

Can a debtor waive rights to property envisaged in section 82(6) of the Insolvency Act 24 of 1936 in an application for voluntary surrender?

1 Introduction

The South African Insolvency Act 24 of 1936¹ creates two methods by which a debtor's estate may be sequestrated, namely voluntary surrender of a debtor's estate and compulsory sequestration of a debtor's estate. The voluntary surrender of a debtor's estate should be aimed at realising a not negligible dividend for the debtor's creditors. It is not a principal aim of South African insolvency law to obtain the debtor's release from his liabilities, but to ensure an equitable distribution of the debtor's assets for the benefit of his creditors, as is expressly required by section 3(1) of the Act.²

So, as has often been observed, the golden rule is that the sequestration of a debtor's estate must be to the advantage of creditors.³ This requirement of course results in an obstacle in the way of debtors who desire to have their estates sequestrated, often for unsavoury reasons, that will prove to be disadvantageous for creditors, and usually then an abuse of the court process in

¹Hereinafter the 'Act' or the 'Insolvency Act'.

²See Bertelsman *et al Mars The law of insolvency in South Africa* (2008) at 48 and the judgments referred to in notes 4 and 5, which include, amongst others, *Ex Parte Anthony* 2000 4 SA 116 (C).

³Loubser 'Ensuring advantage to everyone in a modern South African insolvency law' 1997 *SA Merc LJ* 326. See also Roestoff 'n *Kritiese evaluasie van skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg* LLD Thesis UP (Pretoria) (2002) for a comprehensive discussion of consequences of the 'advantage to creditors requirement' in South African law. See generally Evans 'Unfriendly consequences of a friendly sequestration' 2003 *SA Merc LJ* 437. For more recent debate concerning consumer insolvency see Boraine and Roestoff 'Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform' (part 1) 2014 *THRHR* 351 and (part 2) awaiting publication soon, and Boraine and Roestoff 'The treatment of insolvency of natural persons in South African law: An appeal for a balanced and integrated approach' 2014 (5) *The World Bank Legal Review* 91.

insolvency proceedings.⁴ Dishonesty of this nature places a burden on creditors and socio-economic interests in the country.⁵

In the recent judgments in *Ex Parte Kroese* and *Ex Parte Hattingh*⁶ the question of advantage to creditors in a voluntary surrender application was considered by Landman J. More specifically, Landman J considered the question whether certain 'rights' or 'benefits'⁷ that may be granted to the debtor could be waived so as to inflate the debtor's estate, thereby complying with the requirement of advantage to creditors in an application for voluntary surrender of a debtor's estate.⁸ The rights in question which the debtors in these applications were proposing to waive are those referred to in section 82(6) of the Act. Section 82(6) provides that:

From the sale of the movable property shall be excepted the wearing apparel and bedding of the insolvent and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors, or if no creditor has proved a claim against the estate, as the Master may determine and the insolvent shall be allowed to retain, for his own use any property so excepted from the sale.

In the *Ex Parte Kroese* judgment Landman J concluded, amongst others, as follows:

The effect is in my view that the advantage to creditors cannot lawfully be increased by the action contemplated by the applicants.

⁴See amongst others *Ex parte Mark Shmukler-Tshiko and Emma Shmukler-Tshiko and 13 other cases* 2012 ZAGPJHC 209. For an international view on this subject see Keay 'Balancing interests in bankruptcy law' 2001 *Comm L World Rev* 206 at 208. See also *Ex parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 1 SA 49 and *Plumb on Plumbers v Lauderdale* 2013 1 SA 60 (KZD). In this respect Holmes J in *Ex parte Pillay* 1955 2 SA 309 (N) 311 said 'the procedure of voluntary surrender was primarily designed for the benefit of creditors, not for the relief of harassed debtors'.

⁵See generally *Ex parte Mark Shmukler-Tshiko and Emma Shmukler-Tshiko* (n 4) *Ex parte Arntzen (Nedbank Ltd as Intervening Creditor)* (n 4).

⁶*Ex Parte Kroese* North West High Court (Mafikeng) Case No 145/13 dated 18 April 2013 and *Ex Parte Hattingh* North West High Court (Mafikeng) Case No 144/13 dated 18 April 2013. For the purpose of convenience this note will simply refer to the 'applicants' or to '*Ex Parte Kroese*'. See Ndou 'Waiver of rights in insolvency' 2014 *De Rebus* 45.

⁷Hereafter referred to only as 'rights'.

⁸Section 6 of the Insolvency Act 24 of 1936 regulates the acceptance by the court of the surrender of the debtor's estate, and it encompasses the 'advantage' requirement. The relevant part of s 6 reads as follows: '**6 Acceptance by court of surrender of estate** (1) If the court is satisfied that the provisions of section *four* have been complied with, that the estate of the debtor in question is insolvent, that he owns realizable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor's estate and make an order sequestrating that estate. (2)

It follows that whatever factors may be raised to show that the applicants, because of external circumstances would not be rendered destitute, are irrelevant because the waiver cannot lawfully be made before the application for surrender of the estate has been accepted.⁹

It is submitted that this ruling is correct. However, the reasoning behind the refusal of the court to allow the waiver in question was based rather on constitutional imperatives, than on the nature of the property *vis-à-vis* the 'advantage to creditors' principle. It will be shown in this case note that it was really unnecessary for the court to consider the [possible] constitutional nature of the rights envisaged by section 82(6). However, by doing so, Landman J indirectly shed light on the lot of the debtor, and the strict creditor friendly policy of South African insolvency law. It is submitted that judgments of this nature may serve as vehicles to transport South African insolvency law policy towards a more debtor friendly system which fits more comfortably within the confines of the Constitution.

In this note the authors consider the question of whether prior to sequestration a debtor should be permitted to waive his rights to property that will form part of his insolvent estate, in order to show advantage to creditors in the application for sequestration. The possibility that the 'rights' in question fall within the ambit of constitutional rights worthy of constitutional protection, will also be considered briefly, within the context of Landman J's judgment.

2 Estate property

Before attempting to answer the question whether debtors should be permitted to waive the rights in question, it will be prudent to consider the status of property of the debtor prior to the sequestration of an estate, and after the sequestration of an estate. An understanding hereof will dictate whether the possibility of waiver of certain rights can or should be entertained in the first place.

Prior to sequestration one can generally accept that the debtor is the owner of his property with which he can deal as he wishes.¹⁰ His property generally enjoys constitutional protection.¹¹ However, when the debtor's estate is sequestrated all his property vests in the Master until a trustee is appointed, including property acquired during sequestration.¹² This property passes to the

⁹*Ex parte Kroese* (n 6) para 65.

¹⁰See for example Silberberg and Schoeman *The law of property* (2006) 2.2 3-4, cited in the *Ex Parte Kroese* judgment under discussion (n 6) para 61.

¹¹See generally s 25 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

¹²See s 20(1)(a) and 2(b) of the Insolvency Act.

trustee in ownership, so the *dominium* thereof no longer vests in the debtor.¹³ But some property may be excluded or exempted from an insolvent estate.¹⁴ Such exclusion or exemption is regulated by the common law, various legislative measures and court judgments.¹⁵ The question of whether assets relating to insolvency are excluded, or are exempt from an insolvent estate is of importance regarding the question of whether an insolvent debtor may waive his rights to property to which he is entitled for his essential means of subsistence.¹⁶ It is submitted that excluded property never forms part of an insolvent estate while exempt property does form part thereof, but may under certain circumstances be exempted from the estate for various reasons. Such exempted property may then devolve upon the insolvent debtor (or another person) when it has been exempted, usually by the creditors or the Master. Consequently, the insolvent debtor has no authority to deal with the property in question if it has not been exempted. Property referred to in section 82(6) is typically property that can be exempted from an insolvent estate. Here section 82(6) uses the word 'excepted'. However, until such property is exempted, it remains part of the insolvent estate. Further, until it is so exempted, it cannot be identified as property belonging to the insolvent, as it is not yet identified 'separately' from other property in the estate.

¹³See *De Villiers v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A) 15 I – J where Van Heerden JA said: 'In my view, therefore, the Legislature made it perfectly clear that a transfer of *dominium* of the assets of the solvent spouse takes place. (Cf the Afrikaans text of s 21(1) which speaks of the 'oorgaan' of such assets.) He or she thus no longer retains any of the attributes of ownership of the property concerned'. This ruling was accepted in *Harksen v Lane NO* 1998 1 SA 300 (CC) where at para 31 the Constitutional Court said: 'The starting point of the argument is that the vesting constitutes a transfer of ownership of the rights in the property of the solvent spouse to the Master and, on appointment, to the trustee. Reliance was placed upon the decision of the Appellate Division in *De Villiers NO v Delta Cables (Pty) Ltd*. In that case Van Heerden JA discussed at some length whether the vesting of the property of the solvent spouse in the Master or a trustee, in terms of s 21(1) of the Act, had the effect of transferring ownership in that property to them. As appears from the judgment, it was found not to be necessary finally to decide that question. However, Van Heerden JA, with the concurrence of the other four members of the Court, expressed the firm view that full ownership in the solvent spouse's property did in fact pass to the trustee of the insolvent estate. For the purpose of this judgment I shall assume that to be the effect of s 21'.

¹⁴See Ferriell and Janger *Understanding bankruptcy* (2013) paras 2.11 and 7.04 (hereafter Ferriell) for the situation of exempt and excluded property in the United States of America. The difference between excluded and exempt property will not be discussed here in detail. But see Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* LLD Thesis UP (Pretoria) (2008) at ch 9 (hereafter Evans Thesis) for a better understanding of the South African system.

¹⁵See for eg ss 23, 79 and 82(6) of the Insolvency Act, and the various legislative provisions referred to in Evans 'Legislative exclusions or exemptions of property from the insolvent estate' 2011 *PER* 28. In respect of court judgments, see for example *Wessels v De Jager NNO* 2000 4 SA 924 (SCA) and the cases cited therein.

¹⁶ See the provisions of ss 23 and 82(6) of the Act.

It does not belong to him. These principles must be borne in mind throughout the discussion concerning waiver of property which follows.¹⁷

3 Court judgments

3.1 *Ex parte Anthony*¹⁸

This judgment by a full bench concerned several applications for the voluntary surrender of debtors' estates. The question of waiver of rights was not the main question before the court, but rather in passing, the court ruled that an insolvent debtor was entitled to waive the rights embodied in section 82(6).¹⁹ That court cited *SA Eagle Insurance Co Ltd v Bavuma*²⁰ which ruled as follows:

It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms. This rule is expressed by the maxim: *quilibet potest renuntiare juri pro se introducto* – any one may renounce a law made for his special benefit. See *Ritch and Bhyat v Union Government* 1912 AD 719 where Innes ACJ said at 734:

The maxim of the Civil Law (C 2.3.29), that every man is able to renounce a right conferred by law for his own benefit, was fully recognised by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit but in the interests of the public as well. (*Grot* 3.24.6 n 16; *Schorer* n 423; *Schrassert* 1.c1.n 3 etc.).

Meskin accepted the judgment in *Ex Parte Anthony* as correct.²¹

¹⁷The *Concise Oxford Dictionary* definition of 'waive' is to 'refrain from insisting on or using, tacitly or implicitly relinquish or forgo (rights, claim, opportunity, legitimately *etcetera*.).'

¹⁸*Ex parte Anthony* (n 2).

¹⁹*Id* para 20.

²⁰1985 3 SA 42 (A) at 49G – I.

²¹Meskin *Insolvency law and its operation in winding-up* (1990 looseleaf) para 3.2 states: 'In an endeavour to establish advantage to creditors, the applicant may renounce, in favour of creditors, the protection afforded by section 82(6) of the Insolvency Act which precludes the sale of certain property of his estate, or, it is submitted, the like protection afforded in respect of any other property by other provisions of the Act'.

3.2 *Ex Parte Kroese and Ex Parte Hattingh*²²

3.2.1 *The facts*

In these two applications before Landman J, for the voluntary surrender of debtors' estates, the question arose whether the applicant debtors should be permitted by the court to waive the rights referred to in section 86(2) of the Act. The applicants in this judgment sought to waive their rights under section 82(6) in order to increase the value of realisable assets and thereby show that the surrender of the estates would be to the advantage of creditors.

The question was whether they were competent to do so in order to provide for sufficient funds to pay the costs of sequestration from the free residue.

In this respect one of the applicants stated as follows:²³

I am aware that some of the items listed in the movable property valuation may be viewed as part of basic household necessities, however in terms of section 82(6) of the Insolvency Act 24 of 1936 ("Insolvency Act") I surrender all assets listed in the hands of the Trustee to be appointed herein, thereby waiving the protection afforded by the Insolvency Act pertaining to these assets.

3.2.2 *The applicants' submissions*

In respect of section 82(6) the applicants submitted that:²⁴

- (a) The property mentioned in section 82(6) of the Act is a divisible group of assets to be treated differently;
- (b) The wearing apparel and bedding of the insolvent is absolutely excepted from the sale of the insolvent's movable property without any qualification, but household furniture of the insolvent as well as his or her tools and other essential means of subsistence, *may*²⁵ also be excluded from sale by the trustee.

The applicants relied heavily on the judgment in *Ex parte Anthony*.²⁶ In line with *Ex Parte Anthony*, the applicants submitted that section 82(6) applied in this matter and that no *public interest*²⁷ was involved in either application. The

²²*Ex parte Kroese* (n 6).

²³*Id* para 9.

²⁴*Id* para 13.

²⁵Authors' emphasis.

²⁶*Ex parte Kroese* (n 6).

²⁷Authors' emphasis.

renunciation of the benefits, they said, related to their rights in their *personal capacities*.²⁸

3.2.3 Constitutional issues

In his judgment Landman J proceeded to consider the constitutionality of the waiver of the rights in question. He pointed out that the applicants conceded that *Ex parte Anthony* did not consider whether waiving the rights in question would be an infringement or a renunciation of the equivalent of a constitutional right.²⁹ Sections 10 and 25 of the Constitution of the Republic of South Africa³⁰ were referred to. They deal with the rights to dignity, and property, respectively. In as far as the right to dignity is concerned the applicants apparently argued that they elected to renounce the benefits that they have in terms of section 82(6) of the Act out of their own free will and for the benefit of their creditors.³¹

The court pointed out that it could be argued that their renunciation of any benefits provided for in the Act may infringe a person's dignity, but that dignity should not be seen as an absolute right that should be protected at all costs.³²

The applicants also argued³³ that the Constitution provides for the right of freedom to trade. This includes the right to dispose of their property of their own free will.

In as far as the furniture and possible tools of trade of the applicants are concerned (subject to section 25(1) of the Constitution which states that property may be deprived only in terms of Law of General Application) it was submitted that the applicants would in any event and upon the normal application of section 82(6) of the Act not be entitled to decide upon the fate of their furniture and/or tools, as that decision lies with the creditors of the insolvent estate or the Master of the High Court. What the applicants have in essence done, it was submitted, was to obviate any decision that has to be taken by either the creditors of the insolvent estate or the Master.

The Applicants referred to Silberberg and Schoeman,³⁴ regarding their definition of the *dominium* and/or ownership and the freedom of property, described as the ability of the owners to deal with their property as they deem fit and protect them against influence by others in the exercise of the freedom.³⁵ The

²⁸ Authors' emphasis [and thus complying with the requirements for lawful waiver]. Para 15.

²⁹ *Ex parte Kroese* (n 6) para 16.

³⁰ The Constitution (n 11).

³¹ *Ex parte Kroese* (n 6) para 17.

³² *Id* para 18.

³³ *Id* para 20.

³⁴ Silberberg and Schoeman (n 10) at 3 to 4.

³⁵ *Ex parte Kroese* (n 6) para 23.

applicants averred that the property was theirs, and they were free to do with it what they wished, without even the interference of the court in this instance.³⁶

They submitted that the second group of goods referred to in section 82(6) of the Act was never intended to be property to be disposed of by the applicants. The fate of such property, they argued, falls within the prerogative of the creditors of the insolvent estate and the Master.

In considering whether waiver in the context of the Insolvency Act is permissible, Landman J approached section 82(6) from the point of view that the waiver is a unilateral renunciation of a prospect, *spes*, claim, benefit or right.³⁷ Landman J questioned whether section 82(6) is constitutionally valid in view of its discretionary nature.³⁸ Potentially, it could leave the insolvent and his or her family destitute. He thought that here section 25(1) of the Constitution may come into play. It provides: '(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'. He was of the opinion that the discretion to except or not to except basic necessities from sale must, at least, be exercised reasonably and if the discretion is exercised unreasonably by the Master or creditors, a High Court may intervene.³⁹

Landman J next questioned the ability of the applicants to validly waive their entitlement to basic necessities, and if they could, whether the waiver was made with full knowledge of its consequences.⁴⁰ He further observed that the waiver is meant to be offered to the creditors if the application for the surrender of the estate be accepted. But at the stage of an application for surrender, it can only be considered as a unilateral, legally effective waiver or abandonment of an entitlement to basic necessities. It cannot at this stage be treated as an offer available for acceptance by the creditors (that is, a contractual waiver).⁴¹

Landman J pointed out⁴² that the court in *Ex Parte Anthony's* case⁴³ was not required to decide the issue of the waiver of an entitlement to basic necessities. Landman J found⁴⁴ that the quotation in *Ex Parte Anthony's* case taken from *Ritch and Bhyat v Union Government*⁴⁵ was of importance. This was that a waiver 'was subject to certain exceptions, namely that no one could renounce a right contrary to law, or a right introduced not only for his own benefit but in the interests of the

³⁶*Id* para 24.

³⁷*Id* para 26 (hereafter an 'entitlement' or 'right').

³⁸*Id* para 33.

³⁹*Id* para 34.

⁴⁰*Id* para 35.

⁴¹*Id* para 36.

⁴²*Id* para 37.

⁴³*Ex parte Anthony* (n 2).

⁴⁴*Ex parte Kroese* (n 6) para 37.

⁴⁵1912 AD 719. See the citation in *Ex Parte Anthony* (n 2).

public as well'. Landman was of the respectful view that the full bench in *Ex Parte Anthony* paid insufficient attention to the last restriction on waiver regarding public interest.⁴⁶ Landman said that the Constitution had to be considered in a reading of section 82(6).⁴⁷ He quoted part of section 1 thereof which provides that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

Landman J found that the law is concerned with the dignity of debtors. On this point he referred⁴⁸ amongst others to the protection offered by section 67 of the Magistrates' Court Act⁴⁹ and section 39 of the Supreme Court Act.⁵⁰ These sections offer similar rights to debtors, but more extensive, to the rights envisaged in section 82(6) of the Insolvency Act.

In respect of section 82(6) of the Insolvency Act, Landman J pointed out that the purpose thereof clearly includes measures which are 'intended to preserve the right to life and the dignity of an insolvent and his or her or their dependants and to place them in a position to rebuild their lives'.⁵¹ On this point he proceeded to quote Evans,⁵² whom he said⁵³ places the entitlement as regards basic necessities in context, as follows:

Although South African insolvency law is based on the policy of the collection of the maximum quantity of assets available, to the advantage of the creditors of the insolvent estate, a further policy, that of allowing a debtor to keep a part of his estate, has also been entrenched, originally through the common law. It would appear that originally the rationale behind this policy, as it developed through the

⁴⁶*Ex parte Kroese* (n 6) para 38.

⁴⁷*Ibid.*

⁴⁸*Ex parte Kroese* (n 6) para 39. At para 40 Landman J also referred to Mokgoro J in *Jafftha v Schoeman; Van Rooyen v Stolz* 2005 2 SA 140 (CC) where she said at 151, with reference to the Magistrates' Courts Act of 1944, that: 'Section 67 of the Act serves to limit the range of movables that may be attached. The section lists certain movables that are exempt from execution in all cases. It is clear from the list that the Act seems to insulate from execution, certain items necessary for the debtor to survive'.

⁴⁹32 of 1944.

⁵⁰59 of 1959.

⁵¹*Ex parte Kroese* (n 6) para 41.

⁵²Evans (n 15).

⁵³Landman J para 41 also referred to Bloch 'Approaching the limits of the Bankruptcy Code: Does surcharging a debtor's exempt assets go too far?' 2009 (76) *University of Chicago Law Review* 1747 – 1780 at 1753 who considers the purpose of exemption laws, being to protect a debtor from his creditors, and to provide him with the basic necessities of life, and therefore being both for an individual debtor's benefit as well as for the public good.

common law, was to ensure that the insolvent and his family were not deprived of their dignity and basic life necessities. It is submitted that this remains the cornerstone upon which this policy rests, but that the requirements of modern society, socio-political developments in most societies, and human rights requirements have necessitated a broadening of the classes of assets that should be excluded or exempted from insolvent estates.

With reference to section 10 of the Constitution Landman J pointed out⁵⁴ that all the protections mentioned above have as their purpose the respect for the right to life and dignity. Section 10 provides that:

Everyone has inherent dignity and the right to have their dignity respected and protected.

Landman J mentioned⁵⁵ that work supports the notion of self-esteem or dignity and that section 22 of the Constitution provides that:

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Landman J also referred⁵⁶ to *Bafana Finance Mabopane v Makwakwa*⁵⁷ where the dictum of Innes ACJ in *Ritch and Bhyat v Union Government*⁵⁸ was interpreted to the effect that:

Thus, a party to a contract may waive the benefits conferred upon him by an Act of Parliament unless the statute expressly or by necessary implication prohibits waiver.

And at 585 para 10 of *Bafana Finance Mabopane v Makwakwa*:

An agreement whereby a party purports to waive the benefits conferred upon him or her by statute will be *contra bonos mores*, and therefore not enforceable, if it can be shown that such agreement would deprive the party of protection which the Legislature considered should, as a matter of policy, be afforded by law.

⁵⁴ *Ex parte Kroese* (n 6) para 45.

⁵⁵ *Id* para 46.

⁵⁶ *Id* para 47 – 48.

⁵⁷ 2006 4 SA 581 (SCA) para 10 585.

⁵⁸ 1912 AD 719.

Landman J proceeded⁵⁹ by accepting that the right to dignity is an inalienable human right. He quoted Chaskalson P (as he then was) in *S v Makwanyane*⁶⁰ where he said:

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.

Landman J next considered the applicants' submissions which he reduced to four points.⁶¹ First, concerning the question whether the property mentioned in section 82(6) of the Act being divisible into two categories, he found the distinction irrelevant to the question of waiver because neither group of assets may be waived.⁶²

Secondly he considered the submission that renunciation of benefits provided for insolvents relate solely to the rights of the applicants in their personal capacities, and that no public interest is involved.⁶³ Here the court found that the applicants did not consider the fact that the Act and other legislation which provides for the protection of debtors was enacted for the benefit of such persons and for the well-being of society, under the constitution, founded on human rights. Landman J ruled that it is not in the State's interest that citizens should renounce their assets and become a burden to society.⁶⁴

Thirdly the court pointed out that although the applicants were anxious to surrender their estates, for the reasons set out above, the law does not allow them to sacrifice their [human] rights.⁶⁵

On the fourth point,⁶⁶ that the applicants had the right of freedom of trade, enshrined in the Constitution (subject to section 25(1) of the Constitution which states that property may be deprived in terms of law of general application), they argued that this encompasses the right to dispose of their property of their own free will. Here it was said that concerning the furniture and tools of trade, the applicants would in any event and upon the normal application of section 82(6) of the Act not be entitled to decide upon the fate of their furniture and or tools. This decision has to be taken by either the creditors of the insolvent estate or the

⁵⁹*Ex parte Kroese* (n 6) para 49.

⁶⁰1995 3 SA 391 (CC) para 144.

⁶¹*Ex parte Kroese* (n 6) para 51.

⁶²*Id* para 53 and 54.

⁶³*Id* para 55.

⁶⁴*Id* para 56.

⁶⁵*Id* para 58.

⁶⁶*Id* para 59.

Master. The applicants were trying to obviate this action.⁶⁷ Regarding section 25 of the Constitution Silberberg and Schoeman was referred to as follows:⁶⁸

Freedom of property is often said to be a basic right, amounting to no more than the expression of a demand that society (as represented by the authority of the state) should guarantee the ability of owners to deal with their property as they may deem fit and protect them against interference by others in the exercise of this freedom. Yet the survival of our modern society is dependent on the restriction of this freedom.

Taking the matter of the disposal of their property further,⁶⁹ section 25 of the Constitution was resorted to by the applicants when they submitted that their freedom to dispose of their property permitted them also to freely renounce their benefits for a purpose, namely, the advantage of creditors.⁷⁰ They also argued that the creditors or the Master controlled the fate of the second group of property referred to in section 82(6), but not the first. Landman J however viewed the rights embodied in section 82(6) of the Insolvency Act as safeguarding the right to life and the right to dignity. He ruled that the protection that the section offered was not theirs to waive.⁷¹ He ruled that 'the right to waive a right is part of autonomy and is itself a human right'.⁷² The right to dignity, he said, can be protected by judicial oversight, but 'the initial protection lies in the implied obligation of the master or creditors to act reasonably'.⁷³ So he found that the right to basic necessities envisaged here could not be waived before the property has been surrendered.⁷⁴

The court also ruled that even if the applicants would not be destitute if they waived their rights, it would be irrelevant, because the waiver cannot lawfully be made before the application for surrender of the estate has been accepted. So the waiving of rights to items provided for in section 82(6) for the purpose of increasing the advantage to creditors cannot lawfully be achieved.⁷⁵

Landman J also said it could be argued that because the court has the discretion to decide if sufficient advantage to creditors has been proven, that it should also consider the wisdom of proposed waiver of basic necessities '... ie

⁶⁷*Id* para 59.

⁶⁸Silberberg and Schoeman (n 10) para 1.2.2 at pp 3-4.

⁶⁹*Ex parte Kroese* (n 6) para 61.

⁷⁰*Id* para 61.

⁷¹*Id* para 63.

⁷²*Id* para 64.

⁷³*Ibid* para 64.

⁷⁴*Id* para 64.

⁷⁵*Ex parte Kroese* (n 6) para 65.

the right to dignity at the same time'.⁷⁶ But he found the right to dignity not to be paramount to the inquiry regarding advantage to creditors, and, in the exercise of a discretion, declined to consider a waiver of basic necessities.⁷⁷

He concluded as follows:

Taking into account the vital importance of the inalienable right to human dignity of the applicant[s] and indeed whatever dependants they may have and the right to work or trade, coupled with the purpose of excepting basic necessities, I am of the view that the applicants may not waive their entitlement.⁷⁸

4 Comment

4.1 *Property rights, advantage for creditors and abuse*

It is submitted that the first question that the courts should have considered in both *Ex Parte Anthony* and *Ex Parte Kroese* is whether at the time of the application for sequestration the 'rights' that the soon to be insolvent person will be *assumed* to have, even exist, and whether it is he/or she, or the creditors rather, who must waive the rights to such property mentioned in section 82(6). As stated above, at the moment of sequestration, the insolvent's property passes to the insolvent estate and no longer belongs to him/her. So at this point he/she has no property rights⁷⁹ which can be waived. The section specifically refers to a situation that may occur only after the sequestration of the debtor's estate, namely, the 'excepting' of certain movable property from the sale of the estate property after the second meeting of creditors.

It further follows that it is initially in fact the *creditors* (or the Master) who must waive their rights to the property envisaged in section 82(6). To attain the debtor's purpose of inflating the insolvent estate to increase the advantage of creditors, would be possible only at this point, when the now insolvent debtor could be in a position to waive his rights to his newly 'excepted' property. And why would he/she want to do so then, with his/her estate already having been sequestrated? A further problem with an attempt to waive any rights in the application for sequestration is that not all creditors may have been identified at the time of the application. The entire notion of waiver in this context, if at all possible, arises only after the second meeting of creditors, by which time more creditors may have joined the party, and it may be assumed that the latter creditors would not have been present [at the time of the application for voluntary

⁷⁶ *Id* para 66.

⁷⁷ *Id* para 66.

⁷⁸ *Id* para 67.

⁷⁹ Apart from excluded property.

surrender] to 'determine' what property of the debtor should be 'excepted' under section 82(6).

Insolvency legislation is not intended to assist the debtor to artificially inflate his estate to provide for an advantage to creditors, merely to achieve, as in the cases under consideration, a voluntary application and its consequences. Landman J observed that if an applicant is resorting to this tactic, advantage will already be a borderline case.⁸⁰ It is submitted that this tactic may often be resorted to in an abuse of the process of insolvency proceedings rather than the *bona fide* application for sequestration.⁸¹

4.2 Constitutional questions

As a consequence of the discussion above, one can only conclude that within the context of the cases discussed, and the policy of advantage to creditors, there can be no infringement of rights of a constitutional nature. There simply are no rights of the debtor to be infringed. Whether or not an infringement of the various rights mentioned by Landman J may occur after sequestration should the creditors or the Master refuse to 'except' any property in terms of section 82(6), is of course another question.

So, under different circumstances, the constitutional nature of the rights to the property mentioned in section 82(6), and the infringement thereof, could be a consideration. Then, however, one will probably be confronted by facts where the creditors refuse to 'except' the property in question.⁸² The nature of the rights to the property in that section must then be analysed so as to ascertain what constitutional rights will be infringed. In this respect some of the constitutional rights debated above by Landman J, come to mind. It may be argued, as in the *Ex Parte Kroese* case, that if the insolvent debtor is left destitute by the creditors refusal to 'except' certain estate property for his benefit, it may infringe his right to dignity, his right to property, and to practice a trade, occupation or profession freely.

In *Ex Parte Kroese* the court linked the section 82(6) rights to an infringement of a person's dignity, but said that dignity should not be seen as an absolute right that should be protected at all costs.⁸³ It referred to section 10 of the Constitution and stated⁸⁴ that all the protections envisaged by section 82(6)

⁸⁰*Ex parte Kroese* (n 6) para 66.

⁸¹See the examples of abuse in this context in *First Rand Bank Ltd v Consumer Guardian Services (Pty) Ltd* Case No 10978/2012 Western Cape Division (Cape Town).

⁸²See ss 23(12) and 79 of the Insolvency Act which also provide for a kind of subsistence allowance to the insolvent. It is submitted that a refusal by the trustee or Master to allow the insolvent such benefits could also result in an infringement of the constitutional rights under discussion.

⁸³*Ex parte Kroese* (n 6) para 18.

⁸⁴*Id* para 45.

of the Insolvency Act have as their purpose the respect for the right to life and dignity. Landman J also linked this to the idea⁸⁵ that work supports the notion of self-esteem or dignity. He referred to section 22 of the Constitution which provides that:

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

It is assumed that Landman J referred to section 22 because a refusal by creditors to 'except' estate property in terms of section 82(6) could hamper the debtor's ability to practice a trade, occupation or profession freely and so provide a livelihood for him and his family, and consequently affecting his and/or their dignity. However, it is submitted that the very sequestration of a debtor's estate infringes his dignity to some extent. In this respect Mars states that: 'An order sequestrating a debtor's estate is one affecting status, and is accordingly a judgment *in rem* and not one *in personam*.'⁸⁶

So it brings one back to Landman J's observation that 'dignity should not be seen as an absolute right that should be protected at all costs'.⁸⁷ In this respect Cheadle⁸⁸ says the prevailing view is that the right to dignity is pre-eminent of all fundamental rights, but that the right to dignity can however be limited. In a limitations analysis Cheadle points out,⁸⁹ dignity is considered in the balancing, proportionality test. The section 36(1) limitations must be 'justifiable in an open and democratic society based on human dignity'.⁹⁰

In so far as section 82(6) of the Insolvency Act can be linked to an infringement of what Cheadle calls the economic activity rights⁹¹ of a debtor, he says: 'The use of the phrase 'trade, occupation or profession' is wide enough to cover all forms of economic activity anyone might engage in and should not be read restrictively'.⁹²

⁸⁵*Id* para 46.

⁸⁶*Mars* (n 2) para 8.3.

⁸⁷*Ex parte Kroese* (n 6) para 18.

⁸⁸Cheadle *et al South African constitutional law: The bill of rights* (2014 update) at 5.1.

⁸⁹*Id* 545

⁹⁰*Ibid.*

⁹¹See Cheadle (n89) ch 17 ch 17.

⁹²*Id* 17.1. It must be noted that an unrehabilitated insolvent is disqualified from holding various positions or offices in amongst others, commerce and politics. These positions can probably fall within the phrase 'trade, occupation or profession' and could also come under constitutional scrutiny. For a complete summary of this disqualifying legislation see Sharrock *et al Hockly's law of insolvency* (2012) at 68.

The applicants in *Ex Parte Kroese* also argued⁹³ that the Constitution provides for the right of freedom to trade. This they submitted includes the right to dispose of their property of their own free will. This debate concerning the right to property, and as a corollary to that, freedom to trade, will not be pursued in depth in this case note. Suffice to say that this argument was ill conceived as it is not the insolvent's property to own and trade with.⁹⁴ The argument is also irrational because section 82(6) of the Act does not intend providing the insolvent with property with which to trade. It offers him only a means of subsistence and a *means* to assist him to practice a trade, occupation or profession.

Landman J in *Ex Parte Kroese* also questioned whether section 82(6) is constitutionally valid in view of its discretionary nature as it could potentially leave the insolvent and his or her family destitute.⁹⁵ He thought that here section 25(1) of the Constitution may come into play. It provides: '(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.

However, it is submitted that sufficient protective measures are built into the Act to counter discretionary behaviour by the Master or the trustee, and to protect the interests of the debtor.⁹⁶ In this respect, but regarding a challenge to section 21 of the Insolvency Act, the Court in *Harksen v Lane* said the following:

In the consideration of the effect of s 21 one must assume that Masters and trustees will act reasonably and honestly and not wish to claim for insolvent estates that which solvent spouses are able to establish belongs to them. One must also assume that in an appropriate case the Courts will intervene where they do not so act.⁹⁷

There was also the argument that the applicants would in any event and upon the normal application of section 82(6) of the Act not be entitled to decide upon the fate of their furniture and/or tools, as that decision lies with the creditors of the insolvent estate or the Master of the High Court. This fails to take the matter any further, as it concedes that the insolvent will be waiving a right which is not his to waive, and further, that he cannot fulfil the role of the creditors or the Master.

⁹³*Ex parte Kroese* (n 6) para 20.

⁹⁴In this respect, any infringement of an insolvent's right to trade that may in future be challenged, will probably relate to the restriction by section 23(3) of the Act of an insolvent's right to be involved in the business of 'a trader who is a general dealer or a manufacturer', rather than a particular class of property which is being traded with.

⁹⁵*Ex parte Kroese* (n 6) para 33.

⁹⁶See for example ss 23 and 79 of the Act.

⁹⁷*Harksen v Lane* (n 13) para 66.

Landman observed that at the stage of an application for surrender, a waiver can only be considered as a unilateral, legally effective waiver or abandonment of an entitlement to basic necessities. It cannot at this stage be treated as an offer available for acceptance by the creditors (that is, a contractual waiver). He was of the opinion that the discretion to except or not to except basic necessities from sale must at least be exercised reasonably and if the discretion is exercised unreasonably by the Master or creditors, a High Court may intervene.⁹⁸ But for the various reasons set out above, it is submitted that not even a unilateral waiver is of relevance.⁹⁹

5 Conclusion

The authors of this note submit that it is not competent for an applicant in a sequestration application, be it voluntary surrender or compulsory sequestration, to waive any rights envisaged in section 82(6) of the Insolvency Act in that *application* (our emphasis) for sequestration, in effect meaning waiver prior to the sequestration of the estate.

But the reason why this practice arose is because applicants who are anxious to surrender their estates are unable to show advantage to creditors in the ordinary course of an application for sequestration, and they have no way of escaping their indebtedness. Much has been written concerning the creditor friendly policy of South African insolvency law which provides little respite for harassed debtors. Despite the introduction of legislation to improve the lot of South African debtors,¹⁰⁰ it appears that many debtors are still anxious to have their estates sequestrated, often with impure motives. An attempt by a debtor to waive rights to property envisaged in section 82(6) will probably usually be an indication of an abuse of insolvency proceedings by a debtor who cannot show advantage to creditors in the application for sequestration.

It is submitted that Landman J correctly refused, for the correct reasons, to allow the waiver of the section 82(6) rights in *Ex Parte Kroese*. Whether it was necessary to place a constitutional slant on the judgment is however debatable. But by doing so, the court has shed a little more light on the question of South African insolvency law policy and possible future confrontation with infringement of constitutional rights of debtors by insolvency legislation. In the context of the facts of this note, however, one must be reminded that the Insolvency Act is a law of general application as envisaged by section 36 of the Constitution. On the face of it many rights of various individuals appear to be infringed in the insolvency arena. However, by its very nature, insolvency law limits the rights of most of its

⁹⁸*Ex parte Kroese* (n 6) para 34.

⁹⁹It is submitted that it may even be possible to consider a waiver to be an impeachable disposition.

¹⁰⁰For example the National Credit Act 34 of 2005.

participants. In this regard Currie correctly observes: “Limitation” [regarding section 36] is a synonym for “infringement” or, perhaps, “justifiable infringement”.¹⁰¹

It would appear that much of insolvency legislation has as its consequence the ‘justifiable limitation’ or infringement of persons’ rights, and not only those of debtors, but also of creditors, the government and society in general. However, these limitations are in place generally for the benefit of all parties in the insolvency arena within an open and democratic society based on human dignity, equality and freedom.¹⁰² They mostly are justifiable within the limitation criteria of section 36 of the Constitution and any future challenge to the *status quo* may be an uphill battle.

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¹⁰¹Currie and De Waal *The bill of rights handbook* (2013) 7.1 151.

¹⁰²*Ibid.*