[11] with reference to *De Villiers v Delta Cables*, accepted that the ownership of the property of the solvent spouse passed to the Master and subsequently to the trustee.[12] Notably, the South African Law Reform Commission in its *Report on the Review of the Law of Insolvency*[13] issued in 2000, in the proposed "vesting provision", clause 11 of the *Draft Insolvency Bill*,[14] employed wording similar to that used in section 20 of the *Insolvency Act* 24 of 1936. In its memorandum to this Draft Bill[15] it stated: "Notwithstanding views to the contrary …, the existing rule does not give rise to any problems, except perhaps problems related to section 21."[16]

However, the judgments handed down in the cases under discussion here have seemingly again opened up the question for debate, particularly in view of the fact that the Supreme Court of Appeal in *Fourie v Edkins* ignored its own precedent on this issue. Further, in *Motala v Moller*, the Gauteng South High Court, per Myburgh AJ, apparently sought to align or reconcile sections 21 and 25(4) with each other. However, in doing so it failed to apply the principle laid down in *De Villiers v Delta Cables* regarding the *dominium* of the property of an insolvent estate, which, in the authors' opinion, resulted in an incorrect judgment.

To place the ensuing discussion regarding the ownership of the assets in insolvent estates in context, the vesting provisions in sections 20 and 21 of the Act are quoted as follows:

> 20 Effect of sequestration on insolvent's property
> (1) The effect of the sequestration of the estate of an insolvent shall be –
> (a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him;

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10 *De Villiers v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A) (hereafter *De Villiers v Delta Cables*); Evans 1996 *TSAR* 719; Evans 1998 *Stell LR* 359.

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

12 *Harksen v Lane* para 35.

13 SALRC 2000 http://www.justice.gov.za/salrc/reports/r_prj63_insolv_2000apr.pdf (*Report on the Review of the Law of Insolvency*).

14 See *Report on the Review of the Law of Insolvency* Vol 1; clause 11 of the *Draft Insolvency Bill*.

15 See *Report on the Review of the Law of Insolvency* Vol 2 39 para 11.1.

16 This was stated with specific reference to Stander 1996 *THRHR* 388 and Evans 1996 *TSAR* 719. (In the *Draft Insolvency Bill* the term "liquidation" is used instead of "sequestration" and the term "liquidator" is used instead of "trustee".)

> (b) to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent save such proceedings as may, in terms of section twenty-three, be instituted by the insolvent for his own benefit or be instituted against the insolvent: Provided that if any claim which formed the subject of legal proceedings against the insolvent which were so stayed, has been proved and admitted against the insolvent's estate in terms of section forty-four or seventy-eight, the claimant may also prove against the estate a claim for his taxed costs, incurred in connection with those proceedings before the sequestration of the insolvent's estate;
> (c) as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs;
> (d) to empower the insolvent, if in prison for debt, to apply to the court for his release, after notice to the creditor at whose suit he is so imprisoned, and to empower the court to order his release, on such conditions as it may think fit to impose.
> (2) For the purposes of subsection (1) the estate of an insolvent shall include –
> (a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment;
> (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three.
>
> 21 Effect of sequestration on property of spouse of insolvent
> (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, but subject to the following provisions of this section.

Case law and academic opinion regarding the nature of the vesting of the property of an insolvent or a solvent spouse[17] in the Master and/or the trustee was inconsistent.[18] However, in *De Villiers v Delta Cables* Van Heerden JA held:

> It has always been accepted that a trustee becomes the owner of the property of the insolvent. The legislature did not say so in so many words, but the 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 ... Section 21 (1) employs very much the same terminology.[19]

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17 See Evans *Assets of Insolvent Estates* ch 10 for a detailed discussion of the effect of sequestration on the spouse of the insolvent.

18 See works and cases cited at n 8 above.

19 *De Villiers v Delta Cables* 15G-H. As stated above, this was accepted by the Constitutional Court in *Harksen v Lane*. In *Beddy v Van der Westhuizen* 1999 3 SA 913 (SCA) 916A-C the court per

This ruling of the Appellate Division concentrated on the meaning and effect of section 21 of the Act. The facts of this case, presented in chronological sequence, are as follows. Mr and Mrs Mathews (M) were married out of community of property. On 22 February 1986 they entered into a contract of suretyship in favour of Delta Cables (Pty) Ltd ("Delta Cables"), the respondent. This deed of suretyship secured debts which one VH Cables (Pty) Ltd owed to Delta Cables. Five days later Mrs M signed a power of attorney to register a surety mortgage bond over immovable property that was to be purchased by her at a later date. Delta Cables was the prospective mortgagee. This property was indeed purchased and registered in Mrs M's name on 21 May 1986. On 17 June 1986 the estate of Mr M was provisionally sequestrated and a final order was granted on 29 June 1986. On 24 September 1986 the appellant was appointed trustee in the insolvent estate. On 1 October 1986 the surety mortgage bond was registered over the property. Delta Cables had caused this to occur by virtue of the power of attorney referred to above. Delta Cables later obtained judgment, which was founded on the deed of suretyship, against Mrs M. The trustee was unaware of these facts until shortly before the sale in execution was to occur. Agreement was reached by the parties that, after satisfying the claim of a first mortgage bond holder, the net proceeds would be paid to the trustee (the appellant). Delta Cables then proved a claim as a secured creditor in the insolvent estate, based on the judgment obtained against Mrs M and relying on the surety mortgage bond as security for its claim.

The trustee disputed Delta Cables' status as a secured creditor. He applied to the Witwatersrand Local Division for an order declaring it a concurrent creditor, contending that the bond registered after the sequestration of Mr M's estate and without his (the trustee's) consent conferred no preference on Delta Cables in respect of its claim. The lower court rejected this argument. It ruled that despite the provisions of section 21, the trustee would have been obliged to allow the

Schultz JA held that: "The purpose of s 21 is to 'prevent or at least to hamper collusion between spouses to the detriment of creditors of the insolvent spouse' (as Van Heerden JA put it in *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 13I); and, viewed from the other angle, 'to ensure that property which properly belonged to the insolvent ends up in the estate' (as Goldstone J put it in *Harksen v Lane NO* 1998 (1) SA 300 (CC) at 318E)."

registration of the bond because the power of attorney had been validly executed prior to the sequestration. The trustee appealed against this decision.

In the Appellate Division Delta Cables argued that in terms of section 21 ownership of the solvent spouse's assets did not pass to the trustee. To support this contention it relied on certain provisions in the Act which indicate that an insolvent's property should be treated differently from that of the solvent spouse. For example, section 20(1)(b) stays civil proceedings regarding the insolvent until the appointment of a trustee, whereas no such provision exists in respect of the solvent spouse's property. Furthermore, the execution of judgments against the insolvent are stayed, but not so regarding the solvent spouse.[20] Lastly, the contractual capacity of the solvent spouse is not limited by section 23(2) of the Act.

Van Heerden JA rejected these arguments. He found that one must distinguish between assets that fell within and those that fell outside of the meaning of section 21. He ruled that the solvent spouse could obtain an estate consisting of released (re-vested) assets[21] and assets acquired after the sequestration order. The solvent spouse maintained contractual capacity in respect of these two categories of assets only. The argument that *dominium* had not passed, he said, was valid only in respect of the latter two categories of assets that fell outside the ambit of the limitations of section 21. Nothing militated against the intention that *dominium* in the assets of the solvent spouse that are included within the limitations set by section 21 vested in the trustee. The court held further that the provisions or the absence of provisions upon which Delta Cables relied simply showed that some of the provisions of the Act pertaining to an insolvent and his or her assets were not applicable to the solvent spouse and his or her assets.[22] As a result the court held that these provisions had no bearing on the question of whether or not the trustee became the owner of Mrs M's property. None of these provisions militated against a construction that *dominium* in the assets of the solvent spouse vests in the trustee.

20 Section 20(1)(c) of the *Insolvency Act*.
21 See s 21(2) of the *Insolvency Act*.
22 *De Villiers v Delta Cables* 15B-D.

In the majority judgment in *Harksen v Lane* the Constitutional Court held that the purpose and effect of section 21 is "not to divest, save temporarily, the solvent spouse of the ownership of property that is in fact his or hers" and that "the purpose is to ensure that the insolvent estate is not deprived of property to which it is entitled."[23] Therefore, it would appear that ownership even of those assets that belonged to the solvent spouse at the moment of sequestration and that are ultimately released to him or her pursuant to section 21(2) or section 21(4) passes temporarily to the Master and, upon appointment, to the trustee.

To bring the case discussions that will follow into context regarding the ownership of assets forming part of an insolvent estate, it is appropriate at this point specifically to consider the effect of section 20(1)(c) of the Insolvency Act, as quoted above. It provides that the sequestration of a debtor's estate automatically stays, unless the court directs otherwise, the execution of a judgment that was granted against the debtor before the sequestration of his or her estate. The stay is effected as soon as the sheriff whose duty it is to execute the judgment becomes aware of the sequestration.[24] This provision applies irrespective of the stage which the execution process has reached, unless it has been completed.[25] If the sale in execution has been completed before sequestration but the delivery of the relevant property to the purchaser has not yet occurred, the result of sequestration is that the property under attachment, which is in the hands of the deputy-sheriff or messenger, and the proceeds of the sale in execution of such property which are in his hands, vest/s in the Master and later, upon his appointment, in the trustee.[26] Therefore, for the purchaser's right to delivery to be enforced and to allow delivery to ensue the court must in its discretion lift the automatic stay.[27]

It is against the background of these principles in respect of the ownership of estate property and insolvency legislation that the judgments of *Edkins v Registrar of Deeds,*

23 *Harksen v Lane* para 35.
24 Section 20(1)(c) of the *Insolvency Act*.
25 Bertelsmann *et al Mars The Law of Insolvency* para 8.8; Meskin *Insolvency Law* 6.1.
26 Section 20(1)(a) read with s 20(2)(a) of the *Insolvency Act*; *Simpson v Klein* 1987 1 SA 405 (W) 412 (hereafter *Simpson v Klein*).
27 Section 20(1)(c) of the *Insolvency Act*.

Fourie v Edkins and *Motala v Moller* will now be considered.

3 *Edkins v Registrar of Deeds; Fourie v Edkins* ("the *Edkins* judgments")

3.1 The issue and the facts

The judgment in *Edkins v Registrar of Deeds*, which was overruled by the Supreme Court of Appeal in an appeal by the trustees of the insolvent estate in *Fourie v Edkins*,[28] concerned an application by Edkins, a businessman in the residential property market, for an order declaring him to be entitled to the transfer of certain immovable property. Edkins had purchased the immovable property at a sale in execution conducted by the sheriff of the High Court, Johannesburg, at the instance of the mortgagee, Absa Bank (Pty) Ltd, pursuant to a judgment obtained by the latter against the registered owner and mortgagor of the property, Mthethwa, who had defaulted in respect of bond instalments due. Subsequent to its sale in execution, but prior to its transfer, Mthethwa had published a notice of intention to surrender his estate in terms of section 4(1) of the *Insolvency Act* and his estate was thereafter sequestrated. Edkins had complied with all of his obligations in terms of the sale. The joint trustees of the insolvent estate ("the trustees") opposed the application.[29]

It was not disputed that Edkins had been completely unaware of the voluntary surrender of the insolvent's estate, its acceptance by the high court, and/or the subsequent appointment of the trustees in the estate. The sheriff too was not aware of these facts.[30] On 3 August 2010 Edkins instructed conveyancers to lodge the transfer documents in the offices of the Registrar of Deeds so that the immovable

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28 Hereafter the judgments will be collectively referred to, where appropriate, as "the *Edkins* judgments".

29 The joint trustees were the third and fourth respondents in the matter. (There appears to be some confusion in the judgments concerning the date of their appointment. This, however, has no significant implications for this discussion.) The first respondent was the Registrar of Deeds, Johannesburg; the second respondent was the Master of the High Court, Johannesburg; the fifth respondent was Absa Bank (Pty) Ltd (hereafter "Absa Bank"); the sixth respondent was the sheriff of the High Court, Johannesburg ("the sheriff"), who had conducted the sale in execution. The applicant sought relief only against the trustees.

30 *Edkins v Registrar of Deeds* para 4.4.

property could be transferred into his name. However, the conveyancers subsequently advised him that they were unable to do so because of the Registrar of Deeds' Conference Resolution regarding the transfer of a property after a sale in execution, where the debtor was sequestrated after the date of sale in execution. This Resolution, 54/2009, reads as follows:

> If property was sold in execution and debtor is sequestrated after such sale, does the sequestration prevent the sheriff from transferring the property to the purchaser of the sale in execution?
>
> Resolution: Yes.

The Registrar further resolved that "once the sequestration order has been granted, only the trustee may pass transfer subject to the provisions of section 5 of the Insolvency Act."[31] The trustees refused to agree to the transfer.[32]

3.2 Arguments and judgment in Edkins v Registrar of Deeds

In the court *a quo*, Edkins contended that Mthethwa, the insolvent, was and should have been aware at all stages of the attachment of the immovable property in question and of the subsequent sale in execution. Despite this he purposely decided to wait until after the conclusion of the sale in execution before he lodged an application for the voluntary surrender of his estate, and before the notices connected with it were published.

On the other hand, the trustees argued that section 20 of the *Insolvency Act* provided that the ownership of the immovable property sold in execution vested in them upon their appointment as trustees, and that a sale in execution did not affect this.[33] They also contended that the right to claim transfer of the property prior to sequestration was an unsecured personal right and, when a *concursus creditorum*

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31 *Edkins v Registrar of Deeds* para 4.4. S 5 of the *Insolvency Act* provides that, after publication of a notice of surrender in the *Government Gazette*, it is unlawful to sell any property in the estate which has been attached under a writ of execution or similar process, unless the sheriff could not have known of the publication. However, the court or, where the value of the property does not exceed R5 000, the Master may order the sale of the attached property to proceed and how the proceeds of the sale must be applied.

32 *Edkins v Registrar of Deeds* para 5.

33 *Edkins v Registrar of Deeds* para 5.

came into existence upon sequestration, they were required to treat the claims of creditors according to their status before sequestration. They further argued that the principles pertaining to executory contracts (uncompleted contracts) which are not specifically dealt with by the *Insolvency Act* are by analogy also applicable to uncompleted sales in execution. Therefore, they argued, they themselves and not the Registrar of Deeds were obliged to deal with the fate of the immovable property. They consequently elected not to transfer the immovable property into the applicant's name.

The court, per Moshidi J,[34] granted the relief sought by Edkins. It found that the fact that the sale agreement was concluded before the publication of the notice of surrender suggested that it was a lawful sale that did not conflict with the provisions of section 5(1) of the Act. It reasoned that the insolvent, knowing that Absa Bank had foreclosed on the loan and that sale in execution was pending, deliberately waited until *after* the sale to publish his intention to surrender his estate. It found that the insolvent had no authority over the property and that the trustees had no right to prevent the transfer of the property into the name of Edkins. In the circumstances, the court held that Edkins was entitled to the order sought.[35]

3.3 Arguments and judgment in Fourie v Edkins

In *Fourie v Edkins*, the Supreme Court of Appeal, in a unanimous judgment delivered by Shongwe JA, pointed out that section 5(1) of the Act, upon which Edkins' application in the court *a quo* had been premised, envisages a situation where the sheriff[36] or the insolvent debtor or any person, for that matter, is prohibited from selling any property of the estate *after*[37] publication of the notice of surrender, unless he could not have known of the publication.[38] Shongwe JA explained that the purpose of section 5(1) is to protect creditors against anyone, including the insolvent

34 Relying heavily on *De Jager v Balju van die Hooggeregshof, Bloemfontein-Wes* 2010 ZAFSHC 90 (4 June 2010).
35 *Edkins v Registrar of Deeds* para 26.
36 Who is the one who is charged with the execution of the writ.
37 Authors' emphasis.
38 *Fourie v Edkins* para 12.

debtor, from dissipating the assets of the estate. The appeal court decided, however, that section 5(1) was irrelevant to the facts of this case, as the sale had taken place *before*[39] the publication of the notice of surrender. Shongwe JA ruled that the founding affidavit showed that Edkins had been advised, before the publication of the notice of surrender, that the execution of the sale had been finalised, notwithstanding the fact that transfer of the property had not taken place. But, the court observed, the signing of the deed of sale, *per se*, and the compliance with the conditions of sale are insufficient to complete the execution of the sale.[40]

Shongwe JA stated that the crisp question concerned the principle that upon the sequestration of a debtor's estate it vests first in the Master and thereafter, once they are appointed, in the trustees.[41] Citing *Simpson v Klein,*[42] *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co*,[43] *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central; Schoerie v Syfrets Bank Ltd*,[44] and *Shalala v Bowman*,[45] Shongwe JA stated that the estate includes immovable property sold in execution but not yet transferred at the date of sequestration.[46] He found relevance in section 20(1)(c) and (2)(a) of the Act, which is set out above.[47]

The court ruled that the meaning and effect of section 20(1)(c), read with section 20(2)(a), which "deals with what constitutes the property of the insolvent [sic] at the date of the sequestration", is that:

> … as soon as the sheriff becomes aware of the sequestration of the debtor's estate, he is duty-bound or enjoined by operation of law to stay the execution, unless the court otherwise directs.[48]

Shongwe JA went on to state that:

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39 Authors' emphasis.
40 *Fourie v Edkins* para 12.
41 *Fourie v Edkins* para 13.
42 *Simpson v Klein* 408E-H.
43 *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 558-559.
44 *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central; Schoerie v Syfrets Bank Ltd* 1997 1 SA 764 (D) 772C-I.
45 *Shalala v Bowman* 1989 4 SA 900 (W) 905E-G (hereafter *Shalala v Bowman*).
46 *Fourie v Edkins*) para 13.
47 See para 2 above.
48 *Fourie v Edkins* para 15.

> The effect of … [section 20](1) is to confer the power or control (and not ownership) of the property on the master and subsequently the trustee and to dispossess or remove control of the property from the sheriff unless the court otherwise directs. This simply means any interested party (including the execution purchaser) may approach the court to direct otherwise. Logically the interested party must place facts before the court to persuade it to direct otherwise.[49]

Returning to the facts, Shongwe JA stated that Edkins should have based his application in the court *a quo*, for an order directing the transfer of the property into his name notwithstanding the supervening voluntary surrender of the insolvent estate, on section 20(1)(c) and not on section 5(1) of the *Insolvency Act*.[50] He found that Edkins failed to place facts before the court *a quo* to persuade it to direct *otherwise than to stay the sale in execution*.[51] Shongwe JA cited *Master of the Supreme Court v Nevsky*[52] where Innes CJ concluded that:

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49 *Fourie v Edkins* para 15. In this respect it is submitted that there is a difference between individuals, on the one hand, and companies, on the other, regarding the *effect* of insolvency/liquidation on the ownership of the property in question. S 339 of the *Companies Act* 61 of 1973, which applies by virtue of s9 of Schedule 5 to the *Companies Act* 71 of 2008, provides that "In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act" and s 361(1)of the *Companies Act* 61 of 1973 reads that "In any winding-up by the Court, all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office". Upon the liquidation of insolvent companies, dominium in the property of the company remains with the company. Only the custody and control passes to the Master until a provisional liquidator has been appointed and has assumed office. At the sequestration of an individual's estate, dominium of the debtor's property passes to the Master and ultimately settles upon the trustee of the insolvent estate. Here one must bear in mind that *Shalala v Bowman*, amongst other cases, was referred to by Shongwe JA in *Fourie v Edkins*. Although the facts of *Shalala v Bowman* and *Fourie v Edkins* are fairly similar, they relate to company liquidation and the sequestration of an individual respectively. This distinction is crucial in relation to the *effect* that liquidation/sequestration has on the property in the relevant estates. Also see Kelly 2000 *SA Merc LJ* 373, 374, 379. When considering the passing of dominium in the context of this discussion it is submitted that one must distinguish between the passing of dominium under circumstances of *solvency*, on the one hand, and the passing of dominium under *insolvent* circumstances on the other. If immovable property is sold in execution of a debt while the debtor's estate has not been sequestrated, the dominium remains in the debtor who can up to the last moment before the actual sale redeem his attached property (see *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 558-559). If the latter sale, however, runs its expected course, transfer of dominium occurs with delivery (transfer) pursuant to and in terms of the sale. But when insolvency intervenes (in respect of individuals' estates), dominium of all property that forms part of an insolvent estate passes to the Master (and ultimately, the trustee) at the moment of sequestration (see *De Villiers v Delta Cables* 15B-D).

50 *Fourie v Edkins* para 16.

51 Authors' emphasis.

52 *Master of the Supreme Court v Nevsky* 1907 TS 268.

> The determining considerations are that the proceeds are not likely to be sufficient to satisfy the two bonds, and that there is nobody likely to be benefited by holding over the sale.[53]

Shongwe JA then said that any interested party must show that it would be in the interests of the body of creditors (*concursus creditorum*) to direct otherwise than to stay the execution sale. The court explained that, in the present case, Edkins had bought the property for only R530 000, which was about half of the amount of the bond of R1 100 000 held by Absa Bank over the property. Further, Edkins had failed to place before the court *a quo* any valuation of the property and also had not declared if there were any other creditors of the insolvent estate. The court considered this to be detrimental to his case, bearing in mind that Edkins bore the onus of proof in this regard. However, Shongwe JA confirmed that in exceptional circumstances, and only if the interests of the other creditors of the estate would not be adversely affected, the court has the authority to order the sheriff to proceed with the sale and registration of the property in the name of the execution purchaser.[54]

With specific reference again to *Simpson v Klein*, Shongwe JA emphasised the principle that the ownership of attached immovable property does not pass during the sale in execution, but only upon the formal registration of transfer to a purchaser. He repeated that:

> The effect of the sequestration in terms of section 20(1)(a) is to divest the insolvent of his estate, not his ownership. Ownership remains with the insolvent debtor, but the control vests in the master.[55]

Shongwe JA said that the court *a quo* mentioned section 20(1)(c) but did not deal with the effects of the supervening sequestration, probably because the application in the court *a quo* had been couched in terms of section 5(1). He thought that this had unfortunately created the erroneous impression in the court *a quo* that the

53 *Fourie v Edkins* para 17 with reference to *Master of the Supreme Court v Nevsky* 1907 TS 268 269.

54 *Fourie v Edkins* para 17.

55 *Fourie v Edkins* para 18. See, however, n 49 above.

application turned solely on the provisions of section 5(1).[56] Shongwe JA agreed with the trustees' contention that the court *a quo* misdirected itself because it did not deal with the substitution of a *pignus judiciale* by a *concursus creditorum* and the consequent effect on the position of section 20(1)*(c)* of the *Insolvency Act*. He also agreed with the trustees' submission that the unreported judgment in *De Jager v Balju*, on which the court *a quo* had relied heavily, did not concern a supervening sequestration and was therefore distinguishable, and in fact irrelevant, in the circumstances.[57]

Shongwe JA stated:

> I therefore conclude that upon publication of a notice of surrender in terms of section 4(1) of the Act, the provisions of section 20(1)(c) and (2)(a) immediately come into operation. The effect thereof is that control of the insolvent estate vests in the master until a trustee has been appointed, and that thereafter the estate will vest in the trustee. Ownership, however, remains with the insolvent debtor. (See *Liquidators Union*, *Simpson*, *Shalala* etc, supra.)[58]

He confirmed that once a *concursus creditorum* has been established, nothing may be done by any creditor to alter the rights of the other creditors.[59] Then the rights of the general body of creditors have to be taken into consideration. In other words, no transaction can then be entered into with regard to estate matters by a single creditor to the prejudice of the general body of creditors. Finally, the court ruled that the *bona fides* of the creditors or execution purchaser are irrelevant, as are the *mala fides* of the insolvent debtor.[60]

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56 *Fourie v Edkins* para 18.

57 *Fourie v Edkins* para 19.

58 *Fourie v Edkins* para 20 with reference to cases cited in para 13 of the judgment, which are also mentioned above in para 3.3. All of these cases pre-dated the judgment in *De Villiers v Delta Cables*. See the further comments in this regard at para 4.4 below. It is also submitted that the first sentence of the passage quoted is incorrect in that it is upon the granting of a sequestration order that s 20 immediately comes into operation and not upon the publication of a notice of surrender. See comments at 3.4 below. Also see n 49 above.

59 See *Fourie v Edkins* para 20 with reference to *Walker v Syfret* 1911 AD 141 160 and *Taylor and Steyn v Koekemoer* 1982 1 SA 374 (T).

60 *Fourie v Edkins* para 20. It should be noted that this will not be the position where the publication of the notice of surrender is done merely to stifle the sale in execution. For example, in the recent decision in *Firstrand Bank Limited v Consumer Guardian Services* 2014 ZAWCHC 27 (4 March 2014) para 8 Binns-Ward J stated: "To use the notice procedure for a purpose for which it is not intended is to misrepresent the debtor's position to the legally interested third parties and, when there are pending sales in execution involved, to cause s 5(1) of the Act to

The court consequently upheld the appeal, finding in favour of the trustees.

3.4 Comments

It is submitted that the outcome of the *Edkins* matter is correct. However, in each of the *Edkins* judgments the court erred in respect of its conception of the status of the ownership of the property of an insolvent estate. As discussed above,[61] against a background of conflict between various judicial approaches and differing academic opinions,[62] the Appellate Division, in *De Villiers v Delta Cables*, a judgment reported in 1992, held that the ownership of the assets in the insolvent estate passes to the trustee upon his appointment. This statement of the position was accepted by the Constitutional Court in *Harksen v Lane*. However, surprisingly, this principle was not applied nor was there any reference whatsoever to *De Villiers v Delta Cables* in either of the *Edkins* judgments. The reasoning in each of these judgments may be subjected to criticism on this score.

For instance, in *Edkins v Registrar of Deeds,* Moshidi J considered,[63] *inter alia*, rule 46(13) of the Uniform Rules of Court, which provides as follows:

> (13) The sheriff … shall give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer, and anything so done by him shall be as valid and effectual as if he were the owner of the property.

It was argued on behalf of Edkins that rule 46(13) makes provision for two distinct transactions with regard to execution levied against immovable property, namely the sale of the property and its transfer.[64] The emphasis, the court stated, is on the word "shall", which suggests that it is peremptory for the sheriff to give transfer to the purchaser once the latter has complied with the conditions of sale.[65] In relation to

operate in circumstances in which it was clearly not intended to apply; in other words to act not only *contra legem*, but also *in fraudem legis*. The misrepresentation is clearly *mala fide* when it occurs in the context of a deliberate misuse of the statutory provisions."

61 See para 2 above.

62 See generally Evans *Assets of Insolvent Estates*; Evans 1996 *TSAR* 719; Evans 1998 *Stell LR* 359. Also see works and cases cited in para 2 above.

63 *Edkins v Registrar of Deeds* para 6.

64 *Edkins v Registrar of Deeds* para 8.

65 *Edkins v Registrar of Deeds* para 7.

this, the court also considered the judgment in *Simpson v Klein*,[66] but distinguished the case on the basis that Edkins had complied with all of his obligations under the sale agreement[67] whereas, in *Simpson v Klein* the applicant had paid a deposit, taken occupation, and had been paying monthly instalments. However, it is submitted that, on the strength of the rule established in *De Villiers v Delta Cables*, ownership of property passes to the trustee of the insolvent estate and the matter should have been put to rest there and then in favour of the trustees. Clearly Mthethwa's estate had been sequestrated, the immovable property had in terms of section 20 become part of the insolvent estate, and it was no longer correct or prudent for the court to apply or dissect any rules of court, or section 5 of the *Insolvency Act*, or to consider the *De Jager v Balju* judgment.

Moshidi J held that section 20 (and section 5) must be construed according to the plain meaning of their language unless this leads to some absurdity, inconsistency, hardship or anomaly. With this in mind, the court found that the legislature could not have intended to nullify a valid sale in execution which had occurred before an insolvent surrendered his estate in terms of section 4(1) of the *Insolvency Act*.[68] Moshidi J pointed out that there was no evidence that the estate of the insolvent had vested in the Master at the time of the sale in execution before the appointment of the trustees, and the applicant and the sheriff were not aware of the publication of the insolvent's notice to surrender his estate, which occurred after the sale in execution. It is submitted that, if the court had been aware of the precedent established in *De Villiers v Delta Cables*, it would have realised that the moment the sequestration order was granted the immovable property had, by virtue of section 20 of the *Insolvency Act*, vested in the Master and later in the trustee. Further, it would have been clear that *dominium* in the property had passed to the trustee.

In *Edkins v Registrar of Deeds*, the court viewed the insolvent's conduct as *mala fide*. This was on the basis that it could reasonably be accepted that the insolvent

66 *Edkins v Registrar of Deeds* para 8.
67 *Edkins v Registrar of Deeds* para 8.
68 *Edkins v Registrar of Deeds* para 14.

had known about the attachment and the imminent sale in execution and yet he waited until after the completion of the sale in execution before deciding and publishing the notice of intention to surrender his estate. However, it is submitted that the *mala fides* of the debtor has no effect on the status of the property once sequestration has intervened.[69] In this respect, the Supreme Court of Appeal's judgment in *Fourie v Edkins* was correct: it ruled that the *bona fides* of the creditors or execution purchaser are irrelevant, as are the *mala fides* of the insolvent debtor.[70]

Turning to a different criticism which may be levelled against the *Edkins* judgments, in the court *a quo* counsel for Edkins relied extensively on *De Jager v Balju*, the facts of which are similar to those in the *Edkins* matter in some ways only. The case of *De Jager v Balju* concerned an application by the trustees of a trust, Remi's Property Trust, for an interdict against the transfer of certain immovable property to an execution purchaser. In that case, after the sale in execution of the immovable property registered in the name of the trust, its trustees published in the *Government Gazette* and a relevant newspaper a notice to surrender the estate of the trust in terms of section 4(1) of the *Insolvency Act*. Their attorneys of record consequently addressed a letter to the sheriff informing him of the notice to surrender the estate and requesting him not to proceed with the registration of the transfer of the immovable property into the name of the execution purchaser.

The attorneys representing the respondent mortgagee bank had adopted the stance, which was conveyed to the sheriff, that the publication of the notice to surrender in terms of section 4(1) of the *Insolvency Act* only prohibited a sale in execution after the publication of the notice, and did not prohibit a transfer of property in which the sale in execution occurred prior to the publication of the notice to surrender. Hence application was made for the interdict. The court, per Van Zyl J,

69 *Edkins v Registrar of Deeds* para 14.

70 *Edkins v Registrar of Deeds* para 20. But see the comment in the recent decision in *Firstrand Bank Limited v Consumer Guardian Services (Pty) Ltd* 2014 ZAWCHC 27 (4 March 2014) in n 60 above.

dismissed the application. He made findings on several issues pertinent to the *Edkins* matter.[71]

With regard to the ownership of the immovable property and with reference to *Simpson v Klein*[72] in *De Jager v Balju*, Van Zyl J had ruled that although, *before* transfer, ownership vested in Remi's Property Trust, that did not *per se* confer any right or *prima facie* right on the trustees of Remi's Property Trust to prevent the transfer of the property. The reason for this was that the trustees of Remi's Property Trust had no authority ("seggenskap") over the property with regard to its sale in execution by public auction.[73] Based on this, in the *Edkins* matter counsel for Edkins argued that the insolvent's ownership of the immovable property - the property was still registered in his name - did not confer any right on him (ie, the insolvent Mthethwa). Consequently, so the argument went, whatever entitlement the insolvent had did not confer on the trustees of his insolvent estate any rights to deal with the immovable property.

However, on this point it is submitted that if the insolvent still owned the property it had to be regarded as part of the insolvent estate by virtue of section 20 of the *Insolvency Act* and the precedent established in *De Villiers v Delta Cables*. Furthermore, the court in *Edkins v Registrar of Deeds* failed to grasp the significance of the distinguishing fact that in *De Jager v Balju* the estate of the Remi's Property Trust had not yet been sequestrated but only the notice of surrender had been published. On the assumption that the reasoning in *De Jager v Balju* is correct, the publication of the notice of surrender caused section 5 of the *Insolvency Act* to be relevant and applicable. However, in the *Edkins* matter the debtor's estate had already been sequestrated and therefore section 20 had become immediately applicable and, in terms of section 20(2)(a), the immovable property in question, which was still *in the hands of the sheriff*, had become part of the insolvent estate and vested in the Master and thereafter the trustee. This significant distinction

71 *Edkins v Registrar of Deeds* para 15.4.
72 The reference was to *Simpson v Klein* 411B.
73 See *Edkins v Registrar of Deeds* para 15.5.

should have put an end to any further reference to the judgment in *De Jager v Balju,* and it is submitted that the result is that the ruling in *Edkins v Registrar of Deeds* was incorrect.

Turning to the judgment of the Supreme Court of Appeal in *Fourie v Edkins*, it is submitted that the outcome of the case is correct. However, as indicated above,[74] the appeal court erred in its ruling in respect of the passing of the ownership of property of an insolvent estate. First, Shongwe JA incorrectly stated that it is upon publication of a notice of surrender in terms of section 4(1) of the Act that the provisions of section 20(1)(c) and (2)(a) immediately come into operation.[75] It is submitted that, from the wording of section 20, clearly it is only upon the sequestration of a debtor's estate that its provisions apply to the situation. Another incorrect aspect is the statement that the effect of section 20(1) is "to confer the power or control (and not ownership) of the property on the master and subsequently the trustee".[76] Citing certain reported judgments, as mentioned above,[77] Shongwe JA stated that "ownership … remains with the insolvent debtor".[78] This, it is submitted, is also wrong.

Although the outcome in *Fourie v Edkins* is correct - the position is that the trustees were indeed entitled to prevent the transfer of the immovable property in question to Edkins - this statement of the position, without any reference to *De Villiers v Delta Cables*, and with reference only to judgments reported before *De Villiers v Delta Cables*, in which the Appellate Division resolved the issue regarding the passing of the ownership of the property of the insolvent estate to the trustee, is incorrect. The importance of applying precedent of this nature consistently and correctly, it is submitted, will be illustrated in the following discussion of the third recent judgment,

74 See para 3.2 above.

75 *Fourie v Edkins* para 20. The notice of surrender may be withdrawn, or the application may not be granted by the court. Also see also the reference to the *Firstrand Bank v Consumer Guardian Services* judgment in notes 62 and 72 above, where notices of surrender were published without the intention to surrender the debtor's estate. Under such circumstances neither the control nor the ownership of the property can pass to the Master or a trustee.

76 *Fourie v Edkins* paras 15, 20.

77 See *Fourie v Edkins* para 13. As pointed out above, all of these cases pre-dated the *De Villiers v Delta Cables* judgment.

78 *Fourie v Edkins* para 20. See n 49 above.

in which, it is submitted, the principles regarding the ownership of the property of an insolvent estate were incorrectly applied. This concerns the court's judgment in *Motala v Moller*[79] in respect of the status of the property of the solvent spouse.

4 *Motala v Moller*

4.1 The facts

In this case an insolvent debtor's wife, to whom he was married out of community of property, sold immovable property that was registered in her name, to a third party, Moller. The sale had been concluded between the issuing of the provisional order for the sequestration of her husband's estate and the final order.[80] The insolvent went by the name of Segal, while his wife entered into the transaction for the sale of her immovable property under her name of Stein. To finance the purchase price, a mortgage bond was registered for Moller in favour of Nedbank (Pty) Ltd ("Nedbank"). The trustees of the husband's insolvent estate sought an order declaring the transfer of the ownership of that property sold by the wife to be void. The trustees also contended that the solvent wife (Stein) remained the registered owner of the property she had sold and that the Registrar of Deeds should be directed to amend his records to reflect her, and not the third party purchaser, Moller, as the registered owner. They also argued that a consequence of the facts was that the bond that was registered in favour of Nedbank was void. The application was opposed by Moller, Stein and Nedbank.[81]

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79 *Motala v Moller* (GSJ) unreported case number 32654/11 (GSJ) of 11 September 2013. For a detailed discussion and comment on this judgment within the context of s 21 of the *Insolvency Act*, see Evans 2014 *THRHR*. Some of the observations in that article regarding the *Motala* judgment are also included in this contribution.

80 The provisional order was granted on 23 April 2008. The sale of the immovable property by Stein to Moller was concluded on 20 July 2008, and the final order was granted on 30 July 2008. See *Motala v Moller* paras 3.2, 3.5.

81 Stein and Nedbank did not raise separate arguments of their own, but "embraced" those put forward by Moller; see *Motala v Moller* para 10. Stein had, however, given notice of her intention to raise certain questions of law regarding *inter alia* her capacity to sell and/or transfer the property to Moller in the circumstances, and whether the sale or transfer fell automatically to be set aside or were void; see *Motala v Moller* para 7. Nedbank also brought a counter-application, in the event of the trustees' application being granted, for an order compelling Moller to pay the

An existing mortgage bond had been passed over the property by Stein in favour of a company (Rodel Financial Services (Pty) Ltd ("Rodel")). The trustees argued that this latter mortgage bond actually secured the debt of the insolvent.[82] When the property was transferred the purchase price was paid and the bond in favour of Rodel was cancelled.[83] The proceeds of the mortgage bond passed in favour of Nedbank were used to discharge the balance owing on the Rodel mortgage bond.[84]

4.2 The arguments

The trustees contended that the effect of section 21(1) of the Act was to divest Stein of her capacity to deal with the property or to grant real rights in it, so Moller had not acquired any right or title to the property and the registration of the mortgage bond had been void. The trustees based their argument on the decisions in two cases:[85] *De Villiers v Delta Cables*, which the trustees contended disposed of the matter, and *Gainsford v Tiffski Property Investments (Pty) Ltd*.[86]

On the other hand, Moller contended that he was *bona fide*, being unaware of the sequestration of Stein's husband's estate, and further that the insolvent estate had not been impoverished by the disputed transaction. It was argued on his behalf that the trustees were estopped from asserting their rights of ownership as they had not registered the required *caveat* against the title deed of the property.[87] The argument was also made that the effect of section 21(1) results in the transfer of the property

full balance owing in terms of the mortgage bond registered in its favour; see *Motala v Moller* para 5.

82 The trustees argued that Stein actually held the property for the insolvent as nominee, but the court did not make a decision regarding the latter allegation as "nothing turn[ed]… on this". See *Motala v Moller* para 3.4 n 2.

83 *Motala v Moller* paras 3.6, 3.7.

84 The sale price of R2 550 000 was considered the fair market value of the property. The balance owing on the Rodel bond was R2 820 000; see *Motala v Moller* paras 3.5, 3.8, 3.9.

85 *Motala v Moller* para 8.

86 *Gainsford v Tiffski Property Investments (Pty) Ltd* 2012 3 SA 35 (SCA) (hereafter *Gainsford v Tiffski*). See *Gainsford v Tiffski* Order paras 1, 2 where the Supreme Court of Appeal declared a transfer of immovable property void and ordered the Registrar of Deeds to amend the record reflecting title and to cancel the record of a mortgage bond registered against the property.

87 See *Motala v Moller* para 9.1. S 18B(1) of the *Insolvency Act* provides for the trustee to have such a *caveat* registered.

being "voidable", not "void".[88] Moller further argued that section 25(4) of the *Insolvency Act* denied them the relief applied for.[89]

4.3 The judgment

The court, per Myburgh AJ, stated that *De Villiers v Delta Cables* could be distinguished on the basis that the facts were quite different and that estoppel was neither considered nor relevant. It also stated that because *De Villiers v Delta Cables* had been decided prior to the enactment of section 25(4) of the *Insolvency Act*, the effect of section 25(4) in relation to section 21(1) of the Act was not considered.[90] Myburgh AJ also regarded *Gainsford v Tiffski* as not being applicable because it concerned recovery by company liquidators of company assets which had been transferred less than six months prior to the liquidation of the company otherwise than in the ordinary course of business, without the transfer having been advertised, and which turned on the meaning to be attributed to section 34(1) of the *Insolvency Act*.[91]

But the trustees' argument that the effect of section 21(1) of the Act "is to divest the spouse of an insolvent of the capacity to deal with her property" was ruled against by Myburgh AJ as follows:[92]

> As I have indicated, the central thread of the Applicants' case was that the effect of S 21 (1) of the Act is to divest the spouse of an insolvent of the capacity to deal with her property. That being so, so the argument went, there was nothing else to consider - *caedit quaestio.* Again, I do not agree. On the contrary, it is well settled that notwithstanding the clear language of S 21(1), (viz.

88 Moller argued that even if the sale were void, the applicants would be entitled to receive only what the seller, Stein, had parted with, which was the immovable property over which a third party held a bond as security for repayment of an outstanding sum, in terms of a loan agreement, which exceeded the fair market value of the property. See *Motala v Moller* paras 6, 9.2, 9.3, 9.4.

89 See *Motala v Moller* para 9.5. S 25(4) of the *Insolvency Act* is set out in n 99 below.

90 *Motala v Moller* para 12.

91 *Motala v Moller* para 13. Myburgh AJ also distinguished *Gainsford v Tiffski* on the basis that, in that case, it appeared to be common cause that the purchaser and the financing bank were aware that the transfer was being effected other than in the ordinary course of the company's business and that the sale had not been advertised and that they had not acted *bona fide* in concluding the transaction. See *Motala v Moller* para 14, with reference to *Gainsford v Tiffski* paras 40, 41.

92 *Motala v Moller* paras 15-16.

> *'to vest in'*), there is nothing in law which prohibits the spouse of an insolvent from dealing with her property, and also that any alienation by her will be valid unless and until the insolvent's trustee successfully assails it. If the trustee does not do that, then the transfer will remain valid with the result that the original defect in the transaction is, in effect, made good. The position is analogous with, if not identical to, that which pertains to transfers of assets in the circumstances described in … [s]ections 23(2) and 34(1) of the Act.
>
> In terms of S 34(1) of the Act, an affected transfer *'shall be void as against (the insolvent's) creditors for a period of six months after such transfer, and shall be void as against the trustee of his estate, if his estate is sequestrated at any time within the said period'.* This does not however connote invalidity in the ordinary sense.

Myburgh AJ noted that, with dispositions which may be set aside under sections 26, 29, 30 and 31, and when the assets of a trader are transferred as envisaged by section 34(1) of the *Insolvency Act*, the trustee is not compelled to have them set aside. If he does not apply to set the disposition aside, it remains in force.[93] He adopted the approach that these principles applied also to the transaction between Stein and Moller.[94] Myburgh AJ concluded that such transactions are "provisionally valid" or "voidable" rather than "void".[95]

Myburgh AJ apparently considered that there may be merit in an argument based on estoppel.[96] However, in the absence of estoppel having been expressly pleaded and of an allegation and proof of a representation negligently made, as opposed to facts which were merely "strongly suggestive of negligence" on the part of the trustees "in not causing a *caveat* to be registered against the property", it was held that the defence of estoppel could not succeed.[97]

In respect of section 25(4) of the *Insolvency Act* the court held that section 21(1) "does not simply vest the spouse's assets in the trustee of the insolvent, but does so

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93 *Motala v Moller* para 16. The judge relied on *dicta* in the judgment in *Galaxy Melodies (Pty) Ltd v Dally* 1975 4 SA 736 (A) 743B, a case which concerned s 34(1) of the *Insolvency Act.*

94 *Motala v Moller* para 17.

95 *Motala v Moller* para 17.

96 Myburgh AJ found significant similarities between the facts before the court and those in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 2011 2 SA 508 (SCA). This was especially because "the representation relied on consisted of the failure of the true owner to take steps to ensure that the records of the Registrar of Deeds reflected it as the owner of the property in question when it had reason to believe that the records might have reflected someone other than the owner". See *Motala v Moller* para 20.

97 *Motala v Moller* para 23.

'*as if it were the property of the sequestrated estate*.'" And "[i]t follows that the rights, powers and obligations of the trustee in respect of the spouse's property are (leaving aside the statutory provisos and exceptions) the same as those which apply in respect of the insolvent estate".[98] So Myburgh AJ held that this transaction between Stein and Moller fell within the provisions of section 25(4) of the *Insolvency Act*,[99] which "deals specifically with the rights of trustees relative to disposals of immovable property". Consequently, the trustees would have to resort to section 25(4) for a remedy, but on the facts in this judgment, could not succeed therein,[100] so their application before Myburgh AJ failed.

Myburgh AJ held that section 25(4):

> [W]as enacted precisely in order to deal with the potentially inequitable consequences which could follow from orders declaring transfers to have been void *ab initio* without addressing the circumstances in which such transfers took place, or the benefits which the insolvent or his estate may have derived from or as a result of such transfer[101]

and that section 25(4) was born by way of a 1993 amendment to the *Insolvency Act* against the background of the decision in *De Villiers v Delta Cables*. He found the aforementioned interpretation consistent with:

> ... the scheme and purpose of the Act, which is, in general, to preserve the estate for the benefit of the insolvent's creditors and, in appropriate circumstances, to enable the trustee to recover assets which were disposed of in a manner which adversely affected the estate and hence the interests of the creditors. Thus, subsection (c) limits the trustee's right of recourse against

98 *Motala v Moller* para 24.

99 *Motala v Moller* para 25. Section 25(4) provides: "If a person who is or was insolvent unlawfully disposes of immovable property or a right to immovable property which forms part of his insolvent estate, the trustee may, notwithstanding the provisions of subsection (3), recover the value of the property or right so disposed of – (a) from the insolvent or former insolvent; (b) from any person who, knowing such property or right to be part of the insolvent estate, acquired such property or right from the insolvent or former insolvent; or (c) from any person who acquired such property or right from the insolvent or former insolvent without giving sufficient value in return, in which case the amount so recovered shall be the difference between the value of the property or right and the value given in return".

100 *Motala v Moller* paras 26-33. The court held that subsection 25(4)(a) was clearly not applicable in the circumstances, and that the trustees were precluded from obtaining relief under s 25(4)(b) or (c) because the purchaser Moller was ignorant of the sequestration of the estate of Stein's husband and had paid a fair market value for the property.

101 *Motala v Moller* para 30.

> an innocent purchaser *I* transferee to the difference between the value of the property or right and any value given in return.[102]

Myburgh AJ explained that, while section 21(1) of the *Insolvency Act* "determines whether or not a transaction or transfer may potentially be set aside, a trustee has, in relation to transfers of real rights in immovable property, to frame his case in accordance with … [section] 25(4)" and must therefore make and prove the allegations required by that subsection, which is not "simply … an additional optional remedy".[103]

In the result, the court dismissed the trustees' application with costs.[104]

4.4 Comments

A number of comments may be made in relation to and criticisms levelled at the judgment in *Motala v Moller*. First, it is submitted that, contrary to Myburgh AJ's view that the facts in *Motala v Moller* and in *De Villiers v Delta Cables* were different, comparing the factual circumstances in each case reveals remarkable similarities. It is submitted that the court should have applied section 21(1) of the *Insolvency Act* in line with the precedent established by the Appellate Division in *De Villiers v Delta Cables* and endorsed by the Constitutional Court for the purposes of its judgment in *Harksen v Lane*. The effect is that, upon the provisional sequestration order being granted, *dominium* in the property of Stein, the solvent spouse, vested in the trustees.

It is further submitted that the court in *Motala v Moller* incorrectly compared the position where a solvent spouse has disposed of property which vested in the trustees by virtue of section 21(1) with the position in circumstances regulated by section 23(2) or by sections 26, 29, 30 or 31 or by section 34(1) of the *Insolvency Act*. In each situation the wording of the section is different, and one should not simply apply analogies and ignore the plain meaning of the words contained in the provision. The setting aside of dispositions in terms of sections 26, 29, 30 or 31, or

102 *Motala v Moller* para 31.
103 *Motala v Moller* para 33.
104 *Motala v Moller* para 35.

sequestration rendering the transfer of assets void in terms of section 34, occurs only in respect of dispositions and transfers made (directly or indirectly) by the insolvent himself.[105] Clearly these provisions do not apply to dispositions made or the transfer of assets by a solvent spouse of property which belonged to him or her prior to the sequestration of the estate of the insolvent spouse. Also as far as section 23(2) is concerned, clearly this provision applies only in respect of transactions entered into *after* sequestration by the insolvent him- or herself.

In similar vein, section 25(4) explicitly applies where an insolvent himself has disposed of immovable property. It is submitted that the wording of the subsection cannot justify an interpretation or inference to apply it to dispositions of immovable property by solvent spouses.

As the Appellate Division emphasised in *De Villiers v Delta Cables*, "[it is important to bear in mind that the sequestration of the estate of an insolvent does not bring about the sequestration of his or her spouse's estate".[106] This statement is particularly relevant in the context of the judgment in *Motala v Moller*: Although Myburgh AJ might have been correct in stating that "[i]t follows that the rights, powers and obligations of the trustee in respect of the spouse's property are (leaving aside the statutory provisos and exceptions) the same as those which apply in respect of the insolvent estate"[107] in respect of the *property* of the spouse, it is submitted that the same line of thinking cannot apply to the *person* of the spouse. In other words, the solvent spouse cannot be considered an insolvent for the purpose of subjecting him or her to the provisions of section 25 of the *Insolvency Act*.

Ultimately, if *De Villiers v Delta Cables* had been applied, the transaction would have been void, as would have been the registration of the mortgage bond. There would have been nothing to set aside. Only if Stein had been able to discharge the onus to

105 Meaning that in respect of s 21 and relating to the facts in *Motala v Moller*, the third party is in no way connected to the sequestration proceedings of the insolvent spouse.

106 *De Villiers v Delta Cables* 14F-G.

107 *Motala v Moller* para 24.

obtain the release of the property in terms of either section 21(2) or section 21(4), would the transaction have been able to proceed, as she would have been entitled freely to dispose of released assets.[108] And this would have had nothing to do with the insolvent estate.

This judgment illustrates the practical implications that can result from the attempt to unravel complicated insolvency legislation when combined with complicated facts, particularly section 21 of the Act, which has from its inception been shrouded in uncertainty in a myriad of different circumstances and case-law. One is tempted to speculate that the outcome of this judgment rested to an extent on fairness instead of pure jurisprudence.

5 Conclusion

From the discussion in this essay it follows that the status of property that forms part of an insolvent estate or which belongs to the solvent spouse at the time of sequestration is of considerable importance not only for all parties to a sequestration's proceeding, but also to third parties who have nothing to do with it, and worse, may not even be aware of being ensnared by the provisions of the *Insolvency Act* until it is too late.

It has also been shown that the proprietary status of property forming part of an insolvent estate and its vesting in the Master of the high court and in the trustee, upon the latter's appointment, have been and remain a fountain of debate and conflicting court judgments.[109] The judgments considered in this discussion are evidence of the importance of this subject in practice, and clarity is required particularly for third parties who enter into transactions with insolvent persons and/or their spouses. The outcome of all these judgments also confirms its significance, not only in relation to the trustee's election to litigate for the insolvent

108 *De Villiers v Delta Cables* 14I.

109 See Joubert 1992 *TSAR* 699; Evans 1996 *TSAR* 719; Stander 1996 *THRHR* 388; Evans 1996 *THRHR* 613, Evans 1997 *THRHR* 71; Evans 1998 *Stell LR* 359; Evans *Assets of Insolvent Estates*; Bertelsmann *et al Mars The Law of Insolvency* 212 n 50. Also see *Stand 382 Saxonwold CC v Kruger* 1990 4 SA 317 (T) and *Harksen v Lane*.

estate, but also regarding an election to proceed with or to repudiate executory contracts.[110] Each judgment held consequences for the advantage to creditors in the sense that it either enlarged or depleted the insolvent estate in question, while in *De Villiers v Delta Cables* it affected a creditor's ranking.

It is submitted that the effect of sequestration on the property of the insolvent and on that of the solvent spouse was not correctly or adequately considered in the cases discussed. In the *Edkins* judgments the courts erred in their conception of the effect of the vesting provisions contained in the *Insolvency Act* and the passing of ownership to the trustee of the insolvent estate. This is especially apparent in the Supreme Court of Appeal's judgment in *Fourie v Edkins*, which leaves the impression that the court is unaware of its own precedent established in *De Villiers v Delta Cables* and accepted and applied by the Constitutional Court in *Harksen v Lane*. Further, it is submitted that failure, in *Motala v Moller*, to analyse the impact that section 21 has on the property of the solvent spouse resulted in an incorrect analysis and application of the *De Villiers v Delta Cables* and, consequently, an incorrect interpretation of section 25(4) and its inter-play with section 21 of the *Insolvency Act*. One is tempted to observe that the latter judgment was based purely on reasons of equity.

Be that as it may, these judgments have re-opened the question concerning the status of property in insolvent estates, particularly in view of the fact that the Supreme Court of Appeal in *Fourie v Edkins* ignored its own precedent on this issue. *Motala v Moller* has also left unanswered questions in respect of the functioning of section 21 of the *Insolvency Act*. It will be interesting to follow developments if this decision is taken on appeal.

[110] These are contracts which the insolvent or the solvent spouse, as the case may be, had entered into prior to sequestration, but the performance in terms of which had not been completely carried out at the time of sequestration.

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LIST OF ABBREVIATIONS

SALRC	South African Law Reform Commission
SA Merc LJ	South African Mercantile Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

PROPERTY IN INSOLVENT ESTATES – *EDKINS v REGISTRAR OF DEEDS*, *FOURIE v EDKINS*, AND *MOTALA v MOLLER*

RG Evans* **and L Steyn****

SUMMARY

The question of the ownership of property which vests (by virtue of sections 20(1) and 21(1) respectively of the *Insolvency Act* 24 of 1936) in the Master and, upon appointment, in the trustee of the insolvent estate, has been the source of academic debate and conflicting court judgments over a lengthy period. It was thought that the question had been finally settled by the (then) Appellate Division in *De Villiers v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A), which concerned property belonging to the solvent spouse (as defined in section 21(13)), where it was held that ownership passes to the Master and subsequently the trustee. This was accepted by the Constitutional Court for the purposes of its judgment in *Harksen v Lane* 1998 1 SA 300 (CC). However, recent judgments, in *Edkins v Registrar of Deeds, Johannesburg* 2012 6 SA 278 (GSJ) and, on appeal, *Fourie v Edkins* 2013 6 SA 576 (SCA), have seemingly again opened up the question for debate, particularly in view of the fact that the Supreme Court of Appeal in *Fourie v Edkins* ignored its own precedent on this issue. These two judgments concerned property registered in the name of the insolvent. In a third recent judgment, in *Motala v Moller* (GSJ) unreported case number 32654/11 (GSJ) of 11 September 2013 (copy on file with authors) concerning property which had belonged to the solvent spouse at the time of the sequestration of the estate of her husband, the court regarded section 25(4) of the *Insolvency Act* as countering the precedent established by *De Villiers v Delta Cables*. In this article, each of these three judgments is analysed and criticised.

KEYWORDS: Ownership of assets of insolvent estate; solvent spouse; section 21 *Insolvency Act* 24 of 1936; section 25 *Insolvency Act* 24 of 1936.

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