



**INSOL**  
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# Uncompleted Contracts

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# Introduction: Uncompleted contracts

- **Insolvent** debtor still party to a contract at commencement of sequestration or liquidation when the contract has not been fully performed yet.
  - Example: ABC Stores(seller) sells a fridge to Icy Frost(purchaser) for R18 000,00 cash.
  - Before the fridge is delivered or the price paid, the estate of Icy Frost is sequestrated.
    - The question is what the legal effects of the sequestration will be on the contract? and
    - If it will differ if the purchaser (**prior to sequestration**) merely refused to continue with the contract?
- **As a general rule insolvency will not terminate such a contract that is still ongoing at time of sequestration or liquidation.**
- **So, an uncompleted contract in insolvency can be defined as a contract where**
  - performance has not yet been completed by time of sequestration or liquidation of one of the parties to it -
    - hence, the contractual relationship is ongoing.

# Introduction: Uncompleted contracts

- **Outside insolvency, if a party (Icy Frost) does not perform its a contract, it may amount to breach of contract and the other party may have the following remedies:**
  - **Contractual remedies in case of breach:**
    - Claim specific performance;
    - Cancel contract and
      - reclaim what has been performed (if any);
    - Damages.
- **In insolvency:**
  - “Insolvent party” to contract (sequestered estate or liquidated);
  - “Solvent party” to contract;
  - Trustee or liquidator steps into shoes of “insolvent party,” and
    - must as a general principle decide to abide by contract or to repudiate it.

# Introduction: Uncompleted contracts

- **Trustee acquires rights and obligations from contract.**
  - Must elect if s/he will abide by contract or repudiate,
    - Unless statutory exception, like ss 18-22 of Alienation of Land Act.
  - Must give clear notice
  - Within reasonable time [court order to compel –see s 35 of Insolvency Act]
  - ***Concursus creditorum*** entails that trustee must act in best interest of group of creditors, also when exercising this right.
- **Note:**
  - When trustee decided to abide by it, amounts to be paid like purchase price to be paid as **cost of sequestration and administration.**
    - Personal liability of trustee if there is not sufficient funds.
      - *Kerbels Flooring & Carpeting (Pty) Ltd v Shrosbree* 1994 (1) SA 655 (E).

# Introduction: Uncompleted contracts

- **Solvent party may withhold performance until trustee performs**
  - Reciprocal agreement
    - *exceptio non adimpleti contractus*
      - ***Goodricke & Son v Auto Protection Insurance Co Ltd 1968 (1) SA 717 (A)***
- **If trustee repudiates - amounts to breach of contract**
  - But solvent party limited as to remedies (as rule no specific performance)
  - May claim restitution of property delivered (if s/he, or it) is still owner
  - Claim for damages: as a rule concurrent claim
    - ***Thomas Construction v Grafton Furniture Manufacturers 1988 (2) SA 546 (A)***
- **Rectification**
  - Patent error can be rectified after commencement
- **Rights acquired pre-sequestration will be retained:**
  - ***E.g. accrued right to cancel the contract.***
    - Thus, can continue with cancellation.
      - ***Ellerine Brothers (Pty) Ltd v McCarthy Ltd 2014 (4) SA 22 (SCA)***

# Introduction: Various types of contracts

- **General rule (above) as backdrop – default position.**
  - *Special situations / exceptions:*

## 1. Contracts of sale

### 1. 1 *Sale of immovable property.*

- a) Seller sequestrated.
- b) Purchaser sequestrated.

### 1.2. *Sale of movable property (various situations).*

- a) Cash sale: purchaser sequestrated.
- b) Credit sale: purchaser sequestrated.
- c) Credit sale: seller sequestrated.
- d) Instalment agreement NCA: purchaser sequestrated.
- e) Instalment agreement NCA: seller sequestrated.

# Introduction: Various types of contracts

## 2. Lease

- a) Lessor (owner) sequestrated.
- b) Lessee sequestrated.

## 3. Employment contracts

- a) Employee sequestrated.
- b) Employer sequestrated.

## 4. Other contracts

- 4.1 Mandate
- 4.2 Partnerships

# Introduction: Questions to ask?

- Solution: first identify contractual situation !
- Questions:
  - What type of contract is this?
  - What performance is still outstanding?
  - Which party has been sequestrated?
  - Does the general rule / common law apply or
    - is there a special (statutory) rule?



# Introduction: Questions to ask?

- Ownership in case of contract of sale:
  - Who is the owner at date of sequestration?
    - Transfer of ownership
    - Contract does not pass ownership
    - N.B.: Intention to transfer **and** nemo plus iuris etc
      - Registration in Deeds Registry – immovable property
      - Delivery ico cash sale (+ plus payment ordinary credit sale...) i.e. gen rule
  - Type of property:
    - Immoveable property
    - Movable property: cash or credit sale (common law)
    - Movable property: instalment agreement (NCA - legislation)

# Introduction: Options for trustee

- **Trustee wants to continue (perform):**
  - Personal liability if insufficient funds !
    - *Kerbels Flooring & Carpeting (Pty) Ltd v Shrosbree 1994 (1) SA 655 (E)*
  - Demand specific performance if tender complete performance
  - Counter-performance: **only if reciprocal obligation**
- **Trustee refuses to perform:**
  - Repudiation
  - Normal contractual remedies,
    - except no claim for specific performance
  - Thus, solvent party may accept repudiation, cancel, claim restitution & damages
  - Concurrent claims
- **Reasons as to not perform:?** Cloete Murray NO and others v Ntombela [2022] 3 All SA 689 (FB); & SCA (729/2022) [2024] ZASCA 24 (14 March 2024).

# 1. Contracts of Sale

## Category A: Sale of immovable property

### Scenario 1: Seller sequestrated

- Default - general principle, absence of special rule

#### Facts:

- Common law:
  - A sells her house to B.
  - B pays deposit of R50 000 - purchase price of R800 000,00.
  - A's estate sequestrated before registration to B.
- a) Trustee (of seller's estate, A) can elect whether or not to go ahead with registration (transfer to purchaser, B).
- b) Purchaser cannot claim transfer (even if already paid full price).
  - Only option = cancel contract, claim back purchase price etc = concurrent claim

# Special protection to purchaser: Alienation of Land Act 68 of 1981 Scenario 1: Seller sequestrated

- Protection of purchaser:
- a) Purchaser may claim transfer (registration)
  - “Land” sold for residential purposes- and
    - Must be registrable land !
  - Purchase price paid in instalments-
    - More than two instalments and over longer period than one year
      - \*[but exception ico vulnerable purchasers!]
  - Trustee/ liquidator loses right to elect to repudiate
    - Allow to take transfer in exchange for balance of purchase price etc
- b) **Not take transfer, preferential claim for repayment**
  - If contract recorded in Deeds Office: endorsement against title deed

# Extension of A.L.Act protection by CC: transfer

## Scenario 1: Seller sequestrated

- \*Vulnerable purchasers to claim transfer
- Sarrahwitz v Maritz NO
  - Expanded scope of application of A.L.Act ON Constitutional grounds
  - Paid for land in full within one year before seller's sequestration
  - If purchaser may become homeless = Vulnerable purchaser
  - Reading into A.L.Act provisions
    - The A.L.Act...to facilitate transfer of residential property from the estate of an insolvent seller to a vulnerable instalment purchaser.
    - Basic rights: ...right of access to adequate housing, the right to dignity etc. in so far as it relates to the differential treatment of vulnerable purchasers of residential property.

# Special protection to purchaser: Alienation of Land Act 68 of 1981

- **b) So, if trustee sells land + contract recorded against title deed**
  - Purchaser has preferential right to claim repayment of amounts already paid towards purchase price.
  - After mortgagee is paid from proceeds, purchaser must be paid.
- **c) If purchaser has already paid at least 50% of purchase price:**
  - Can claim transfer of property.
  - Must register a mortgage bond for payment of balance.
- **d) Land not registrable: s 26**
  - Seller must give bank guarantee, pay into trust
  - Purchase price payable when land attached or subject to sequestration

# Category A: Sale of immovable property: Scenario 2: Purchaser sequestrated

- **S 35 of Insolvency Act applies.**
  - Trustee of purchaser's estate must decide whether to continue or repudiate the sale contract.
  - If no decision in reasonable time: seller can request decision.
  - If still no decision after 6 weeks: seller can apply to court for order to cancel sale.

# Category B: Sale of movable property

## Scenario 1: Cash sale of movable property: Purchaser sequestrated

- **Example:**
  - A sells car to B for R80 000, 00 cash
    - Ownership passes on delivery of thing plus payment of price.
      - **If uncertainty: presumption cash sale.**
- **Section 36 of Insolvency Act applies:**
  - Where purchaser receives delivery **before** payment-
  - **It s 36 seller may reclaim property, if:**
    - Purchaser or trustee (or master) **notified within 10 days of delivery;**
      - Regardless if sequestration takes place within those 10 days.
    - Seller must return any part of price already received.
    - But if trustee tenders full price, seller must accept.
- **If trustee disputes seller's right to reclaim:**
  - **Seller must institute action to prove his/ her/ its ownership, -**
    - **within 14 days after receipt of notice.**



# Category B: Credit sale of movable property: Scenario 1: Purchaser sequestrated

- **Example:**

- A sells car on credit (not as defined by instalment agreement ito NCA read with s 84(1) of Insolvency Act).
  - Purchaser's estate sequestrated.

- **Credit sale ito common law:**

- General rule: ownership transfers at delivery
- Seller cannot reclaim car,
  - Concurrent claim for balance of purchase price -
- even if purchase price not paid in full at time of sequestration,
  - unless contract stipulated otherwise [**but then it may be instalment sale defined ito NCA read with s 84 below**]; or
- Special circumstances (fraud.)

- ***Cornelissen NO v Universal Caravan Sales 1971 (3) SA 158 (A); Eriksen Motors (Pretoria) Ltd v Protea Motors Warrenton 1973 (3) SA 685 (A)***

# **Category B: Credit sale of movable property:**

## **Scenario 2: Seller sequestrated**

- Trustee of seller's estate must collect outstanding purchase price from purchaser.

# Category C: Instalment agreement defined in NCA: Scenario 1: Purchaser sequestrated

- **Example:**

- A sells car on credit instalment sales agreement (defined by s 1 of NCA).
  - Purchaser's estate sequestrated.

- **Instalment agreement defined in NCA read with s 84(1) of I Act:**

- S 1 of NCA

- (a) all, or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;
- (c) ownership of the property either:
  - (i) passes to the consumer only when the agreement is fully complied with;...

- **Section 84(1) of the Insolvency Act:**

- Seller loses ownership (passes to purchaser's insolvent estate ex lege).
- In exchange: seller gets a hypothec (real security right) for outstanding amount.

# Category C: Instalment agreement into NCA: Scenario 1: Purchaser sequestrated

- But what if thing surrendered to seller within one month before sequestration?
- **S 84(2):**
  - Trustee may demand the delivery of the goods, **or**
  - **Where sold again, the value thereof as on the day of its surrender to the seller.**

# Category C: Instalment agreement ito NCA: Scenario 2: Seller sequestrated

- I.e. Where seller is still the owner of the property at commencement-
  - But purchaser still owes balance of purchase price.
- Opinion 1:
  - Purchaser may become owner: entitled to keep on paying, and
    - at fulfilment of condition become owner.
- Opinion 2:
  - Insolvent seller cannot transfer ownership, purchaser concurrent creditor
    - Cannot force transfer, no preference.

## 2. Contracts of Lease: (Letting and hiring)

- **Example:**

- Lessor rents apartment to Lessee for R10 000, 00 per month for a specified period.
  - Apartment may be subject to mortgage bond, **or not.**
  - Scenario 1: Estate of Lessor sequestrated whilst contract still in force.
  - Scenario 2: Estate of Lessee sequestrated whilst contract still in force.

# Scenario 1: Lessor's (owner) estate sequestrated

- **Lessor sequestrated**
  - Not dealt with in Insolvency Act
  - Sale subject to *huur gaat voor koop*, but
  - when subject to mortgage bond ?
- **Rights of lessee vis-à-vis mortgagee:**
  - If rights of lessee vested before mortgage bond, protected but
    - **if not, sold subject to lease if offer insufficient to satisfy claim**
  - Unliquidated concurrent claim for damages for breach of contract

# Scenario 2: Lessee's estate sequestrated

- **S 37 of Insolvency Act applies**
  - Not automatically terminated.
  - **Trustee may cancel contract through written notice to Lessor**
    - Due to cancellation: estate loses right to claim compensation for improvements, unless lessor agreed to improvements.
  - **If trustee does not terminate contract specifically:**
    - Lease will automatically **terminate three months after appointed** of trustee, **unless**
      - trustee notifies lessor of intention to continue.
  - **If trustee continues with lease:**
    - bound to all conditions relating to prohibition on transfer of lessee's rights.



# Scenario 2: Lessee's estate sequestrated

- **Lessor's claim(s) against estate:**
  - Tacit hypothec over movables, rentals in arrears, secured (s 85 limitation)
    - balance concurrent
  - Rentals due as from commencement sequestration (cost of sequestration)
  - Damages for breach of contract (concurrent)
- **Any term of contract that contract will terminate or be varied on sequestration of lessee, void – s 37(5) –so called ipso facto clause, but**
  - Lease can still expire i.t.o. termination clause linked to effluxion of time.

# 3. Employment contracts:

## Scenario 1: Employee sequestrated

- **Example:**
  - A is employed by Eskom as an electrician and he earns R25 000, 00 per month. His estate is sequestrated.
  - In principle no effect on contract of employment.
- **In employ of a trader, permission of trustee.**

# Employment contracts:

## Scenario 2: Employer sequestrated

- **Example:**
  - A owns a small petrol filling station and runs the business as a sole proprietor.
  - He employs 7 people, a manager (earning R20 000, 00 pm), a mechanic (earning R12 000, 00 pm) and five petrol attendants earning R8000, 00 each pm).
- **S 38 of Insolvency Act**
  1. **Contracts of employment not terminated upon sequestration/ liquidation of employer**
    - 1.1 **Effect: no work + no pay**
      - 1.1.1 **Entitled to unemployment benefits (UIF)**
  2. **But contracts may be terminated by trustee (after his/ her appointment) but**
    - **Must first consult employees or trade unions**
    - **proposals to rescue the business**

# **Employment contracts:**

## **Scenario 2: Employer sequestrated**

**6. Unless terminated earlier by trustee, or agreed otherwise – terminate automatically 45 days after appointment of final trustee**

**7. Terminate, effects:**

**7.1 Limited statutory preferent claim (salaries, bonuses etc) = prior to sequestration**

**7.2 Severance pay**

**7.3 Compensation for suspension or termination = concurrent (damages)**

# Employment contracts:

## Scenario 2: Employer sequestrated

- **Section 197A of the Labour Relations Act**
  - Transfer of business as going concern.
  - New employer automatically replaces the old employer.
  - If contracts were terminated before transfer = will revive.
- **Section 197B**
  - Employees have right to be informed about financial difficulties that might lead to sequestration as well as of sequestration/ liquidation application.
- **Insolvency Act and Companies Act**
  - Notification of sequestration / liquidation applications.

# 4. Other contracts

## 4.1 Mandate

- Mandator's estate sequestrated
  - Mandate terminates

## 4.2 Partnership

- Sequestration of partnership: terminates partnership.
- Sequestration of the individual estate of a partner leads to withdrawal of his/ her contributions, which will lead to termination of partnership relationship.