REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2013/37016

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

______________________ ______________________

DATE SIGNATURE

In the matter between:

MEYEROWITZ: MICHELLE LINDA	Applicant
And	
MATHOLE SEROFO MOTSHEKA N.O.	First Respondent
MOSES PETER SILINDA N.O.	Second Respondent
SECHABA TRUST (PTY) LTD	Third Respondent
FIRSTRAND BANK LIMITED	Fourth Respondent

JUDGMENT

NOCHUMSOHN AJ

1. This is an application brought in terms of Section 21(4) of the Insolvency Act, Act No. 24 of 1936, ("the Insolvency Act"), for the release from the operation

of her husband's insolvent estate to the applicant of her immovable property, comprising Erf 103 Silvamonte Extension 1 Township, in extent 1019 square metres, held by the applicant under Deed of Transfer T065746/2005, registered in her name by the Registrar of Deeds, at Johannesburg upon 14 November 2005 ("the property").

2. The relief was initially brought against the first respondent, Surmany A I and RMG Trust CC, in their capacities as the joint provisional trustees in the insolvent estate of one Lesley Meyerowitz ("the insolvent"), who is the husband of the applicant and who was provisionally sequestrated by order of this court upon 22 March 2013, and finally sequestrated by order of this court on 14 May 2013.

3. In terms of a Notice delivered in terms of Rule 15 upon 27 October 2014, at the hearing, the aforesaid provisional trustees, were substituted with **Mathole Serofo Motsheka N.O., Moses Peter Silinda N.O.** and **Sechaba Trust (Pty) Ltd,** in their respective capacities as the final trustees. There were no objections to this substitution and accordingly the respondents are

now the said Motsheko N.O., Silinda N.O. and Sechaba Trust (Pty) Ltd, in their respective capacities as the first, second and third respondents and FirstRand Bank Ltd, who up until now was the third respondent, now becomes the fourth respondent. I will accordingly refer to FirstRand Bank Ltd, who up until this time, was the third respondent, as the fourth respondent throughout the remainder of this judgment.

4. The fourth respondent, FirstRand Bank Limited, is the bondholder over the property. The fourth respondent had launched a prior application through this division under Case Number 25450/2013, for foreclosure proceedings.

5. In the alternative, and only if the court is unwilling to grant the main relief, the applicant sought to interdict the first to third respondents from alienating the property, pending a referral of the application to oral evidence. The relief sought by the applicant against the fourth respondent, is for the holding over of the foreclosure proceedings initiated by it, pending the finalisation of this application. As Mr Hollander for first to third respondents pointed out, a court cannot *mero motu* refer a matter to oral evidence. Ms Gordon for the

applicant thereupon made an election to cling to the main relief sought and the parties were all *ad idem* that the matter could be properly determined on motion proceedings.

6. The applicant and the insolvent are married to one another, out of community of property, and have been so married since 1990.

7. Prior to the applicant having acquired transfer of the property, the same had been held by her mother since 1964, under Deed of Transfer T569/1964.

8. At a time after the filing of:

   8.1. the first respondent's Answering Affidavit,

   8.2. the applicant's Replying Affidavit; and

   8.3. the first respondent's Heads of Argument;

the fourth respondent served and filed an Answering Affidavit, which in its words, was not strictly an Answering Affidavit but rather an Affidavit in which it supports the applicant's claim that the property be released in terms of Section 21(4) of the Act. Mr Meintjies for the fourth respondent presented the fourth respondent in court upon the basis of it being a friend of the court, without it seeking costs against the remaining litigants.

9. From all the papers filed of record, including the papers relating to the Application for the Sequestration of the insolvent, which were annexed to the Founding Affidavit, it would appear that the only asset unearthed at this point, which is of any significance, is the property.

10. The fourth respondent, *qua* bondholder, has a real interest over such asset, given that:

10.1. foreclosure proceedings have been initiated in this court;

10.2. were the property to form part of the insolvent estate, the fourth respondent would enjoy full preferential rights to the proceeds of the sale, after the costs of administration, subject to the maximum amount secured under its bond;

10.3. conversely, were the property not to form part of the insolvent estate, the fourth respondent would remain secured to the maximum value of its mortgage bond.

11. Given the fourth respondent's material interest in the property, it is incumbent upon me to take its stance carefully into account, in determining whether or not the applicant is entitled to the relief sought.

12. The aforesaid "*Answering Affidavit*" of the fourth respondent, is most helpful and sets out a very detailed analysis and synopsis of material facts and circumstances relating to the matter. I would have thought that the contents of the fourth respondent's affidavit would have materially altered the approach of the first to third respondents. As Mr Hollander attacked such affidavit in his argument, it is necessary for me to set out in detail, all of the submissions made in such affidavit. Such long and detailed submissions by fourth respondent, comprise the following:

    12.1. The purpose of the Affidavit is to ensure that the court is possessed of all facts surrounding the acquisition of the immovable property so as to avoid a grave travesty of justice to the applicant;

12.2. As a result the fourth respondent does not seek any costs order against any of the parties, as its involvement is exclusively based on its vested interest by virtue of its mortgage bond, which it says could be prejudicially affected by an order of court refusing the applicant's relief;

12.3. Having read all of the papers filed of record, the fourth respondent avers this Affidavit is filed in order to place all the relevant and material facts before the court;

12.4. The fourth respondent sets out the following chronology of events:

12.4.1. In 1964, the applicant's mother became the owner of the property;

12.4.2. In 1965, the applicant's parents executed a joint Will which provided that should either of them pass away, the entire estate of the deceased would devolve upon the surviving spouse and in the event of them both passing away, then the entire estate would pass to their children, being the applicant and her sister;

12.4.3. During 1995, the applicant's mother, passed a mortgage bond over the property in favour of Absa Bank, being Bond No. B4108/1995, securing a loan of some R160 000.00;

12.4.4. The property constituted the applicant and her sister's family home where they grew up;

12.4.5. In 2005, the applicant's mother was no longer able to maintain the property, neither was she able to maintain the monthly bond instalments to Absa Bank, who were owed at the time the balance of some R140 217.59, in order to cancel the Absa bond. Thus since the inception of the loan, the applicant's mother was merely able to reduce the capital by the sum of R19 782.41;

12.4.6. The entire family stood together in a time of crisis and elected that the applicant would purchase the property from her mother for a purchase price of R850 000.00, which was then market related. This was done in order to avoid foreclosure against the property by Absa Bank;

12.4.7. The initial idea was that the applicant and the insolvent and their children would move into the property, together with the applicant's parents and grandmother, for which purpose they would build a cottage upon the property for the applicant's parents and grandmother. For this purpose, the funds raised in order to purchase the property would be acquired by way of mortgage loan finance, part of which would be used for the renovation of the property and to construct such cottage;

12.4.8. At the time, the insolvent was desirous of being a party to this plan. Thus a Deed of Sale dated 5 August 2007 described the offerors as both the applicant and the insolvent. The purchase price embodied therein was R850 000.00 conditional upon loan finance of R850 000.00 being obtained. The price was market related;

12.4.9. The applicant's parents and grandmother did not wish to continue with the sale on the basis that the insolvent would be part thereof, as it was their desire, as evidenced by the mutual Will that the property was ultimately to be awarded to the applicant and her sister. The parents did not want the property to be registered in the insolvent's name and should be free from the insolvent's estate in the event of his insolvency and free from any accrual in the event of termination of the marriage subsisting between the insolvent and the applicant;

12.4.10. The insolvent acquiesced and accepted that he would not become an owner of the property;

12.4.11. With the result, the intention of the mother was to transfer ownership of the property to the applicant with a corresponding intention of the applicant to become the sole owner thereof;

12.4.12. The applicant had no knowledge of renovations and therefore asked the insolvent to attend to the construction of the cottage for her parents. A quotation was provided by Cetalia Projects on 5 September 2005 to the insolvent and he signed same on 7 September 2005. From this quotation, the amount payable for the renovation came to R650 000.00;

12.4.13. The construction of the cottage would commence on 12 September 2005 and be completed upon 30 April 2006;

12.4.14. On 16 September 2005 the insolvent paid R50 000.00 to Cetalia Projects by way of cheque;

12.4.15. During August or September 2005, the applicant applied for loan finance from the fourth respondent, who granted to the applicant, a loan, by virtue of her application per the grant of loan letter annexed to the Founding Affidavit as annexure **"FA10"**;

12.4.16. The fourth respondent granted a loan of R850 000.00 to the applicant against the security of a first mortgage bond. In addition, it was required that a suretyship be obtained from the insolvent;

12.4.17. Subsequent to the grant of the loan, the insolvent made two further payments to Cetalia Projects, respectively on the 8 and 18 October 2005, in cash, of R25 000.00

and R20 000.00. These payments were towards the construction of the cottage;

12.4.18. The property was transferred from the applicant's mother to the applicant on 14 November 2005, as more fully appears from the title deed annexed to the Founding Affidavit as annexure **"FA11"** and, simultaneously with such transfer, the mortgage bond in favour of Absa was cancelled, against payment of R140 217.59, and, a first mortgage bond was registered over the property in favour of the fourth respondent for R850 000.00 under Mortgage Bond No. B89191/2005;

12.4.19. The loan finance to the applicant was granted on the basis of her credit standing and her application and as security it was required that a first mortgage bond be registered over the property. Purely as additional security, the insolvent signed a Suretyship, as was the customary and usual practice of the fourth respondent;

12.4.20. As is apparent from annexure **"FA12"** to the Founding Affidavit, being the document from Cuzen Randeree in their capacity as the transferring attorney, the loan funds from the first mortgage bond of R850 000.00 were applied in the following manner:

12.4.20.1. R140 217.59 was utilised to pay Absa in order to cancel their bond;

12.4.20.2. The applicant could not finance the attorney's costs and therefore same was financed by her mother in the form of a loan of R21 136.40;

12.4.20.3. R300 000.00 was paid directly to the insolvent, on the instructions of the applicant's mother.

12.4.21. The payment of R300 000.00 was made directly to the insolvent as the insolvent had already expended R95 000.00 on behalf of the applicant from his own funds, for the construction of the cottage;

12.4.22. The insolvent was reimbursed and the remainder of the funds of R205 000.00 was utilised by the insolvent in order to fund the continued construction of the cottage;

12.4.23. In terms of the initial quote, an initial payment of R200 000.00 had to be made and two interim progress payments also had to be made of R200 000.00. R300 000.00 was then utilised to pay for the renovations and the construction of the cottage, the total of which amounted to R650 000.00, leaving a balance still required in the sum of R350 000.00 in order to finalise the construction;

12.4.24. The loan advanced by the fourth respondent was administered in the fourth respondent's books and records under account 3 000 009 972 972. The monthly bond instalment payable by the applicant by debit order and the credits originated from an account held by the insolvent with the fourth respondent, being account number 54232401057. The applicant did not have her own savings account with the fourth respondent and consequently deposited her salary into the insolvent's account number 54232401057;

12.4.25. The debit orders were presented to account number 54232401057 and honoured upon presentation as a result whereof account 54232401057 would be debited and a corresponding credit entry would be made in the home loan account administered under account number 3 000 009 972 972;

12.4.26. Applicant applied in January 2006 for a further loan to be advanced in the sum of R250 000.00 and pursuant thereto a second loan agreement between the applicant and fourth respondent was entered into on 12 January 2006**.** The terms of such agreement were verbatim to that in respect of the first Grant of Loan letter, with the difference being that the loan sum would be the amount of R250 000.00. The second mortgage bond was to be registered and the monthly instalment relative thereto would be R2 260.72. The loan was granted, the R250 000.00 was advanced, making the collective loan sum the amount of R1 100 000.00 to the applicant, which loans were consolidated and still administered under account number 3 000 009 972 972. Against this loan a second mortgage bond was registered on 8 February 2006 under Bond No. B9187/06.

12.4.27. These funds were then utilised by the applicant in order to pay Cetalia Projects;

12.4.28. However, a further R100 000.00 was needed for the construction to be completed;

12.4.29. Again, the applicant approached the fourth respondent for a further loan of R100 000.00 against the security of a third mortgage bond to be registered over the property, which loan was approved on 21 February 2006;

12.4.30. The third Grant of Loan letter was entered into on 6 March 2006, again on verbatim terms, with the difference that the third loan was R100 000.00, which was advanced against the security of a third mortgage bond, with a monthly instalment of R907.02. The third loan of R100 000.00 was also consolidated with the two previous loans and is still administered under account number 3 000 009 972 972;

12.4.31. Ultimately, the fourth respondent advanced funds totalling R1 200 000.00;

12.4.32. A third mortgage bond in favour of the fourth respondent was registered on 5 April 2006 under Bond B25845/2006 to secure the sum of R100 000.00;

12.4.33. The further loan advances of R250 000.00 and R100 000.00 respectively were made upon the strength of separate applications made by the applicant to the fourth respondent, who considered same upon the strength of the applicant's credit record. The fourth respondent took into account the fact that the market value of the property had, with each advance increased due to renovations and that the ultimate value would be sufficient to provide real security in the sum of

R1 200 000.00. In addition, by virtue of the fact that an unlimited Suretyship was already held, it was decided that such advances be made to the applicant;

12.4.34. The applicant's salary was paid into the insolvent's account and debits were originated therefrom by virtue of such debit orders. Such debit orders were continuously honoured;

12.4.35. Only two years thereafter did the applicant and the insolvent decide to consolidate their banking accounts and financial indebtedness owing to the fourth respondent, who offered a facility known as a "*FNB One Account Facility";*

12.4.36. During July 2007 the applicant applied for the One Account Facility with the fourth respondent. In terms of same, applicant and the insolvent sought that the applicant's home loan indebtedness under account

3 000 009 972 972 and the insolvent's overdraft Facility under account 54232401057 be consolidated into one account, whereby the applicant alone would be liable and the insolvent would stand surety;

12.4.37. At that stage, the insolvent owed R72 508.77 to the fourth respondent under account 54232401057. The applicant herself owed R1 171 470.93 to the fourth respondent in respect of the home loan indebtedness under account number 3 000 009 972 972, secured by the three mortgage bonds;

12.4.38. The applicant herself took over the insolvent's indebtedness, including her own indebtedness, in the form of a single account;

12.4.39. The account to be utilised for this purpose was already an account in the name of the insolvent which was utilised by them in the form of depositing their salaries into the account and then paying their usual and necessary expenses therefrom;

12.4.40. Same was utilised to pay monthly bond instalments. Furthermore, such account was already utilised by the insolvent for his business purposes in the form of receiving payments from clients and to make corporate payments;

12.4.41. In order to avoid the logistical nightmares, occasioned from the cancellation of debit orders and thereby creating a new account with a new account number, it was decided that the One Account Facility would still be administered under account number 54232401057, which would then be the account of the applicant;

12.4.42. The account would however still remain in the name of the insolvent. Consequently on 23 August 2007, the applicant and fourth respondent entered into a written agreement entitled FNB One Account Transaction and Facility Agreement. For this purpose it was required that the three existing bonds be cancelled and a new mortgage bond be registered over the property;

12.4.43. The applicant took over her own home loan indebtedness, including the insolvent's indebtedness and the facility would significantly reduce bank charges and other costs, making perfect commercial sense;

12.4.44. On 24 October 2007 the three prior mortgage bonds were cancelled, against the simultaneous registration of a fresh mortgage bond in favour of the fourth respondent, passed by the applicant, under Bond No. B86897/07, securing the sum of R1 980 000.00.

12.4.45. On 6 September 2007 the fourth respondent and applicant gave expression to the One Account Application by crediting the previous Home Loan

Mortgage Bond indebtedness under Account No. 3 000 009 972 972 with the sum of R1 171 470.93 and a corresponding debit was passed in the same sum in respect of the one account;

12.4.46. The result was that the applicant's previous home loan indebtedness under account 3 000 009 972 972 was discharged and a corresponding indebtedness created in the One Account;

12.4.47. The ultimate indebtedness owing by the applicant to the fourth respondent by virtue of the One Account Facility amounted to R1 243 636.77 as at 6 September 2007;

12.4.48. Because applicant and the insolvent previously utilised the One Account in which they pooled their income and resources the effect was that such position still continued, but at this stage the account was that of the applicant, only in the name of the fourth respondent. Resultantly, the applicant continued to pay her salary into the one account, which was then her account;

12.4.49. The insolvent continued to receive deposits into the account as was done previously, which was utilised for monthly expenses and liabilities and to discharge the home loan indebtedness;

12.4.50. Annexure **"JDL10"** comprises copies of account statements administered under account number 54232401057 for the period 20 August 2007 until 7 October 2013. Such statements reveal that prior to the One Account Facility being entered into, the applicant paid the monthly instalments by way of debit order which was originated from the One Account as appears from the entry 3 September 2007. Within the duration of the One Account Facility from September

2007 until 13 December 2012, the applicant's salary was deposited into the account, starting from R6 000.00, usually against the entry "*Salary Elderberry",* which increased throughout the years and by virtue of cheque deposits representing the insolvent's salary of R25 000.00. Various credits appear which usually range between R3 000.00 to R5 000.00, paid into the account by way of cheque, which it is suspected relate to rental paid by the parents and grandmother, in cash, to the applicant and then handed over to the insolvent, who would then pay an equivalent sum by cheque or Internet transfer into the account. The last payment to the account was on 13 December 2012 in the amount of R19 200.00 and since then no further payments have been made, with the closing balance amounting to R1 736 856.70 in debit as at 7 October 2013, it being this sum for which the applicant is still liable to the fourth respondent;

12.4.51. For a period in excess of seven years, the applicant and the insolvent pooled their income, by depositing same into the One Account and utilised same to discharge the monthly bond instalment and other liabilities. The One Account was concluded two years after the applicant acquired transfer of the property, on 14 November 2005. Once the One Account was concluded, this *modus operandi* was followed without problems for at least another five years;

12.4.52. It was only during March 2012 that the applicant realised that the insolvent was in a financial predicament, when she applied for debt review which was ultimately terminated by fourth respondent in terms of Section 86(10) of the National Credit Act 34 of 2005;

12.4.53. The insolvent experienced financial difficulty and could not repay unknown indebtedness owing to one Mr Blank who launched the sequestration application out of this division under Case Number 45060/2012, in relation to which Acting Justice van Eeden granted a provisional order on 22 March 2013 and Madam Justice Weiner granted a final sequestration order on 14 May 2013;

12.4.54. The applicant delivered an Affidavit to the first respondent confirming that the property constitutes an asset during or about 17 June 2013 and her attorneys addressed a letter to first respondent on 22 July 2013, demanding the release of the property to her, failing which she would launch an application in terms of Section 21(4) of the Insolvency Act;

12.4.55. On 8 August 2013, the first respondent, through his attorneys, addressed an e-mail to the applicant's attorney alleging that it was abundantly clear that the applicant did not acquire the property in question, nor was she able to have acquired same based on her income. The insolvent's contributions clearly facilitated the acquisition of the property as well as the subsequent renovations and for this and other reasons the property is regarded as an asset in the insolvent estate;

12.4.56. This stance led to the ultimate issue of this application upon 30 October 2013, wherein the applicant seeks the release of the property from the operation of the insolvency in terms of Section 21(4) of the Insolvency Act;

12.4.57. The applicant obtained loan finance from the fourth respondent in order to become the owner of the property. This was based on her own credit standing and only additional security in the form of a Suretyship was required. The fact that their income and/or funds were pooled does not detract from the fact that she became the owner, whether or not the insolvent also effectively contributed thereto. The insolvent was not in financial difficulties at the time and consequently the transactions were *bona fide*;

12.4.58. This is not a case where the insolvent sought to protect his own assets by transferring same to his wife. This is simply a case where a family stood together in a time of crisis. The mere fact that the insolvent also contributed to the payment of the monthly bond instalments throughout the duration of both loan accounts does not detract from the fact that it was at all material times the intention that only the applicant be the owner thereof;

12.4.59. The mere joint contribution to the monthly bond instalment does not invalidate or cast suspicion upon the genuineness of the real agreement;

12.4.60. The mere fact that the quotation for the renovation was made out to the insolvent does also not discredit the veracity of the applicant's version;

12.4.61. The quotation relied upon by the first respondent in the judgment of Van Eeden AJ was taken out of context. The Honourable Van Eeden AJ indicates that "*investigations and inquiries"* **MAY** result in the unearthment of assets. In other words, Van Eeden AJ, was applying a legal principle in order for a provisional sequestration order to issue and did not finally determine that assets and/or the property actually belonged to the insolvent;

12.4.62. Most importantly, the investigations by the fourth respondent itself leads to no other conclusion but for the fact that the insolvent is not the owner of the property;

12.4.63. The applicant became the owner of the property as far back as November 2005. How can it subsequently seven years thereafter be contended that she did not become the owner? The first loan was merely for R850 000.00, at monthly instalments in excess of R7 000.00. By virtue of the applicant's own income at that stage and the fact that she received rental income, she was fully in a position and capable to pay the monthly instalments on her own;

12.4.64. It seems to be first respondent's case that by virtue of the One Account, that her own income and rental would not have been able to pay the instalments and therefore the contributions of the insolvent leads to the conclusion that it was intended that both of them should be the owner. This is incorrect. There was a valid real agreement and the property was actually transferred a year or two prior thereto in November 2005 at a substantially reduced mortgage bond instalment.

13. The aforementioned Affidavit of the fourth respondent was very detailed and enormously helpful in clarifying the background facts and history, which Affidavit bolsters and lends credence to the relief sought by the applicant.

14. The fourth respondent's affidavit is designed to demonstrate that the applicant's entitlement to the property is correct in law. Mr Hollander attacked such affidavit for want of attachment of the applicant's loan

application form in respect of the three bonds granted and for want of any form of confirmation as to its contents on the part of the applicant. Such attack was further based upon the fourth respondent's inability to speak first hand to the affairs of the applicant or to identify with certainty whose salary or monies had been paid into the bank accounts attached to the affidavit and the exact nature and sources of the various credits to the bank account. For these reasons, Mr Hollander argued that I am to ignore the affidavit on the basis of it being unsubstantiated.

15. Such attack was countermanded by Mr Meintjies for the fourth respondent, who raised with me that the first to third respondents had at no time called for any further documents such as loan application forms, or salary advices of the applicant under rule 35(12). Mr Meintjies argued further that the first to third respondents had not responded to the allegation set out in the affidavit and had not launched any application to strike out.

16. Mr Hollander responded to the effect that it was not necessary for the first to third respondents to serve any notices under Rule 35(12) or otherwise,

calling for loan applications and details of the applicant's source of income. He maintained that applicant should have adduced such evidence herself, without which, he argued that the applicant is unable to discharge her onus of proof. Mr Meintjies correctly pointed out that the certificates forming annexures "**JDL11"** at page 501 of the papers in terms of Section 15(4) of the Electronic Communications and Transactions Act 25 of 2002 has the effect of adding probative value to the bank statements attached and that there is no reason to reject the fourth respondent's evidence relating to the payments made allegedly by or on behalf of the applicant. Whilst I agree that the applicant bears the onus and for that reason it was not in any way necessary for the first to third respondents to call for further documents under Rule 35, I cannot simply overlook such a well formulated, structured and detailed affidavit, deposed to, with (in the deponent's words) books and records under her control to which she had reference and which she says bears out everything contained therein. By this line of reason, I cannot simply pass the affidavit off as hearsay evidence.

17. Whilst the applicant does not confirm or answer the affidavit of the fourth respondent, the contents of such affidavit, by and large bears out and expands upon the very case of the applicant. In the absence of any application to strike out, the affidavit stands, side by side, with the papers of the applicant and there is no reason for me to jettison its contents, as correctly contended by Mr Meintjies.

18. The deponent to such affidavit confirms that she is authorised to depose thereto and that the contents fall within her personal knowledge. She adds at paragraph 2.2 thereof that where such allegations do not strictly fall under her personal knowledge that they appear from the books and records of the fourth respondent, which fall under her control and to which she has had reference. I must have regard to the words of Roux J in ***Bernard v Klein N.O. 1990 (2) SA 306 (W),*** in a similar application:

> *"May I add to pour scorn on a version or to simply doubt it or to rest by saying it is suspicious does not create dispute of fact. Before a version, the only version before the court, can be*

rejected because it is so inherently improbable, must in each case depend upon the particular version. I would hesitate to reject a version which is, in accordance with human experience, one capable of having occurred. Only if it was fantasy or a demonstrable lie would I be justified in rejecting the only version before the court."

19. In applying the words of my brother, Roux J, the only real version before the court is the version of the applicant and the version of the fourth respondent. They are, in essence, the same version. There is no conflict between the two versions. The first respondent's rejection of the applicant's version, is a form of pouring scorn upon such version, without true and substantial facts to support such rejection. If not scorn, the first respondent simply doubts the veracity and truth of such version. The suspicion of the first respondent cannot create a dispute of act, as envisaged by Roux J. The version, is the only version before me, which cannot be rejected. There is nothing inherently improbable in such version. The version before me accords fully with "*human experience"* and is fully "*capable of having occurred".* There is

no "*fantasy"* or "*demonstrable lie",* or any lie which would justify the rejection of the only version before the court. This version overwhelmingly supports the relief sought by the applicant.

20. In terms of Section 21(1) of the Insolvency Act, the 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 of the spouse whose estate has not been sequestrated as if it were property of the sequestrated estate and to empower the Master or trustee to deal with such property accordingly.

21. In terms of Section 21(2)(c) of the Insolvency Act, the trustee shall release any property of the solvent spouse which is proved to have been acquired by that spouse during the marriage to the insolvent, by a title valid as against creditors of the insolvent.

22. In terms of Section 21(4) of the Insolvency Act, the solvent spouse may apply to court for an order releasing any property vested in the trustee of the

insolvent estate under sub-section 1 or for an order staying the sale of such property, and the court may make such order on the application as it considers just.

23. The applicant bears the onus to establish the true validity of her title valid against creditors of the insolvent. The incidence of the onus requires that the applicant demonstrate that the transaction under which she acquired the property was not simulated, or designed to defeat the rights of creditors.[1]

24. I am satisfied that the applicant has validly explained the genuine nature of the transaction and did not acquire the property as a simulated transaction designed to defeat the rights of creditors. This was not a case where the applicant had acquired transfer of the property from the insolvent, to protect it against the creditors of the insolvent. There was nothing sinister or clandestine about the acquisition of such property. The applicant had acquired the property for herself from her mother, by way of an arms-length

[1] *Rends v Gutman N.O. & others 2003 (1) SA 93 (C) at 97G*
Beddy N.O. v van der Westhuizen 1999 (3) SA 913 (SCA) at 916H to 917F
Snyman v Rheeder 1989 (4) SA 496 (T) at 505H to 506A
Coetzer v Coetzer 1975 (3) SA 931 (E) at 936A

sale, some seven years prior to the insolvency of her husband, at the time, such insolvency was not in the minds of the parties.

25. In ***Kilburn v Estate Kilburn 1931 A.D. 501 at 507 to 508*** *Wessels ACJ* said:

> *"The trustee must release such property of the solvent spouse as shown to have been acquired during the marriage of the insolvent by a title valid as against the creditors of the insolvent spouse. In other words if property has been acquired by the spouse who is not insolvent by means of her own money or from a source other than her husband, then she holds it by title valid as against the creditors of her insolvent husband. But if she obtains it from him during marriage as a donation, or if the insolvent gives money to his wife to buy property and have it registered in her name, or if she buys property with money provided by the husband ostensibly for herself but in reality for her husband's estate or event for the benefit of both the spouses, then it is his property and forms part*

of his estate; and the property though registered in her name is not acquired by the non-insolvent spouse by a valid title as against the creditors of the insolvent."

26. It has been demonstrated that the property was initially acquired by the applicant, by way of mortgage bond finance, which she, with her own earnings, coupled with the rentals received from her family, as well as her husband's income, was able to service and did so service for several years. The additional loans were raised over time, with the proceeds utilised for the improvements to the property, and the repayments continued to be made, partly from the applicant's own resources. However, it is inescapable that the insolvent's monthly salary was also utilised towards the joint discharge by the applicant and the insolvent of the loan obligations.

27. Sight must not be lost of the fact that the combined obligations comprised not only the loan obligations for the house, but the business and other obligations of the insolvent, himself, all of which were consolidated into the One Account Facility. It thus becomes a difficult egg to unscramble, as to

who exactly paid what, as by and large, the combined income of the insolvent and her husband merged into one melting pot, for the joint discharge of their respective obligations.

28. This, notwithstanding, for seven years and beyond, the applicant paid her full salary into the joint account, which was utilised for this purpose. It could hardly be said that she sat back, without an income and was supported by her husband, or that she acquired the property solely with funds derived from her husband.

29. It is clear that her entire income was utilised towards the discharge of the joint obligations, which in the main comprised the discharge of the home loan obligations. Whilst the insolvent also applied his funds towards the discharge of such obligations, he could not be expected to have an entitlement to a rent free life. Over all of those years, there was surely an obligation upon the insolvent to contribute towards the roof over his head. By this line of reason, it could not be cogently argued that his contribution towards the discharge of the home loan obligation comprised the co-

discharge of a purchase consideration, entitling co-ownership. All of the evidence and factors, point to the contrary. It is crystal clear from the papers that the intention was to pass transfer of the property to the applicant to the exclusion of her husband, and, whether or not his income was partly utilised towards the discharge of the monthly bond repayments, it could hardly be argued that such payments would entitle him to lay claim to co-ownership. Thus it could hardly be said that the applicant received money from the insolvent to buy property and have it registered in her name, or that she bought property with money provided by her husband ostensibly for herself but in reality for her husband's estate, as envisaged by Wessels ACJ in *Kilburn supra.* Therefore, on the test set up in *Kilburn supra,* when applied to the facts and circumstances of this case, the applicant did acquire the property by a title valid as against the creditors of the insolvent spouse.

30. Kriegler J, as he then was, set out the position in a most profound manner in the case of ***Snyman v Rheeder N.O. 1989 (4) SA 496,*** where he speaks primarily to the alteration of the *status quo* upon the impact of Section 21 of the Insolvency Act, by the introduction of Section 22 of the Matrimonial

Property Act 88 of 1984, which serves to effectively legitimise donations between spouses, which prior thereto were considered to be illegitimate. Whilst it is not necessary to get bogged down with the concept of donations, as there is no evidence on the papers before me to the effect that the contributions made by the insolvent were donations to the applicant, the facts of the Snyman case nevertheless are in alignment with the case in question. At the letter **I** on page 499 of the judgment, the court analysed the facts and found the investigation as regards the house in Potgietersrust should not be aimed at determining whether the applicant had acquired the purchase price from a source other than the insolvent or had received it from him other than as a gift, but should be aimed at determining whether the payment of the purchase price from the funds in the insolvent's bank account was suspect for reason other than donation. In answering this in the negative, the court considered the nature of the arrangement with the applicant's deceased father not to be strange with persons from that particular generation, the court considered the non-existence of a separate bank account for that applicant not to be strange and the court found that it was probable that the applicant and her husband would have agreed that she should share in profit obtained from the sale and re-sale of the Marble Hall farm, since her inheritance was used towards the purchasing thereof. The court found that the registration of the house in that applicant's name from the start was therefore relatively weighty evidence of a real and *bona fide* intention ***at the time*** (my emphasis) that it should be the applicant's asset. The court therefore found that the applicant had proved that she was entitled to the release of the house.

31. In ***Beddy N.O. v van der Westhuizen 1999 (3) SA 913 (SCA) at 916A to C***, it was asserted that the purpose of Section 21 of the Insolvency Act is to prevent or at least to hamper collusion between spouses to the detriment of creditors of the insolvent spouse and to ensure that property which belonged to the insolvent ends up in the insolvent's estate. There is no evidence before me in this matter of any such collusion. Whilst Mr Hollander made much emphasis upon the offer to purchase having been submitted by the applicant and the insolvent jointly, coupled with the fact that upon its rejection and subsequent transfer of the property to the applicant herself,

there was no attempt to remove the name of the insolvent from such offer to purchase, absolutely nothing turns on this. It is adequately explained that the insolvent and her husband initially intended to jointly purchase the property, at the time that the offer was made. This was the reason why the offer was made by them jointly. Simply because that was their intention, does not mean that the insolvent is deemed to be a co-owner or was in any way a co-owner. Quite on the contrary, such intention was scuppered by the seller, who was the applicant's mother, who insisted on passing transfer to the applicant alone to the exclusion of the insolvent, for the very fear of a future insolvency, which did come about, albeit as late as seven years beyond the time of the acquisition of transfer into the applicant's name.

32. In ***Mia & others v Morrison N.O. 1962 (3) SA 756 (N)*** it was held "*necessary for the spouse, in order to obtain the release of the property which has vested, in terms of Section 21(1) in the Master, and thereafter in the trustee, to show that the title,* ***AT THE TIME IT WAS OBTAINED,*** *(my emphasis) was good as against the creditors of the insolvent"* (at 758A). From the correct analysis and interpretation of the facts and circumstances

of this case, it is abundantly clear that the applicant demonstrates that her title to the property, ***<u>at the time that it was obtained</u>*** in November 2005 was certainly good as against the creditors of the insolvent and to this end, the applicable test in Mia *supra* is adequately discharged.

33. As was held in ***Maudsley's Trustees v Maudsley 1940 TPD*** the onus on proving validity in title as against creditors in order to qualify for an order of release of property from the operation of the insolvency to the solvent spouse under Section 21(2)(c) of the Insolvency Act, fairly and squarely rests upon the shoulders of the solvent spouse. This onus is created as one facing insolvency, may wish to attempt to conceal the true purpose of a transaction. In this regard, the applicant is *bona fide* and has clearly satisfied such onus. The real transaction is that the mother of the applicant wanted to transfer the property to the applicant herself and this is exactly what happened, some seven years prior to the insolvency having taken place.

34. Against this backdrop, the property was transferred to the applicant on 14 November 2005. One is also to take into account the abstract theory of transfer of ownership of immovable property, in accordance with which the validity of transfer of ownership is not dependent upon the validity of underlying transactions such as contract of sale. For this reason alone, Mr Hollander's point to the effect that the agreement of sale was never amended so as to strike the name of the insolvent as a joint offeror, cannot and does not hold any water.

35. This maxim was held in the landmark judgment of ***Legator McKenna Incorporated v O'Shea 2010 (1) SA 35 (SCA).*** Accordingly, the validity or invalidity of the Sale Agreement as the underlying transaction is irrelevant to the validity of the actual transfer of ownership. It therefore becomes irrelevant that in the initial Offer to Purchase, the insolvent was joined as a joint purchaser. His "joint purchase" was rejected out of hand by the seller, who was the applicant's mother and the transfer was passed to the applicant alone, it being the intention to oust the insolvent from any form of co-ownership. Accordingly, I agree with counsel for the applicant that the

acquisition of the property by the applicant was in no way simulated with a view to defrauding any creditors and such acquisition was seven years prior to the insolvency, and, as such, the applicant derived valid title to the property, valid against the creditors of the insolvent, certainly as at the time of its acquisition.

36. In the circumstances, I make the following Order:

36.1. That the first, second and third respondents are hereby ordered to release the immovable property described as Erf 103 Silvamonte Extension 1, held under Deed of Transfer T065746/05 to the applicant forthwith;

36.2. The first respondent is ordered to pay the costs of the applicant, as taxed on the tariff as between party and party, with such costs to exclude all or any costs relating to the exchanging of any affidavits by and between the fourth respondent and the other parties. Similarly, on no account are any costs awarded of whatsoever nature against the fourth respondent.

NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant:	Advocate C Gordon
Instructed by:	Jordaan & Wolberg Attorneys
On behalf of the First, Second	
and Third Respondents:	Advocate L Hollander
Instructed by:	Nowitz Attorneys
On behalf of the Fourth Respondent:	Advocate L Meintjes
Instructed by:	Rorich Wolmarans Luderitz Inc
Date of Hearing:	27 October 2014
Date of Judgment:	31 October 2014