

SOUTH AFRICA / JUDGMENT

De Villiers NO v Delta Cables (Pty) Ltd (56/1990) [1991] ZASCA 115; 1992 (1) SA 9 (AD); [1992] 1 All SA 192 (A) (23 September 1991) [1991] ZASCA 115

COURT

Supreme Court of Appeal

BEFORE

Van Heerden, Nestadt, Goldstone, Nicholas, Van
Coller

CASE / FILE NUMBER

56/1990

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LL Case No 56/1990

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between:

MICHAEL LEO DE VILLIERS N O Appellant

and

DELTA CABLES (PTY) LTD Respondent

CORAM: VAN HEERDEN, NESTADT, GOLDSTONE JJA

NICHOLAS et VAN COLLER AJJA

HEARD: 5 SEPTEMBER 1991

DELIVERED: 23 SEPTEMBER 1991

JUDGMENT VAN HEERDEN JA:

2.

The facts material to this appeal are not in dispute. They may be summarised as follows.

- (1) On 22 February 1986 R A Matthews("the insolvent") and his wife ("Mrs Matthews"), towhom he was married out of community of property, executed a deed of suretyship in favour of the respondent.

- (2) Five days later Mrs Matthews signed a power of attorney for the purpose of registering a surety mortgage bond over immovable property ("the property") situated in Constantia. The respondent was the prospective mortgagee. (3) On 21 May 1986 the property, which had been purchased by Mrs Matthews during 1986, was registered in her name. (4) On 17 June 1986 the estate of the insolvent was provisionally sequestrated. A final order of sequestration was granted on 29 June 1986 and on 24 September of that year the appellant, who had
3. been the provisional trustee for some time, was appointed trustee in the insolvent estate.
- (5) On 1 October 1986 the respondent caused a surety mortgage bond to be registered over the property. This was done by virtue of the aforesaid power of attorney. The bond secured, up to a limit of R70 000, the indebtedness of V H Cables (Pty) Ltd to the respondent. That company was the principal debtor to which the deed of suretyship referred to in (1) above related. (6) On an unknown date the respondent instituted action against the insolvent and Mrs Matthews in the Witwatersrand Local Division. The action was apparently founded upon the deed of surety-ship. On 14 April 1987 the court granted judgment by default against the insolvent and Mrs Matthews. They were jointly and severally ordered to pay the respondent the amount of R62 984,17, interest and costs.
- (7) Pursuant to the judgment and the
4. consequential issue of a writ of execution the property was attached by the Deputy Sheriff, Wynberg.
- (8) Until shortly before the sale in execution was to take place the appellant was unaware that the surety bond had been registered and that the judgment by default had been obtained. The parties agreed, however, that the sale would go ahead and that the nett proceeds, after satisfaction of the claim of the holder of a first mortgage bond over the property, would be paid to the appellant by the Deputy Sheriff. In the event an amount of some R70 000 was paid to the appellant. (9) Subsequently the respondent proved a claim in the insolvent estate. The claim was based on the default judgment obtained against the insolvent and Mrs Matthews. By virtue of that judgment the respondent claimed to be a creditor of Mrs Matthews in the amount of R68 137,31. The respondent also averred that the surety mortgage bond, valued at R91 000, was
5. the only security in respect of its claim, and stated that it relied on the bond for the satisfaction of its claim. During August 1989 the appellant brought an application against the respondent in the Witwatersrand Local Division. The main relief sought by him was an order declaring that the respondent was a concurrent, and not a secured or preferent, creditor in the insolvent estate. The appellant's contention was that the registration of the bond, which had been effected without his consent subsequent to the sequestration of the insolvent's estate, did not confer any preference on the respondent in respect of the claim proved by it. This contention was rejected by the court a quo. It held that notwithstanding the provisions of s 21 of the Insolvency Act 24 of 1936 ("the Act") the appellant would have been obliged to allow registration of the bond on the strength of the power of attorney which

had

been validly executed prior to the date of sequestra-

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tion and that, in any event, the bond had never been set aside. Hence the court dismissed the application with costs but subsequently granted the appellant leave to appeal to this court.

The outcome of the appeal turns on the mean-

ing and effect of s 21, and in particular s 21(1), of the Act. That subsection reads:

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." (My underlining.)

S 21(2) enjoins the trustee to release

property of the solvent spouse which is proved to fall

into one of five categories of assets. In the event of 7. the trustee failing to comply with an application for such release, the solvent spouse may in terms of s 21(4) apply to court for an order releasing any property vested in the trustee under subsection (1). It is common cause, however, that Mrs Matthews made no application for the release of the property. S 21(3) provides that if the solvent spouse is in the Republic and the trustee is able to ascertain his or her address, the latter may not, except with the leave of the court, realize property which ostensibly belonged to the solvent spouse until the expiry of six weeks' written notice of his intention to do so. Such notice must be given to the solvent spouse and also be published in inter alia the Gazette, and the latter notice must invite all separate creditors for value of that spouse to prove their claims as provided in subsection (5). In so far as its provisions are material, that subsection reads:

"... any property of the solvent spouse 8.

realized by the trustee shall bear a proportionate share of the costs of the sequestration as if it were property of the insolvent estate but the separate creditors for value of the solvent spouse having claims which could have been proved against the estate of that spouse if it had been the estate under sequestration, shall be entitled to prove their claims against the estate of the insolvent spouse in the same manner and, except as in this Act is otherwise provided, shall have the same rights and remedies and be subject to the same obligations as if they were creditors of the insolvent estate; and the creditors who have so proved claims shall be entitled to share in the proceeds of the property so realized according to their legal priorities inter se and in priority to

the separate creditors of the insolvent estate

It is clear that had the estate of Mrs Matthews been sequestrated prior to the registration of the surety bond, the respondent would not have been a secured or preferent creditor in her insolvent estate. This is so because the object of the Insolvency Act is to ensure a distribution of assets among creditors in the order of their preferences existing at the date of the sequestration order. This object is achieved⁹ mainly by s 20(1)(a) of the Act which provides that the effect of the sequestration of the estate of an

insolvent shall be "to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him". In the words of Innes JA

in *Walker v Syfret* N O, 1911 AD 141, 166:

"The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."

It follows that subsequent to the hypotheti-

cal sequestration of Mrs Matthews' estate the respondent could not have compelled the trustee in her estate

to take steps to effect registration of the surety bond, and that registration obtained by virtue of the

power of attorney would not have conferred a *ius in rem*¹⁰ upon the respondent. Cf *Ward v Barrett* N O and *Another* N O 1963 (2) SA 546 (A) 552-3. The estate of Mrs Matthews was, of course, not sequestrated. But, as far as the position of the appellant vis-à-vis the respondent and the nature of the latter's claim are concerned, the same results flow from an application of s 21 of the Act. It will be recalled that s 21(1) provides for the vesting in the Master, and later in the trustee in the insolvent estate, of all the property of the solvent spouse as if it were property of the sequestrated spouse. The main object of s 21(1), read with s 21(2) and (4), is, no doubt, to prevent or at least to hamper collusion between spouses to the detriment of creditors of the insolvent spouse. But s 21(1), read with s 21(5), has an ancillary object, viz, to bring about a *concursum creditorum* in respect of unreleased assets of the solvent spouse. For this reason subsection (5) provides that the separate creditors for value of the

11.

solvent spouse shall be entitled to prove their claims in the same manner, and, subject to an immaterial proviso, shall have the same rights as if they were creditors of the insolvent estate. It is moreover specifically provided that those creditors shall be entitled to share in the proceeds of unreleased property of the solvent spouse according to their legal priorities inter se.

The legislature clearly intended that subsequent to the vesting of the assets of the solvent spouse in the Master nothing could be done by a creditor of that spouse to alter his own rights or those of other creditors (cf Ward at p 160). The "legal priorities inter se" were thus intended to be the priorities existing at the date of the above vesting. Indeed, that vesting in itself had the effect that creditors of the solvent spouse could no longer, as against the trustee, claim specific performance of an obligation of the solvent spouse, or, as regards 12. unreleased assets, act on an authority conferred by that spouse. Counsel for the respondent contended, however, that the effect of s 21 (1) of the Act is not to "divest" the solvent spouse of her assets, and that the trustee in an insolvent estate does not acquire dominium in those assets. In support of this contention counsel referred to a number of provisions of the Act which, in his submission, are indicative of an intention that an insolvent's property be treated differently from that of the solvent spouse. Thus he pointed out that: 1) save for immaterial exceptions civil proceedings initiated by or against an insolvent are stayed until the appointment of a trustee (s 20(1)(b)), whereas no provision is made for the staying of proceedings by or against the solvent spouse;

- 2) the execution of a judgment against an insolvent - but not one against the solvent spouse - is 13. also stayed (s 20(1)(c)); and 3) the contractual capacity of an insolvent - but not that of the solvent spouse - is curtailed by s 23(2). I do not propose to deal in any detail with the above provisions and a few others upon which counsel relied. It is important to bear in mind that the sequestration of the estate of an insolvent does not bring about the sequestration of his or her spouse's estate. Subject to the provisions of s 21, the spouse's status is not affected by the sequestration order with the result that he or she retains full contractual capacity. And what vests in the trustee, is property acquired by the spouse prior to the sequestration order, and not - as in the case of an insolvent - also property acquired subsequently. The solvent spouse may therefore deal freely with such property ("after-acquired property").

There is also a fundamental difference

14. between the effect of a vesting in the trustee of property of an insolvent, on the one hand, and of the solvent spouse, on the other. Property owned by an insolvent at the date of sequestration as a rule remains vested in the trustee until disposed of by him in the course of the administration of the estate. By contrast the solvent spouse is entitled to the release - thus to a re-vesting
- of assets falling within one of the categories set out in s 21(2). If a release takes place, the solvent spouse may freely dispose of the released assets. Since the solvent spouse can obtain an estate consisting of released and after-acquired assets, it was obviously inappropriate to provide for a limitation on his or her contractual capacity or for a stay of proceedings or execution. The separate creditors of that spouse may have their claims satisfied out of the

proceeds of released or after-acquired assets. Indeed, s 21(6) provides that those creditors shall only be¹⁵ entitled to share in the proceeds of property of the solvent spouse realised by the trustee after released and after-acquired property have been excused. Obviously, however, an execution creditor may not attach unreleased property (which vests in the trustee). This is borne out by s 21(1) which provides for a vesting in the trustee of all the property of the solvent spouse, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment. The provisions - or the absence thereof - upon which counsel for the respondent relied show no more than that some provisions of the Act pertaining to an insolvent and his or her assets are not applicable to the solvent spouse and his or her assets. In the light of the above considerations they have no bearing on the question whether the appellant became the owner of Mrs Matthews' property. Certainly, none of them tends to militate against a construction that dominium

16. in the assets of a solvent spouse vests in the trustee. Counsel also relied upon the decision in *Stand 382 Saxonwold CC and Another v Kruger* 1990 (4) SA 317 (T). In that case it was argued that because the property of a solvent spouse vests in the trustee, it must be regarded as if it were the property of the sequestrated estate for the purposes of s 20 of the Act. This argument was rejected by a full bench of the Transvaal Provincial Division (per Kirk-Cohen J). That the assets of the solvent spouse are not to be regarded as property of the insolvent spouse, may be conceded. It is, however, another question whether a trustee does not become the owner of two separate sets of assets.

Part of the reasoning of the full bench was that despite the vesting provided for by s 21(1) a trustee "does not become the owner of the solvent spouse's property". This was expressed as follows (at p 323):

17.

"Having regard to our system of the registration of immovable property and the principle referred to in *Estate Phillips*, one would expect the Legislature, if it wished to provide for a transfer of dominium from the solvent spouse to the insolvent spouse's trustee, to have said so. It did not say so; it merely used the words 'to vest in him (the trustee) all the property ... of the spouse whose estate has not been sequestrated'."

It has always been accepted that a trustee

becomes the owner of the property of the insolvent. The Legislature did not say so in so many words, but a transfer of dominium is clearly inherent in the terminology employed in s 20(1)(a) which provides that a sequestration order shall divest the insolvent of his estate and vest it first in the Master and later in the trustee. (In order to obviate repetition I shall henceforth refer only to a vesting in the trustee.) S 21(1) employs very much the same terminology. It also provides for a vesting in the trustee. True, the

subsection does not speak of a divesting but it goes on

to provide that the property so vests 'as if it were¹⁸. property of the sequestrated estate". This can only mean that the property of the solvent spouse vests in the trustee to the same extent as does the property of the insolvent. 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. In *Estate Phillips v Commissioner for Inland Revenue* 1942 AD 35, to which reference was made in the passage quoted above, a husband had, by way of donation, paid the purchase price of a farm sold by a third party to his wife. The farm was then transferred from that third party to the wife. It was contended that, because of the prohibition against donations between spouses, the husband became the owner of the farm when it was registered in the name of his wife.

19.

Thereafter this court said that statements of text-writers to the effect that ownership of a thing donated by a husband to his wife is not acquired by her, were not in point. This was so because the husband in *Estate Phillips* had never been the owner of the farm. Tindall JA then said (at p 45):

"Having regard to our system of registration of immovable property, in the absence of fraud the proposition that the dominium in the farm vested in the donor until his death is indeed startling."

It would appear that in *Stand 382 Saxonwold*

CC Kirk-Cohen J, on the strength of the above dictum,

regarded as startling the proposition that the dominium

in property of a solvent spouse may vest in the trustee

of the insolvent estate. But in *Estate Phillips*

Tindall JA went on to recognize that property

registered in the name of A may nevertheless be owned

by B, e g, because of the effect of prescription. And

if the legislature has provided that on the happening

of an event the property of a person - including

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property registered in his name - will pass to another, effect must, of course, be given thereto. Now, as has been pointed out, the legislature has clearly provided that on the sequestration of an estate the property of each spouse vests in the trustee. As far as such vesting is concerned, there is consequently no reason to distinguish between the property of an insolvent and that of the solvent spouse. The ordinary meaning of the word "vests" connotes the acquisition of ownership: *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163, 175, and at the risk of repetition, it should

be stressed that s 21(1) does not merely provide that the property of the solvent spouse vests in the trustee, but states that it so vests as if it were property of the sequestrated estate (the dominium in which, it is common cause, does vest in the trustee). Hence I cannot agree with the reasoning which led Kirk-Cohen J to the conclusion that the trustee in Stand 382 Saxonwold CC had not become the owner of the solvent spouse's property. (I am not to be understood as expressing any opinion on the actual decision in that case.) I am accordingly of the view that the appellant did become the owner of the erf in Constantia, and that the registration of the surety bond on the strength of a power of attorney granted by Mrs Matthews did not bind the appellant. More in particular, it did not confer upon the respondent a real right as against the insolvent estate. In the final analysis, however, it does not make any difference - for the purposes of this appeal - whether a trustee becomes the owner of property of the solvent spouse, or whether he merely obtains the right of disposition and control thereof (which, it would seem, is the right obtained by the liquidator of an insolvent company in respect of the company's assets). I say so because, as has been pointed out, the legislature intended that the vesting of the property

22.

of the solvent spouse in the trustee should bring about a concursus of the creditors of that spouse. Subsequent to such vesting any disposition of the property, or the purported grant of a right in regard thereto, by the solvent spouse is ineffective as against the trustee. Thus the spouse cannot confer ownership upon a third party to whom he or she donates and delivers an unreleased asset. Likewise a person to whom the solvent spouse delivers such an asset pursuant to a contract of pledge does not obtain a real right. And if the spouse performed any juristic act regarding his or her property prior to the sequestration of the insolvent's estate, the position is frozen as at that date. Put differently, a creditor cannot by virtue of anything done by the spouse acquire a further or different right to unreleased property after that date. There is consequently no merit in the contention, advanced on behalf of the respondent, that because Mrs Matthews retained full contractual capacity she could

23.

confer a right in respect of the erf on a third party. True, a sale of the erf by her to X would not have been invalid, but she could not transfer ownership thereof to X. (Cf *Acton N 0 v Reek N 0 and Others* 1966 (3) SA 640 (T) 641. Counsel for the respondent also submitted that the registration of the surety bond cannot be regarded as a nullity since, if it were, the respondent would be an unsecured creditor of Mrs Matthews in the event of a release of the erf. It is not necessary to decide whether the release of property by a trustee has any retrospective effect. All that need be said is that as long as the erf remained unreleased the respondent could not acquire a real right thereto by virtue of anything done by Mrs Matthews. In his heads of argument counsel submitted that since the bond has not been set aside, effect must be given to it. It will be recalled that that was apparently also the approach of the court *a quo*. There²⁴ are two answers to this submission. Firstly, it appears to have been the implicit understanding of the parties - when the aforesaid agreement was concluded shortly before the sale of the erf - that the efficacy of the bond would be tested in proceedings flowing from the respondent's submission of a claim against

the estate. Secondly, the appellant was at no stage bound by the registration of the bond which, as regards the respondent's claim against the estate, was wholly ineffective. Whatever efficacy registration might have had were the erf released, it was, as far as the appellant was concerned, a nullity. It was therefore unnecessary that the bond should be cancelled. See *Ward v Barrett* N 0 and Another 1962 (4) SA 732 (N) 739. The appeal is allowed with costs and the following is substituted for the order made by the court a quo:

"1) It is declared that the respondent is a concurrent and not a secured²⁵.

or preferent creditor in the insolvent estate of R A Matthews.

2) The respondent is ordered to pay the costs of the application."

H.J.O. VAN HEERDEN JA

NESTADT JA

GOLDSTONE JACONCUR NICHOLAS AJA

VAN COLLIER AJA

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