

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

Case Number: 2025-007062

(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED: NO	
_____ DATE	_____ SIGNATURE

In the matter between:

D[...] L[...] K[...]

Applicant

and

GERT LOUWRENS STEYN DE WET N.O. (In his capacity
as joint trustee in the insolvent estate of I[...] W[...] K[...])

First Respondent

CHETAN KUMAR VENILAL TANNA N.O. (In his capacity
as joint trustee in the insolvent estate of I[...] W[...] K[...])

Second Respondent

SUMMARY

Insolvency Act 24 of 1936 – section 21 – release of property of solvent spouse – onus on solvent spouse to be discharged on a balance of probabilities and not to a standard of certainty – Harksen v Lane NO and Others applied – section 31 of the Insolvency Act not available as a defence to a section 21(4) application;

impeachment of pre-sequestration transactions to be brought in separate proceedings – section 16(3) statement of affairs not triggered absent service under section 16(1) – punitive costs order considered but not granted; threshold for vexatious, frivolous, fraudulent or otherwise reprehensible conduct not met; costs awarded on the party-and-party scale.

JUDGMENT

CILLIERS AJ

ORDER

The following order is made:

1. It is declared that the proceeds of the sale of Portion 7 of Erf 1[...] A[...] Township, Registration Division I.R., Gauteng, presently held by the first and second respondents in their account in the insolvent estate of I[...] W[...] K[...], is the property of the applicant.
2. The first and second respondents are directed forthwith to pay to the applicant the full proceeds of the sale, together with all interest accrued thereon.
3. The first and second respondents, in their official capacities, are ordered to pay the costs of this application on the party-and-party scale, including the costs of one counsel on Scale C.

Introduction

[1] The applicant is the former wife of I[...] W[...] K[...], whose insolvent estate is administered by the first and second respondents in their capacity as joint trustees. She was married to him out of community of property with the exclusion of the marital power on 18 September 1975, and divorced from him on 16 February 2024. Twelve days before the divorce decree, on 12 December 2023, his estate was provisionally sequestrated. The final order followed on 20 March 2024.

[2] On 15 September 1987 the applicant alone purchased an immovable property situated at 1[...] C[...] Avenue, A[...] Township, Sandton, being Portion 7 of Erf 1[...] A[...] Township, Registration Division I.R., Gauteng (the property). It was registered in her name on 11 March 1988 under deed of transfer T[...]. After Mr K[...]’s sequestration the applicant sold the property for R3 500 000.00. The trustees stopped the transfer. They permitted it to proceed only on terms that the proceeds were paid into the estate account, and they have refused to release the proceeds to the applicant.

[3] The applicant invokes section 21(4) of the Insolvency Act 24 of 1936¹ for an order declaring that the proceeds, presently held by the trustees, are her property, coupled with the seeking of an order that the proceeds, together with interest, be paid over to her. She also seeks the granting of an order for costs on a punitive scale against the trustees.

The submissions of the parties

[4] The applicant's case may be summarised as follows. She and Mr K[...] married in 1975 out of community of property, with the exclusion of the marital power. Almost twelve years later, in 1987, she alone purchased the property, and it was registered in her name. During the course of her ownership of the property, six successive bonds were raised in her name, and subsequently cancelled. The last of these bonds was cancelled on 23 November 2011. The property has been wholly unencumbered since.

¹ Section 21(4) of the Insolvency Act 24 of 1936.

[5] The applicant contends that the property was acquired during the marriage by a title valid as against the creditors of Mr K[...] within the meaning of section 21(2)(c) of the Insolvency Act, and that the proceeds of its sale fall to be released. She contends that the trustees' refusal to release the proceeds was unreasonable, that they applied a standard of certainty unknown to the law, that they took the proceeds before complying with the procedural requirements of section 21(3), and that a punitive costs order is therefore warranted.

[6] The trustees oppose the relief sought on several grounds. First, they raise a point *in limine* that the founding affidavit was commissioned by an unidentified person under the stamp of "Reid Attorneys Inc." and is to be declared *pro non scripto*. Secondly, it is advanced that the applicant has not satisfied the trustees, with the certainty they say is required, that the property fell outside the insolvent estate. Thirdly, they say that the applicant has produced no contemporaneous bank statements, salary slips or other source documents to vouch for her funding of the acquisition of the property, or the financing of the bonds. Fourthly, the applicant described herself in the divorce affidavit as a housewife, from which they invite the inference that Mr K[...] funded the household, and the property along with it, from his financial means. Fifthly, the divorce decree of 16 February 2024 was procured by collusion between the applicant and Mr K[...] to defeat his creditors. Sixthly, the applicant failed to lodge a statement of affairs with the Master under section 16(3) of the Insolvency Act, and that failure is fatal to her application.

The point in limine

[7] It is convenient to dispose of the point *in limine* first.

[8] On the unchallenged version put up by the applicant, the founding affidavit was commissioned by Mr Brandon Coetzee, an attorney at Reid Incorporated Attorneys. Mr Brandon Coetzee also deposed to a confirmatory affidavit in this regard. The omission of his full name from beneath the stamp was a clerical oversight. More to the point, the founding affidavit has since been re-commissioned in Israel, in compliance with section 8 of the Justices of the Peace and

Commissioners of Oaths Act 16 of 1963 read with the powers conferred by GN R1872 of 12 September 1980.² Even setting those steps aside, the Court retains a discretion to admit an affidavit which substantially complies with the regulations where the deponent has appreciated the solemnity of the oath. To the extent necessary, I am inclined to exercise my discretion in favour of admitting the affidavit. The point *in limine* is accordingly dismissed, and the answering affidavit is admitted.

The answering affidavit and the conditional replying affidavit

[9] The applicant submitted that the answering affidavit was filed materially out of time, that no condonation has been sought, and that the application should accordingly be adjudicated on the founding papers alone. That submission goes too far. Rule 27(3) of the Uniform Rules of Court empowers this Court, on good cause shown, to condone any non-compliance with the rules; the discretion is wide and is exercised judicially in light of the degree of lateness, the explanation, the prospects of success, and what the interests of justice require. The discretion may be exercised *mero motu*, without a substantive condonation application, on good cause shown, and where the interests of justice and an efficient disposition of the matter so require.³ To exclude the answering affidavit *in limine* would be to deprive the trustees, who hold a fiduciary office in the public interest, of an opportunity to be heard on a substantial application affecting the assets in their administration. In the absence of any prejudice articulated by the applicant flowing from the lateness of the answering affidavit, and given the importance of the matter, the interests of justice favour receiving the answering affidavit. I do so. The conditional replying affidavit, contingent upon this finding, falls also to be received. I now turn to the substantive issues.

The merits

² Section 8 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 read with the Powers regarding Oaths Outside the Republic, GN R1872 GG 7215 of 12 September 1980.

³ Rule 27(3) of the Uniform Rules of Court empowers the Court, on good cause shown, to condone any non-compliance with the rules. The discretion is wide: *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 463G. The standard governing its exercise is the interests of justice: *Brummer v Gorfil Brothers Investments (Pty) 2000* (2) SA 837 (CC) at [3]; *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at [22] to [23].

[10] The starting point is section 21(1) of the Insolvency Act. On the granting of the provisional sequestration order on 12 December 2023, all the property of the applicant as the solvent spouse vested in the Master, and thereafter in the trustees, “as if it were property of the sequestrated estate”. The vesting takes effect automatically and operates as a transfer of *dominium* to the trustees.⁴ Its purpose, as the Constitutional Court held in *Harksen v Lane NO and Others*, is “not to divest, save temporarily, the solvent spouse of the ownership of property that is in fact his or hers”, but to ensure that the insolvent estate is not deprived of property to which it is entitled.⁵ The mechanism is procedural. Section 21(2) requires the trustee to release any property of the solvent spouse which is proved to fall within one of five categories, and section 21(4) confers on the court an original discretion, where the trustee will not release, to make “such order on the application as it thinks just”.

[11] Of the five categories in section 21(2), only sub-paragraph (c) is relevant. It concerns property “acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent”. Whether the applicant has discharged her onus under that sub-paragraph is the central question. I turn to the four contentions advanced by the trustees in answer.

Whether the trustees were entitled to demand certainty

[12] The trustees formulate the test by reference to whether they could be satisfied “with certainty” that the property fell outside the insolvent estate. On my understanding, that is, however, not the test to be applied. The Constitutional Court in *Harksen* held as follows on this issue:

“Where the solvent spouse claims property as his or hers and fails to adduce evidence to establish that claim on a balance of probabilities then the insolvent estate is entitled to the property.”⁶

⁴ *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 15I–16I.

⁵ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at [35].

⁶ At [65].

[13] A trustee who proceeds on the basis that he must be satisfied to the standard of certainty before releasing the solvent spouse's property is therefore misdirected. To set up the legal test against which the applicant's evidence is to be weighed at a level higher than the law requires is to subvert the section 21(2) machinery, and to render the standard of satisfaction on a balance of probabilities expressed in *Harksen* illusory. The trustees' own formulation, that they could "never have been in a position to ascertain with certainty" that the property remained in the insolvent estate, is, with respect, a misstatement of the test.

Whether the absence of contemporaneous source documentation defeats the application

[14] The trustees contend that, in the absence of contemporaneous bank statements, salary slips or other source documents from the period 1987 to 2011, the applicant has not discharged her onus. That contention asks too much. The applicant is 75 years old. She is asked to produce records from up to 38 years ago to vouch for her funding of an acquisition that took place in 1987 and 1988, and the servicing of bonds raised between 1988 and 2011. Her version, set out on the papers and consistent with the title deed, is that the deposit of R1 500.00 was funded from a gift from her father, that the balance of the purchase price of R217 500.00 was financed by the first bond raised in her name, that successive bonds in her name replaced their predecessors over the years, and that the sixth and last bond was settled with funds contributed by her and Mr K[...], including from the sale of certain personal assets such as Krugerrands and a Henri Moore lithograph.

[15] On the meaning of "title valid as against creditors" in section 21(2)(c), it is well-settled that the words carry no special substantive meaning. In *Maudsley's Trustee v Maudsley*, since approved in *Harksen*, it was held that the sub-paragraph imports the existing law as to the validity of title, and that its only effect is to shift the onus to the solvent spouse.⁷ A simulated transaction will not confer title, but a genuine acquisition will.⁸ What is required of the solvent spouse, then, is proof on a

⁷ *Maudsley's Trustee v Maudsley* 1940 TPD 399 at 404; approved in *Harksen* at [11].

⁸ *Snyman v Rheeder* NO 1989 (4) SA 496 (T) at 505H–506B.

balance of probabilities that the title is valid in the ordinary sense, not the production of every contemporaneous record from the period of acquisition.

[16] The applicant's version of the funding of the acquisition and the bonds is consistent with the documentary record. The deed of transfer is in her name. The first bond, registered simultaneously with transfer, was in her name. The sixth and last bond was cancelled on 23 November 2011, and the property has been unencumbered since. Whatever Mr K[...] may have contributed to the financing of the bonds before that date is, on the trustees' own access to his records, capable of being established or excluded. The trustees have themselves also not produced any contrary version. In this respect I do not consider that a real, genuine and *bona fide* dispute of fact arises. The applicant's version, that establishes *prima facie* that the property is held by her with a title valid against creditors as required by section 21(2)(c), must accordingly be accepted.

The housewife inference

[17] The trustees seek to draw, from the applicant's description of herself in the 2020 divorce affidavit as a housewife, the inference that Mr K[...] funded the household and the property along with it.

[18] In my view, the contention fails on two levels. The first level concerns the temporal reach of the inference. The relevant transactions, namely the acquisition of the property in 1987 and 1988, the raising of six bonds between 1988 and 2011, and the settlement of the last bond on 23 November 2011, all pre-date the housewife description in the 2020 divorce affidavit by between nine and thirty-three years. The applicant's version, which is not seriously disputed on this point, is that she was for many years employed as a nuclear radiographer at Milpark Hospital. Whatever inferences may be drawn from the description of her status in 2020, none of them can speak to her economic role in the period 1987 to 2011.

[19] The second level concerns the soundness of the leap from “housewife in 2020” to “Mr K[...] funded everything since 1987”. The applicant produced the final liquidation and distribution account in the estate of her late mother, the late Joan Edwina Steytler. It records a capital distribution of R2 247 437.96 to the applicant in or about September 2021. That is not the only source of independent income shown on the papers, but it is sufficient to demonstrate that the applicant was not, even in the period closest to the housewife description, exclusively financially dependent on Mr K[...]. The inference the trustees invite the Court to draw is, on the version that emerges from the papers, simply not open.

The collusion case and section 31

[20] The fourth contention is the gravamen of the trustees’ case. They allege that the divorce decree of 16 February 2024, with the deed of settlement made an order of court, was procured by collusion between the applicant and Mr K[...] to defeat the creditors. The factual matrix on which they rely is reduced, in argument, to a sequence of dates:

- a. a divorce summons of 21 October 2020;
- b. a deed of settlement of 25 October 2020 (without witnesses);
- c. more than three years of inactivity;
- d. the urgent sequestration application against Mr K[...] launched on 5 December 2023;
- e. the granting of the provisional sequestration order on 12 December 2023;

- f. the opening of the divorce court file by the applicant's attorneys on 11 January 2024;
- g. the divorce affidavit dated 22 January 2024;
- h. the application for an unopposed date for the hearing of the divorce on 23 January 2024;
- i. the allocation of an "expedited" date on 25 January 2024 for hearing of the divorce on 16 February 2024; and
- j. the divorce decree on that date.

[21] The trustees rely, in part, on section 31 of the Insolvency Act, which empowers a court to set aside transactions entered into by a debtor before sequestration in collusion with another. Two preliminary observations make it plain that section 31 cannot determine the outcome of this application.

[22] First, section 31 confers a power on the court, on application properly brought for that purpose, to set aside collusive dispositions by the insolvent. The trustees have brought no application under section 31. They invoke the section in opposition to a section 21(4) application, and seek to use it as a defence. That is not the office of the section. In *Janit v Van den Heever and Another NNO (No 1)* it was held that, where trustees seek to impeach pre-sequestration transactions of the spouses, they must invoke the impeachment provisions of the Act and cannot reach the same result by withholding release under section 21.⁹

[23] Secondly, section 31 is concerned with dispositions by the insolvent. The disposition under examination must be one made by Mr K[...]. The applicant's acquisition of the property in 1987 and 1988 is not such a disposition. Nor are the

⁹ *Janit v Van den Heever and Another NNO (No 1)* 2001 (1) SA 731 (W) at 735C–D and 736B–C.

cancellations of the various bonds, all of which pre-date the debts that gave rise to the sequestration of Mr K[...] by between eleven and thirty-six years. The deed of settlement and the divorce decree are not, properly understood, dispositions of property by Mr K[...] in any sense relevant to section 31. The trustees' submissions that the order making the deed of settlement an order of court "stands to be set aside in terms of section 31", and that "any disposition after the granting of the provisional sequestration order is void", conflate the position.

[24] The trustees' reliance on the divorce proceedings amounts, in substance, to an allegation of collusion. An allegation of that character falls to be ventilated in separate proceedings under section 31. No such application has been brought, and the section cannot be deployed in opposition to a section 21(4) application as if it were a defence. To the extent that the divorce-related contentions are advanced not as the foundation for impeachment under section 31, but only to impugn the *bona fides* of the applicant's title under section 21(2)(c), they require a proper factual foundation directed to that issue. Whether such a foundation has been laid is the question to which I now turn.

[25] The trustees' averments concerning the divorce proceedings rest on a series of inferences. No primary facts are relied on. The inferences relied on cannot support the superstructure of this defence. The proposition that the unopposed date allocation was "questionable" because waiting periods at the time were "4 to 6 months" is a bare assertion by the first respondent, who has no personal knowledge of the registrar's practice. It is contradicted by the confirmatory affidavit of Mr Anton James Slabbert, an attorney with access to the relevant practice information, who confirms that, from his own enquiries, the waiting time in late January 2024 for an unopposed divorce date was not materially different to that experienced by the applicant. The proposition that the applicant must have known of the provisional sequestration because it had been published in the Government Gazette and a local newspaper sits awkwardly with the fact, on the trustees' own papers, that publication occurred only on 12 August 2024, long after the applicant had emigrated to Israel on 2 July 2024. The proposition that the applicant was "still living with K[...] as her husband at the time the provisional order was granted" is contradicted by the

applicant's version, which is not seriously disputed by the trustees, that she had travelled to Israel on 9 November 2023 to attend to her daughter's pregnancy emergency, and only returned to South Africa on 31 December 2023.

[26] As to the rhetorical question concerning the existence of "another bundle" for the divorce proceedings, this is a submission which imputes complicity in collusion without an evidential foundation. It amounts to no more than speculation.

[27] The applicant carries the onus of proving, on a balance of probabilities, that the property was acquired during the marriage by a title valid as against creditors. That is the standard set in *Harksen*. The applicant has tendered the antenuptial contract, the deed of transfer in her sole name, and the bond cancellation history. That evidence makes out a *prima facie* case of a title valid as against creditors within the meaning of section 21(2)(c).

[28] The trustees' burden, in answer, is to adduce facts on the papers sufficient to disturb that *prima facie* case, by raising a real, genuine and *bona fide* dispute as to simulation or as to the *bona fides* of the title. They have not done so. They have, on their own evidence, full access to Mr K[...]s bank accounts and have subpoenaed the applicant's banking records. Were a documentary record of a concerted course of conduct between the spouses to defeat the creditors to exist, the trustees would be expected to produce it. They have produced none. Their denials, in respect of facts peculiarly within their own informational reach, do not raise a real dispute of fact. The applicant's *prima facie* case under section 21(2)(c) accordingly stands undisturbed.

[29] Were the trustees to bring proceedings under section 31, the burden of proving collusion would rest on them, and they would have to discharge that onus on a balance of probabilities. That, however, is not the inquiry before me. No section 31 application has been brought. The trustees cannot achieve, by way of opposition to a section 21(4) application, what section 31 requires them to plead and prove.

[30] The trustees' collusion case, even on its own terms, leaves the property's acquisition history untouched. The property was registered in the applicant's name on 11 March 1988, thirty-six years before sequestration. The last bond was cancelled on 23 November 2011, more than twelve years before the events of 2023 that led to the sequestration of Mr K[...].

Section 16(3) and the alleged statement of affairs default

[31] The trustees contend that the applicant was obliged to lodge a statement of affairs under section 16(3) of the Insolvency Act and that her failure to do so is fatal to her application. The contention proceeds on a factual premise that is not made out on the papers, and, in my view, on a misreading of the section.

[32] Section 16(3) is conditional. It applies to a solvent spouse "upon whom a copy of an order referred to in subsection (1) has been served".¹⁰ Sub-section (1) requires the registrar of the Court granting the final sequestration order to "cause a copy thereof to be served by the deputy sheriff, in the manner provided by the rules of court" on the solvent spouse.¹¹ The seven-day period within which a statement of affairs must be lodged runs from "such service". The condition precedent to any obligation under section 16(3) is therefore service under section 16(1).

[33] Whether such service occurred is a question of fact. The applicant has deposed that the final sequestration order was never served on her by the deputy sheriff. That is an averment of a fact peculiarly within her own knowledge. The trustees, in their version on the papers, do not allege that service was effected. They do not produce the deputy sheriff's return of service. They do not engage with the averment at all.

¹⁰ Section 16(3) of the Insolvency Act.

¹¹ Section 16(1) of the Insolvency Act.

[34] In the result, the applicant's version that no service under section 16(1) has taken place must be accepted.¹²

[35] The trigger event for section 16(3) has accordingly not arisen. The seven-day period has not begun to run. The applicant cannot have defaulted on an obligation that was not triggered.

The trustees' conduct under section 21(3)

[36] Section 21(3) regulates the trustee's power to *realise* property which "ostensibly belonged" to the solvent spouse. Where the solvent spouse is in the Republic and the trustee can ascertain the address, the trustee may not realise such property without leave of the Court "until the expiry of six weeks' written notice", which notice must also be published in the Government Gazette and in a local newspaper inviting the solvent spouse's separate creditors to prove their claims.

[37] The trustees' conduct in regard to the proceeds raises a difficulty. They stopped the transfer of the property on 26 July 2024. They agreed, on 19 August 2024, to the sale proceeding only on the basis that the proceeds were paid into their estate account. The section 21(3) notice was given on 6 September 2024. Publication in the Government Gazette and a local newspaper occurred on 12 August 2024. By that date, the applicant had emigrated to Israel.

[38] The applicant submits that, by reason of the trustees' conduct, "the first and second respondents have never been entitled to retain the proceeds of the sale of the property". That submission goes too far. Section 21(3) regulates realisation of the property. It does not operate retroactively to undo the vesting of the property under section 21(1), which is automatic. The trustees' conduct is, however, relevant to the exercise of the section 21(4) discretion and on costs. The trustees stopped the transfer first, took the proceeds second, and gave notice to the solvent spouse third.

¹² *Plascon-Evans and Wightman* (supra).

That sequence reverses the order which the section contemplates, and is a matter to be weighed in the exercise of the section 21(4) discretion and on costs.

Costs

[39] The applicant prays for costs on a punitive scale. A trustee operating under section 21 is, on the authority of *Harksen*, obliged to act “reasonably and honestly” in dealing with the property of the solvent spouse.¹³ Where that obligation is not met, and the conduct of the trustees crosses into the territory of the vexatious, frivolous, fraudulent or otherwise reprehensible, a punitive costs order is appropriate. The threshold is high.

[40] The trustees’ procedural sequencing under section 21(3) is a feature properly to be taken into account on costs. So too is the trustees’ reliance on a standard of certainty unknown to the law and their pursuit of the collusion case in the form in which it was advanced. There is however no indication that the conduct of the trustees can fairly be described as vexatious, frivolous, fraudulent or otherwise reprehensible. Duly considered, I have come to the conclusion that an order for on a punitive scale is not warranted.

Conclusion

[41] On a balance of probabilities, and on the version that emerges from the papers, the property was acquired by the applicant during the marriage by a title valid as against the creditors of Mr K[...] within the meaning of section 21(2)(c) of the Insolvency Act. The trustees should have released the proceeds when the documentary proof was first tendered.

[42] The applicant has discharged her onus, and the application should accordingly succeed.

¹³ *Harksen* at [65].

ORDER

The following order is made:

1. It is declared that the proceeds of the sale of Portion 7 of Erf 11 Athol Township, Registration Division I.R., Gauteng, presently held by the first and second respondents in their account in the insolvent estate of I[...] W[...] K[...], is the property of the applicant.
2. The first and second respondents are directed forthwith to pay to the applicant the full proceeds of the sale, together with all interest accrued thereon.
3. The first and second respondents, in their official capacities, are ordered to pay the costs of this application on the party-and-party scale, including the costs of one counsel on Scale C.

CILLIERS AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date of hearing: 21 January 2026

Date of judgment: 28 April 2026

APPEARANCES

For the Applicant: A Bishop

Instructed by Slabbert Venter Yanoutsos Inc

For the First and Second Respondents: J J Scheepers

Instructed by Lacante Inc Attorneys