Insolvency enquiries and the right against self-incrimination: divergent approaches in South Africa and other jurisdictions

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Abstract
In South Africa, the recognition, in the Bill of Rights, of the right to remain silent and the right against self-incrimination, gave rise to challenges to the validity of statutory provisions which regulate insolvency enquiries. The Constitutional Court confirmed the validity of sections 64, 65 and 66 of the Insolvency Act, but declared invalid certain portions of sections 415 and 417 of the Companies Act on the basis of their infringement of the right against self-incrimination. Subsequent legislative amendments appear to favour an examinee's right against self-incrimination to an extent which goes beyond what the Constitutional Court required for the legislation to be valid.

Striking parallels may be drawn between developments in the United Kingdom, since the coming into force of the Human Rights Act 1998, and the European Convention on Human Rights having become applicable. However, there is a marked difference in approach on the question whether the right against self-incrimination requires derivative use, as well as direct use, immunity to be extended to an examinee in insolvency enquiries. Apparent inconsistencies have also emerged in the approach of the European Court. It is hoped that, before long, the issue will be resolved in the European Court in such a way as to provide guidance to South African legislators.

INTRODUCTION
There is in the common law a traditional objection to compulsory interrogations. Blackstone explained it: "For at common law, nemo tenebatur prodere seipsum [no one can be forced to betray himself]; and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men." Comm. iv. 296.

... But, strong as has been the influence of this attitude upon the administration of the common law, of the criminal law, especially, ... in bankruptcy jurisdiction it has been largely displaced. For example, a debtor upon his public examination in bankruptcy cannot refuse to answer questions...
on the ground that the answers may tend to incriminate him ..., the purpose of the bankruptcy statute being to secure a full and complete examination and disclosure of the facts relating to the bankruptcy in the interests of the public.¹

This statement of the English law, made in 1965, may be said accurately to reflect the position at the time in a number of jurisdictions, including South Africa. A common feature in most legal systems is legislation providing for, and regulating, the production of documents and books relevant to the affairs of an insolvent estate, and the examination by designated officials of insolvent persons and erstwhile executive officers and managers of insolvent business entities. These examinations perform a vital function in facilitating the discovery and collection of assets belonging to the insolvent estate, for the benefit of creditors. The importance of the public interest served by such examinations was reflected in legislative provisions which abrogated, or curtailed, an examinee’s right to silence and the right against self-incrimination by obliging a person to answer questions and providing that a person could not refuse to answer questions on the ground that the answer might tend to incriminate him or her. Refusal to answer questions often constituted a criminal offence for which imprisonment was a possible consequence. Some statutes specifically provided that self-incriminatory evidence given in answers to questions put at examinations was admissible in subsequent criminal proceedings brought against the examinee. More recently, with increased emphasis being placed on the protection of human rights, the validity of such legislative provisions has become an issue in light of their intrusion upon the right against self-incrimination.

In South Africa, the recognition, in the Bill of Rights, of the right to remain silent and the right against self-incrimination, gave rise to a number of constitutional challenges to the validity of, inter alia, sections 64, 65 and 66 of the Insolvency Act 1936 and sections 415 and 417 of the Companies Act 1973, which provide for and regulate insolvency examinations. In various decisions, the High Court and the Constitutional Court confirmed the validity of sections 64, 65 and 66 of the Insolvency Act, but declared certain portions of sections 415 and 417 of the Companies Act invalid on the basis of their infringement of the right against self-incrimination. However, although other parts of these sections remained intact, subsequent legislative amendments to sections 415 and 417 of the Companies Act have brought about significant changes which appear to favour an examinee’s right against self-incrimination to an extent which goes beyond what the Constitutional Court required for the legislation to be valid.

With reference to comparable developments in the United Kingdom since the Human Rights Act 1998 came into force, and to the approach of the European Court of Human Rights to these, and related issues, I question whether, in South Africa, an appropriate balance has been struck between an examinee’s right against self-incrimination and the public interest in the proper administration of insolvent estates. Apparent inconsistencies in a number of

¹Per Windeyer J in Rees v Kratzmann (1965) 114 CLR 63 at 80.
decisions of the European Court have raised concern amongst commentators about the lack of clarity surrounding these issues. It is hoped that before long, a more definitive approach by the European Court may provide the cue for the enactment of more appropriate legislation in South Africa.

SOUTH AFRICA

The Republic of South Africa Constitution ('the constitution')

Section 35

Section 35 of the constitution deals with the rights of arrested, detained and accused persons. Section 35(1)(a) of the constitution provides that everyone who is arrested for allegedly committing an offence has the right to remain silent and section 35 (1)(c) provides that every such person has the right not to be compelled to make any confession or admission that could be used in evidence against him or her. Section 35(3) provides that every accused person has a right to a fair trial, which includes, inter alia, the right to be presumed innocent, to remain silent, and not to testify during the proceedings (section 35(3)(h)), and the right not to be compelled to give self-incriminatory evidence (section 35(3)(j)). Section 35(5) provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Section 12

Section 12(1) of the constitution provides that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause, and the right not to be detained without trial. Some consideration has been given by our courts to whether statutory provisions which impose criminal sanctions for refusal to answer questions at insolvency examinations and enquiries affect the right to freedom and security of the person, rather than the right against self-incrimination, in circumstances where the examinee has not been arrested or where no criminal charge has been brought against him or her.2

Section 36

Section 36 provides that the rights contained in the Bill of Rights may be limited to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The section further provides that, in order to determine whether a limitation is justifiable, account must be taken of all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means which could achieve the same purpose. Thus the application of section 36 potentially serves an important function in achieving

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2While the majority (eight judges) of the court, in Ferreira v Levin NO and Others; Vryenboek and Others v Powell NO and Others 1996 2 SA 621 (CC), held that it was the right against self-incrimination which was affected, Ackermann J and Sachs J considered it to be the right to freedom, which incorporated a residual right against self-incrimination.
an appropriate balance between the interests of the individual (in the context of insolvency enquiries: the examinee) and the public interest in the proper administration of insolvent estates.

**Interrogations in terms of the Insolvency Act 1936**

To enable the trustee and creditors to investigate the insolvent's affairs and to ascertain his or her true financial position, sections 64 and 65 of the Insolvency Act provide that the presiding officer at a meeting of creditors of an insolvent estate may call upon the insolvent or any other person to produce a book, document or record or to appear before him or her and to give evidence, and to be interrogated on all matters relating to the insolvent or his or her business or affairs and concerning any property belonging to his or her estate, and concerning the business, affairs or property of the insolvent person's spouse. Section 66 provides for the presiding officer to commit to prison any person who fails to attend or to remain in attendance at such a meeting without a reasonable excuse, and any person who fails to produce a book or document which he was required to produce, or who refuses to be sworn, or who refuses to answer fully and satisfactorily any question lawfully put to him. Section 66(3) provides that such person may be detained until he or she has undertaken to do what is required of him or her. Section 139 of the Insolvency Act provides that any act or omission for which a person has been committed to prison in terms of section 66 constitutes a criminal offence for which a sentence of a fine of R500 or a maximum of six months imprisonment may be imposed.

In *Harksen v Lane NO and Others*, it was argued that sections 64 and 65 of the Insolvency Act amounted to a violation of a number of the solvent spouse's constitutional rights, including the right to freedom and security of the person. The court considered the scope of questions which sections 64 and 65 require a person summoned to answer: the questions which may be put to the person summoned are limited to such questions as are relevant to an insolvent person's business, affairs or property. The court identified a second and even wider limitation created by the provisions of section 139 read with section 66(3) of the Insolvency Act: a question which constituted an invasion of a constitutional right of an examinee could not be said to be one 'lawfully put', and therefore would not expose an examinee to committal to prison. Thus the court found that sections 64 and 65 were constitutionally valid. In *De Lange v Smuts NO and Others*, it was argued that committal to prison for failing to produce a document, take the oath, or answer a question

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3Section 66(1) & (2).
4Section 66(3).
5Subject to subsection (5) which provides for an application by such person for discharge from custody if he or she has been wrongfully committed to prison.
61997 (11) BCLR 1489 (CC); 1998 1 SA 300 (CC).
7The challenge was based upon the predecessor to s 12, ie s 11(1) of the Republic of South Africa Constitution Act 1993 (the Interim Constitution).
8That is, consistent with the Interim Constitution.
91998 3 SA 785 (CC).
satisfactorily, in terms of section 66(3) of the Insolvency Act, is constitutionally invalid because it violates the right not to be detained without a fair trial (in terms of section 12(1)(b) of the constitution). The court held that the section is invalid only to the extent that it empowers a presiding officer who is not a judicial officer in the court structure established by the constitution (in other words, a judge or a magistrate), to issue a warrant committing an examinee to prison. Otherwise, it is valid. 10

As far as the right against self-incrimination is concerned, in terms of the second proviso to section 65(2), a person being interrogated under section 65(1) may not refuse to answer any question on the ground that the answer would tend to incriminate him, or on the ground that he is to be tried on a criminal charge and may be prejudiced at such trial by his answer. Section 65(5) provides that any evidence given under section 65 shall, subject to the provisions of subsection (2A), be admissible in any proceedings instituted against the person who gave that evidence. Section 65(2A)(a) provides that a presiding officer must hold the incriminating or prejudicial part of any proceedings in camera and prohibit the publication of any incriminating evidence, and section 65(2A)(b) provides that no incriminating evidence given at an enquiry may be admitted in any criminal proceedings, except in proceedings for perjury and other related offences. Thus, the effect of these provisions is that an examinee cannot refuse to answer incriminating questions and the answers which he gives may be used as evidence against him in civil proceedings and in criminal proceedings for perjury and perjury related offences, but not in criminal proceedings generally. 11

The rationale is that the purpose of the interrogation is to obtain information about the insolvent estate which would not otherwise be disclosed to the trustee or the creditors, and which may be used to recover money or property for the benefit of the insolvent estate. 12 As it is essential for the trustee and the creditors to be able to ascertain whether any person has acted improperly, it would defeat the object if the examinee could refuse to answer the questions or if any incriminating evidence which emerged from the interrogation could not be used against him or her in subsequent civil proceedings. This reasoning is clearly reflected in Equisec (Pty) Ltd v Rodrigues & Another, 13 a case in which a debtor applied for the stay of a final sequestration order against the estate on the basis that exposure to interrogation would prejudice him in criminal proceedings which were pending against him. The court dismissed the application and held that section 65(2A) provided adequate protection as any incriminating answers would not be admissible against him in criminal proceedings.

10 Id at 824 for the remarks of Ackermann J.
11 See, for example, Du Plessis NO v Oosthuizen; Du Plessis NO v Van Zyl 1995 3 SA 604 (O) and Wessels NO v Van Tonder en 'n Ander 1997 1 SA 616 (O).
12 See Pitsiladi v Van Rensburg & Others NNO 2002 2 SA 160 (SE) 162.
13 1999 3 SA 113 (W).
Enquiries in terms of the Companies Act 1973

Certain provisions declared unconstitutional

Section 415 of the Companies Act serves a similar purpose to that of section 65 of the Insolvency Act, although the wording is different. Section 415(1) provides that the Master, presiding officer, liquidator and any creditor who has proved a claim, may interrogate any director or other person about the company, its business affairs, and its property. Section 415(3) used to provide that no person interrogated was entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him. In terms of section 415(5), the incriminating evidence extracted during the interrogation was admissible in civil and criminal proceedings against the person interrogated. In Parboo & Others v Getz & Another, it was held that section 415(5) was constitutionally invalid to the extent that it permitted the use of incriminating evidence given at such an interrogation to be admitted in criminal proceedings other than those for perjury or related offences.

In terms of section 417, the Master or the court may at any time after a winding-up order has been made, summon directors, officers or others to appear before him or it for examination. Any director or officer of the company, or any person known or suspected to have in his possession any property of the company, or believed to be indebted to the company, or any person deemed capable of giving information concerning the trade, dealings, affairs or property of the company, may be summoned to appear at an enquiry. Section 417(2)(b) used to provide that a witness could be compelled to answer any question despite the fact that the answer might incriminate him, and that any answer given could subsequently be used in evidence against him. In Ferreira v Levin NO and Others; Vryenboek and Others v Powell NO and Others, this provision was held to be unconstitutional to the extent that it allowed answers given at an enquiry to be used as evidence in criminal proceedings against the person on charges other than those of perjury and related offences. In Bernstein and Others v Bester and Others NNO, the Constitutional Court upheld its decision in the Ferreira case, stating that only the last portion of section 417(2)(b) was unconstitutional.

Mitchell and Another v Hodes and Others NNO

This case concerned an enquiry, under sections 417 and 418 of the Companies Act, into the affairs of LeisureNet Ltd, a public company in liquidation. While the joint chief executive officers of LeisureNet were being examined, they were arrested on charges of fraud, theft, a contravention of section 234 of the Companies Act (by failing to disclose a material interest in a contract into which the company had entered), and evasion of income tax.

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141997 4 SA 1095 (CC).
151996 2 SA 621 (CC).
161996 2 SA 751 (CC).
172003 3 SA 176 (C).
18Section 418 provides for examination by commissioners who may be magistrates or other persons appointed by the Master of the High Court or by the High Court.
and value added tax. After their arrests, they requested the commissioner presiding at the enquiry to stay the proceedings pending the finalisation of the criminal proceedings. The commissioner refused their request and they brought an application, before the High Court, for the review of the commissioner's decision. The LeisureNet liquidators opposed the application.

The applicants alleged that the enquiry was a public one and that, throughout the enquiry proceedings, representatives of the South African Police Services and the South African Revenue Services had been present. They alleged that the draft charge sheet had been formulated largely on the basis of the evidence already given at the enquiry and that they would suffer prejudice in that they were about to be examined on issues relating to the other charges which had not yet been properly formulated. They claimed that the state intended to use their testimony to 'flesh out' the charges against them and that compelling them to testify would erode their right to a fair trial as entrenched in section 35(2) of the constitution. The applicants relied on a number of pre-Constitution High Court decisions in insolvency cases as authority for the existence of 'a well-established principle of South African law' that '[w]here civil proceedings and criminal proceedings arising out of the same circumstances are pending against a person, ... [the usual practice] is to stay the civil proceedings until the criminal proceedings have been disposed of.'

They argued that it is 'axiomatic' that no individual's common-law rights have been diminished by the advent of the constitution, and that to oblige them to give evidence at the section 417 enquiry would place them in a worse position than that in which they would have been prior to the enactment of the constitution. This, they contended, could never have been the intention of the framers of the constitution.

The applicants argued that the judgments in the Ferreira and Bernstein cases could not be interpreted so as to prevent them, as accused persons, from invoking their fair trial rights under section 35(3) of the constitution. They referred to the judgment of Ackermann J (writing for the majority), in the Bernstein case, in which it was stated...

... the provisions of ss 417 and 418 can and must be construed in such a way that an examinee is not compelled to answer a question which would result in the unjustified infringement of any of the examinee's chap 3 rights... [and]

... [n]othing could be clearer in my view than this. If the answer to any question put at such examination would infringe or threaten to infringe any of the examinee's chap 3 rights, this would constitute "sufficient cause", for purposes of ... [section 418(5)(b)(iii)(aa)], for refusing to answer the question.

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19 They relied upon decisions in Gratus & Gratus (Prop) Ltd v Jackelow 1930 WLD 226; Du Toit v Van Rensburg 1967 4 SA 433 (C); Standard Bank v Johnston 1923 CPD 303; Irvin & Johnson Ltd v Basson 1977 3 SA 1067 (T); Havenga v Rheeder and Another NNO case no 287/88, TPD (unreported); Kamfer v Millman and Stein NNO and Another 1993 1 SA 122 (C).

20 Per Tindall J in Gratus & Gratus (Prop) Ltd v Jackelow n 19 above at 230.

21 This is a reference to Chapter 3 of the Interim Constitution, which contained the Bill of Rights.

22 At par 60.
unless such right of the examinee has been limited in a way which passes s 33(1) scrutiny. By the same token the question itself would not be one "lawfully put" and the examinee would not, in terms of this very provision, be obliged to answer it ... 24

Relying upon, *inter alia*, Kriegler J's formulation in the *Havenga* case25 to the effect that 'incalculable prejudice' could be suffered by an accused person having to 'show his hand' before the trial, the applicants argued that such prejudice is not confined to the risk that, by being compelled to answer questions at a winding-up enquiry, the examinee may incriminate himself or herself, and that such incriminating evidence could subsequently be used against the examinee at the criminal trial. The applicants' complaint was much broader: they contended that they would suffer prejudice in that the manner in which the state would present its case, the witnesses it would call, the witnesses it would attempt to avoid calling, the way in which it would formulate the charges, and the approach it would adopt to cross-examination, would be based upon, or at the very least informed and shaped by, the evidence to be given by the applicants at the enquiry. Their contention was that such prejudice was not eliminated by the 'direct use' immunity in respect of incriminating evidence given at the enquiry.26

The LeisureNet liquidators rejected the 'axiomatic' position relied upon by the applicants. They pointed out that before the constitution was enacted, self-incriminatory evidence given at an enquiry could be used against an examinee in subsequent criminal proceedings. For this reason, courts stayed interrogations in order to avoid potential prejudice to an examinee which might result from being forced to incriminate himself or herself. As self-incriminating evidence was no longer admissible, the reason for staying the interrogation no longer existed. They also pointed out that the applicants were relying upon a kind of prejudice not previously pertinently raised or considered by the courts, that is, the risk that the state would obtain a 'tactical advantage' in the forthcoming criminal trial should the applicants be forced to 'show their hand' prior to the finalisation of the trial.

The liquidators emphasised that the statutory mechanism provided by sections 417 and 418 of the Companies Act, save only for the offending part of section 417(2)(b) which was declared invalid, was left intact by the Constitutional Court as it recognised the important public purpose served by such examinations. In light of the *Ferreira* and *Bernstein* cases, it was clear that appropriate safeguards existed for the protection of an examinee's right to a fair trial in that, in relation to direct evidence given by the examinee, there is a complete use immunity and, in relation to derivative evidence, the court ultimately hearing the criminal trial has a discretion to disallow such evidence.

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23This is a reference to s 33 of the Interim Constitution, the 'limitations clause', now contained in s 36 of the 1996 Constitution.

24At par [61].

25Note 19 above.

26In the *Ferreira* case n 2 above, direct use immunity was read in to s 417(2)(b) of the Companies Act of 1973.
if its admission would compromise the examinee's right to a fair trial. The liquidators contended that the issues in the LeisureNet enquiry were complex and intertwined, that the liquidation was one of the largest corporate failures in South African financial history with estimated claims against the company of R1,15 billion, and that to stay the enquiry would in substance mean that the executive officers would not be examined in any meaningful way, thus stultifying the very purpose of such enquiry.

Van Heerden J (as she then was) was of the view that whether the applicants were entitled to a stay of the enquiry depended on whether, in the South African context, in addition to a direct use immunity it was necessary also for a derivative use immunity to be extended to an examinee. Van Heerden J considered Ackermann J's detailed analysis, in the Ferreira case, of the different judgments delivered in the case of Thomson Newspapers Ltd v Canada (Director of Investigation and Research) et al,27 in the Supreme Court of Canada. This case concerned section 22(2) of the Canadian Combines Investigation Act (RSC 1970 c C-23) which protected examinees who were compelled to testify (in examinations in terms of section 17 of that Act) by providing that no oral evidence given by an examinee could subsequently be used against him or her in criminal proceedings, except on a charge of perjury. However, nothing in that section protected the examinee from the use of derivative evidence obtained as a result of the compelled testimony. The applicants contended that section 17 violated, inter alia, the 'fundamental justice' requirement contained in section 7 of the Canadian Charter of Rights and Freedoms.28 In the Thomson Newspapers case, Wilson J (one of the two minority judges) followed the approach of the United States Supreme Court, in Kastigar v United States,29 that both a direct use and a derivative use immunity was necessary in order to meet the 'fundamental justice' requirement. However, Ackermann J, in the Ferreira case (with whom the majority of the Constitutional Court agreed in this respect), favoured the approach of La Forest J (one of the three majority judges), in the Thomson Newspapers case. Likewise, Van Heerden J, in the Mitchell case, relied heavily upon, inter alia, the following passages from the judgment of La Forest J:

The fact that derivative evidence exists independently of the compelled testimony means... that it could have been discovered independently of any reliance on the compelled testimony. It also means that its quality as evidence does not depend on its past connection with the compelled testimony. Its relevance to the issues with which the subsequent trial is concerned, as well as the weight it is accorded by the trier of fact, are matters that can be determined independently of any consideration of its connection with the testimony of the accused. If it were otherwise, it would not, in fact, be derivative evidence at all, but part of the actual testimony itself...


28 As explained by Van Heerden J, at 202, s 7 guarantees the right to liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice.

What prejudice can an accused be said to suffer from being forced to confront evidence “derived” from his or her compelled testimony, if that accused would have had to confront it even if the power to compel testimony had not been used against him or her? I do not think it can be said that the use of such evidence would be equivalent to forcing the accused to speak against himself or herself, once the derivative evidence is found or identified, its relevance and probative weight speak for themselves. The fact that such evidence was found through the evidence of the accused in no way strengthens the bearing that it, taken by itself, can have upon the questions before the trier of fact. In short, a general requirement of derivative use immunity would mean that in many cases the use of the power to compel testimony would furnish wrongdoers with the type of “immunity baths” that were characteristic of the transaction immunity formerly available in the United States. Law enforcement authorities would be faced with the choice of either securing information quickly, at the risk of jeopardising subsequent prosecutions, or conducting more protracted and widely cast investigations. Either way, the advantages the community currently enjoys from the power to compel testimony would be severely restricted. While I accept that this price must be paid where the use of evidence derived from compelled testimony would undermine the fairness of a person’s trial, I cannot accept that it should also have to be paid where the use of the derivative evidence would not have that effect ...

In my view, derivative evidence that could not have been found or appreciated except as a result of the compelled testimony ... should in the exercise of the trial judge’s discretion be excluded since its admission would violate the principles of fundamental justice ... I do not think such exclusion should take place if the evidence would otherwise have been found and its relevance understood. There is nothing unfair in admitting relevant evidence of this kind ...

The touchstone for the exercise of the discretion is the fairness of the trial process. (Emphasis added by Van Heerden J.)

Following the reasoning favoured by Ackermann J, in the Ferreira case, Van Heerden J held that, while the direct use of evidence compelled under section 417(2)(b) was not constitutionally permissible, evidence derived from such evidence might be used, in the discretion of the trial judge. Thus, while the applicants might well, should they be compelled to testify at the section 417 enquiry, be deprived of certain ‘tactical advantages’ in the conduct of their criminal trials (since the state would probably use their evidence to complete the charges against them), the state would still have to prove the charges without being able to rely directly on any of the evidence given by the applicants during the section 417 proceedings.

In the circumstances, the court held that, given the key position which the applicants had occupied in the company, and the very complex and intertwined nature of the issues upon which the liquidators still had to examine them, the effect of staying the proceedings would delay indefinitely, and substantially stultify, the very purpose of the section 417 proceedings. Bearing in mind, also, the particular emphasis which the Constitutional Court had placed, in the Ferreira and Bernstein cases, upon the important public policy objective of section 417 enquiries, Van Heerden J concluded that the applicants should not be allowed to rely on either their fair trial rights, under

30(1990) 47 CRR 1 at 52-3, quoted by Van Heerden J at 205.
31(1990) 47 CRR 1 59–61, quoted by Van Heerden J at 205.
section 35(3) of the constitution, or on the potential loss of a tactical advantage at their criminal trial to escape being examined on the affairs of the company, including such matters as may have a bearing on the criminal charges against them. Van Heerden J endorsed the liquidators' argument that the honest conduct of the affairs of companies is a matter of great public concern, requiring the exposure of dishonest conduct and the restoration to the company of assets misappropriated from it. In the court's view, such exposure could not effectively take place unless the affairs of companies which fall are thoroughly investigated and reconstructed. The court held\(^3\) that the inevitable tension between the rights of an examinee in section 417 proceedings, and the public interest in the proper investigation of corporate collapses, were adequately and fairly balanced by the introduction of a direct use immunity, and by making the use of derivative evidence at a subsequent criminal trial subject to the discretion of the trial judge.

**Legislative amendments**

Section 415(3) has now been amended\(^3\) to provide that no person may refuse to answer any question upon the ground that the answer would tend to incriminate him or her and that, if he or she does refuse on such ground, such person will be obliged to answer at the instance of the Master or officer presiding at such meeting, provided that the Master or officer presiding at the meeting has consulted with the Director of Public Prosecutions who has jurisdiction. Section 415(5) has also been amended to provide that any incriminating answer or information directly obtained, or incriminating evidence directly derived, from an interrogation in terms of section 415(1) will not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is an officer, except in criminal proceedings where the person concerned is charged with perjury or related offences.

Section 417(2)(b) of the Companies Act has also been amended to provide that any person (summoned to the enquiry) may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her, and shall, if he or she does refuse on such ground, be obliged to answer at the instance of the Master or the Court: Provided that the Master or the Court may only oblige the person in question to so answer after the Master or the Court has consulted with the Director of Public Prosecutions who has jurisdiction. Section 417(2)(c) now provides that any incriminating answer or information directly obtained, or incriminating evidence directly derived, from an examination in terms of this section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with perjury or related offences. The amended provisions are silent in relation to the admissibility in civil proceedings of

\(^3\)At 211–2.  
\(^3\)Sections 415 & 417 were amended by s 10 of the Judicial Matters Amendment Act 55 of 2002, as published in the Government Gazette (24277, 17 January 2003).
evidence obtained from an examination.

Comment
The statutory amendments have introduced a distinct change in the principles applicable to admissibility of 'derivative evidence': while, before, the courts' approach was that derivative evidence would be admissible in the discretion of the trial judge, now statute provides that derivative evidence is inadmissible except in relation to charges for specified (perjury related) criminal offences. Thus the legislature appears to have introduced protection for the examinee's fair trial rights beyond that which the Constitutional Court considered to be necessary.

Presumably, I submit, the purpose of the inclusion of provisions which require consultation between the presiding officer and the Director of Public Prosecutions before an examinee may be compelled to answer a question, is at least two-fold. First, it provides a measure of protection for the examinee as it ensures that the Director of Public Prosecutions becomes aware of the evidence and knows, in advance, that it will be inadmissible in any subsequent criminal proceedings which may be brought against the examinee. Thus, such evidence may not be used when framing criminal charges against the examinee. (This purpose, I submit, also indirectly serves the public interest in that there will be greater clarity, from the state's perspective, as far as the admissibility of evidence in the criminal proceedings is concerned, and therefore should reduce the possibility of any wasted expense incurred by the state in unnecessary litigation.) But, more significantly, the purpose intended to be served by the requirement of consultation between the presiding officer and the Director of Public Prosecutions is to avoid the 'immunity baths' referred to by La Forest J in the Thomson Newspapers case. In other words, it is an attempt to avoid extraction of self-incriminating replies which would render inadmissible, in subsequent criminal proceedings, evidence which is, in any event available to the prosecution from some source other than the examinee.

Concern has been expressed that consultation with the Director of Public Prosecutions may lead to undue delay in finalising enquiries and may, in some cases, have the effect of defeating their very purpose. Woodland makes the point that, in most cases, 'the trigger of the proviso' will be in the hands of the examinee, while, inevitably, it will be the creditors who must bear the cost of any delays occasioned by what may well become an 'unworkable stop-start process with the examinee repeatedly refusing to answer a question triggering the consultative process at each reconvened examination'. There is no

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34 See n 31 above, quoted by Van Heerden J at 205. See also, G Woodland 'Recent Companies Act amendments: a charter for delinquent corporate controllers' AIPSA News (June 2003) 1.
36 See Woodland n 34 above at 2.
prescribed procedure for the required consultation and, apparently, the objectives of, and process for, the required consultation, are far from clear. Commentators have highlighted potential difficulties which may arise in the interpretation of the amendments which were, according to them, hurriedly drafted in order for them to be 'pushed through' before the end of the parliamentary session in 2002. Also, surprisingly, it would appear that the Bill was not referred to the Standing Advisory Committee on Company Law which advises the Minister of Trade and Industry on any amendments to the Companies Act. Of further concern, is that, presently, statutory provisions regulating interrogations under the Insolvency Act differ markedly from the 'corresponding' provisions for enquiries under the Companies Act, without any apparent rationale for this difference. This, in my view, is undesirable. The South African Law Reform Commission, in its Draft Insolvency Bill, published in 2000, recommended provisions regulating interrogations which are the same as those contained in section 65 of the Insolvency Act 1936. It is unclear what form these provisions will take in the anticipated revised version of the Commission's Draft Insolvency Bill.

It remains to be seen, I submit, whether these amendments to the Companies Act will provide an effective solution. They have not been met with enthusiasm by insolvency practitioners, and the hope has been expressed that these provisions will be withdrawn or replaced with legislation which is more understandable and workable. My information is that, thus far, the amendments have not, as was originally feared, caused delay in the holding of enquiries as examinees are not refusing to answer questions and, as a result, are not initiating the required consultation process. My concern, however, is the extent to which examinees may be avoiding the refusal of questions, and, more cunningly, I submit, willingly 'spilling the beans', thus 'wallowing' in the 'immunity baths' recently 'run for them'. My question, then, is this: With the public interest in mind, what is more important, in the greater scheme of things? Promptly recovering assets of the insolvent estate which have been misappropriated, or, ultimately, punishing dishonest corporate controllers

37Ibid. See also Strime n 35 above at 12-13 as well as extracts from the minutes of a meeting of the Justice and Constitutional Development Portfolio Committee, held on 22 October 2002, to discuss the Judicial Matters Amendment Bill 2002, available at www.pmg.org.za, in which it is recorded to have been stated that the amendment 'did not impose an obligatory solution, but rather allowed the parties to come together and then each decide on the best way forward' and that 'no prescribed course of action was being given to the parties' but '[t]hey were free to proceed as each saw fit: they merely had to talk to each other'.

38For further criticism in this regard, see Strime n 35 above.

39See Woodland n 34 above at 2; Strime n 35 above at 11ff.

40See Woodland n 34 above at 2. This point was raised by Sheila Camerer at the meeting held on 22 October 2002; see minutes of the meeting referred to in n 37 above.


42See Woodland n 34 above; Strime n 35 above.

43See Strime n 35 above.

44From informal discussions with a representative from the Master's Office, Pretoria.
through successful criminal prosecution? To my mind, the achievement of one of these objectives necessarily excludes the achievement of the other.

THE UNITED KINGDOM
The Human Rights Act 1998
The coming into force, in December 2000, of the Human Rights Act 1998, impacted significantly upon issues concerning the right against self-incrimination in insolvency law in the United Kingdom. In terms of section 3 of the Human Rights Act, legislation must be read and given effect to in a way which is compatible with rights guaranteed under the European Convention on Human Rights ('the Convention'). Section 2 of the Human Rights Act provides that courts and tribunals must take account of the judgments, decisions, declarations or opinions of the institutions established by the Convention when determining a question in connection with a Convention right. It has been stated that interpretation of the Convention should give effect to the general principle of the need to strike a 'fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.

Article 6 of the European Convention on Human Rights
Article 6 of the Convention provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The European Court of Human Rights has adopted the approach that, while the right to silence and the right against self-incrimination are not explicitly protected by article 6, they are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 ... [and that] the right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.

Legislative amendments
Various sections of the Insolvency Act 1986 and the Companies Act 1985 give officeholders wide powers to examine, in private or publicly, a bankrupt, officers of companies or other persons, and to obtain evidence (including documentary evidence) from them under compulsion. It has been held that whether compelled evidence is admissible in subsequent civil proceedings against the person who made the self-incriminating statement, is in the

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47For example, ss 218, 235, 236, 333 & 366.

48For example, ss 431, 432 & 442.
discretion of the trial judge who should take into account all factors relevant to achieving a 'fair hearing'. Director disqualification proceedings have been categorised as civil proceedings. Thus, whether such evidence is admissible against a director in disqualification proceedings is in the discretion of the trial judge. An important consideration in determining fairness is the purpose of the examination, and it has been held that, if the sole purpose of the examination was to obtain evidence for the disqualification proceedings, such evidence will not be admissible.

Section 433 of the Insolvency Act 1986 used to provide that a statement made in pursuance of a requirement imposed by or under a provision of the Insolvency Act could be used in evidence against any person making or concurring in making such a statement. A similar provision also existed in section 20 of the Company Directors Disqualifications Act 1986. Section 219 of the Insolvency Act 1986 provided that answers given by a person under compulsion to inspectors appointed under the Companies Act 1985, or to questions put by the Secretary of State under section 218(5) of the Insolvency Act 1986, could be used against such person. As these provisions infringed rights guaranteed by article 6 of the Convention, parliament amended them by enacting paragraphs 7 and 8 of Schedule 3 to the Youth Justice and Criminal Evidence Act 1999 and section 11 of the Insolvency Act 2000. These amendments have the effect that, in criminal proceedings in which any such person is charged with an offence, no evidence relating to the statement may be adduced and no question related to it may be asked by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.

'Direct use' and 'derivative use' immunity

Before the Human Rights Act came into force and the above amendments were implemented, the issue of an accused person's right against self-incrimination arose in the well known case of Saunders v United Kingdom. Saunders was a director and chief executive of Guinness plc. The Department of Trade and Industry carried out an investigation into a takeover which had been mounted by Guinness and, in the course of the investigation, Saunders was interviewed by DTI inspectors. Under section 436 of the Companies Act 1985, Saunders was obliged to answer any questions put to him by the inspectors with respect to the affairs of the company and refusal to do so amounted to

50 Simmons & Smith n 45 above refer, at n 52, as authority for this proposition, to DC, HS and AD v United Kingdom (unreported) 14 September 1999 and R v Secretary of State for Trade and Industry, ex parte McCormick [1998] 2 BCLC 18.
52 As held in Saunders v United Kingdom n 46 above.
53 Certain (perjury related) offences are excluded from this amendment.
54 See n 46 above.
a criminal offence. The inspectors handed the transcripts of the interviews to the police. These formed part of the evidence used against Saunders in subsequent criminal proceedings against him. The European Court unanimously held that the use of his answers to the DTI inspectors’ questions violated the right against self-incrimination found in article 6 of the Convention. It stated

The right not to incriminate oneself is primarily concerned ... with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, \textit{inter alia}, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.\footnote{At 69.}

Thus, in the \textit{Saunders} case, the European Court apparently drew an important distinction between what amounts, I submit, to direct use immunity and derivative use immunity: article 6 was interpreted so as to extend direct use immunity, but not derivative use immunity, to the examinee. Of some significance has been that this approach differed from that which the European Court had adopted in the earlier case of \textit{Funke v France}.\footnote{(A/256) [1993] 1 CMLR 897 (ECHR).} Funke’s house was searched by French customs officers, investigating possible criminal offences under the Customs Code, and documents, including bank statements, were seized. Funke declined, upon their request, to produce to the customs officers further bank statements and records of his investments and so he was prosecuted, fined for his failure to hand over the documents and ordered to do so. Funke complained that the use of compulsory powers to obtain information from him was a breach of article 6 and the court held that it was, regarding it as infringement of the right to remain silent and, accordingly, the right against self-incrimination.\footnote{At 44.} In the \textit{Funke} case, the European Court did not, in effect, draw any distinction between direct evidence ‘created’ by the accused person, and documentary evidence which existed independently of the will of the accused person. In the circumstances, the court found that the use of compulsory powers to obtain documents from an accused person was a violation of his right against self-incrimination.

It may be noted that the approach in the \textit{Saunders} case was confirmed in \textit{L v United Kingdom}.\footnote{[2000] FLR 322.} The issue also came before the English Court of Appeal in \textit{Attorney General’s Reference No 7 of 2000}.\footnote{[2001] Crim LR 74 (CA (crim div)).} The respondent was a bankrupt with an estimated deficiency of £7.6 million. Section 291 of the Insolvency Act 1986 required him to deliver up to the Official Receiver all books, papers and other records of which he had possession or control and which related to his estate and affairs. Failure to comply with this duty...
constitutes an offence, punishable by two years imprisonment. He completed a preliminary questionnaire in relation to his bankruptcy and admitted having lost money by gambling in the two years leading up to his bankruptcy. As a result, he was prosecuted for the offence of materially contributing to, or increasing the extent of, his insolvency through gambling, contrary to section 362(1) of the Insolvency Act 1986. He contended that this was an abuse of process and the Crown Court ruled in his favour, finding that the admission of the documents obtained by the Official Receiver would give rise to a violation of article 6 of the Convention and, further, that their admission would not be fair and should be excluded under section 78 of the Police and Criminal Evidence Act 1984. He was found not guilty. The Attorney-General referred, to the Court of Appeal, the question whether the use by the Crown in the prosecution of a bankrupt for an offence under Chapter VI of Part IX of the Insolvency Act 1986 of documents which were delivered up to the Official Receiver under compulsion (under section 291 of the 1986 Act), and which do not contain statements made by the bankrupt under compulsion, violate the bankrupt's rights under article 6 of the European Convention on Human Rights.

The Court of Appeal answered the question in the negative, stating that the privilege against self-incrimination was not absolute and that, in English law, various statutes made inroads upon that privilege. It concluded that, as far as the English courts were concerned, there was no doubt that these documents would be regarded as admissible, subject to the trial judge's discretion to exclude them, under section 78 of the Police and Criminal Evidence Act 1984. The Court of Appeal, having considered the cases of Funke and Saunders, adopted the reasoning in Saunders. As pointed out by Ward and Gardner, in so doing, the Court of Appeal endorsed the reasoning of La Forest J, in the Supreme Court of Canada in the Thompson Newspapers case, that a distinction must be drawn between testimony which the accused had been 'forced to create', and 'independently existing evidence he or she has been forced to assist in locating, identifying or explaining'. Ward and Gardner explain the rationale thus: 'Whilst evidence of the former kind should be excluded, there was nothing unfair in the use of evidence which could have been discovered independently of the use of compulsory powers, and the quality of which did not depend on its connection with the use of compulsory powers.'

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60 In terms of s 291(6) of the Insolvency Act 1986.
63 See n 27 above.
64 Ward & Gardner n 62 above at 393.
Published comment in relation to direct use immunity and derivative use immunity reveals a lack of clarity surrounding these issues and difficulty in reconciling the various approaches and decisions in the reported cases, especially in light of a more recent decision by the European Court in _JB v Switzerland_, in which the court appears, without specifically referring to it, to have favoured the approach it adopted in the _Funke_ case. Clearly, there is a need for the European Court to clarify the position, and, presumably, until then, the admissibility of evidence will lie in the discretion of the trial judge, under section 78 of Police and Criminal Evidence Act 1984. Barsby and Ormerod express concern that section 78 was never intended, and is ill-suited, to serve as the principal mechanism by which 'fairness' under article 6 is guaranteed in English trials, and that it provides for a 'completely unstructured discretion that does not focus the court's attention on any particular principles'. Ward and Gardner point out that there is authority, at least in the United Kingdom under the Human Rights Act, that derogations from the privilege against self-incrimination may be justified where they pursue a legitimate aim and are held not to impose a disproportionate burden. They submit that the content of this right may therefore be diluted where policy requires it. They conclude that, in the circumstances, despite the importance of the privilege against self-incrimination, and the existence of a large body of case law on its application, there remain fundamental unanswered questions about its true scope and application.

A recent English Court of Appeal decision which highlights the policy considerations which justify limitations being imposed upon the right against self-incrimination in insolvency cases is _R v Kearns_. Kearns was charged with, _inter alia_, a contravention of section 354(3)(a) of the Insolvency Act 1986 in that he had failed without reasonable excuse to account for the loss of property incurred after the presentation of his bankruptcy petition. It was alleged that, in the eight week period after the presentation of the petition against Kearns, £22,400 went from his tractor business account as a result of cheques payable to cash. The Official Receiver investigating the affairs of the insolvent, sought information from him about these cheques. Kearns failed

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65See Barsby & Ormerod n 61 above; Ward & Gardner n 62 above; C Campbell 'Protection by elimination: winding up of companies on public interest grounds' (2001) 17 Insolvency Law & Practice 129; Simmons n 51 above at n 54.
66[2001] Crim LR 748 (ECHR).
67See Ward & Gardner n 62 above at 393.
68See Barsby & Ormerod n 61 above at 738.
69This comment is made with reference to the decision in _Brown v Stott_ [2002] 2 WLR 817 at 825.
70Ward & Gardner n 62 above at 388-9.
71[2002] EWCA crim 748.
73In terms of powers provided by sections 288 and 289 of the Insolvency Act 1986.
to comply with the request, hence the criminal charge against him. At his trial, Kearns raised, as a preliminary point, that this offence contravened article 6(1) of the Convention and, in particular, his right to silence and his right to be presumed innocent and that, by forcing him to give information under threat of conviction, the section infringed his right against self-incrimination. His contention was that this had the effect of presuming him to be guilty unless he could account for the losses or had a reasonable excuse for not giving such an account, thereby infringing the presumption of innocence. The trial judge rejected this submission and a guilty plea was entered. On appeal, the Crown argued that a distinction must be drawn between a statutory power to compel a person to provide information for regulatory purposes, which is permitted, and the subsequent use of such information in criminal proceedings, which is prohibited. The Crown contended that section 354(3)(a) was a 'sanction' offence which fell into the first category as the information sought by the Official Receiver was not to be used to prove any independent charge.

The court, per Aikens J, held that section 354(3)(a) did not offend against the presumption of innocence as the prosecution had to prove each element of the offence. The court held that the right to silence could be qualified and restricted if there was an identifiable social or economic problem and the qualification or restriction was proportionate to the problem under consideration. The court concluded that section 354(3)(a) did not offend the right to silence as the information was demanded pursuant to an administrative purpose in the course of an extra-judicial inquiry, in line with the Official Receiver's duty under section 289 of the Insolvency Act to investigate the affairs of the estate. It also drew a distinction between the production of material which existed independently of the will of the accused, where there would be no infringement of the right, and statements obtained from the accused under compulsion, the subsequent use of which, in judicial proceedings, might breach the right to silence. The court concluded, however, that, even if the section does infringe the 'absolute' concept of the right to silence and/or the right not to incriminate oneself, this is a proportionate response designed to deal with the social and economic problem of bankrupts. The court found that the bankruptcy regime provided for in the Act serves the public interest and that of the defendant who ultimately is absolved from his debts. The only function of the section is to provide the necessary sanction to the regulatory regime under the Act and to ensure the efficient administration of bankrupt estates.

74 Clare n 72 above, at 309, refers to the 'compromise' reached by virtue of the statutory amendments: such offences do not breach art 6 because information provided by a defendant as a result of any compulsion imposed by the offence cannot be used against him in criminal proceedings for any independent criminal charge.

75 See Clare n 72 above at 303-9.
CONCLUSION

Striking parallels may be drawn between developments in the United Kingdom, since the coming into force of the Human Rights Act 1998, and with the European Convention on Human Rights becoming applicable there, and in South Africa since the advent of the new constitutional dispensation. However, there is, in particular, a marked difference in the approach adopted in each of the two jurisdictions, to the question of whether the right against self-incrimination requires derivative use immunity to be extended to an examinee. Amidst apparently conflicting indications given by the European Court of the approach which ought to be adopted in order to uphold an examinee’s article 6 rights, the English Court of Appeal has favoured policy considerations, in the public interest, for the proper administration of insolvent estates. On the other hand, in South Africa, while the courts have consistently adopted a similar approach to that of the English Court of Appeal, the legislature has explicitly provided not only for direct use immunity, but also for derivative use immunity, for examinees in enquiries held in terms of the Companies Act 1973. In so doing, the legislature has extended to examinees a measure of protection which apparently exceeds what the Constitutional Court has required in order for the provisions to be constitutionally valid. My submission is that a more stringent approach may well be justifiable, upon application of section 36 of the constitution, in the interests of debt recovery and the combating of criminal behaviour in South Africa.

An unsatisfactory aspect of the legislative amendments is that the consultation process which is required to be followed is far from clear. What is of further concern, I submit, is that by amending the relevant sections of the Companies Act 1973 in this way, without any change to applicable provisions contained in the Insolvency Act 1936, the legislature has created a situation where examinees’ rights differ, depending on whether the examination is held in terms of the Companies Act 1973 or the Insolvency Act 1936, without any clear rationale for such differentiation. It is conceivable, that this could give rise to a new constitutional challenge, based upon the right to equality.

I submit that the recent amendments to the Companies Act 1973 should be reconsidered and substituted with provisions similar to those contained in the Insolvency Act 1936. Further, it is submitted that application of the approach adopted in the Ferreira, the Bernstein and the Mitchell cases, namely, that the question of the admissibility of derivative evidence in subsequent criminal proceedings brought against the examinee, is in the discretion of the trial judge, would strike a far more appropriate balance between an individual’s right against self-incrimination and the public interest in the proper administration of insolvent estates. Ultimately, it is hoped that soon the issue will be resolved in the European Court in such a way as to provide guidance to South African legislators.