

Effects of Sequestration on the Solvent Spouse

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06 March 2025

INTRODUCTION

Sequestration is a legal process that aims to rehabilitate an insolvent person ("debtor") by taking temporary possession of the debtor's estate and realising property in the estate to satisfy the debtor's debts and obligations. The sequestration of a debtor's estate is governed by the Insolvency Act No 24 of 1936 ("Insolvency Act"). This article aims to shed light on the effects of the Insolvency Act on the estate of the solvent spouse (whose estate has not been sequestered) of the debtor, the so-called "solvent spouse".

INSOLVENCY ACT

Section 21 of the Insolvency Act regulates the effect of sequestration on the property of the solvent spouse. Section 21(1) and (2) of the Insolvency Act provide as follows:

1. "The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestered (hereinafter referred to as the solvent spouse) as if it were property of the sequestered estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section.
2. The trustee shall release any property of the solvent spouse which is proved-
 - (a) to have been the property of that spouse immediately before her or his marriage to the insolvent or before the first day of October, 1926; or
 - (b) to have been acquired by that spouse under a marriage settlement; or
 - (c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent; or

(d) to be safeguarded in favour of that spouse by section twenty-eight of this Act; or

(e) to have been acquired with any such property as aforesaid or with the income or proceeds thereof."

What is evident from section 21(1) of the Insolvency Act is that the property of solvent spouse will automatically vest with the Master or trustee as if it formed part of the insolvent debtor's property. Section 21(2) of the Insolvency Act provides for when the Trustee should release the property of the solvent spouse. Section 21(4) of the Insolvency Act grants the solvent spouse a remedy to apply to court for the release of any property that has vested in the trustee pursuant to section 21(1).

RELEVANT CASE LAW

The Court held in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) in paragraphs 36 to 37 that the purpose and effect of the section 21 of the Insolvency Act was not to permanently transfer or divest the property of the solvent spouse but to give the Master or the trustee an opportunity to establish and ensure that the insolvent estate is not deprived of any property that it is entitled to.

In *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) it was found that the provisions of section 21(1) read with 21(2) and (4) of the Insolvency Act aim to prevent any collusion of property between spouses to the disadvantage of creditors of the insolvent estate.

Lastly in *Motala and Another NNO v Moller and Others* 2014 (6) SA 223 (GJ), specifically at paragraph 24, it was held that the provisions of section 21(1) of the Insolvency Act vests the solvent spouse's property in the trustee as if it was the property of the insolvent debtor. The trustee will possess the same rights, powers and obligations in the solvent spouse's property as those applicable to the debtor's estate.

THE SOLVENT SPOUSE'S REMEDIES

The solvent spouse may apply to the court in terms of section 21(4) and (10) of the Insolvency Act for the release of any property that has vested in the trustee.

Section 21(10) of the Insolvency Act requires that the court must be satisfied that the solvent spouse will safeguard the interests of the insolvent estate should they be excluded from vesting in the trustee.

CONCLUSION

It is evident from the Insolvency Act and relevant case law that a solvent spouse's property will vest with the Master or trustee as if it formed part of the debtor's estate to avoid potential collusion resulting in the insolvent estate being deprived of property that it is entitled to. The trustee will be only obliged to release such property under certain statutory provisions and exceptions. The solvent spouse may apply to the court for the release of the solvent spouse's property, but the court must be satisfied that the interests of the insolvent estate will be safeguarded should it be released to the solvent spouse.



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