



**INSOL**  
INTERNATIONAL



# Sequestration and liquidation procedures and the application of Insolvency law to winding-up

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# Debtor

- Person or estate of person – includes deceased estate, estates of persons incapable of managing their own affairs, trust, club
- Partnership or estate of partnership
  - That is a debtor in usual sense of the word
- Companies and body corporates that cannot be wind up in terms of Companies Act or Close Corporation Act
- Provisions of Insolvency act are applicable to companies that are liquidated on the ground of inability to pay debts

# Jurisdiction

- Only a local or provincial division of High court has jurisdiction to sequestrate
  - Domiciled within jurisdiction of the court
  - Owns or is entitled to property within the jurisdiction of the court
  - At any time during 12 months preceding date of application, ordinarily resided, or carried on business within jurisdiction of the court
- Application for rehabilitation must be brought in same division where sequestration was heard
- Normal jurisdiction rules e.g. setting aside voidable dispositions
- Any division of high court can review decisions of Master or chairperson of meetings of creditors (not appointment of trustee)
- Trust deemed to 'reside' in area of jurisdiction of the Masters office where it was registered

# Voluntary surrender

- Who may apply
  - Representative of debtor with special authority
  - Curator bonis of person incapable of managing own affairs
  - Executor of deceased estate
  - Both spouses where married in community of property (co-applicants)
  - Partners living in SA
  - Can only join two respondents when there is complete identity of interests between respondents

# Formal requirements

- Notice in government gazette and newspaper
  - No more than 30 days and no less than 14 days before date of application
  - Publish notice of intention to surrender in Government Gazette and newspaper circulating in area where debtor resides or if trader, carries on a business
  - Section 4 of Interpretation Act. Count backwards from date of application. Include date of application and exclude date of publication of notice.

# Notice of Intention to Surrender

- Expires if application is denied
- Debtor does not continue with application = act of insolvency

# Consequences of notice of intention to surrender

- Stay of sales in execution
- Master has discretion to appoint *curator bonis*



# Notice to creditors, employees, trade unions and SARS

- Send copy of notice to all known addresses of creditors within seven days of publication
- Furnish copy of notice within seven days to trade unions, employees and SARS.
- S197B of LRA – employer that is facing financial difficulties that may reasonably result in sequestration must advise consulting party in terms of s189(1) of the LRA



# Statement of affairs

- Prepare statement of affairs that includes all assets and liabilities
- Submit two copies to Master's office in district where debtor resides or carries on business.
- No Masters office – send two copies to provincial Masters office and one to magistrate's office of specific district.
- Statement of affairs must be confirmed by sworn affidavit
- Lie open for inspection for 14 days from date of notice of surrender.

# Condonation of formal defects

- S157(1)- court may condone a forma defect if the mistake can be corrected without prejudicing the creditors

# Substantive requirements: Voluntary surrender

- Factual insolvency
- Sufficient free residue to pay the costs of sequestration
- Advantage to creditors

# Compulsory sequestration

- Formal requirement: applicant to provide security to Master to pay costs of sequestration till trustee is appointed.
- Master must issue certificate not more than 10 days before the date of the application confirming security was provided.
- Certificate must be filed with application for sequestration
- Serve copy of application on registered trade union. Employees, SARS, debtor – person who served to provide affidavit confirming the serving

# Requirements

- Applicant must have liquidated claim of not less ZAR 100
- Debtor is factually insolvent/ committed act of insolvency
- Reason to believe that sequestration will be to advantage of creditors

# Date of sequestration

- Compulsory sequestration – date of provisional order
- Voluntary surrender – date of final order that accepts surrender of the estate

# Setting aside orders, Appeal and Review

- *Matji v Van Straten NO and Others* – Applicant for rescission of final sequestration order must prove substantial defence
- Filing application for rescission does not suspend the operation of sequestration order
- Winding-up – court may at any time after commencement of winding-up make order staying or setting aside proceedings
- No appeal against granting of provisional order of sequestration or refusal to grant order for voluntary surrender of estate
- Require leave to appeal against sequestration order (Superior Courts Act)



# Appeal

- When appeal has been noted, administration of estate continues
- No property of estate may be sold without written consent of insolvent
- Appeal of winding up of solvent company – cannot invoke provisions of Insolvency Act – winding up order is suspended pending outcome of appeal
- Liquidators appointment, powers and duties are suspended