

# Section 27 of the *Insolvency Act* 24 of 1936 as a Violation of the Equality Clause of the *Constitution of South Africa*: A Critical Analysis

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## Abstract

This paper examines section 27 of the *Insolvency Act* 24 of 1936 within the context of the right to equality in section 9 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*). Section 27 of the *Insolvency Act* protects benefits arising from an antenuptial contract and given by a *man* to his wife or to a child born of their marriage, from being set aside as dispositions without value during sequestration proceedings. It excludes men, same-sex partners, children born outside of wedlock and children born to same-sex partners from keeping benefits given to them in an antenuptial contract. It affords such a privilege only to a *wife* or a child born in the marriage. The right to equality in the *Constitution* seeks to provide equal benefits before the law to persons in the same or similar positions by prohibiting unfair discrimination. This paper points out that the limitations in section 27 make it vulnerable to constitutional review under section 9(3) of the *Constitution* on the grounds of marital status, sexual orientation and birth. Certain proposals have been made to develop section 27 to be consistent with the *Constitution* by amending the definition of spouse in section 21(13) of the *Insolvency Act*. Such proposals will be considered to illustrate the progress made in reforming the section and to establish whether the reform measures proposed will protect all those affected by the discrimination arising from section 27. The paper concludes that if the proposals are implemented in a future *Insolvency Act*, they will eliminate the discriminatory effect section 27 has on husbands and wives, civil unions, and children adopted by civil union partners. However, as regards the right to birth, the proposals extend the benefit only to children born of a customary marriage or union, children who are adopted by partners in a civil union, or children who are born to parents who live together as partners in a partnership. Children born outside of marriage or to parents who do not live together in a relationship as partners are still excluded. It is submitted, therefore, that the proposal still distinguishes between the rights afforded to children and still violates the right to birth in section 9(3) of the *Constitution*.

## Keywords

Insolvency; sequestration; dispositions; antenuptial contract; right to equality; discrimination; marital status; sexual orientation; birth; civil union; civil marriages; customary marriages; section 27 of the *Insolvency Act* 24 of 1936

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## 1 Introduction

The *Constitution of the Republic of South Africa, 1996* (the *Constitution*) is regarded as one of the most progressive constitutions in the world. It is premised on the right to equality, social justice, fundamental human rights, and an open and democratic society.<sup>1</sup> It acknowledges the injustices of the past and seeks to heal those injustices by creating laws that are non-racial and non-sexist.<sup>2</sup> As the supreme law in South Africa, it applies to all law and conduct. The obligations it imposes must be fulfilled and any law or conduct inconsistent with the *Constitution* is invalid.<sup>3</sup> All South African laws must, therefore, be consistent with the *Constitution*. Where there is an alleged violation of constitutional provisions, that law or conduct must be evaluated to establish whether or not it is consistent with the values of an open and democratic society based on fundamental human rights such as human dignity and the right to equality.

The *Insolvency Act*,<sup>4</sup> and section 27 in particular, which is the focus of this paper, must be consistent with the *Constitution*.<sup>5</sup> Insolvency proceedings affect not only the interests and rights of creditors and debtors but also the interests and rights of the spouses and children of the debtor and society as a whole.<sup>6</sup> Insolvency proceedings therefore raise competing interests that must be balanced within the context of the *Constitution*.

Section 27(1) provides:

No immediate benefit under a duly registered antenuptial contract given in good faith by a man to his wife or any child to be born of the marriage shall be set aside as a disposition without value, unless that man's estate was sequestered within two years of the registration of that antenuptial contract.

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<sup>1</sup> See s 1 of the *Constitution*. For the purpose of convenience, where relevant the male and/or female genders will be used interchangeably. No discrimination is implied or intended.

<sup>2</sup> See the preamble to the *Constitution*.

<sup>3</sup> Section 2 of the *Constitution*.

<sup>4</sup> *Insolvency Act* 24 of 1936 (hereafter the *Insolvency Act* or the Act).

<sup>5</sup> *The South African Restructuring and Insolvency Practitioners Association v The Minister of Justice and Constitutional Development* (WCC) (unreported) case number 4314/2014 of 13 January 2015 (hereafter *The South African Restructuring and Insolvency Practitioners*) paras 24, 28-29.

<sup>6</sup> Although the law of insolvency is primarily concerned with protecting the rights and interests of creditors, insolvency law is shifting from being a creditor driven system to focussing on the interest of other stakeholders involved in and affected by insolvency proceedings. For the changing role of insolvency law in society see *The South African Restructuring and Insolvency Practitioners* paras 23-29.

This section protects benefits arising from an antenuptial contract (ANC) and given by a *man* to his wife or to a child born of their marriage, from being set aside as dispositions without value during sequestration proceedings.<sup>7</sup>

As this section explicitly indicates which gifts it aims to protect, it appears to discriminate against certain groups of people. As it stands, a *wife* can keep benefits given to her under an ANC, whereas gifts given to a man by a *wife* under an ANC can be set aside. Only married females can keep benefits given to them by a man under an ANC. Benefits given in same sex marriages are not considered and section 27 does not apply in circumstances where the *wife* is insolvent. Further gifts given to children born in the marriage are protected and those given to children born outside wedlock can be set aside.

The right to equality in the *Constitution* seeks to provide equal benefits before the law to persons in the same or similar positions by prohibiting unfair discrimination.<sup>8</sup> The limitations in section 27 render it vulnerable to constitutional review under section 9(3) of the *Constitution*.

Certain proposals have been made to develop section 27 to comply with the *Constitution*. An example is clause 19 of the proposals made in the South African Law Reform Commission's Report,<sup>9</sup> which addresses ANC's and section 27.<sup>10</sup> The National Economic Development and Labour Council<sup>11</sup> (NEDLAC) further proposed that the definition of "spouse" in section 21(13) of the *Insolvency Act* be adapted.<sup>12</sup>

This paper examines section 27 of the *Insolvency Act* as it currently reads, within the context of the right to equality in section 9 of the *Constitution*. Current developments in respect of section 27 will be considered to illustrate

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<sup>7</sup> See s 26 of the Act.

<sup>8</sup> See s 9 of the *Constitution*.

<sup>9</sup> SALRC *Project 63* vol 1 37 (hereafter the Explanatory Memorandum).

<sup>10</sup> See cl 19 of the Explanatory Memorandum and cl 20 of the *Draft Insolvency Bill, 2015* (hereafter the *Draft Insolvency Bill*), a copy of which is on file with the author.

<sup>11</sup> See cl 4.1.7 of the NEDLAC *Interim Report* presented by the Department of Justice and Constitutional Development to the labour Market Chamber on 28 July 2003 and 23 November 2006.

<sup>12</sup> Civil marriages which are concluded in terms of the common law as amended by the *Marriage Act* 25 of 1961 (hereafter the *Marriage Act*); the *Civil Union Act* 17 of 2006 (hereafter the *Civil Union Act*), which makes provision for opposite and same-sex couples to marry one another, and the *Recognition of Customary Marriages Act* 120 of 1998 (hereafter the *Recognition of Customary Marriages Act*), which makes provision for the legal recognition of both monogamous and polygynous customary marriages. See Smith and Robinson 2010 *PELJ* 36, 37.

progress made in reforming the section and to ascertain whether or not the reform measures proposed will protect all those affected by the discrimination arising from section 27.

The discussion opens with a consideration of the current dispensation and the question whether section 27 violates section 9(3) of the *Constitution*. Current developments will then be discussed in the light of the NEDLAC proposals.

## **2 Current dispensation**

### **2.1 Legally recognised marriages in South Africa**

For the sake of completeness it is necessary to provide a brief summary of the types of marriages legally recognised in South Africa.

#### *2.1.1 Civil marriages*

Civil marriages are regulated by the *Marriages Act*. Only monogamous, heterosexual marriages may be solemnised in terms of this Act.<sup>13</sup> Civil marriages are further made out of marriages in community of property and marriages out of community of property.<sup>14</sup> In marriages in community of property there is a joint estate and in marriages out of community of property there are separate estates.<sup>15</sup>

#### *2.1.2 Marriages under the Civil Union Act*

The *Civil Union Act* makes provision for same-sex and opposite sex couples to enter into a civil union to formalise their relationships.<sup>16</sup> A civil union is defined as the voluntary union of two people which is solemnised or registered by entering into a marriage or a civil partnership.<sup>17</sup> Civil unions

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<sup>13</sup> See Smith and Robinson 2010 *PELJ* para 3.3.1.

<sup>14</sup> See generally ch 1 and 3 of the *Matrimonial Property Act* 88 of 1984 (hereafter the *MPA*).

<sup>15</sup> See s 1 of the *MPA*.

<sup>16</sup> See s 1 of the *Civil Union Act*. See also Smith and Robinson 2010 *PELJ* para 3.2.

<sup>17</sup> See s 1 of the *Civil Union Act*. Civil partnerships, however, are not defined in the *Civil Union Act*. It is submitted in Smith and Robinson 2010 *PELJ* para 3.3.4 that the institution of civil partnerships was an attempt by the legislature to create a mechanism by which two persons can formalise their relationship in instances in which they do not wish to marry one another but nevertheless wish to ensure that their relationship obtains legal recognition.

enjoy the same legal recognition and give rise to the same legal consequences as civil marriages.<sup>18</sup>

### 2.1.3 Customary marriages

The *Recognition of Customary Marriages Act* makes provision for the legal recognition of both monogamous and polygamous marriages in South Africa.<sup>19</sup> These marriages have to be concluded in accordance with customary law. Customary law is defined as the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people.<sup>20</sup>

### 2.1.4 Religious marriages

South African law does not legally recognise marriages that are entered into in accordance with the tenets of a specific religion without being solemnised or registered according to legally recognised marriage legislation.<sup>21</sup> In South Africa, this would refer to Hindu and Muslim marriages, where polygamy is allowed.<sup>22</sup>

The *Muslim Marriages Bill*,<sup>23</sup> which emanates from an investigation by the South African Law Reform Commission on Islamic Marriages and Related Matters,<sup>24</sup> is still the subject of debate in the Muslim community, and as such has not yet been passed. Currently Muslims may be married in accordance with the *Marriages Act* to have their marriages recognised as legal in South Africa.<sup>25</sup>

## 2.2 The right to equality

Before delving into the provisions of section 27 of the *Insolvency Act* and the question of whether it violates section 9(3) of the *Constitution*, it is important first to set out the equality provisions in section 9 of the *Constitution*, which read as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

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<sup>18</sup> Section 13 of the *Civil Union Act*.

<sup>19</sup> See Smith and Robinson 2010 *PELJ* para 3.3.3.

<sup>20</sup> Section 1 of the *Recognition of Customary Marriages Act*.

<sup>21</sup> Smith and Robinson 2010 *PELJ* para 3.3.5.

<sup>22</sup> Clark "Law of Marriage" para A7.

<sup>23</sup> See Gen N 37 in GG 33946 of 21 January 2011.

<sup>24</sup> SALRC *Project 59*.

<sup>25</sup> See Clark "Law of Marriage" para A7.

- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

As indicated, the right to equality in section 9 promotes equal protection and equal benefit of the law for all persons who find themselves in the same or similar positions.<sup>26</sup> In addition, it prohibits unfair discrimination – whether direct<sup>27</sup> or indirect<sup>28</sup> – and provides that any discrimination on the grounds listed in section 9(3) is unfair, unless it is established that it is fair.<sup>29</sup>

One has to understand that the purpose of the equality clause was to overcome the burden of past inequality.<sup>30</sup>

In this regard Goldstone J in *President of the Republic of South Africa v Hugo* stated that

... although a society which affords each human being equal treatment on the basis of human worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.<sup>31</sup>

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<sup>26</sup> Currie and De Waal *Bill of Rights Handbook* 210-215.

<sup>27</sup> Direct discrimination occurs when there is a direct and explicit relationship between the distinction and the prohibited ground. Meskin *Insolvency Law* para 4.8.2.1. Also see Smith 2014 *AHRLJ* para 2.1.

<sup>28</sup> Indirect discrimination occurs when conduct that may appear neutral and harmless nevertheless treats people unequally based on attributes or characteristics which are not related to the specified grounds and has the effect of impairing their fundamental human dignity as human beings or impacts on people harmfully in a comparably serious manner. See *Harksen v Lane* 1998 1 SA 300 (CC) (hereafter *Harksen v Lane*) para 46; De Vos and Freedman *South African Constitutional Law* 446, 448; Meskin *Insolvency Law* para 4.8.2.1.

<sup>29</sup> See s 9(5) of the *Constitution*.

<sup>30</sup> See generally Currie and De Waal *Bill of Rights Handbook* 210-215; Cheadle *et al South African Constitutional Law* para 4.4.2. Also see *Brink v Kitshoff* 1996 6 BCLR 752 (CC) (hereafter *Brink v Kitshoff*) para 42.

<sup>31</sup> *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41. Also see Currie and De Waal *Bill of Rights Handbook* 214.

Constitutional interpretation requires that the impugned rule be tested in the context of the constitutional text.<sup>32</sup> Secondly, the effect of the impugned rule on certain individuals or groups of people must be examined against the history of the rule and the social and economic conditions of those individuals or groups.<sup>33</sup>

Differentiation based on one or more of the grounds listed in section 9(3) of the *Constitution* has the potential of infringing on a person's fundamental human dignity.<sup>34</sup> If the impugned rule violates the fundamental human dignity of certain individuals or groups of people by denying them equal moral worth, the differentiation may amount to unfair discrimination.<sup>35</sup>

Where there is an allegation that a particular legislative rule violates section 9(3) of the *Constitution*, a two-stage analysis is followed.<sup>36</sup> In *Harksen v Lane*<sup>37</sup> Goldstone J laid out the process to be followed when undertaking this analysis.<sup>38</sup> It is important to note that *Harksen v Lane* was heard under the *Interim Constitution*,<sup>39</sup> in which "marital status" was not a listed ground.

In the first stage it must be determined whether the impugned rule differentiates between people or groups of people and whether the differentiation amounts to discrimination.<sup>40</sup> If it does and the differentiation is on a specified ground, then discrimination will have been established. If the differentiation is not on a specified ground, it will have to be determined whether the ground is based on characteristics which have the potential to

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<sup>32</sup> Currie and De Waal *Bill of Rights Handbook* 213-214; De Vos and Freedman *South African Constitutional Law* 421-423. Also see Cheadle *et al South African Constitutional Law* para 4.4.

<sup>33</sup> See *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC); *Brink v Kitshoff* para 40; *City Council of Pretoria v Walker* 1998 2 SA 363 (CC); *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) (hereafter *Prinsloo v Van der Linde*). Also see De Vos and Freedman *South African Constitutional Law* 421-423; Currie and De Waal *Bill of Rights Handbook* 213-214; Cheadle *et al South African Constitutional Law* para 4.4.

<sup>34</sup> See Woolman and Bishop *Constitutional Law* para 36.3 as cited in De Vos and Freedman *South African Constitutional Law* 426-427; Currie and De Waal *Bill of Rights Handbook* 250-253.

<sup>35</sup> See Woolman and Bishop *Constitutional Law* para 36.3 as cited in De Vos and Freedman *South African Constitutional Law* 426-427; Currie and De Waal *Bill of Rights Handbook* 250-253; *Prinsloo v Van der Linde* para 33. See De Vos and Freedman *South African Constitutional Law* 427.

<sup>36</sup> Currie and De Waal *Bill of Rights Handbook* 216.

<sup>37</sup> See *Harksen v Lane* para 44.

<sup>38</sup> See *Harksen v Lane* para 49.

<sup>39</sup> *Constitution of the Republic of South Africa Act 2000 of 1993* (hereafter *the Interim Constitution*).

<sup>40</sup> *Harksen v Lane* para 52. Also see De Vos and Freedman *South African Constitutional Law* 444; Currie and De Waal *Bill of Rights Handbook* 210-215.

impair the fundamental human dignity of persons as human beings, or seriously to affect them in a harmful manner.<sup>41</sup>

Once it has been determined that the differentiation amounts to discrimination, it must be determined whether or not the discrimination is unfair. If the discrimination is on a specified ground, unfairness will be presumed and the impugned action will be unconstitutional.<sup>42</sup> If on the other hand the discrimination is on an unspecified ground, unfairness must be established by focusing on the impact the action has on the people on whom it has an effect.<sup>43</sup>

To determine the unfair impact, the position of the affected persons in society and whether they have been victims of past discrimination must be considered.<sup>44</sup> The nature of the discriminating rule and the purpose sought to be achieved by it must be considered. The question to be asked in this regard is whether the main purpose of the rule is to achieve a worthy and important societal goal? Lastly, whether the extent of the impairment affects the fundamental right to dignity of the affected individuals? Unfair discrimination is, therefore, discrimination which has an unfair impact on the persons affected.<sup>45</sup>

If at the end of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3) or (4). If, however, the discrimination is found to have an unfair impact, a determination will have to be made as to whether the provision can be justified in terms of the limitation clause in section 36 of the *Constitution*.

Section 36 provides for a general limitation on all the rights in the Bill of Rights if a right is found to have been infringed. The limitation in section 36 involves examining the content and scope of the protected right and the meaning and effect of the impugned rule to see whether the rule limits the right.<sup>46</sup> Once the Constitutional Court has established that the particular rule limits a protected right, it must consider whether the limitation can be justified.

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<sup>41</sup> *Harksen v Lane* para 52. Also see De Vos and Freedman *South African Constitutional Law* 444-447.

<sup>42</sup> *Harksen v Lane* para 52. De Vos and Freedman *South African Constitutional Law* 450. See Smith 2014 *AHRLJ* para 3.

<sup>43</sup> See *Harksen v Lane* para 52.

<sup>45</sup> See generally Currie and De Waal *Bill of Rights Handbook* 223-226.

<sup>46</sup> *Ex parte Minister of Safety and Security: In re S v Walters* 2002 4 SA 613 (CC) paras 26-27.



This requires the state to show that the right has been limited by law of general application for reasons that can be considered reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>47</sup> If the court finds that limitation is justified, the rule will have passed the test of constitutionality. If, however, the court finds that the limitation is not justified, then the legal rule will be unconstitutional and therefore invalid.<sup>48</sup>

It is submitted that, in its current form, section 27 of the *Insolvency Act* violates section 9(3) of the *Constitution* on the grounds of sexual orientation, marital status and birth. The prohibition of unfair discrimination on the ground of sexual orientation protects those who are attracted to members of the same sex.<sup>49</sup> It prohibits the granting of benefits to married people that are not granted to same-sex life partners.<sup>50</sup>

Marital status, on the other hand, refers to the status of being married, single, divorced, or living in a permanent heterosexual or same-sex relationship.<sup>51</sup> The two important features underlying the prohibition of unfair discrimination on the grounds of marital status are that *all* marriages enjoy equal status and *all* parties in a marriage relationship enjoy equal status.<sup>52</sup> This ground of discrimination encourages reform that is aimed at removing the favouring and promotion of marriages concluded in accordance with the *Marriages Act* over other forms of marriage or union.<sup>53</sup> Marital status has formed the basis for discrimination claims by same-sex couples.<sup>54</sup>

Lastly, unfair discrimination on the ground of birth refers to circumstances where children are differentiated on the basis of whether their biological

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<sup>47</sup> See s 36(1) of the *Constitution*; Currie and De Waal *Bill of Rights Handbook* 217; De Vos and Freedman *South African Constitutional Law* 360.

<sup>48</sup> De Vos and Freedman *South African Constitutional Law* 360.

<sup>49</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) (hereafter *National Coalition*) para 20; Meskin *Insolvency Law* para 4.8.2.1; Currie and De Waal *Bill of Rights Handbook* 228.

<sup>50</sup> *National Coalition* para 40. Also see Currie and De Waal *Bill of Rights Handbook* 229.

<sup>51</sup> See generally *Harksen v Lane* paras 62, 95; *National Coalition* paras 33-40.

<sup>52</sup> *Ngwenyama v Mayelane* 2012 4 SA 527 (SCA) para 21; Currie and De Waal *Bill of Rights Handbook* 233.

<sup>53</sup> See *Harksen v Lane* para 62, where it is held that insolvency legislation that burdens a solvent spouse by virtue of his or her marriage relationship with the insolvent has the potential to demean persons in their inherent humanity and dignity; Currie and De Waal *Bill of Rights Handbook* 232.

<sup>54</sup> See Cheadle *et al South African Constitutional Law* para 4.8.2.2. Also see *National Coalition* paras 33-40; *Langemaat v The Minister of Safety and Security* 1998 4 BCLR 444 (T); *Satchwell v President of the Republic of South Africa* 2002 9 BCLR 986 (CC) para 13; *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) (hereafter *Du Toit*).

parents were married either at the time the children were conceived or when the children were born, or married subsequent to its birth, or never married.<sup>55</sup> The prohibition seeks to do away with the differences created between the rights afforded to children born within a marriage and those afforded to children born outside of marriage.<sup>56</sup> This prohibition also seeks to do away with the distinction that is created by the word "birth", between children born in a marriage and children who were adopted by people in a marriage.<sup>57</sup>

It is against this background that section 27 will now be considered.

### **2.3 Section 27 of the Insolvency Act**

It is important to state at this stage that section 27 applies only to marriages out of community of property where there is a duly registered ANC,<sup>58</sup> and not to marriages in community of property.

Upon the sequestration of the estate of a debtor married out of community of property, the assets of the insolvent debtor and those of his solvent spouse vest in the trustee of the insolvent estate.<sup>59</sup> If the insolvent debtor had given a benefit to his wife in the duly registered ANC mentioned above, that benefit would also vest in the trustee by virtue of section 21 of the *Insolvency Act*. The solvent spouse would then have to apply for a release of her assets by proving that she acquired them in terms of a valid title.<sup>60</sup> However, even after the release of these assets, they can still fall into the insolvent estate by virtue of section 26 of the *Insolvency Act's* dispositions made without value.

Dispositions<sup>61</sup> made without value are those dispositions made by an insolvent prior to the sequestration of his estate for which he did not receive

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<sup>55</sup> *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 57; Currie and De Waal *Bill of Rights Handbook* 235.

<sup>56</sup> See Meskin *Insolvency Law* para 4.8.2.1.

<sup>57</sup> See Borraine and Evans *Law of Insolvency* para 4A8.

<sup>58</sup> See s 27 of the *Insolvency Act*.

<sup>59</sup> See ss 20(1) and 21(1) of the *Insolvency Act*; Sharrock, Van der Linde and Smith *Hockly's Insolvency Law*.

<sup>60</sup> See s 21(2)(c) of the *Insolvency Act*.

<sup>61</sup> The term "disposition" means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation, or a contract for any payment, release, compromise, donation, or a contract for any of these by the insolvent, but does not include a disposition that is made in compliance with an order of court. See s 2 of the *Insolvency Act*; Meskin *Insolvency Law* para 5.31.2; Bertelsmann *et al Mars* para 13.3.

sufficient compensation.<sup>62</sup> Section 26 allows the trustee to apply to the court for an order to set aside the disposition and recover the property.<sup>63</sup> In seeking such an order the trustee is required, amongst other things, to prove that the insolvent made a disposition and received no value for it when he made it.<sup>64</sup>

Section 27 protects these benefits from being set aside as dispositions made without value, provided they were given in a duly registered ANC made by a man to his wife or to his child born of their marriage. It is important to note that section 27 came about as a result of the fact that prior to section 22 of the *MPA*'s widening the category of property that can be acquired by a solvent spouse by making donations between spouses legal and enforceable, donations between spouses were invalid.<sup>65</sup> Therefore section 27 protected and continues to protect those donations from falling into the insolvent estate by virtue of section 26 of the *Insolvency Act*'s dispositions without value.<sup>66</sup>

Section 27 will now be discussed against section 9 of the *Constitution*.

### 2.3.1 Section 27 and "marital status"

As already indicated, section 27(1) regulates the position between a husband and wife where a duly registered ANC exists. Although donations between spouses are legal<sup>67</sup> and such donations are protected from the insolvent estate through section 27, benefits given to a man by his wife in an ANC may still be set aside by a trustee of the estate. Section 27 protects only benefits to be received by a wife and not those to be received by a man or a civil partner.<sup>68</sup> However, the benefit to the wife will be protected only if the

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<sup>62</sup> See Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 140.

<sup>63</sup> See s 26 of the *Insolvency Act*. If the disposition was made within two years of sequestration, the court will set it aside, unless the person claiming under or benefitted from it can prove that immediately after it was made, the assets of the insolvent exceeded his liabilities. However, if the disposition was made more than two years before sequestration, the court can set it aside only if the trustee proves that immediately after the disposition was made, the liabilities of the insolvent exceeded his assets. See Bertelsmann *et al Mars* paras 13.1-13.2; Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* para 12.2.1.

<sup>64</sup> Value in the context of s 26 means a benefit promised as a *quid pro quo*, either by the recipient of the disposition or by someone else. *Estate Wege v Strauss* 1932 AD 76 76, 84. Also see Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* para 12.2.1; Bertelsmann *et al Mars* para 13.2.

<sup>65</sup> See *Harksen v Lane* para 11.

<sup>66</sup> Bertelsmann *et al Mars* para 13.9; Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* para 12.2.1.

<sup>67</sup> See s 22 of the *MPA*.

<sup>68</sup> Bertelsmann *et al Mars* para 13.9.

man's estate is sequestrated and not when the wife's estate is sequestrated. In this respect section 27 discriminates against both spouses. The man cannot keep a gift given in an ANC and the wife can keep the gift only if the man's estate is sequestrated. This discrimination on the grounds of marital status hinges on the second leg of the prohibition that *all* parties in a marriage relationship should enjoy equal benefits.

### 2.3.2 Section 27 and "birth"

Section 27 limits the benefit accruing to children born in wedlock and does not extend to children born outside of wedlock.<sup>69</sup> As with the benefit to the wife, the benefits to children will be protected only if the man's estate is sequestrated and not when the wife's estate is sequestrated. As already indicated, the reference to the word "born" separates the benefits afforded to children born in a marriage and those afforded to children who were adopted by partners in a civil union.<sup>70</sup> Although the *Children's Act*<sup>71</sup> states that an adopted child must for all purposes be regarded as the child of the adoptive parent and vice versa, section 27 should also clearly indicate that it also applies to adopted children. This discriminates on the ground of birth.

### 2.3.3 Section 27 and "sexual orientation"

The protection is further limited to benefits given to married females,<sup>72</sup> and does not consider benefits given in same-sex marriages. The reference to the word "wife" in this section further separates those persons who have entered into a civil union in terms of the *Civil Union Act*,<sup>73</sup> which advocates for the equal treatment of same-sex parties.<sup>74</sup> This is clearly discriminatory on the grounds of sexual orientation.

In addition, the references to the words "man", "wife" and "marriage" imply that the benefit is protected only if it is given within a heterosexual setup. The Constitutional Court in *Fourie*<sup>75</sup> declared that the lack of the legal recognition of same-sex relationships was unconstitutional and that partners in a same-sex relationship should enjoy the same status and

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<sup>69</sup> See Boraine and Evans *Law of Insolvency* para 4A8.

<sup>70</sup> See Boraine and Evans *Law of Insolvency* para 4A8.

<sup>71</sup> Section 242(3) of the *Children's Act* 38 of 2005 (hereafter the *Children's Act*).

<sup>72</sup> See Boraine and Evans *Law of Insolvency* para 4A8.

<sup>73</sup> *Civil Union Act*. See Boraine and Evans *Law of Insolvency* para 4A8.

<sup>74</sup> See Boraine and Evans *Law of Insolvency* para 4A8.

<sup>75</sup> *Minister of Home Affairs v Fourie* 2006 1 SA 542 (CC) (hereafter *Fourie*). Also see Ntlama 2010 *PELJ* para 1.

benefits and have the same responsibilities as partners in a heterosexual marriage.<sup>76</sup>

The *Civil Union Act*, which was enacted in 2006 in direct response to the *Fourie* case, made same-sex marriages a reality in South Africa,<sup>77</sup> and in so doing did away, or intended to do away, with the limitation of benefits such as those in section 27 to heterosexual relationships.

In *Du Toit*,<sup>78</sup> where a lesbian couple in a permanent relationship was prevented from jointly adopting children the Constitutional Court found that certain provisions of the *Child Care Act*<sup>79</sup> and the *Guardianship Act*<sup>80</sup> violated the equality provisions on the grounds of sexual orientation and marital status, as the legislation limited the right to adopt children to married couples.<sup>81</sup> In this case the court read words into the impugned provisions to ensure that they covered the right of same-sex life partners to adopt children jointly.<sup>82</sup>

The *Du Toit* case is an example of how the Constitutional Court has widened the meaning of concepts such as "family", "spouse" and "domestic relationships" by recognising that the definition of "family life" in South Africa needs to reflect changes in social practices and traditions.<sup>83</sup> This case and other direct discrimination cases such as *National Coalition*<sup>84</sup> and *Brink v Kitshoff*,<sup>85</sup> show that the Constitutional Court is more willing to find a violation in direct discrimination cases than in indirect discrimination cases.<sup>86</sup> The fact that section 27 still contains references to words that

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<sup>76</sup> The consequences of a civil union are now the same as those of a marriage between heterosexual couples. See s 13 of the *Civil Union Act*.

<sup>77</sup> Smith and Robinson 2010 *PELJ* 10.

<sup>78</sup> *Du Toit* case; see note 54.

<sup>79</sup> *Child Care Act* 74 of 1983, which was amended in 1996 by the *Child Care Amendment Act* 96 of 1996.

<sup>80</sup> *Guardianship Act* 192 of 1993, which was repealed with effect from 1 July 2007 by the *Children's Act*.

<sup>81</sup> Smith 2014 *AHRLJ* para 3.3.

<sup>82</sup> Smith 2014 *AHRLJ* para 3.3.

<sup>83</sup> *Du Toit* case para 19; *Hattingh v Juta* 2013 3 SA 275 (CC); Smith 2014 *AHRLJ* para 3.3.

<sup>84</sup> See *National Coalition*.

<sup>85</sup> *Brink v Kitshoff* para 42. This case dealt with the issue of institutionalised inequality in the guise of s 44 of the *Insurance Act* 27 of 1943, which deprived married women, in certain circumstances, of some or all of the benefits of life insurance policies. Married men did not lose the benefits of insurance policies ceded to them or taken out in their favour by their wives. The Constitutional Court subsequently held that s 44 was unconstitutional as it violated the equality clause. See Smith 2014 *AHRLJ* para 4.

<sup>86</sup> Smith 2014 *AHRLJ* para 4. See fn 27 and 28 on the distinction between direct and indirect discrimination.

violate equality rights such as sex, sexual orientation, and marital status is a sign that the need for the reform of the *Insolvency Act* is urgent.

### 3 Current developments

#### 3.1 Explanatory Memorandum

The 2000 *Explanatory Memorandum* proposed that the phrase "by one spouse to the other" be inserted in section 27 and the words "by a man to his wife" be omitted.<sup>87</sup> However, as same-sex marriages did not exist in 2000 and the *Marriage Act* had not been amended, a "spouse" was defined to include a person who lived with the debtor as his or her spouse even if the debtor was still legally married, and did not take into account partners in customary unions or partners in terms of the *Civil Union Act*.

Something therefore still needed to be done to ensure that the *Insolvency Act* complied with the *Constitution*.

#### 3.2 NEDLAC proposals

In its presentations to the Labour Market Chamber in 2003 and 2006 with regard to the *Draft Insolvency Bill*,<sup>88</sup> the Department of Justice and Constitutional Development proposed that the definition of the term "spouse" in section 21(13) of the *Insolvency Act* be maintained but adapted as follows:

- (a) partner in a marriage;
- (b) partner in a customary union or customary marriage according to customary law;
- (c) civil union partner as defined in section 1 of the Civil Union Act, 2006 (Act No. 17 of 2006); or
- (d) partner in a relationship in which the parties live together in a manner resembling a partnership contemplated in paragraphs (a), (b), or (c), even if one or both are in such a partnership with another partner.

The above amendment to the definition of spouse includes persons in more than one relationship, and extends to all forms of "marriage" now recognised by legislation.<sup>89</sup> These proposals were incorporated in the *Draft Insolvency*

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<sup>87</sup> See cl 19 of the Explanatory Memorandum.

<sup>88</sup> Also see Boraine and Roestoff 2014 *THRHR* 527.

<sup>89</sup> Civil marriages which are concluded in terms of the common law as amended by the *Marriage Act*; the *Civil Union Act* 17 of 2006, which makes provision for opposite and same-sex couples to marry one another and the *Recognition of Customary Marriages Act*, which makes provision for the legal recognition of both monogamous and polygynous customary marriages. See Smith and Robinson 2010 *PELJ* 36, 37.

*Bill*.<sup>90</sup> The *Draft Insolvency Bill* now contains a clause that incorporates the proposal in the *Explanatory Memorandum* omitting "a man to his wife" and replacing it with "by one spouse to the other".<sup>91</sup>

#### 4 Commentary

As previously indicated, *Harksen v Lane* was heard under the *Interim Constitution*, in which marital status was not a specified ground. If one uses the analysis in *Harksen v Lane* to establish whether or not section 27 violates the final *Constitution* on the basis of marital status alone, infringement should now be easier to prove.

Firstly, section 27 provides that only a benefit given by a man to his wife in an ANC will be saved from being set aside as a voidable disposition in the event of his insolvency. In this regard section 27 discriminates against both spouses in different respects. Section 27 protects dispositions only where a man is sequestered. In this respect the wife's equal rights in a marriage are violated. At the same time, only the wife can keep benefits given in an ANC. This violates the man's equal rights in a marriage. This clearly distinguishes between the benefits enjoyed by parties in their marriage. This goes against one of the pivotal features of the prohibition of unfair discrimination on the ground of marital status: that all parties to a marriage enjoy equal rights. Therefore, the first question in establishing whether section 27 differentiates between people or groups of people would probably be answered affirmatively.

Secondly, because "marital status" is a ground listed in section 9(3), unfair discrimination is established.<sup>92</sup> It is unnecessary therefore to consider whether or not the differentiation impairs the fundamental human dignity of persons as human beings, as required in *Harksen v Lane*. The next stage is to test the unfair discrimination against section 36 of the *Constitution*, where the respondent will have the burden of justifying any limitation of the right.

If one examines the protection of marital status and the effect section 27 has on it, one can assume that section 27 limits the rights of both spouses in their marriage. The question that remains now is whether the right to marital status has been limited by law of general application and whether

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<sup>90</sup> See cl 20 of the *Draft Insolvency Bill*.

<sup>91</sup> See cl 20 of the *Draft Insolvency Bill*.

<sup>92</sup> Section 9(5) of the *Constitution* justifies the assumption that if the discrimination is on a listed ground, it is unfair – unless, of course, it is established that it is fair.

this limitation is justifiable in an open and democratic society based on human dignity, equality and freedom. This requires section 27 to serve a legitimate purpose based on equality, freedom and human dignity, creating a rational connection between it and its stated purpose.<sup>93</sup>

As indicated, ANC's are used in marriages out of community of property where there are separate estates. As donations are allowed between spouses, a spouse can keep a gift given by the other spouse.<sup>94</sup> In marriages out of community of property this gift is protected by section 27 from falling into the estate of the insolvent spouse in terms of section 26.

The advantage provided by section 27 to marriages out of community of property is not provided to marriages in community of property. In marriages in community of property there is a joint estate which becomes the insolvent estate upon insolvency.<sup>95</sup> As in marriages out of community of property a spouse can keep a gift given by the other spouse. However, because in this type of marriage section 27 is not applicable as there is no ANC, that gift is at risk of being set aside as a disposition without value. In this regard section 27 does not generally apply to all marriages. It favours civil marriages that are out of community of property, with no regard to benefits given in marriages in community of property.

One may also argue that section 27 generally applies to all civil marriages out of community of property - that upon deciding to get married one decides which matrimonial system one wants to govern the marriage, that if you choose to marry in community of property you should accept that there is a joint estate and any gifts between the spouses will fall into the insolvent joint estate upon insolvency. On the other hand, if you choose to marry out of community of property, gifts in ANC's will be protected in insolvency. However, even in this argument it may be said that section 27's application is limited to certain groups of people, namely a wife in a civil marriage, married females, and children born in a civil marriage.<sup>96</sup> Therefore, even in this argument section 27 does not apply generally within this group of

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<sup>93</sup> De Vos and Freedman *South African Constitutional Law* 363.

<sup>94</sup> Section 22 of the MPA provides that donations between spouses are allowed provided that there is no conflict with the *Insolvency Act*.

<sup>95</sup> See s 1 of the MPA.

<sup>96</sup> In this regard s 27 is in conflict with the extended definition of "spouse" in s 21(13) of the *Insolvency Act*. S 21(13), which provides that a spouse not only includes a husband or wife in the legal sense but also a husband or wife in a customary marriage and same-sex marriage, and common law partners. Also see s 13 of the *Civil Union Act*.



marriages. It is submitted that section 27 may therefore not withstand constitutional scrutiny.

The proposed amendments to section 27 and the new definition of a spouse in the *Draft Insolvency Bill* will give effect to the principle that all parties in a marriage enjoy equal status. Each party in a marriage, whether it be a civil partner or a partner in a customary marriage, will be able to confer a benefit on the other or their child, in an ANC, which will be protected from the insolvent estate. The proposed amendments further create equality amongst different types of marriage and union. If the *Draft Insolvency Bill* is passed, all marriages and unions legally recognised will be able to benefit from section 27. It is submitted, therefore, that should these current proposals be implemented in a future *Insolvency Act*, they would do away with the current violation of the rights of sexual orientation and marital status that the current section 27 creates.

However, as regards the right to birth, the proposals do not protect the benefits of *all* children conferred in an ANC by their parents. The proposals extend the benefit only to children born of a customary marriage or union, children who are adopted by partners in a civil union, or children who are born to parents who live together as partners in a partnership. The term "or to any child born of the marriage" in the *Draft Insolvency Bill*<sup>97</sup> still excludes children who are born outside of marriage or who are born to parents who do not live together in a relationship as partners. It is submitted, therefore, that the proposal still distinguishes between the rights afforded to children and still violates the right to birth in section 9(3) of the *Constitution*.

The question that remains now is why the constitutionality of section 27 has not been challenged, with the occurrence of so many developments in the law affecting marriage. Essentially, the people affected by section 27 and who would be appropriate to challenge its constitutionality are men married out of community of property, people married under the *Civil Union Act*, children adopted by those people, and children born outside marriage.

The truth is that many of the provisions in legislation that have been challenged in the courts were those affecting woman.<sup>98</sup> This was caused by the coming into effect of the *Constitution*, which aims, amongst other things,

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<sup>97</sup> See cl 20 of the *Draft Insolvency Bill*.

<sup>98</sup> See *Brink v Kitshoff*; *Harksen v Lane*; *Volks v Robinson* 2005 5 BCLR 446 (CC); *Fourie* case.

to protect people who were disadvantageded in the past.<sup>99</sup> Those were mainly woman.<sup>100</sup> Men were not disadvantageded in the past and civil unions are relatively new, taking into account that they gained recognition only as recently as in 2006. With regard to children, their age and absence of knowledge may perhaps play a role in their not challenging section 27. These and other reasons possibly may explain why many of the public organisations<sup>101</sup> which were involved in challenging certain legislative provisions focused only on women.

Another possible reason why a provision like section 27, which disadvantages men, has not been challenged could be that we live in a society that expects certain behaviour from certain genders.<sup>102</sup> Wharton states that:

Gender gives shape and meaning to individuals, social relations, and institutions. We cannot fully understand the social world without attending to gender. But the opposite is equally true: We cannot understand gender without understanding the social world. As social life unfolds, gender is produced; as gender is produced, social life unfolds.<sup>103</sup>

Therefore, in order to understand why legislation has certain provisions which now appear discriminatory, one has to understand the meanings that were given to gender at the time that the law came into effect. Gender stereotyping in the past and to a certain extent still today depicts men as providers, independent, masculine and career oriented.<sup>104</sup> According to this stereotype men are not regarded as vulnerable and in need of protection from legislative provisions that favour women. This gender stereotype is then regarded as justifying the violation of men's right to the equal treatment of people in the same situation. The harmful gender stereotype in section 27 has not yet been brought to the attention of the courts, and men who may have identified this stereotype may not have wanted to challenge it for fear of being regarded as vulnerable and in need of protection.

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<sup>99</sup> See s 9(2) of the *Constitution*, which directs the enactment of measures designed to protect and advance persons disadvantageded by unfair discrimination.

<sup>100</sup> See regulation 1(h) of the *Preferential Procurement Regulations* published under Gen N R725 in GG 22549 of 10 August 2001. See generally *Preferential Procurement Policy Framework Act 5 of 2000*; *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 1 SA 327 (CC) para 25.

<sup>101</sup> Such as the Legal Resources Centre and the South African Human Rights Commission.

<sup>102</sup> This is called gender stereotyping. See Bizimana *Gender Stereotyping* ch 1.

<sup>103</sup> See Wharton *Sociology of Gender* 10. Also see Bizimana *Gender Stereotyping* para 2.1.

<sup>104</sup> Bizimana *Gender Stereotyping* para 2.2.

## 5 Conclusion

This paper has considered section 27 of the *Insolvency Act* as a violation of the equality clause in the *Constitution*. The *Constitution* prohibits unfair discrimination between people or groups of people and invalidates behaviour that disadvantages them in a seriously harmful way. Constitutional interpretation requires that in testing whether a certain rule violates the *Constitution* or not, the history of the rule, the history and the social and economic conditions of the affected individuals or groups of people must be considered as a whole. This must take place in the light of the fundamental right to human dignity and the intent to create a society that is non-sexist.

As the *Insolvency Act* affects the competing interests of creditors, debtors, spouses, children and society as a whole, its provisions and its implementation must comply with the *Constitution*. Similarly, the *Insolvency Act* affects other legislation already mentioned, such as the *Marriages Act* and the *Civil Union Act*; and it should therefore be ensured that its provisions do not conflict with that legislation.

For the above reasons it is submitted that currently section 27 of the *Insolvency Act* violates the equality rights to sexual orientation, marital status, and birth in section 9(3) of the *Constitution*. This it does by limiting the protection of benefits that can be given in ANC's to those that are given by a man to his wife or to a child born in their marriage, without considering benefits given to a man by a wife and benefits given to spouses in same-sex marriages.

This, in turn, differentiates between the rights given to spouses in heterosexual marriages and same-sex marriages (civil unions), and the rights given to children born in a civil marriage or same-sex marriage and children born outside of wedlock. This differentiation affects the human dignity of the affected persons and harms them in a serious manner. Section 27 of the *Insolvency Act* therefore contains archaic provisions which require urgent reform.

This paper has also considered the current developments in respect of section 27 to address its *lacuna*. In this regard the *Draft Insolvency Bill* has been improved to include a clause omitting the phrase "a man to his wife" and by replacing it with the phrase "by one spouse to the other".

If these amendments to the *Draft Insolvency Bill* remain and are implemented in a future *Insolvency Act*, they will eliminate the discriminatory effect section 27 has on husbands and wives, civil unions, and children adopted by civil union partners.

However, as previously indicated, the current proposals do not address the discriminatory effect of section 27 on children born out of wedlock or who are born to parents who do not live together in a relationship as partners. The term "or to any child born of the marriage" in the *Draft Insolvency Bill*<sup>105</sup> still excludes these children. Something therefore still needs to be done to address this *lacuna*.

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<sup>105</sup> See cl 20 of the *Draft Insolvency Bill*.

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AHRLJ	African Human Rights Law Journal
ANC	antenuptial contract
MPA	Matrimonial Property Act 88 of 1984
NEDLAC	National Economic Development and Labour Council
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal of Human Rights
SALRC	South African Law Reform Commission