THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 763/2024

In the matter between:

SEAN CHRISTENSEN N O **FIRST APPLICANT**

JABULANI KHUMALO N O **SECOND APPLICANT**

and

LILIANNE DE MAGALHAES **RESPONDENT**

Neutral citation: *Christensen N O and Another v De Magalhaes* (Case no 763/2024) [2025] ZASCA 193 (15 December 2025)

Coram: DAMBUZA, HUGHES and KOEN JJA and CLOETE and BLOEM AJJA

Heard: 20 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 15 December 2025 at 14h00.

Summary: Law of Insolvency – application for special leave to appeal in terms of the Superior Courts Act 10 of 2013 – referred for oral argument – special leave granted – full court incorrectly applying onus under s 21(2)*(c)* of the Insolvency

Act 24 of 1936 – solvent spouse failing to discharge onus resting on her – funds from sale of immovable property registered in her name not per se a title valid against the creditors of insolvent spouse's estate.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mudau, Malindi and Wilson JJ, sitting as a court of appeal):

1 The application for special leave to appeal is granted with costs.

2 The appeal against the order of the full court is upheld with costs.

3 The order of the full court is set aside and replaced with the following order:

'1 The appeal is upheld with costs.

2 Paragraph 1 of the order of the high court is set aside and substituted with the following order:

"The application is dismissed with costs."'

JUDGMENT

Cloete AJA (Dambuza, Hughes and Koen JJA and Bloem AJA concurring):

Introduction

[1] This is an unopposed application for special leave to appeal, referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act.[1] The parties were also directed to address the merits of the appeal at the hearing.

[2] The applicants are the duly appointed trustees of the insolvent estate of Mr Antonio de Magalhaes (the insolvent), who at all material times, was married out of community of property to the respondent, Mrs Lilianne de Magalhaes (the wife). Central to the application for leave to appeal and the appeal itself is

[1] The Superior Courts Act 10 of 2013.

whether the wife is entitled to the release of her bank account, a First National Bank Money Maximiser account (the Maximiser account), pursuant to the provisions of s 21 of the Insolvency Act[2]. The Gauteng Division of the High Court, Johannesburg, per Maeir-Frawley J (the high court) granted the wife's application brought in terms of s 21(2)*(c)* of the Insolvency Act. The full court of the Gauteng Division of the High Court, Johannesburg (the full court) dismissed the trustees' appeal against the order of the high court. The trustees seek special leave to appeal against the order of the full court.

[3] Although the relief claimed related to the balance in the bank account, it is common cause that the amount remaining in the bank account is in respect of the balance of the proceeds of an immovable property situated at erf 4826 Simonstown, Western Cape (the Simonstown property) which the wife claims is to be excluded from the insolvent estate. Section 21(2)*(c)* provides that a trustee shall release the property of a solvent spouse if it is proven 'to have been acquired by that spouse during the marriage with the insolvent by a title valid as against the creditors of the insolvent'. In terms of s 21(2)*(e)* the same applies to property 'acquired with any such property… or with the income or proceeds thereof'.

[4] The trustees had refused to release the proceeds of the Simonstown property from attachment on the basis that although the wife had acquired that property during the marriage, it was not by a title valid against the insolvent's creditors. According to them, the insolvent was the beneficial owner of the property and the proceeds of its sale thus accrued to them on behalf of the insolvent estate for the advantage of his creditors.

[2] The Insolvency Act 24 of 1936.

Background

[5] The relevant litigation background is as follows. On 11 March 2020 the wife launched an application in the high court for an order that the trustees be directed to release from attachment monies in three of her bank accounts, one of which was the Maximiser account; *alternatively* they be directed to release the proceeds of a disability benefit policy with Liberty Life transferred by the insolvent into that account on 28 January 2019, on the ground that such proceeds fell to be excluded from the insolvent estate by virtue of s 63(1)*(a)* of the Long - Term Insurance Act.[3]

[6] The trustees brought a counter-application in terms of s 18(3) of the Insolvency Act to extend their powers in order to oppose the wife's application, which counter-application was granted by the high court, and simultaneously delivered their answering affidavits on the merits. Essentially, the high court was asked to determine whether either, or both of two contentious payments into the Maximiser account were to be excluded from the insolvent estate. The first, as indicated, was the disability benefit payment. The second pertained to the payment into that account of R2 743 836.14 on 17 May 2019 which, it was common cause, constituted the net proceeds of the sale of the Simonstown property. The high court found that both payments fell to be excluded and in paragraph 1 of its order granted the main relief together with costs against the trustees in their capacities as such. It subsequently granted the trustees leave to appeal the aforementioned part of its order to the full court (which, as indicated, dismissed that appeal).

[7] Although both the high court and the full court excluded the disability benefit payment from the insolvent estate, the trustees have limited their

[3] The Long-Term Insurance Act 52 of 1998.

application for special leave to appeal to this Court only to that part of the full court's order which pertained to the net proceeds of the sale of the Simonstown property. In addition, during argument, counsel for the trustees expressly disavowed their intention to appeal the findings of the full court in respect of the disability benefit payment. The balance which remained in the Maximiser account is less than the nett proceeds of the sale of the Simonstown Property.

[8] Accordingly, the only issues for determination in relation to the proceeds of the Simonstown property are whether: (a) the full court properly applied the onus for purposes of s 21(2)*(c)* of the Insolvency Act; and (b) if the wife bore that onus, she succeeded in discharging it. The trustees contend that the full court erred in concluding that the evidence of the wife was sufficient on this score, and that in concluding thus, effectively shifted the onus onto them to disprove her assertions, thereby deviating from the established approach.

Applicable legal principles

[9] In *Beddy NO v Van der Westhuizen* (*Beddy NO*),[4] this Court reiterated that the purpose of s 21(2) of the Insolvency Act – which sets out five distinct categories of property which may be excluded from an insolvent estate – is 'to prevent or at least to hamper collusion between spouses to the detriment of creditors of the insolvent spouse…' Viewed from the other angle, the object is 'to ensure that property which properly belonged to the insolvent ends up in the estate' (referring to *De Villiers NO v Delta Cables (Pty) Ltd* [5] and *Harksen v Lane NO and Others*).[6] The court is concerned with the actual intention of the insolvent and the solvent spouse in relation to the property sought to be excluded,[7] although validity of title or otherwise is 'usually closely related to the parties' knowledge

[4] *Beddy NO v Van der Westhuizen* [1999] 3 All SA 227 (A); 1999 (3) SA 913 (SCA) (*Beddy NO*) at 916A-C.
[5] *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 13I.
[6] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at 318E.
[7] *Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue* 1996 (3) SA 942 (A) at 952F.

of the alienor's actual or imminent insolvency'. In instances where collusion, as described in s 31 of the Insolvency Act, is alleged, actual intention is determined first before such collusion is considered.[8]

[10] Section 21(2) expressly places the *onus* on the solvent spouse to demonstrate valid title against the insolvent's creditors. This onus is not discharged simply by pointing to the ostensible transaction and saying to the trustee: 'It is now your turn to do your worst with it.'[9] In *Kilburn v Estate Kilburn*[10] it was held, with reference to the predecessor to s 21(2),[11] that:

'… if property has been acquired by the spouse who is not insolvent by means of her own money or from a source other than her husband, then she holds it by title valid as against the creditors of her insolvent husband. But if she obtains it from him during the marriage as a donation, or if the insolvent gives money to his wife to buy property and have it registered in her name, or if she buys property with money provided by the husband ostensibly for herself but in reality for her husband's estate or even for the benefit of both 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.'[12]

[11] In *Harksen v Lane*[13] the Constitutional Court, having found s 21 to be constitutionally compliant, went on to state that '[t]he fact that the onus of establishing his or her ownership of the property is placed upon the solvent spouse should not in any way be confused with the purpose of the provision. In any vindicatory action the claimant has to establish ownership. The onus of proof had to be placed on either the Master or the trustee or on the solvent spouse. Having regard to which of those parties has access to the relevant facts, the onus was

[8] *Beddy NO* at 917C-F.
[9] Ibid at 917D-E.
[10] *Kilburn v Estate Kilburn* 1931 AD 501.
[11] The equivalent of s 21(2) was introduced into the Insolvency Act 32 of 1916 by s 10 of the Insolvency Amendment Act 29 of 1926. Act 32 of 1916 was repealed by Act 24 of 1936.
[12] *Kilburn* fn 10 above at 507-508. See also, for example, *Rens v Gutman NO and Others* 2003 (1) SA 93 (C).
[13] *Harksen v Lane* fn 6 supra.

understandably and justifiably placed on the solvent spouse'.[14] The Constitutional Court also stated that:

'…in the case of honest spouses, who are married out of community of property, it is not infrequently a matter of complexity for the spouses themselves to determine which property in their possession belongs to each of them, or, indeed, which is held in co-ownership because both contributed to the purchase price. Having regard to the close identity of interests of many married couples, they do not always make nice calculations and keep accurate records of their respective contributions to property they acquire. If it is difficult for them to do so, then so much more difficult and complex is it for a trustee who comes as a complete stranger to the financial affairs of the spouses. The provisions of s 21 thus assist a trustee in the important determination of which property in the possession of "spouses" belongs to the insolvent estate, not only in cases of collusion but also in the case of honest partners to a marriage or similar close relationship. This statutory mechanism is an appropriate and effective one.'[15]

[12] In *Cape Explosive Works Ltd v Denel (Pty) Ltd*[16] this Court confirmed that '[w]e have a negative system of registration where the deeds registry does not necessarily reflect the true state of affairs'. Put differently, one must bear in mind the abstract theory of ownership in our law. It was described in *Legator McKenna Inc and Another v Shea and Others (Legator McKenna)*,[17] and succinctly encapsulated by this Court in *Strohmenger v Victor*[18] as follows: '[t]he theory postulates two requirements for the passing of ownership, namely delivery which in the case of immovable property is effected by registration in the deeds office, coupled with the so-called real agreement'. In *Legator McKenna* the 'real agreement' was formulated thus: '…an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the

[14] *Beddy NO* at 317G-318A.
[15] *Harksen v Lane* fn 6 above at 326C-F.
[16] *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) at 579F. See also for example *Gugu and Another v Zongwana and Others* [2013] ZAECMHC 30; [2014] 1 All SA 203 (ECM) para 19.
[17] *Legator McKenna Inc and Another v Shea and Others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA) (*Legator McKenna*) para 22.
[18] *Strohmenger v Victor* [2022] ZASCA 45 (8 April 2022) para 21.

property' Ownership would not pass, despite registration of transfer, if there is a defect in the real agreement.[19]

The evidence

[13] The insolvent and his wife were married out of community of property on 11 January 1992. His estate was provisionally sequestrated at the instance of a creditor on 3 July 2019, and a final sequestration order was granted without opposition on 15 August 2019. At the time of the sequestration, the wife was the holder of three bank accounts, one of which was the Maximiser account. On 19 August 2019 the trustees attached these bank accounts pursuant to the provisions of s 21(1) of the Insolvency Act.[20] Earlier on 27 January 2019 the wife had sold the Simonstown property to Mr and Mrs van Rensburg (the purchasers) for the sum of R4,3 million. On 16 May 2019 the net proceeds of the sale of R2 743 836.14 were paid into one of the wife's bank accounts and transferred by her into the Maximiser account the following day. Central to the determination of the remaining dispute was thus whether the wife had acquired valid title to those net proceeds against the insolvent's creditors.

[14] In motion proceedings an applicant must make out their case in the founding affidavit. The evidence of the wife in the founding affidavit was sparse, to say the least. First, she alleged that the Simonstown property (and hence the net proceeds arising from the sale thereof) 'belonged' to her. Second, in support of this allegation she annexed the following: a deed of transfer dated 15 August 2001 reflecting her having purchased the Simonstown property from Moneyline (Pty) Ltd on 17 April 2001 for R179 500; and a deed of transfer dated 16 May 2019 pertaining to the sale of that property to the purchasers, along with

[19] *Legator McKenna* fn 17 supra.

[20] Section 21(1) provides that: [t]he additional effect of the sequestration of the separate estate of one of the spouses … shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property … of the spouse whose estate has not been sequestrated ….'

a few related documents. Third, she alleged that she had purchased the Simonstown property in 2001 with her own money, but given the 18-year period which had since elapsed, she was unable to produce proof of her ownership of that money.

[15] In their answering affidavit the trustees relied, inter alia, on what had been conveyed to their attorney at a meeting with the wife on 28 September 2018. This was confirmed under oath by the attorney. In short, it had been the wife's version at the meeting that, prior to 1999, she had not received a 'fixed salary' from her employment in a business of which she and the insolvent were co-directors, namely PAM Fabricators (Pty) Ltd (PAM). From 1999 until 2014 she earned a salary (the amount was however not divulged). During 2014 she was appointed as PAM's 'consultant financial director', until it was placed in voluntary business rescue on 22 August 2018 by way of a directors' resolution in terms of s 129 of the Companies Act[21] (again her earnings during this period were not disclosed).

[16] According to the trustees, the couple had also been co-members of another entity since 20 November 2003, namely Double Delight Investments 4 CC (Double Delight) which too was placed in voluntary business rescue on 22 August 2018. They thus became members of Double Delight two years after the wife purchased the Simonstown property. Double Delight was registered to create a property portfolio for the couple separate from their personal estates, but it was also later used by the wife as a vehicle to receive payments for services rendered to PAM in her capacity as consultant.

[17] The trustees produced the following further evidence, unearthed during their investigation. Some of it was supported by bank statements and source

[21] The Companies Act 71 of 2008.

documents, and some also by the transfer documents upon which the wife herself relied, but with which she did not deal at all in her founding affidavit other than in the sketchiest of terms. From a perusal of the first deed of transfer (when she acquired the Simonstown property), as well as what is commonly referred to as a deeds office 'prep sheet', it is evident that on 19 July 2004 a mortgage bond was registered thereover in the amount of R1 365 000. It was only cancelled upon registration of transfer of the property to the purchasers. From the trustees' investigation, on 23 September 2014, the balance owing to First National Bank under the bond was R1 287 371.07.

[18] The trustees explained that they had been unable to obtain all of the bond statements, but from those available to them, it was evident that over the periods 7 March 2013 to 7 December 2014 and 8 January 2018 to 7 July 2018, the insolvent made twenty-one payments towards the bond totalling R365 898.51.

[19] In addition, during 2009 the insolvent instructed third parties in relation to building work at the property, and written communications and quotations for such work referred only to him and not the wife. Also annexed to the answering affidavit were the wife's tax assessments issued by the South African Revenue Service reflecting nil income for the 2017 year of assessment, at a time when she was allegedly employed and earning an income as a 'consultant financial director' of PAM.

[20] In her replying affidavit the wife took the stance, allegedly on legal advice, that ownership of immovable property is determined (solely) by proof of registration thereof, and given that she had produced such proof, the evidence put up by the trustees in relation to the real agreement between her and the insolvent was irrelevant to the issue at hand. As she put it, 'the question of ownership stops there and …there was no need to produce any further "material facts"'. In similar

vein, she contended that whether she could have afforded to purchase the property, or paid the bond instalments, were likewise irrelevant, but stated she would nonetheless address the trustees' allegations out of an abundance of caution.

[21] However, the wife nonetheless again failed to deal with the source of the initial purchase price of R179 500 for the Simonstown property in 2001. Even if she no longer had documentary proof of that source, it is difficult to accept she was unable to recall whether she had that sum available as a result of savings, inheritance, donation, loan or the like. In addition, all she alleged about the mortgage bond was that, because it was only registered in 2004, it had nothing to do with the purchase. She admitted the insolvent made bond payments, but averred he only did so after she was diagnosed with a life-threatening illness in 2013. She failed to deal with the documentary evidence pertaining to work at the property in 2009, described by one supplier as 'the new build' .She did, however, disclose that at the time she purchased the Simonstown property she was not earning an income from PAM, which is at odds with what she told the trustees' attorney, namely that she earned such income from 1999 until 2014.

[22] She further maintained that in 2001 she had other movable and immovable assets as well as alternative sources of income, but yet again, no particulars were provided, although these would clearly have been within her knowledge even if documentary proof was no longer available. The wife's stance was further that, because the trustees had failed to demonstrate the insolvent made all the payments in respect of the Simonstown property, they were in any event not entitled to the full net proceeds of the sale thereof.[22]

[22] It was common cause that at date of attachment the amount standing to the credit of the Maximiser account had been depleted to R1 830 901.52.

[23] In respect of her 2017 tax assessments reflecting her income as nil, she claimed to have been funding her expenses during that period from her loan account in Double Delight, but again failed to take the court into her confidence about that loan account, or what her expenses had been over the period in question, or why, if she was able to have done so, the insolvent had been obliged to make the bond payments in respect of the Simonstown property on her behalf. She also did not explain whether the payments made by the insolvent were loans to her, or donations, or were made on some other basis.

[24] She did not dispute the trustees' version that Double Delight was established to create a separate property portfolio for their mutual benefit, nor that she had in addition used it as a vehicle to channel her consultancy remuneration from PAM, which would have started in 2014. However, in any event, on her own version, that source of income was insufficient to fund her own expenses as well as the bond instalments, at least from 7 January 2014 to 7 December 2014 and again on 8 January 2018, 7 June 2018 and 7 July 2018, when regard is had to the bond statements annexed to the answering affidavit. Further, she completely failed to engage with how she alone had funded the bond instalments from 2004 until 2013.

The full court's findings

[25] Before the full court the trustees submitted the wife had failed to put up sufficient evidence to prove her ownership of the Simonstown property and thus the net proceeds of its sale. They contended that it could be inferred from the evidence that the property was not paid for by her and was never intended by the couple to be her property, but rather that of the insolvent as the beneficial owner. They sought to retain the balance of those proceeds still remaining in the Maximiser account.

[26] The full court recognised that the onus rested on the wife to prove her title to the proceeds. It found that she had discharged that onus having regard to the following. In its view, the bond payments made by the insolvent during the periods 2013 to 2014 and later in 2018 were understandable, given the wife's illness and the insolvent's common law duty of support towards her. It also found that the conclusions sought to be drawn by the trustees were at best speculative for the following reasons.

[27] First, unlike in *Kilburn*, there was no basis to conclude there was an agreement between the couple that the wife would acquire the property to protect the insolvent's assets in the event of his estate being sequestrated, which in the present case only occurred 18 years later. Second, it was understandable that, because of the passage of time, the wife was unable to produce proof of how she funded its purchase from her own separate resources. Third, given that the bond was only registered in 2004, it was unlikely that the wife would have succeeded in obtaining registration of the property in her name unless 'the purchase price had been paid or its payment secured'.

[28] Fourth, seemingly relying on the remark made in *Beddy NO* that validity of ownership is usually closely related to the alienor's actual or imminent insolvency, the full court considered the passage of 18 years to be a hurdle for the trustees which they could not overcome. It thus dismissed the appeal.

Discussion

[29] Not mentioned, and apparently not considered by the full court, is the important passage in *Beddy NO*, which was a so-called collusion case, that for purposes of establishing valid title against creditors under s 21(2), actual intention as to the true nature of the transaction must be determined before considering whether or not there was collusion, either as envisaged in s 31 of the Insolvency

Act or under the common law.[23] But in any event, it was not the trustees' defence that the insolvent made a collusive disposition to the wife in the face of actual or imminent insolvency, or indeed at all. Their defence was instead that from the outset, when the property was purchased in 2001, the couple likely agreed and understood that the insolvent would be the true and beneficial owner, when regard was had to the evidence supporting this inference. It was not for the trustees to prove this but for the wife to advance facts sufficient to demonstrate the trustees were wrong.

[30] It is clear from the summary of the evidence set out above that the wife failed to discharge the onus resting on her, despite having two opportunities to do so, the first in her founding affidavit and the second in her replying affidavit. She was required to go much further than she did to establish true ownership of the Simonstown property and thus the proceeds of its sale. Borrowing from the words used in *Beddy NO*,[24] the evidence put up by the wife was 'selective, evasive, unpersuasive and at times contradictory'. In addition, it was open to the wife to have obtained a supporting affidavit from the insolvent. His silence speaks for itself.

[31] The full court regrettably appears to have determined the issue by proceeding from the erroneous premise that collusion was the trustees' defence. Further, not even the wife contended that the insolvent paid the bond instalments as part of his duty of support, and thus the conclusion drawn by the full court in this regard had no factual foundation. Section 31, or indeed any of the other sections of the Insolvency Act dealing with so-called impeachable transactions, namely ss 26, 29 and 30, were simply not in issue.

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[23] *Beddy NO* fn 6 above at 917G-918A.
[24] *Beddy NO* at 923F-G.

[32] The full court unfortunately overlooked this and thus misunderstood the trustees' case. Any doubt on this score is dispensed with when regard is had to s 32 of the Insolvency Act which provides a statutory mechanism for a trustee to institute proceedings to set aside an impeachable transaction. One must not conflate the remedy available to a solvent spouse in s 21(2) with the remedy available to a trustee in s 32 of that Act. It follows that the trustees must succeed.

Order

[33] In the result, the following order is made:

1 The application for special leave to appeal is granted with costs.

2 The appeal against the order of the Full Court is upheld with costs.

3 The order of the Full Court is set aside and replaced with the following order:

'1 The appeal is upheld with costs.

2 Paragraph 1 of the order of the High Court is set aside and substituted with the following order:

"The application is dismissed with costs."'

J CLOETE

ACTING JUDGE OF APPEAL

Appearances:

For the Appellant:	S Symon SC with A Vorster
Instructed by:	Cox Yeats Attorneys, Sandton
	Symington de Kock Attorneys, Bloemfontein
For the respondent:	No appearance.