INSOL INTERNATIONAL

SARIPA

Compositions, rehabilitation, partnerships and cross-border insolvencies

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Overview

1. Compositions
2. Rehabilitation
3. Partnerships
4. Cross-Border Insolvencies

1. Compositions

- Introduction
  - What is a composition? Agreement Ito which an insolvent is to pay and each creditor that is bound by the composition is to accept, in settlement of such creditor's claim, an amount less than 100 cents in the Rand.
  - Forms:
    - **Common law composition**
      - rooted in agreement/ contract
    - **Statutory composition**
      - rooted in statutory mechanisms i.e. Insolvency Act
  - Practical relevance
    - In practice, compositions are used for a debtor to avoid insolvency or where they have already been sequestrated, to avoid the usual liquidation process and shorten the period of insolvency.

1. Compositions

- Common Law Composition
  - When does this become available?
    - When the insolvent's estate is under provisional sequestration
  - The written agreement is typically entered into with some or all of the **creditors** and **provisional trustees,** providing that the insolvent will pay certain dividends IF:
    - They are released from their debts; AND
    - The provisional order of sequestration will be discharged.
  - Who does it bind? Only creditors who have **agreed** to it.
    - Practical implications → Dissenting minority → (Not Bound)
  - Advantages?
    - Attractive alternative to sequestration
    - Earlier dividend / greater return

1. Compositions

- Statutory Law Composition
- **S119 – 123 of the Insolvency Act**

  - **Purpose** of the composition?

    Provide the insolvent with a **special ground** for rehabilitation and a release of debts.

    - Advantage → Not dependent on all creditors participating or consenting to it (dissenting minority also bound)
    - Disadvantage?

      Won't result in the discharge of the sequestration order and the insolvent remains unrehabilitated (but provides the opportunity to apply for early rehabilitation).

1. Compositions

- Statutory Composition (cont.)
  - Any time *after* the first meeting of the creditors → insolvent may submit a **written offer of composition** to the trustee
    - Rationale → Special grounds for rehabilitation + release of debts
    - If trustee thinks creditors are likely to accept the offer, they must:
      - Deliver a copy of the offer; AND
      - Deliver a **trustee's report** thereon to every creditor (who has a proven claim)
    - If the trustee thinks the creditors are unlikely to accept the offer, they must:
      - Inform the insolvent that:
        - the offer is unacceptable, and that
        - the trustee won't send a copy to the creditors
      - Note – Appeal can however be made to the Master

1. Compositions

- Statutory Composition (cont.)
  - Trustee must also, when sending the offer to the creditors → give **notice of a meeting *(for purposes of considering the offer)***
    - 14-28 days after the notice was posted
    - General meeting → advertised via notice in the Govt Gazette + Afr, Eng newspaper
      - Notice must indicate that a composition will be considered at the meeting
      - Recommended that the trustee submit the **report** at the same meeting where the composition will be considered (if possible) → to provide the creditor's with all the available info and ensure reduced costs and work
    - Notice requirements are peremptory – failure to adhere may invalidate the acceptance of the offer of composition
  - At the meeting: creditors should have the opportunity to prove their claims before the offer of composition is considered
    - To be binding and validly established, offer must be accepted by the requisite 75% of creditors in value and number of creditors who vote at this meeting → **s52 of Insolvency Act**
    - Payment/ security for payment
    - Only concurrent creditors vote

1. Compositions

- Statutory Compositions (cont.)
  - Composition offers may contain **any** term an insolvent wishes to be contained therein
    - (Exceptions however in Insolvency Act)
      - Extraordinary benefits to a single creditor
      - Offer made subject to rehabilitation
      - Inducing. Penalty applicable
  - If the offer attaches a security
    - The nature of that security should be fully specified → if it's to consist of a surety bond/ guarantee – every surety must be named
      - Directory
      - Substantial compliance means creditors have the right to reject the offer/ ask for further particulars re the security to be furnished

1. Compositions

- Statutory compositions (cont.)
  - Effect of acceptance of the offer
    - Composition becomes binding on all concurrent creditors, whether proved or unproved.
      - Statutory novation – discharging claims of concurrent creditors + substituting with the terms of composition
    - Unless otherwise stated, operation of the composition is not suspended until the insolvent has performed their obligations in terms of the composition. The trustee has no right to apply to have the composition set aside.
    - Property re-vests: if provided for in the composition (on the date it is entered into).
      - Takes place by operation of law – estate assets not included within the ambit of the provisions of the composition remain vested in the trustee.
    - Becomes binding on all concurrent creditors – the rights of preferent/ secured creditors are not prejudiced unless they've waived their preference/ secured rights expressly and in writing.
    - Composition doesn't affect the surety's liability – they remain liable to the concurrent creditors for any shortfall.
    - Won't affect/ bind solvent spouse's creditors – the property of the solvent spouse which vested in the trustee must be restored to him/her.

1. Compositions

- Statutory composition (cont.)
  - Payment of money/ beneficial acts for creditors are done through the trustee who must frame an account as per usual
  - If the insolvent obtains a certificate from the Master that the composition has been accepted by requisite majorities AND payment/ security for the composition has been made/ given →
    - May apply to the HC for rehabilitation after 3 weeks notice in the Govt Gazette
    - And to the trustee if the composition provides for payment of not less than 50c in the Rand to concurrent creditors

2. Rehabilitation

- Introduction
  - The rehabilitation of an insolvent person brings the insolvency of such person to an end → acts as a “fresh start” for such persons. Consequently:
    - Their status as an insolvent is terminated;
    - Restrictions placed upon them are removed;
    - They are also released from their pre-sequestration debts.
  - Passage of time/ Order of court
  - Insolvent may apply for their OWN rehabilitation → not applicable thus to:
    - Partnerships; companies or legal entities
      - *Conradie v Master* – trust can be rehabilitated
      - Married spouses? Both can be rehabilitated
      - Deceased persons? Not applicable to ‘estates’ only persons
  - Per *Acar v Pierce and Other Like Applications* & **s124, 127A and 129 Insolvency Act**
    - Estates → sequestrated
    - Insolvents → rehabilitated

2. Rehabilitation

- Automatic Rehabilitation
  - S127A Insolvency Act
    - An insolvent not rehabilitated by the court within 10 years from the date of (provisional) sequestration = DEEMED as rehabilitated
    - UNLESS:
      - Court orders otherwise (upon application of an interested person) before the expiry of the 10 years
  - No difference between rehabilitation through effluxion of time or by Order of Court.

2. Rehabilitation

- Rehabilitation by the court
  - **Insolvency Act** sets out circumstances ito which court may grant a rehabilitation order – before the 10yr period ends, as discussed.
    - Insolvency of an individual affects a person's status – thus only the HC may grant a rehabilitation order
    - In principle, only the court that granted the initial sequestration order may grant the rehabilitation order.
  - Notably, even where the **IA** provisions have been complied with, the HC isn't obligated to grant the rehabilitation order
    - No inherent right to rehabilitation – Entirely within the court's discretion
  - The period after sequestration when an insolvent may apply to court for rehabilitation, depends on the circumstances
  - Time when application can be made -depending on circumstances

2. Rehabilitation

- Rehabilitation by the court (cont.)
  - Time when application can be made?
    - Ordinarily: 4 years after sequestration
      - Exceptions:
        - If 1st account is confirmed by Master → insolvent can apply after12 months following confirmation
        - Where insolvent has had their estate sequestrated before, 3 years must pass after the confirmation of their 1st account to apply
        - Insolvent convicted of fraudulent act/ certain other offences relating to their insolvency → after 5 years from date of conviction
        - Where Master recommends rehabilitation, the insolvent may obtain such an order within 4 years of date of sequestration
    - The insolvent may apply for rehabilitation much earlier where:
      - If no claims proved against the estate **within 6 months** from sequestration (after giving 6 weeks notice) – provided the insolvent hasn't been convicted of certain offences & the estate hasn't been sequestrated previously.
      - The insolvent may, with the relevant notice, **immediately seek a rehabilitation order**, if Master issued a certificate regarding a composition iro which payment has been made/ security given – of not less than 50c in the Rand for every concurrent claim against the estate or after confirmation of an account providing for the payment in full of all the claims of creditors with interest thereon.

2. Rehabilitation

- Rehabilitation by the court (cont.)
  - Court's discretion
    - The court has the discretion to either postpone/ refuse/ grant a rehabilitation application either absolutely or conditionally.

    - The "TEST"
      - Is the applicant, taking all the relevant facts into consideration, a fit and proper person to trade with the public, and participate in the commercial life of the community, on the same basis as any other honest person?
        - Onus? On Applicant
        - Interests to balance → insolvent + creditor + State + commercial Public

2. Rehabilitation

- Report by the Trustee
  - A trustee who receives notice of application must report to the Master any facts which in his opinion would justify the court in refusing, postponing or qualifying rehabilitation.
  - Matters to be dealt with in trustee's report:
    - Conduct before and after sequestration
      - Especially where it will influence the court – eg. did insolvent furnish acceptable reason for their insolvency; did the insolvent commit any offences; did insolvent co-operate with trustee + comply with all obligations; any evidence of dishonesty etc.
    - Criticism of passive attitude in reports by Master and trustee
      - *Ex Parte Le Roux; Ex Parte Snook*
  - It is illegal to pay or promise benefits
    - Such undertakings are void + criminal offence (to agree to/ not oppose rehabilitation)

2. Rehabilitation

- Effect of rehabilitation on claims and assets
  - Effect on claims
    - Discharges debts provable against the estate. Insolvent remains personally liable for liabilities incurred after sequestration i.e maintenance .
  - Does not affect liability to pay a penalty, punishment or surety
    - Sureties – remain liable despite the discharge of the insolvent's debts
      - Right of recourse for surety if they pay the debt after rehabilitation.
  - Effect on assets
    - Property which vested in insolvent's trustee prior to the rehabilitation remains vested accordingly for the benefit of creditors (iro realization and distribution) – unless expressly stated that it should re-vest in the insolvent in a composition
  - Re-vesting assets
    - **s124(3) Insolvency Act** – no creditors proved claims within 6 months
  - Caveat against property
    - **s18B Insolvency Act** – Mortgage Bond over Prop + automatic rehabilitation (10 yrs.)

2. Rehabilitation

- Declaratory Orders

  Often insolvents will apply, alongside rehabilitation, for an order that property vests with them thus entitling them to deal with the property. Such an order could also be applied for after rehabilitation. NB to **distinguish** cases where:

  - Property did not vest in the estate or re-vested in the insolvent
    - Declaratory order strictly not necessary for this, can merely be used for certainty.
  - Property vested in the trustee
    - Here the order would be based on a waiver by the trustee and creditors of their rights.

  - Notice of application
    - Written
    - Must be given to Master, trustee and proved & unproved creditors
    - Footnote in Govt Gazette must give full details of the property claimed

2. Rehabilitation

- Transfer of property which vested in the trustee
  - Immovable property which vested in a trustee and which hasn't revested in the insolvent, may, before or after rehabilitation be transferred only by the trustee
    - May not after rehabilitation be dealt with by the insolvent until trustee has transferred property to the insolvent.
  - No trustee?
    - Master may pass transfer of the property.
  - Property has re-vested in the insolvent?
    - An endorsement must be made by the Registrar of Deeds before the insolvent may deal with the property.

3. Partnerships

- Common Law:

  - At common law, a partnership is not a legal entity having an existence separate from the individual partners;
  - The “assets” of the partnership are indistinguishable from the assets of the partners;
  - The “partnership debts” are in law the debts *in solidum* (jointly and severally) of all the partners;
  - A partnership creditor can sue the partners; and
  - A partner who has paid a partnership debt will have a claim against the other partners for a proportional share of the debt.
  - This may result in a chain reaction until all the creditors have been paid in full.

3. Partnerships

Insolvency Act

- Insolvency of Partnership:
  - Partnership and partners separate entities
    - The Insolvency Act has departed from the common law position;
    - Treats the estates of the partnership and its partners as separate entities;
    - Therefore, a partnership is treated as a separate entity with an estate which may be sequestrated as if it were a natural person; and
    - The Master follows suit by opening separate files for each estate and making appointments, holding meetings, dealing with accounts in each estate.

3. Partnerships

- <u>Partners' estate sequestrated if partnership sequestrated</u>
  - Section 13(1) of the Insolvency Act provides that if the court sequestrates the estate of a partnership, it must simultaneously sequestrate the estate of every partner of the partnership, except for:
    - Those who are not liable to outsiders for partnership debts; or
    - Those who have undertaken to pay the debts of the partnership and have given security for payment.
  - The position is similar in the case of the Voluntary Surrender of a partnership estate;
    - Certain partners may avoid sequestration on personal grounds, such as a partner who is protected under the Moratorium Act 1963.
  - If the estate of a person who is a partner is sequestrated, it does not necessarily follow that the partnership estate, or the individual estates of the remaining partners, need to be sequestrated;
    - However, the effect of the sequestration of one partner's estate is that the partnership itself will terminate and, as such, the partnership will be wound – up.

3. Partnerships

- Where a partnership is wound-up, the partnership assets are divided amongst the partners in terms of either the partnership agreement or the common law;
- Any partnership assets due to the insolvent partner pursuant to the termination of the partnership, vests in the trustee of the insolvent partner's estate.

- Partner who is a legal person
  - A partner who is a legal person, for example a company, cannot be sequestrated.

3. Partnerships

- Proof of claims
  - The principle regarding the proof of claims is simply that partnership assets are to be applied for purposes of paying partnership debts, and the assets of an individual partner's separate estate must be used for the payment of separate estate debts;
  - Accordingly, section 49(1) of the Insolvency Act provides that when the estate of a partnership and the estates of the partners are under sequestration simultaneously:
    - the creditors of the partnership must prove their claims against the estate of the partnership only; and
    - the personal creditors of a partner against the personal estate of such a partner.

3. Partnerships

- Claims based on different causes of action
  - Section 49 of the Insolvency Act does not prevent claims being lodged in both the partnership estate and the estate of a partner if the creditor's claim is in law maintainable against both the partnership estate and the estate of a partner, or if such claims are based on different causes of action.
    - For example, if a partner has passed a mortgage bond over their property to secure a debt of a partnership, the bondholder is entitled to prove a claim for the amount due to it by the partnership against the estate of the partner and against the estate of the partnership.
- Balance after payment of creditors
  - The trustee of the estate of the partnership is entitled to any balance of a partner's estate that may remain after satisfying the claims of the creditors of the partner's estate, in so far as that balance is required to pay the partnership's debts;
  - If there is a balance in the partnership estate after payment of partnership claims, the trustee of the estate of each partner is entitled to the balance, in so far as that partner would have been entitled thereto if the estate of the partner had not been sequestrated.

3. Partnerships

- Not sufficient assets to pay costs:
  - Section 13(2) of the Insolvency Act provides that where the individual estate of a partner is unable fully to meet the costs of sequestration, the balance must be paid out of the assets of the estate of the partnership.
  - The converse is not provided for and any shortfall in the partnership estate has to be recovered by way of contribution.
- Insolvency of partner only
  - The insolvency of one of the partners of a partnership dissolves the partnership but it does not cause the partnership estate to be sequestrated.
  - A consequence of the dissolution of the partnership is the winding-up or liquidation of the partnership.
  - After dissolution each partner becomes liable jointly and severally for the debts of the partnership and may be sued for the whole of such debts without the necessity of the creditors taking action against the other members or assets of the partnership.
  - Section 49(1) of the Insolvency Act regarding proof of claims does not apply where the estate of a member of a partnership only is sequestrated, it appears that partnership creditors are entitled to prove claims against the estate of any insolvent partner.

3. Partnerships

- The trustee will have a claim against other partners for a share of the debts paid by the insolvent partner's estate, but has no control over the process of the liquidation of the dissolved partnership.
- It is cumbersome and disruptive for the trustee to claim against other partners with a view to settling all the partnership debts.

- **Composition, rehabilitation and offences**
  - A composition in the estate of an insolvent partner does not take effect until the trustee of the partnership estate (if the partnership estate has been sequestrated) has had the opportunity of taking over the rights and obligations of a partner in terms of the composition.
  - Since a partnership is *ipso facto* terminated on the sequestration of its estate, a partnership whose estate has been sequestrated "shall not be rehabilitated";
    - However, an individual partner whose separate estate has been sequestrated may apply for rehabilitation as an ordinary debtor;
    - The effect of rehabilitation is the insolvent partner's release from all liability, not only for their private debts, but also from their liability for the partnership debts.
- Section 143 of the Insolvency Act contains special rules in respect of the criminal liability of partners.

4. Cross-Border Insolvencies

- Introduction
  - The classical case of cross-border insolvency is where the assets of the debtor are located in more than one country.
  - This often results in insolvency administrators or creditors competing for the debtor's assets at considerable (and often duplicative) effort and cost.
  - South African courts will, in terms of *Jones v Krok* enforce a foreign judgment if certain requirements, based largely on the Roman-Dutch common law, are met, namely:
    - The foreign court must have had international competence as determined by South African law;
    - The judgment must be final and conclusive and must not have become superannuated - outdated
    - The enforcement of the judgment must not be contrary to South African public policy (which includes the rules of natural justice);

4. Cross-Border Insolvencies

- The judgment must not have been obtained by fraudulent means;
- The judgment must not involve the enforcement of a penal or revenue law of the foreign state; and
- enforcement must not be precluded by the Protection of Businesses Act 1978.

- However, these requirements are not the only requirements relevant for enforcement in South Africa of foreign collective insolvency proceedings:
  - On 13 November 1997 the General Assembly of the United Nations adopted a resolution, co-sponsored by South Africa, recommending that States review their legislation on cross-border insolvency and give favourable consideration to UNCITRAL's Model Law on Cross- Border Insolvency.
  - South Africa has enacted the Cross-Border Insolvency Act 42 of 2000 which is based on UNCITRAL's Model Law.

4. Cross-Border Insolvencies

- **<u>Inbound Recognition - Cross-Border Insolvency Act 42 of 2000</u>**
  - The stated purposes of the UNCITRAL Model Law on Cross-Border Insolvency are reflected in the preamble to the Cross-Border Insolvency Act as:
    - The need:
      - To strengthen cooperation between the courts and other competent authorities of the Republic of South Africa and those of foreign states involved in cases of cross-border insolvency;
      - For greater legal certainty for trade and investment;
      - For fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
      - For protection and maximization of the value of the debtor's assets;
      - For the facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.
  - Further, one of the main aims of the Cross-Border Insolvency Act is to provide for easy and speedy access and recognition of foreign representatives or creditors, while retaining measures to curb abuse.

4. Cross-Border Insolvencies

- The Cross-Border Insolvency Act provides for the equal treatment of ordinary creditors, whether local or foreign, but safeguards the rights of local secured and preferent creditors.
- The Model Law was amended in the Cross-Border Insolvency Act to provide in section 2 thereof that the South African Minister of Justice must designate the states to which the Act will apply,
  - No such designation has as yet occurred, nor does designation (which must be tabled in Parliament) appear to be imminent.

4. Cross-Border Insolvencies

- **Inbound Recognition - Common Law**
  - South Africa has a mixed legal system that relies on case law, statutes, customary law and the Constitution.
    - Therefore, although no designation under the Cross-Border Insolvency Act has occurred, the values espoused in this Act's preamble and in the UNCITRAL Model Law, and which aligns with the common law principles of equity, comity, convenience and public policy, have been adopted and developed by our Courts.
    - In this regard it is important to note, an order granted in 2012 where the High Court of South Africa, KwaZulu- Natal Division in Durban, recognized reorganization proceedings under Chapter 11 of the United States Bankruptcy Code (and applied with full effect the moratorium provided for in section 362 of the United States Bankruptcy Code) in relation to Overseas Shipholding Group (OSG), being a company listed on the New York Stock Exchange. OSG approached the South African courts because it was concerned that its vessels, which often passed into South African territorial waters and ports, could be arrested by local or foreign creditors. Prior to this order our courts had previously only been prepared to recognize foreign liquidators or administrators and to give them certain powers in South Africa. This order now sets a precedent for the recognition of foreign bankruptcy proceedings.

4. Cross-Border Insolvencies

- **<u>Outbound Recognition – US Bankruptcy Code</u>**
  - It is relevant to note that the United States adopted the UNCITRAL Model Law into its national law in Chapter 15 of its Bankruptcy Code, much like South Africa did with the Cross Border Insolvency Act 2000.
  - South African business rescue proceedings have been recognized under Chapter 15 in the United State of America by the United States Bankruptcy Court, Southern District of New York, in respect of Comair Limited.
    - However, even prior to the business rescue proceedings of Comair Limited being recognized as aforesaid, in *In re Edcon Holdings Ltd* the US Bankruptcy Court entered an order summarily recognizing a South Africa compromise proceeding under section 155 of the Companies Act 2008 as a foreign main proceedings pursuant to 11 USC, section 1517, under Chapter 15 of the US Bankruptcy Act and recognizing and rendering enforceable Edcon's compromise (and related orders and documents) upon its effective date.
    - The fact that foreign jurisdictions are willing to recognize South African proceedings are relevant when a South African Court considers the principle of comity.

4. Cross-Border Insolvencies

- **Outbound Recognition - European Union Regulation**
  - The Council of the European Union issued Regulation 1346/2000 of 29 May 2000 on insolvency proceedings, which is binding and directly applicable where insolvency proceedings are opened in any Member States of the Union, except Denmark.
  - The main insolvency proceedings take place in the state of the center of main interests (COMI).
  - The law of the opening state is the applicable law and the proceedings apply to all goods of the debtor in the European Union.
  - Proceedings do not affect rights *in rem* and may be ignored if they are contrary to the public policy of another country.

4. Cross-Border Insolvencies

- **Common law:**
  - Change when Cross-Border Insolvency Act becomes effective
    - The common law will continue to apply in respect of States that have not been designated in terms of section 2 of the Act and for matters not dealt with in the Act.
  - Comity and convenience
    - South Africa's non-statutory procedure has been fashioned by the courts on the strength of common law authority.
    - Considerations of comity and convenience play an important role in the exercise of the discretion of the court to recognize a foreign trustee or liquidator, or foreign collective insolvency proceedings.
    - The established principles of the Comity of Nations is a foundational concept in the conduct of South Africa's international relations.
    - A foreign Court will be far less likely to recognize and enforce collective insolvency orders of a South African Court, if it can be shown that South African Courts do not recognize and enforce collective insolvency orders of foreign courts.

4. Cross-Border Insolvencies

- Therefore principles of comity suggest that the reciprocal enforcement of foreign court orders is in the interests of both the Republic of South Africa and its international relations.
- South African Courts have repeatedly expressed the preference for single collective insolvency proceedings taking place rather than conflicting or, indeed, competing proceedings taking place simultaneously.

- External Companies
  - In 1973 when the previous Companies Act 1973 was enacted, and well before the adoption of the Constitution, South Africa was isolated internationally.
  - As a result it could not assume reciprocity would be available to it in cross-border insolvency situations and as a result the Companies Act 1973 provided for the unilateral liquidation of external companies by SouthAfrican courts.
  - Nevertheless, even under the previous dispensation in terms of the provisions of section 427 of the Companies Act 1973, as read with sections 346 and 337, an external company could, in addition to being wound up by a South African Court, also be placed under judicial management and notionally be rescued through that process.

4. Cross-Border Insolvencies

- Currently, a registered external company cannot enter into business rescue under Chapter 6 of the Companies Act or reach a compromise with its South African creditors in terms of section 155 of the Companies Act, but it may we wound-up by a South African Court.
- With the above in mind, the Supreme Court of Appeal has noted, in *Cooperativa Muratori Cementisti - CMC Di Ravenna and Others v Companies and Intellectual Property Commission* (the CMC judgment);
  - A external company, which is a foreign company carrying on *inter alia* business within South Africa, is expressly excluded from the definition of "company" under the Companies Act 2008;
  - The Supreme Court of Appeal described this express exclusion of external companies as the "final nail in the coffin for the argument" that the business rescue provisions of the Companies Act 2008 applied to foreign companies operating in South Africa.
- Therefore, external companies are excluded from the provisions of Chapter 6 of the Companies Act 2008 under the CMC Judgment cited above and so must look to the company law provisions in their countries of incorporation if they are to seek relief from financial distress and seek to have those proceedings recognized in South Africa.

4. Cross-Border Insolvencies

- Territoriality, Unity and Universality
  - The territoriality principle implies that a country does not recognize the legitimacy of foreign insolvency proceedings and asserts the sovereignty of domestic law, at least in respect of domestic assets.
  - The view has been expressed that South African insolvency legislation is not intended to have extra-territorial operation.
  - The unity principle has as its object a single “common” insolvency regime with the result that there could only ever be one administration of a cross-border insolvency.
    - This principle is only workable in situations involving treaties among countries sharing similar laws and customs or binding directions such as the European Insolvency Regulation.
  - The universality principle seeks, primarily, a high degree of predictable recognition, assistance and co-operation for cross-border insolvency.
  - Circumstances would dictate whether the proceeding might be conducted through a main insolvency proceeding with the possible support of an ancillary proceeding, or through two or more concurrent proceedings.

4. Cross-Border Insolvencies

- Property wherever situated within the Republic
  - Section 2 of the Insolvency Act defines “property” as “movable and immovable property wherever situate within the Republic.
  - Although at first sight the definition suggests that only assets situated within the Republic of South Africa form part of the insolvent estate, the true intention is to extend the operation of a bankruptcy order beyond the territorial limits of the particular division of the High Court granting it.
- Rule regarding movables
  - The principles of international private law are applied.
  - The general rule relating to movable property is that it is subject to the same law as that which governs the person of the owner, in other words, the law of a person’s *domicile*.
  - By a fiction of law the insolvent’s movable property is considered to be present at this domicile.
  - In the case of a company, the place of incorporation may be substituted for the place of domicile but the principal place of business may afford jurisdiction even if the place of the registered office is elsewhere.

4. Cross-Border Insolvencies

- Immovable property
  - Immovable property is administered in terms of the *lex rei sitae,* the law of the place where the property is situated.
  - The sequestration of an estate outside South Africa does not divest the insolvent of immovable property situated in South Africa.
- In practice recognition required in all cases
  - Although in theory a distinction is made between movables and immovables, as a matter of practice the need for formal recognition in the case of movables has been elevated to a principle.
  - In practice, therefore, a foreign trustee or liquidator cannot deal with movable or immovable property in South Africa until he has been recognized by a South African court.

4. Cross-Border Insolvencies

- Recognition of Provisional Judgement or Appointment
  - In *Bekker v Kotzé,* the Namibian court stated that although a court cannot enforce a foreign judgement unless it is final, a provisional foreign appointment can be recognised because such recognition does not enforce the provisional sequestration order granted in South Africa – a foreign provisional trustee cannot exercise powers in Namibia without recognition by the Namibian court.
  - In the subsequent case of *Bekker v Kotzé* the Namibian court expressed serious doubts as to whether an appointment as provisional trustee under a provisional order can be recognised.
    - However, the court held that where a sequestration order was given by the court of the debtor's domicile, movables, wherever situated, vested in the trustee or provisional trustee by operation of law.
    - The court issued an interim interdict that froze the assets, kept the attachment of assets in force and restrained dealings with assets pending the finalisation of the application for sequestration and the appointment and recognition of the final trustee.

4. Cross-Border Insolvencies

- A South African trustee and foreign assets

  - Procedures depend on foreign law
    - If the insolvent was domiciled in South Africa at the time of insolvency, the trustee will seek to recover all assets, whether situated within or outside South Africa.

  - Letters of request
    - The procedures that a trustee will have to follow in dealing with assets outside South Africa depend on the law and practice in the country where the assets are situated.
    - In Ex parte *Wessels & Venter*: In re *Pyke-Nott's Insolvent Estate*:
      - the court refused to issue an order requesting assistance from the courts of England because the applicants had not shown reasonable prospects of success that an examination in England would lead to the discovery of further assets.

4. Cross-Border Insolvencies

- In *Gardener v Walters:*
  - The court disagreed with this view and stated that it was sufficient if the liquidator was *bona fide* of the view that proceedings should be initiated in the foreign country, because when approached to issue a letter of request the court is not asked to approve or to sanction the actions of the liquidator.

4. Cross-Border Insolvencies

- Recognition in South Africa of a Foreign Trustee
  - Foreign representative recognized in SA generally and NOT the foreign proceedings.
  - Factors to persuade the court to recognize foreign proceedings
    - Equitable and convenient if the insolvent resident outside SA
    - Preference for single proceeding directed by court of domicile
    - Assets in SA not a prerequisite for recognition
    - Formality if granted by court of domicile and movables only, discretion if immovable property
    - Recognition does not apply foreign legal position in full (e.g. debtor not an insolvent in SA)
    - Application of South African insolvency law upon recognition
      - *Moolman v Builders & Developers (Pty) Ltd – type of order granted*
    - Foreign creditors: proof of claims and position of preferent creditors – foreign creditors must prove claims individually
    - Position of foreign concurrent creditors – local creditors sometimes preferred over foreign
    - Effect of rehabilitation of debtor – foreign debt only discharged by rehabilitation of debtor in SA.