

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: A2023/053792

- | | |
|---|---|
| (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES | |
| 12 June 2024
DATE | <hr style="border: none; border-top: 1px solid black;"/>
SIGNATURE |

In the matter of:

S[...] C[...] N.O.

First Appellant

JABULANI KHUMALO N.O.

Second Appellant

And

L[...] D[...] M[...]

Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 12 June 2024

JUDGMENT

MUDAU J, (MALINDI AND WILSON JJ CONCURRING):

[1] This an appeal by the trustees of an insolvent estate against a successful application in this division (per Maier-Frawley J) by the wife of an insolvent in terms of section 21(2) of the Insolvency Act¹ (“the Act”) with leave of the court below. The respondent is the wife of Mr AMF D[...] M[...] (“the insolvent”) whose estate was placed under final sequestration by order of court on 15 August 2019. The crisp issue to be determined in this appeal is whether the respondent demonstrated that she acquired the proceeds from the sale of the immovable property registered in her names by a valid title against the creditors of the insolvent as required by section 21(2)(c) of the Act. Differently put, if the property has been acquired by the respondent by means of her own money or from any other source other than her husband, then she holds it by a title valid as against the creditors of her insolvent husband.

[2] The respondent and the insolvent were married to one another out of community of property on 11 January 1992. The marriage at the time the application in the court below was launched still subsisted. All indications were that the couple have continued to live together as husband and wife.

[3] The respondent was during the relevant period the holder of three bank accounts: a cheque account and a maximiser account held at First National Bank (“FNB”), as well as a credit card account held at Standard Bank. During September 2004, the insolvent procured life and disability cover for himself (as principal/first life assured) and the respondent (as second life assured) from Liberty Life (“Liberty Life” or “the insurer”). In terms of that policy the insolvent was listed as both the policy holder, owner and a beneficiary of the policy benefits pertaining to the respondent.

[4] On 25 January 2019, Liberty Life paid an amount of R2,160 000.00 into the insolvent's bank account. This happened some eight months prior to the sequestration of the insolvent's estate. This was in respect of a disability claim submitted to the insurer under the disability portion of the policy pertaining to the respondent. It is common cause that the claim was submitted on account of the

¹ Act No. 24 of 1936.

respondent having been diagnosed with cancer and so having suffered a disability as defined in the policy.

[5] Subsequently, and on 28 January 2019, the insolvent paid an amount of R2,135 000.00 into the respondent's FNB maximiser account, which had a zero balance before this payment was received. In this regard the court *a quo* concluded, correctly, that since the insolvent was the policy holder, owner and beneficiary of the disability portion of the respondent under the policy and in terms of the express wording of the contract, it is the insolvent who, in the absence of any cession, rightfully obtains payment of benefit proceeds on the happening of the applicant's death or in the event of the respondent suffering a disability. This was despite the respondent's contention the payment was in effect hers or intended to be made to her and thus properly belonged to her, because it was a policy benefit to which she was entitled following her disability claim.

[6] The court below also concluded, correctly, that by virtue of section 63 (1)(a) of the Long-Term Insurance Act² ("the LTI Act") the benefit was protected from attachment and thus did not ever form part of the property of the sequestrated estate in the hands of the insolvent.

[7] On 17 May 2019, an amount of R2,740,000.00 was transferred from the respondent's FNB cheque account into her FNB maximiser account. This amount comprised a portion of the proceeds obtained by the respondent from the sale of an immovable property situate in Simons Town, which she allegedly owned. On 3 July 2019, the insolvent's estate was placed under provisional sequestration by order of court, which order was made final on 15 August 2019. Subsequently, and on 2 August 2019, the appellants were appointed as the provisional trustees of the sequestrated estate.

[8] Pursuant to their appointment, on or about 19 August 2019, the appellants attached the respondent's FNB maximiser account under the provisions of section 21(1) of the Act, after an appropriate written notice addressed to the respondent was

² Act No. 52 of 1998.

issued, in which they informed her of their intention to realise the funds in the FNB maximiser account for the benefit of the creditors of the sequestrated estate, as envisaged in section 21(3) of the Act. It is common cause that at the time of the attachment, the FNB maximiser account reflected a credit balance of R1,830 901.52, whereas the balance in the FNB cheque account was R3176.79. The Standard Bank credit card account reflected a zero balance. The value of R1,830 901.52 was however less than the proceeds from the sale of the respondent's Simons Town immovable property being R2.7 million.

[9] It is trite that upon sequestration of an insolvent's estate, which brings about a *concursum creditorum*, all the insolvent's property vests in the Master of the High Court until a trustee is appointed, and upon appointment, in the trustee. Section 21 of the Act creates an additional consequence of such sequestration upon the estate of the solvent spouse who is not living apart from the insolvent, by providing that all the property (or proceeds thereof) belonging to the solvent spouse will vest in the Master or trustee in the same way as the estate of the insolvent spouse.

[10] Section 21 (1) of the Act states:

"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".

[11] The respondent alleged that she purchased the Simons Town property in approximately 2001 with her own monies. However, since the sale took place some 18 years before at that time, she no longer had proof of the fact that she purchased same by utilising her own financial resources. As proof of ownership of the property, the respondent put up a deed of transfer, dated 15 August 2001 which reflects that she purchased the property on 17 April 2001 from Moneyline 489 (Pty) Ltd for the

sum of R179,500.00. She subsequently, sold the property for the sum of R4.3 million to Mr and Mrs Van Rensburg on 27 January 2019. The property was transferred into the purchasers' names during May 2019. It was from this transaction that an amount of R2.7 million was thereafter transferred from her FNB cheque account into the FNB maximiser account on 17 May 2019.

[12] The appellants contend that the respondent failed to put up sufficient evidence to prove her ownership of the property that she sold and, thus, the proceeds. According to the appellants, it can be inferred that the property was not paid for by the respondent and was not intended to be the property of the respondent. They contend that the insolvent is in fact the true or beneficial owner of this property and that the insolvent estate is therefore entitled to the money they attached since the amount standing to the credit of the FNB maximiser account at the time of attachment was less than the proceeds received from the sale of the property.

[13] The appellants also averred that since the respondent was a salaried employee for only two years prior to her acquisition of the property, it is inconceivable she could have utilised her own funds to purchase the property. The respondent had been full time employed at PAM since 1992 but conceded that she did not receive a salary from PAM from 1992.

[14] The appellants provided documentary evidence to show that a mortgage bond was registered over the property in 2004 in the amount of R1,365 000.00. However, by September 2014, a balance of R1.287 million was outstanding on the loan. They further ascertained that the respondent had not received a salary in 2014 and had filed zero tax returns in 2017. Moreover, as evidenced by the insolvent's bank statements, the insolvent had paid the bond instalments in respect of the Simons Town property for several months during 2013, 2014 and 2018, amounting to approximately R360 000 00. The appellants relied on various correspondence dating back to March 2009, which shows that the insolvent gave instructions relating to construction on the immovable property, and that the property was referred to as the insolvent's property. But the respondent explained that during a period of illness that she suffered, the insolvent contributed towards payment of the monthly bond

instalments, as one would ordinarily expect to occur, given his common law duty of support towards her.

[15] In written submissions and in argument before us, the appellants contended that the respondent's version falls materially short from what is required to discharge the onus resting upon her in terms of section 21 of the Act. They submitted that, based on their factual allegations, it can be inferred that the property was not paid for by the respondent and was not intended to be the property of the respondent.

[16] In addition, they contended that the deed of transfer is not conclusive proof of the fact that the respondent, and not the insolvent, was the owner of the property. This is because the trite legal position, being that even though our system of land registration generally proves ownership, it is not necessarily conclusive. In *Gugu and Another v Zongwana and Others*³ citing *Cape Explosive Works Ltd v Denel Pty Ltd*⁴ where the SCA stated the following: 'We have a negative system of registration where the deeds registry does not necessarily reflect the true state of affairs.'

[17] The appellants relied in the court below and before this court on *Kilburn v Estate Kilburn*⁵. There, a husband had before his marriage passed and registered a notarial bond for £500 as a second charge upon all hire property in favour of his wife, and the court found as a fact that although the bond purported to secure a sum of £500, which the husband had verbally promised to pay to his wife there was no serious promise of £500 and no intention to pay the wife that sum, but that the whole intention of the spouses was that the wife should claim the sum if and when the husband became insolvent. Wessels ACJ said, if she (the solvent spouse) "buys property with money provided by the husband ostensibly for herself but in reality, for her husband's estate or even 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 title valid as against the creditors of the insolvent".

³ 2014 (1) All SA 203 (ECM) par 19.

⁴ [2001] ZASCA 28, 2001 (3) SA 569 (SCA) at 579F.

⁵ 1931 AD 501.

[18] Section 21 (2) (c) states:

“The trustee shall release any property of the solvent spouse which is proved-

(c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent; or...”

[19] The conclusions sought to be drawn by the appellants are, at best, fundamentally speculative and bear scrutiny. Unlike in *Kilburn*, there is no basis in this case that can lead this court to conclude that there was an agreement between the respondent and the insolvent husband that the property was bought by the insolvent with a purpose to protect his assets in the event of his estate being sequestrated. As the court *a quo* concluded, firstly, the explanation tendered by the respondent that she no longer has proof of payment by her of the immovable property from her own resources, given that this occurred some 18 years ago prior, is not unreasonable. Secondly, the sequestration of the insolvent's estate eighteen years later could hardly have been in the contemplation of the respondent and the insolvent. Thirdly, a bond was only registered against the property some three years after the property was purchased for purposes of securing a loan obtained from the bank. It is unlikely that the respondent would have succeeded in obtaining registration of transfer of the property into her name, as the court *a quo* correctly reasoned, unless the purchase price had been paid or its payment secured.

[20] Equally, the fact that the insolvent contributed towards the repayment of the bond liability did not and could not confer upon him a real right of ownership in the immovable property. Importantly, the fact that the insolvent contributed towards payment of the monthly bond instalments sometime after transfer, given the insolvent's common law duty of support towards the respondent is of no moment.

[21] The mischief that section 21 of the Act seeks to address is to hinder collusion between spouses to the detriment of the insolvent spouse's creditors (*Beddy No v Van Der Westhuizen*,⁶ as Van Heerden JA put it in *De Villiers NO v Delta Cables*

⁶ [1999] ZASCA 32; 1999 (3) SA 913 (SCA).

(Pty) Ltd.⁷ Also viewed from another viewpoint, '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 and Others*).⁸

[22] In *Beddy NO*⁹ relied upon by the appellants, the immovable property was registered in the wife's name, the court on appeal concluded that there was enough evidence to justify an inference that the sale of the house to the wife had been a simulated transaction, which had amounted to collusive dealing (donation) in order to prejudice creditors and save the home for themselves.¹⁰ The appellate court confirmed that it is the validity of the true transaction that must be examined in order to ascertain whether a title valid against creditors has been established for the purposes of section 21(2)(c) as even a donation can now find such title.

[23] However, the merits of the matter in *Beddy NO*¹¹ relied upon by the appellants are markedly different to the facts at hand. The hurdle for the appellants is, as indicated above, firstly, that the sequestration of the insolvent's estate could hardly have been in the contemplation of the respondent or her insolvent husband eighteen years before the application in the court below was launched. , the sequestration of the insolvent's estate could hardly have been in the contemplation of the respondent and her insolvent husband. Secondly, one cannot conclude that because the insolvent contributed during some months over a three-year period to the repayment of the bond after it was registered, that the property was therefore paid for by him or belongs to him as a donation can now find such title.

[24] In addition, the insolvent had, as indicated above, a common law duty of support. Accordingly, the respondent's evidence that she no longer had proof of payment by her of the purchase price from her own resources, given that this occurred some 18 years before, is not unreasonable. It follows that, the conclusions sought to be drawn are at best for the appellants, largely speculative. It accordingly

⁷ [1992] 1 All SA 192 (A); 1992 (1) SA 9 (A) at 13I.

⁸ [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) at 318E.

⁹ See footnote 6 above.

¹⁰ Id at p 917.

¹¹ See footnote 6 above.

further follows that the appeal falls to be dismissed. There is no reason why the question of costs should not follow the result.

Order

[25] The appeal is dismissed with costs.

MUDAU J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 22 May 2024

Date of Judgment: 12 June 2024

APPEARANCES

For the Appellant: Adv. A Vorster

Instructed by: Cox Yeats Attorneys

For the Respondents: Adv. F Slabbert

Instructed by: Ewart Attorneys